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THE RETENTION RIGHT - A REAL GUARANTEE MEANT TO ENSURE THE FULFILLMENT OF A PATRIMONIAL OBLIGATION

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Abstract: *The retention right, to which the lawmaker has provided a special regulation, represents nowadays a form of real guarantee of patrimonial obligations. Unlike the other forms of guarantee of patrimonial obligations (personal, autonomous or real) which are created under expressly stated conditions, the retention right provides the creditor with the power to claim justice for himself, namely to choose to keep a good which belongs to his debtor until he fulfills his obligation. The institution of retention right was acknowledged by previous doctrine and jurisprudence before the new Civil Code; however it gave rise to a series of controversies given its legal nature; nowadays, it entails a general regulation, as it applies to all legal situations in which the patrimonial obligation is in close connection with the retained good and it does not result from fraud, illicit action or bad faith.*

Key words: *obligation, creditor, debtor, guarantee, administration, opposability.*

Retention right generated a special interest in specialty literature and in judicial practice (Laurent F., 1878, p. 184; Planiol M., Ripert G., 1930, p.776, p.1280.), thus becoming the subject of analysis and controversy across time.

In the doctrine (Pop L., 1998, p.436), the retention right was defined as that real right which provides the creditor, who is at the same time the debtor of the obligation to return the good, the possibility to retain that certain good in his possession and to refuse to return it until his debtor, the creditor of the good, will pay his debt in regard to that certain good. Unlike the former Civil Code, which did not regulate retention right among real guarantees, but only referenced a series of practical applications, the doctrine is the one which pointed out the characteristics of a true institution of law; furthermore, the creators of the new Civil Code directly regulated the retention right, without offering a specific legal definition.

Thus, according to article 2495 of the Civil Code "(1) *The person who must give or return a good can retain that certain good if the creditor does not fulfill his obligation which results from the same legal relation or in case the creditor does not pay damages for the useful and necessary expenses made for that certain good or for the damages*

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caused by the good. (2) Several other situations in which a person can exercise the retention right are regulated by law".

The object of the retention right is any mobile or immobile good, which can be the object of private property. Material possession, which is characteristic to the retention right, exercised over mobile goods, has generated some controversy in specialty literature (Pop L., Popa I. F., Vidu S.I., 2015, p.55-62) in regard to the possibility to exercise this right in case of immobile goods.

In relation to the latter, we must point out that such conditions must be material and must not be subject to special contrary legal provisions, thus retention right can be exercised in relation to immobile goods [Adam A.R., 2017, p.588). Such an example is the "hotel deposit", as defined by article 2135 of the Civil Code "In case the client fails to pay the price of the room or the performed hotel services, the hotel has the right to retain the client's goods, except for documents and personal effects of no commercial value". The doctrine (Adam I., 2004, p. 637) showed that "the material possession of a good is the essential trait of the existence of a retention right as, from the time it is lost, retention stops". The retention of the good can be exercised by the retaining creditor directly or by an expressly empowered person, in his name and for his interest. However, the retention right does not stop when the retaining creditor is forced by law to give the good to a special guardian or handing it to the court", thus losing material possession (Voicu M., 2001).

Goods which are part of public property can't be subject to the retention right, namely this right can't be exercised when the good is subject to foreclosure or it is impossible to be sold, as declared by law. According to the provisions of article 2496 of the Civil Code "(1) the retention right can't be exercised if the possession of the good results from an illicit act, is abusive or unlawful or if the good is subject to foreclosure. (2) The retention right can't be invoked by the bad faith possessor except for certain cases regulated by law".

The legal nature of the retention right has entailed numerous controversies in specialty literature. The problem of its legal nature is of practical interest in regard to the effects of this right.

The retention right "is a measure of ensuring the execution of the main obligation, a guarantee of payment and it functions as a special preference cause which is exercised over an individual determined good. What differentiates it from mortgage and privilege is the absence of the possibility to use the good and the right to demand its foreclosure. Thus, the holder of the retention right must preserve the good without being able to enjoy its fruit which will be imputed on the debt" (Dogaru I., Drăghici P., 2014; Hamangiu C., Rosetti-Bălănescu I., Băicoianu Al., 1929, p.661).

Most authors believe that the retention right is an imperfect real right or an imperfect real guarantee right (Stătescu C., Bîrsan C., 2008, p.429).

As it is a real right, it is opposed not only to the debtors, but also to third parties, as regulated by article 2498 first alignment of the Civil Code. It can be opposed not only to guaranteed creditors, but also to mortgage and privileged creditors. Also, it can be opposed both to the initial owner and the sub-owners.

As it is an imperfect real right, the retention right is a passive guarantee, thus it does not provide the prerogative of following the good in the hands of another person; as the right ceases to exist at the time it was voluntarily removed from the hands of the retentor. The retention right is indivisible, as it extends to the whole good until the debt is fully paid. Also, it provides temporary possession over the good and not such a possession which would allow the retentor to use the fruits of the good or invoke usucapion (Hamangiu C., Rosetti-Bălănescu I., Băicoianu Al., 1929, p.629). The quality of temporary owner of the person who retains the good must not be confused with that of the pledger which is also the material possessor of the good, but is not entitled to use the fruit of the good or impute it on the debt claimed by his debtor, as is the case of the pledge.

Thus, article 2488 of the Civil Code, in relation to the legal regime of the fruit of the pledged good states that "In lack of any contrary provisions, the creditor gives the debtor the natural and industrial fruit. He imputes the civil fruit first in case of expenses made, then interest and then the debt itself". In exchange, the person who retains the good has, according to article 2497 of the Civil Code "The rights and obligations of an administrator of the good tasked only with the simple management of the good".

Another distinction to be made in relation to the pledge is that the source of the temporary detention of the good by the person who retains it is a *legal* one, whereas the pledger is always a *conventional* one. For these reasons, we agree with the thesis (Vasilescu P. , 2012, p.197) according to which "the retention right is always generated *ex law,* as the parties are free to invoke it (or not). However, if they intend to create a real guarantee, a conventional guarantee will have to be chosen and if the preference is a mobile one, the pledge is to be chosen".

From a procedural point of view, a retention right is usually invoked by exception in litigation regarding the return of the good. Jurisprudence (Bucharest Tribunal, 1992, Civil Decision, no. 1027, in C.P.J.C. 1992, p.84) stated that the retention right can be invoked by contesting the execution of a court decision to return the good in case of litigation between the parties, in case the problem of restitution or evacuation was not yet discussed.

By returning to our analysis pertaining to the legal nature of the retention right, we believe it is important to distinguish between the retention right and *the exception of non execution of contract.* Thus, we must point out that "the retention right is of absolute character, as it can be opposed to all parties, whereas the exception of non execution of contract is of relative character and it results from a bilateral contract". Also, the non execution of contract exception can be opposed to obligations regardless of their nature, whereas the retention right can be exercised only by the creditor of the obligation to turn in or return the good over which the retention right is exercised" (Adam I., 2013, p.642).

We must also point out that fact that the retention right is a *legal guarantee.* The retention right is not a mere favor provided randomly by the court, it is a right acknowledged to all creditors whose debts occur in relation to goods which are subject to restitution, regardless of the value of the debt and that of the good (Supreme Court , 1976, Civil Decision no. 2179, in Repertory III, Bucharest, p.84). Thus, a retention right is

not a real imperfect guarantee, but a means of protecting the creditor (Supreme Court, 1973, Civil Decision no. 377, in Repertory II, Bucharest, p.119).

We must also mention that the lawmaker of the new Civil Code included it in article 551 point 10 of the Civil Code, named *Real Rights*, *Real guarantee rights*, without expressly pointing them out.

Furthermore, in title XI named *Privileges and real guarantees*, in article 2323 the lawmaker stated that this title regulates privileges, as well as real guarantees meant to ensure the fulfillment of a patrimonial obligation.

We believe that the retention right must be seen today as a true form of guaranteeing the obligations and an effective means for the creditor to claim his debt, thus providing the retaining creditor the prerogatives of a real right. By simply looking like a situation (the retention of the good), but justified by the existence of another situation (the obligation to pay a debt in relation to the good), the possession of the person who retains the good appears as an unjustified refusal to turn in the good, thus a means of private justice performed by the creditor himself.

The lawmaker has regulated some sort of *legal blackmail* by the creditor of the debt performed against the creditor of the obligation to turn in the good or, in a more simple phrasing, if you do not give me the money, I will not return the good. This form of guarantee of obligations, which appears to lack legal instruction by which the debtor is forced to execute his obligation, ensures legal equity between the two creditors, who are mutual debtors of different obligations.

We think that the lawmaker has correctly placed the regulation of the retention right along other real guarantees (mortgage and pledge), by simply listing them among real rights, as the retention right is a form of real guarantee of a patrimonial obligation which by its nature assumes the characteristics of real rights.

The main *effect* of the retention right is the capacity of the creditor which is in the possession of the good, namely that of *refusing to return* the good until the debt is fully paid. In case of partial payment, there is no obligation to return the good.

The doctrine (Vasilescu P., 2012, p.199) has stated that “the essential effect of the retention right is given by its negative nature”, thus “the person who retains the good opposes its restitution, an opposition which is legitimate until the owner of the good pays the debt he owes”. Surely, the word “negative” shows just a licit opposition in relation to another negative attitude (that of refusing to pay the debt which entitles the creditor to retain the good). Furthermore, when used as a defensive means, it points out the passive character of this right.

Another effect is the *(de facto) temporary freezing of the assets,* however the person who retains the good can’t oppose foreclosure started by another creditor, but he will be able to “participate in the distribution of the price of the good under the conditions stated by law”, according to the provisions of article 2498 second alignment of the Civil Code.

When it pertains to mobile goods, the preference right of the person who retains the good will be valorized first, as a special mobile privilege. When it pertains to immobile goods, the retention right does not enjoy the same priority, as it is preceded by previous mortgages.

The effects of the retention right is characterized by some specificity in regard to the means of achieving it and, for these reasons, the rule of pledge and mortgage will not apply, as the common law procedure applies in the matter of foreclosure, thus establishing the relation in regard to the other co-creditors.

The retention right does not provide the creditor with a special preference right, nor the right to use the good. If the good is used (by living in the immobile good), he will have to pay the owner-debtor the equivalent of the use of the good (The Botoşani Court, 1978, Civil Decision no. 570, in R.R.D. no. 5/1979, Bucharest, p.53).

The creditor who detains the good is not seen as a good faith possessor. Furthermore, seen more as an obligation and less as an effect in our opinion (as a "duty" according to the provisions of article 2497 of the Civil Code) is the fact that the person who detains the good must have the attitude of "an administrator of the good of another person, thus empowered with the simple management of the good", thus the provisions of article 795-799 of the Civil Code will apply.

The retention right can't be granted in case the legal act is subjected to absolute annulment, nor when the material retention of the good was performed by an illicit act or as a result of an illicit act. Also, the retention right can't be exercised when the possession of the good originates in the violation of an imperative or prohibitive provision of the law which declared certain goods as out of the civil circuit. However, it can be granted in case of the resolution of contracts which have as an object certain goods which give rise to the obligation to return the good in case of dissolution of contract or annulment of certain acts, with the consequence of the obligation to return the good (Supreme Court, 1977, Civil Decision no. 459, in C.D. 1977, p.56).

Thus, we welcome the initiative of the new lawmaker to show in article 2496 of the Civil Code, as an exception, the cases when the retention right can't be invoked or valorized.

Another effect which results from jurisprudence stems from the fact that the creditor who retains the good without legal privilege will be paid before the other creditor to whom the retention right can't be opposed, much like the debtor, meaning that if the good is sold and is still in the possession of the retaining creditor, the buyer will not be able to obtain the good before the creditor pays his entire debt (The Constanţa Tribunal, 1985, Civil Decision no. 135, unpublished).

The holder of the retention right can't invoke usucapion (The Supreme Court, 1982, Civil Decision no. 1072, in C.D. 1982, p.258), as he has a mere temporary possession of the good. It is however obvious that we are in the presence of a legal act (and not a legal fact) and useful possession with all its attributes can't be invoked. However, the retention right also causes the following effect: it can be opposed to both the initial holder of the good and the subsequent owner; it can't be opposed to privileged creditors and mortgage creditors which are previous to the time the good came to be in the possession of the retaining creditor; it appears as "an important means of forcing the debtor to execute his obligation thus the holder of this right can't be forced to pay for the lack of use of that particular good" (Court of Appeal Iaşi, 2000, Civil Decision no. 1991, Court of Appeal Iaşi, Bulletin of Jurisprudence 2000, Bucharest Ed. Lumina Lex, p.60-61).

We must point out that the relation between compensation and the retaining right from the perspective of its effects is regulated in article 2505 of the Civil Code: "Statute of limitation does not prevent the compensation of mutual debts nor the exercise of the retention right, if the right to action was not subject to the statute of limitation at the time a compensation or a retention right might occur".

The loss or demise of the retention right is achieved either by indirect (or accessory) means, as a result of the demise of the guaranteed obligation or directly (as the main course of action) in case the debt "survives retention". We believe this phrasing is quite inspired as it was taken over from the doctrine (Pop L., Popa I. F., Vidu S.I., 2015, p.656), because it completely covers all the cases regulated by article 2499 of the Civil Code, namely "the retention right ceases if the interested party paid the due amount or offers the retaining creditor sufficient guarantee" (according to article 1) as it is obvious that maintaining this right is no longer justified if the creditor's retaining right is compensated by the payment of debt or by "valorizing the guarantee".

According to article 2499 first alignment of the Civil Code, the retention right ceases when the amount is paid, thus the text regulates an *out of court* means of performing justice. It is important to mention that the category of people who can perform this operation is not limited to the retaining creditor, as any interested party, namely another creditor who wishes to avoid foreclosure can pay the debt, thus valorizing the provisions of article 2499 second alignment of the Civil Code. Of course, in practice several problems in regard to this operation might occur, in relation to the quality or the interest of the party who performs this operation.

A second hypothesis in which the retention right ceases is the one stated by the final thesis of article 2499 first alignment of the Civil Code, namely that of offering sufficient guarantee. The offered guarantee can be real or personal, as the text does not distinguish between the two. For these reasons, if the co creditor is different from the retaining debtor, we will be in the presence of a "real bond". Subsequently, if we are in the presence of a personal guarantee, it is only natural to believe that a third party is interested in creating this guarantee, as if it would entail the person of the debtor, this text would be superfluous for the simple reason that, based on the provisions of article 2324 first alignment of the Civil Code, a common guarantee over the patrimony of this debtor is acknowledged.

Article 2499 second alignment of the Civil Code states that "the involuntary dispossession of a good does not cause the demise of the retention right. The person who exercises this right can demand the restitution of the good, under the reserve of the statute of limitation of the main action and the acquiring of mobile goods by the good faith owner". From a *per a contrario* interpretation of the first thesis of this alignment, we can conclude that the retention right does not end by voluntary dispossession which can be equivalent to a tacit waiver of the retention right.

In case of the statute of limitation of the main action (by which the retaining creditor demands the execution of the obligation of his debtor) if the right to file such an action was not subject to the statute of limitation, it can still be valorized, as the involuntary dispossessed retaining creditor can still act against the person who dispossessed him or the one who owns the good, an action which can be paralyzed in case mobile property is

acquired by good faith possession stated in article 937 of the Civil Code. This action is one of possession, based on the provisions of article 949 second alignment of the Civil Code.

In case the retention right is regulated in favor of the creditor who is at the same time the debtor of the obligation to return the good, it operates *ope legis*. The court before which the exception of the retention right is invoked is obliged to acknowledge it. However, the retention right is not instituted by the court as it is often stated by jurisprudence, but the court acknowledges (declares) it, given the legal nature of this right. The court will limit itself to determining if the case can be solved, if it meets all the elements required by law, thus validating the enforcement of the real guarantee. However, we must not neglect the fact that this right can be valorized by extra judiciary means, as it must not be declared before the court.

In case the retention right is granted by the courts of law outside the expressly regulated cases, several conditions must be met:

a) A connection must exist between the debt of the holder of the good and the good which is held, thus a *debitum cum re junctum* (Urs I.R, Ispas P.E., 2015, p.490). An essential condition of the existence of the retention right is that according to which between the immobile good which belongs to the debtor and the debtor of the creditor, a close connection must exist (Court of Appeal Ploiesti, Civil Section, 2006, Civil Decision no. 781).

This connection can be contractual (for example, a deposit contract) or extra contractual (for example, accession). The retention right will exist only in case the debt resulted in connection with the good, but also in the situation in which the possession of the good by the retaining creditor and the debt resulted from the same legal relation. Also, a convention conexity is accepted, by which the retention right can be opposed *erga omnes*, as the convention can only cause effects between the contracting parties and the real rights can't be opposed in the absence of publicity. We believe that this hypothesis is a true exception to the provisions of article 2498 first alignment of the Civil Code, in the matter of opposability of the retention right, as the principle of the relativity of the effects of contracts between the parties is valorized with priority.

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The court will limit itself to determining if the case can be solved, if it meets all the elements required by law, thus validating the enforcement of the real guarantee. However, we must not neglect the fact that this right can be valorized by extra judiciary means, as it must not be declared before the court.

b) The debt of the retaining creditor must be certain, determined and overdue. If the creditor was granted a term for the execution of the obligation, the retention right is no longer justified. Furthermore, the debt must not be subsequent, *in extremis* it must occur at the same time the retaining creditor retains the good;

c) The good in regard to which the retention right is invoked must be the exclusive property of the person who is the debtor of the retaining creditor in regard to the expenses he demands. As a result, the holder of the debt and the debtor (the holder of the good) must coincide, namely the same person is the creditor of restitution and the debtor for the payment of the expenses incumbent upon the good;

d) The good must be a mobile or immobile asset which is in the possession of the retaining creditor, a good which is not outside the civil circuit. The retaining creditor, as a mere temporary possessor does not have the right to enjoy the fruit of the good, as this prerogative belongs only to the owner, except for the situation in which, by convention, it was stated otherwise.

From the time these conditions are met, the retention right will be acknowledged to all creditors whose debts occurred in relation to that certain good, and not just a simple favor granted by the court of law by appreciation (Hunedoara Court, 1984, Civil Decision, no. 532, in R.R.D. no. 2/1985, p.69).

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