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SECURITY INSTITUTES RESULTING FROM OBLIGATION LAW ACCORDING TO THE CIVIL CODE 1950

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Abstract
The presented paper deals with securing institutes of obligation law according to the Civil Code 1950 which was passed after the World War II. and reflected the effort of communist leaders to shape new legal order. The paper briefly characterizes individual institutes as the Code regulates them in order to give a brief overview of the system of securing obligation during the 1950's.

Key words
Obligation; security; contractual penalty; civil code; obligation law.

Introduction

After the World War II. there were monumental changes taking place in every area of society. That was even more true about the countries which had ended up in the Soviet sphere of influence where gradually Communist parties took over governments of their countries and had begun shaping society – socially as well as politically and legally – to the image of their great model – the Union of Soviet Socialistic Republics.

In the area of law the changes were gigantic and fast coming. The base for these changes in the Czechoslovak Republic had been adoption of a new constitution[1] in year 1948. According to the political decision of the highest echelon of the Communist Party of Czechoslovakia within two years a new legal order, based on adoption of new codes for every field of law (civil law, penal law, administrative law, etc.) was to be created. This goal on the field of civil law was accomplished when on October 25, 1950 there were passed two civil codes – the Civil Code[2] and the Code of Civil Procedure[3].

[1] The new constitution was passed unanimously on May 9, 1948. Therefore it is often referred to as May 9 Constitution.

[2] Published as law No. 141/1950 Coll. the Civil Code.

[3] Published as law No. 142/1950 Coll. the Code of Civil Procedure.

Securing Institutes Generally

The Civil Code offers the creditor on option to secure his claim in case of debtor's not fulfilling his obligation, even though the performance is in a way being secured by all regulations of the obligation law especially the ones sanctioning non-performance of an obligation. Securing of an obligation is meant to encourage the debtor to fulfill his obligation properly and on time. Therefore position of the creditor is strengthened even before the time of carrying out of the debtor's obligation. Securing presents itself markedly in case of non-performance of the debtor's obligation. Securing provides the creditor with an easier way to achieve fulfillment of his claim. There are different forms of securing depending on the institute chosen by the parties.[4] Thus, securing of obligations is securing of performance of obligations through obligation or other legal relationships assenting to the original obligation.[5] Only the securing institutes of the obligation character are an object of this paper though.

All forms of securing of obligations which are regulated by the Civil Code are of an accessoric character. They are bound to the existence of creditor's claim which is being secured. If the claim is terminated, its securing is terminated as well. This character also denotes that not only are the conditioned by their existence but also by their content.[6]

Individual institutes of securing obligations of the obligation character are regulated in the XIVth title of the law No. 141/1950 Coll. Civil Code. These are: contractual penalty, suretyship, contract creating a lien, securing obligations by the transfer of a right, security, and acknowledgement of an obligation.

Some of these acts can be done by one party, i.e. the debtor (acknowledgement of an obligation), or they may be concluded between the creditor and the debtor (contract creating a lien, securing by assigning a debt) or only between the creditor and a third party (suretyship).

[4] HANES, D. – PLANK, K.: Občianske právo, II. diel (Záväzkové právo, dedičské právo a dodatky). Bratislava: SPN, 1955, s. 289.

[5] KNAPP, V. a kol.: Učebnica občianskeho a rodinného práva, II. sväzok (Záväzkové právo). Bratislava: Slovenské vydavateľstvo politickej literatúry, 1954, s. 332.

[6] HANES, D. – PLANK, K.: Občanské právo. Praha: SPN, 1955, s. 226.

Contractual Penalty

The contractual penalty is a sum of money determined by an agreement, which is to be paid by the debtor to the creditor in case that the debtor due to his own fault does not fulfill his debt at all or not in time or not properly.[7]

The agreement does not have a prescribed formal elements, but since the binding declaration of the debtor's will must be done in writing, usually the whole agreement is written. The other requirement is that the contractual penalty must be agreed upon in money.[8] It must also be specified in the contract on which case the contractual penalty applies.

The amount of the contractual penalty should be on principle appropriate to the significance of the proper performance of the contract for the party which is being secured by this agreement. The Civil Code recognizes though, that it might be difficult, and sometimes even impossible, to properly determine the amount at the time of conclusion of the agreement. Therefore it includes regulations enabling a additional adjustments of the contractual penalty thus:

if the agreed-upon contractual penalty is inappropriately high, a court may lower it appropriately taking into consideration significance which has proper performance of the contract to the entitled party[9]; furthermore, the code uses a mandatory provision to safeguard this right when it states that it is impossible to waive the right to cut down the inappropriately high contractual penalty.[10]

From the wording of these regulations as well as from the explanatory report it is obvious, that the legislator is more concerned with protection of the debtor against "exploiting" creditor, which conforms with the overall view of civil relationships as relationships among citizens which were used by the capitalists to covertly exploit the workers and farmers and thus rendering the civil law to be a weapon of exploitation instead of a tool of exchange of property and services among citizens.

On the other hand, the legal scientists, who at this time are still the ones who were educated during the previous "epoch", in their works still followed a path of "old" civilistic reasoning and they incorporated some of it into their

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[7] Art. 284 of the Civil Code.

[8] Art. 284 Sect. 2 of the Civil Code.

[9] Art. 286 of the Civil Code.

[10] The legislator had reasoned that this is necessary in order to protect "common citizens and workers" against shrewd manipulations of capitalists and exploiters who do not hesitate to use lack of legal or other knowledge of their fellow citizens to their advantage. See an Explanatory report on the Civil Code at http://www.psp.cz/eknih/1948ns/tisky/t0509_15.htm

interpretations of the code, e.g. professor Knapp in his textbook on civil law explains functions of the contractual penalty thus[11]:

first of all, such an agreement under the threat of damage to property encourages the debtor to prepare for the fulfillment of his obligation properly and on time – here lies the essence of its securing purport;

further the agreement on a contractual penalty offers the creditor an alternative possibility to demand, in case of contractual non-performance, either the contractual performance or the contractual penalty; in a way it gives the creditor a chance to rescission of the secured contract and to hold onto the claim arising from the agreement on contractual penalty;

apart from the abovementioned the agreement has also character of an agreement of a lump sum damages which means another advantage for the creditor when realizing his claim for damages, since in this case he does not even have to prove any sustained damage nor the actual amount of damage and he can demand a compensation simply because of the fact that a situation has arisen that was covered in the agreement on contractual penalty;

finally, the contractual penalty has a character of a penalty (a fee) if it was agreed upon in case of breach of time or place of performance, since in such a case the contractual penalty could be demanded alongside the contractual performance.

To protect the creditor further it is impossible for the debtor to rescind the contract exploiting this institute – the contractual penalty does not have the function of a cancellation fee and thus the debtor does not have the option of choosing between payment of the contractual penalty and performance of the contract, i.e. he cannot buy out of the obligation to perform through paying the contractual penalty.[12]

During the effectiveness of the Civil Code 1950 the contractual penalty had had a specific character and function with the economic contracts[13] and the regulations of the Civil Code were used only subsidiarily.

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[11] KNAPP, V. a kol.: Učebnica občianskeho a rodinného práva, II. sväzok (Záväzkové právo). Bratislava: Slovenské vydavateľstvo politickej literatúry, 1954, s. 333.

[12] HANES, D. – PLANK, K.: Občianske právo, II. diel (Záväzkové právo, dedičské právo a dodatky). Bratislava: SPN, 1955, s. 290.

[13] Economic contracts are such contracts which are specifically adjusted to the needs of economic planning, through which performance of the state plan of development of national economy was being safeguarded. See KNAPP, V. a kol.: Učebnica občianskeho a rodinného práva, II. sväzok (Záväzkové právo). Bratislava: Slovenské vydavateľstvo politickej literatúry, 1954, s. 51.

Suretyship

Suretyship is established on the basis of a written declaration in which the surety takes on the obligation towards the creditor to satisfy the claim, if the debtor fails to do so.[14] Generally the surety is obliged to satisfy the claim in the same way and to the same extent as the debtor, unless something else was agreed upon.

The basic content of this type of agreement is a pledge of the surety that he will satisfy the creditor if the debtor fails his obligation and the acceptance of this pledge by the creditor. The rest of the content is dependent on the content of the secured obligation.

Within the relationship between the surety and the creditor is characterized by the following rights and obligations[15]:

the creditor is entitled to demand satisfaction of his obligation from the surety[16] and the surety is obliged to satisfy the obligation;

the creditor is required, anytime during the duration of the suretyship relationship, at any time and without undue delay to inform the surety, upon the latter's request, of the amount of his (the creditor's) claim. This requirement is substantiated through the fact that the surety is not a debtor and therefore he does not have to be familiar with the state of the obligation[17];

a surety who has satisfied a debt is entitled to claim from the debtor indemnification for the performance which the surety has made to the creditor while the creditor is required to forward all legal aids and tools, which will guarantee surety's position against the debtor, to the surety after the satisfaction of the debt.

The suretyship relationship terminates particularly with the termination of the main obligation, from which is its duration dependent; then with the expiration of the time, for which the suretyship was established; with a merger of creditorship and suretyship in one person; and if it was the

[14] Art. 288 of the Civil Code.

[15] For more information see KNAPP, V. a kol.: Učebnica občianskeho a rodinného práva, II. sväzok (Záväzkové právo). Bratislava: Slovenské vydavateľstvo politickej literatúry, 1954, s. 334 – 337.

[16] Depending on whether it is a subsidiary or direct suretyship he has to call upon the debtor in writing or not prior to demanding satisfaction from the surety.

[17] See Art. 290 of the Civil Code.

creditor's fault that the debtor was not able to satisfy the obligation since then the surety is not required to render the performance[18].

Contract Creating a Lien

A claim may also be secured by a contract creating a lien[19]. How a claim is secured by encumbering a thing or a right is governed according to the Code's provisions concerning rights to things.[20]

Securing Obligations by the Transfer of a Right

The performance of an obligation may be secured by the transfer of a debtor's or third person's right in favor of the creditor[21]. In case the debtor does not satisfy the creditor's claim from the primary obligation, the creditor is entitled to demand satisfaction from the transferred right. If the debtor satisfies the creditor's claim properly and on time, the creditor is required to transfer the right back on either the debtor or the third person who had in the first place transferred the right.

This type of securing is more dependent on a relationship of trust between the parties[22] since with the transfer of the right the transferring party looses any legal claims to the right and the creditor, as an owner of the right, can dispose with the right with full legal binding effect. The transferring party can defend its rights only via judicious proceedings which can be lengthy.

Due to the fiduciary character of this securing institute the legislator determined that there are provisions that cannot be part of the contract of transfer.[23] These provisions are the same ones that apply to the contract of lien[24] and they include prohibition of agreement that the debtor can never reimburse the transferred right; that the transferred right can be realized in an arbitrary way; or that the transferred right will forfeit for the benefit of the creditor for an arbitrary or in advance determined amount.

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[18] See Art. 292 of the Civil Code.

[19] Art. 293 of the Civil Code.

[20] See Art. 188 – 210 of the Civil Code.

[21] Art. 294 of the Civil Code.

[22] Previously known also as fuduciary cession.

[23] HANES, D. – PLANK, K.: Občanské právo. Praha: SPN, 1955, s. 228.

[24] See Art. 201 of the Civil Code.

Security

Regulations of Articles 295 and 296, entitled as security, are of a different character than the rest of the institutes regulating securing of obligations. Previous provisions pertained to individual types of securing of obligations whereas provisions of these articles do not pertain to specific way of securing obligations but they only explain in what way the obligation may be fulfilled in particular by the creation of lien or by having trustworthy surities.

Granting of a security may be done through agreement between parties or directly ex lege.[25] The Code determines that nobody is obliged to accept as a security a thing or a right given as a guarantee of an amount higher than two-thirds of the assessed value of the thing or the right, though deposits in banks and savings banks and government securities shall be considered a reliable security to their full value.[26]

Acknowledgement of an Obligation

Acknowledgement of an obligation is debtor's unilateral legal act towards the creditor which the Civil Code defines thus: If a person acknowledges in writing his obligation determined as to its reason and amount, it shall be presumed that the obligation was still binding at the time of acknowledgement. With regard to a debt barred by the statute of limitations, such an acknowledgement shall have this legal effect only if the person who acknowledged the obligation was aware that it was statute-barred.[27]

According to these provisions when all the formal necessities[28] are fulfilled a rebuttable legal presumption has been established that the obligation is binding at the time of acknowledgement. Acknowledgement of the obligation, though, does not cause termination of the original obligation and its replacement with a new obligation on the grounds of the acknowledgement.

Acknowledgement of a debt or an obligation barred by the statute of limitations also establishes a rebuttable legal presumption, though here is important also the subjective aspect of debtor's knowledge, or better of debtor's error – either error in fact or error in law, e.g. if the debtor does not know that his obligation is barred by the statute of limitations because he

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[25] HANES, D. – PLANK, K.: Občianske právo, II. diel (Záväzkové právo, dedičské právo a dodatky). Bratislava: SPN, 1955, s. 292.

[26] Art. 296 of the Civil Code.

[27] Art. 297 of the Civil Code.

[28] Especially the written form.

does not know the appropriate legal provisions, his acknowledgement is not legally binding.[29]

Legally binding acknowledgement of an obligation has two substantial consequences, namely establishment of a rebuttable legal presumption that the obligation is binding at the time of acknowledgement and interruption statutory barring[30] and establishment of a new limitation period[31].

Informal acknowledgement of an obligation, e.g. verbal acknowledgement or acknowledgement through an implied action, such as payment of an installment, does not establish the above-mentioned rebuttable legal presumption.[32]

Conclusion

Changes adopted in the Civil Code 1950 were far-reaching, especially in the area of ownership. Even though the concepts in the obligation law were not so radically new, still some of the legal theoreticians considered obligation law to cause the most substantial problems – in theoretical interpretation as well as in practical application.[33]

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- HANES, D. – PLANK, K.: Občanské právo. Praha: SPN, 1955, s. 366.

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[29] For further detail see KNAPP, V. a kol.: Učebnica občianskeho a rodinného práva, II. sväzok (Záväzkové právo). Bratislava: Slovenské vydavateľstvo politickej literatúry, 1954, s. 339 – 340.

[30] According to the Art. 98 of the Civil Code.

[31] According to the Art. 91 of the Civil Code.

[32] For further detail see HANES, D. – PLANK, K.: Občianske právo, II. diel (Záväzkové právo, dedičské právo a dodatky). Bratislava: SPN, 1955, s. 292 – 293; or KNAPP, V. a kol.: Učebnica občianskeho a rodinného práva, II. sväzok (Záväzkové právo). Bratislava: Slovenské vydavateľstvo politickej literatúry, 1954, s. 339 – 340.

[33] See e.g. LUBY, Š.: Najvýznamnejšie teoretické otázky československého občianskeho práva, s. 27. In: LUBY, Š.: Výber z diela a myšlienok. Bratislava: Iura Edition, 1998.

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