PARTICULARITIES IN CONSTITUTING UNDERWRITER DISTRAINT

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ABSTRACT

Underwriter measures, also called "insurance measures" or "the insurance of rights that are capitalized through action", are defined as the possibilities given by the law so that, pendente lite, the court will impose, within appropriate limits, measures concerning the unavailability and preservation of goods, in relation to actions or deeds that may endanger the possibility of an effective exertion, at the moment of the compulsory execution of the decision, of the right of the creditor [1].

The underwriter measures consecrated by our civil law Code are: the underwriter distraint (art. 591- 596 civil law C.), the inhibition (art. 597 civil law C.), and the legal attachment (art. 598- 601 civil law C.)

Keywords: *Underwriter measures, Insurance measures, Underwriter distraint, Debt*

1. INTRODUCTION:

The underwriter distraint, regulated by the provisions of art. 591- 596 civil law C., consists in the unavailability, instituted by the court to which the main request has been pointed out, at the – optional – request of the creditor/ claimer, of movable or immovable goods belonging to the debtor, found in their possession or with a third party, so that, if necessary, the court can execute them compulsorily, with the aim of covering the alleged debt, and in proportion with its value [2].

In order to institute the underwriter distraint, the following conditions must be met: the creditor's debt must be acknowledged in writing, otherwise they will have to deposit a guarantee equal to half the claimed value; the petitioner should prove to the court that they have filed a debt request against the defendant; the debt that the claimer stands should be contingent, and if this requirement is not met, one of the following situations should be invoked: when the debtor has diminished by their actions the given guarantees or has not provided the promised guarantees, or there already is the risk for them to run away and hide their goods.

2. THE EXISTENCE OF A DEBT

According to art. 591, paragraph 1 civil law C., the underwriter distraint on the movable or immovable goods of the debtor can be requested by the creditor who does not have a compulsory execution title but has a contingent debt acknowledged in writing. There are waivers from this rule, regarding the contingent character of the debt and the need for it to be acknowledged in writing.

In the opinion of certain authors, the underwriter distraint is based on a certain, liquid, and contingent debt, and the debt can be easily acknowledged, without the need for detailed researches [3]. The opinion according to which a certain and liquid debt is not absolutely necessary, only a due debt, is more reasoned [4].

The certain and liquid character of the debt is requested only in the compulsory execution decision. The debt is certain when its existence results from the debt document itself or from other documents issued by the debtor or acknowledged by them. If such a condition were enforced, the institution of the underwriter distraint would be devoid of meaning, because, if the creditor had such a debt, they may resort to the more flexible procedure of the payment call, without starting a lawsuit that implies higher costs and a longer duration to be solved.

Basically, the debt must be acknowledged by a written document. However, the condition of acknowledging the debt through a written document has been considered met in case the debt was acknowledged by a court decision that is not yet final, because an appeal attack had been started against it, which is suspensive of execution [5]. Although, from the perspective of the application of the provisions of art. 379, paragraph 3 civil law C., in this case we cannot speak of a certain debt, the non-final court decision represents a sufficient guarantee of the claims invoked by the petitioner and justify the adoption of the measure of the attachment, under circumstances that leave the evaluation and amount of the guarantee at the latitude of the court.

The problem of this ascertaining document of the debt is difficult to approach, and the recent practice of law courts has not provided solutions to it. The explanation of this absence of recent jurisprudence lies in the fact that the application of the underwriter distraint in a civil context has an insignificant weight, and in a commercial context, the distinction between a debt acknowledged in writing and a debt without this quality is not essential, since the guarantee is compulsory in both cases.

The debt claimed by the petitioner must concern an amount of money, and the underwriter distraint cannot sanction the non-fulfillment of an obligation of action. In the hypothesis that the debtor refuses to fulfill an obligation of action, the creditor can request the compensation of the prejudices caused by the debtor's

obligation to pay damage – interests. Once such an action started, the creditor has the possibility to request an underwriter distraint even without depositing a guarantee, since it can be considered that they have a written document confirming the debt, and the object of the promoted action is the payment of an amount of money.

The same solution will also be adopted in case the creditor starts an action whose object is to establish the equivalent of the value of the goods in the case of the impossibility of fulfilling the obligation of its delivery, established through the execution title [6].

Finally, the debt invoked has to be contingent. However, the interest in acting towards obtaining an underwriter measure is also justified in case that the debt has not reached its deadline, but there can be noticed that the debtor has decreased through their actions the guarantees provided to the creditor or has not given the promised guarantees, as well as when there is the danger for the debtor to circumvent from prosecution or to hide or dispel their fortune (art. 591, paragraph 3 civil law C.). In these cases, the debtor is declined from any term, so that the creditor can file a suit request without the debtor to be able to oppose them with the exception of the premature character of their action. The same solution also results from the provisions of art. 1025 civil law C., according to which the debtor cannot request the benefit of the term anymore, when they are insolvable or when “through their actions, they have diminished the guarantees given by contract to their creditor”.

3. THE PROOF OF FILING A LAWSUIT

The person who requests the enforcement of the underwriter distraint has to prove the fact that they have filed a lawsuit for recovering the debt claimed from the debtor. The existence of a lawsuit justifies the actual interest of the creditor in the process of obtaining an underwriter measure and also guarantees that the unavailability of the goods of the alleged debtor will be limited in time, during the lawsuit.

The object of the lawsuit initiated by the claimer should be the enforcement of de the debt right over an amount of money. In law practice, it has been evaluated that a petition whose object is to issue a payment call, stated based on G.O. no. 5/2001, is not able to allow enforcing an underwriter distraint. The solution of the courts is based on the fact that the procedure of issuing a payment call does not imply the legal analysis of the creditor’s claims, as they have no authority over the judged goods and, as a consequence, they do not meet the condition of a lawsuit according with art. 591. paragraph 1, second thesis, civil law C.

However, the mentioned solution is arguable, in what concerns both its legitimacy and its opportunity. Indeed, doctrine has consecrated the necessity of the existence of a lawsuit over the debt right, whose preservation should be obtained following the enforcement of the underwriter distraint. Still, this conception has taken shape under the circumstances in which, at the moment, the legislation did not include a procedure that would allow issuing an execution title without reference to the basis of the legal, so that the only procedure that the creditor could use in order to recollect their debt was that of common law.

At present, jurisprudence has to take into account the reasons why underwriter measures have been regulated. In this sense, we can notice that the need to protect the creditor’s rights can also be found in case they choose to issue a payment call with the purpose of obtaining the execution title against their debtor. Although the procedure of the payment call is implemented as urgent, if the debtor is unsatisfied with this solution, they can resort to a petition for annulling the payment call, and only in case it is rejected, the order of allowing the call will be able to be invested with an execution formula, according to the provisions of civil law C.

Between the moment when the creditor decides to act in the direction of obtaining an execution title and when the execution against the debtor can actually be started, there is enough time for a dishonest debtor to attempt to alienate their goods so as to create a context of insolvability, which would lead to the impossibility of the compulsory execution of the debt. Therefore, it is not fair that, in case the creditor chooses a simpler procedure for recovering their debt, they would be devoid of procedural means to preserve their rights against the risks implied by the length of the used legal procedure [7]. The fact that the procedure of the payment call excludes the analysis of the basis of the legal reports between the parties only during the first stage must also be taken into consideration. If the debtor against whom an order has been issued, according to O.U.G. no. 5/2000 files an annulment suit, the court invested with such a petition will analyze the basic defense formulated against the claims of the creditor, which implies that the second stage of the procedure can no longer be characterized as lacking any analysis of the basis of the legal reports between the parties [8].

We can state that the legislator gives in this case a right of option concerning the procedural means of invoking the basic defenses – exerting the annulling request or challenging the execution. If, however, in relation to the claims of the parties, the administration of unconscionable evidence in the procedure of the payment call would be required, then the court will reject the petition of the creditor – and, respectively, will allow the annulment petition filed by the debtor – and as a consequence the claims of the petitioner will be solved according to the common law procedure [9].

In all the cases where the law imposes the condition of the existence of an essential suit for the underwriter measure, the proof of the file of the lawsuit should be annexed to the underwriter distraint request. The doctrine also preserves the idea that this condition is not met unless the lawsuit file that triggered the basic suit is legally labeled and a solution deadline has been set, and not when, under the provisions of art. 114 civil law C., the claimer has been granted a short delay for completing or modifying their request. Also, it is considered that, in order for this condition to be seen as met, the petitioner must continue the lawsuit, because if the matter is left unanswered, the text request is not achieved [10].

4. DEPOSITING A GUARANTEE

The third condition that must be met in order to institute the underwriter distraint is the deposit of a guarantee. The purpose of this requirements is to test the seriousness of the claim filed by the creditor and to provide a guarantee for the debtor against possible damage they might incur through the unavailability of their goods, in case it will be proven that the basic lawsuit filed by the creditor has been unfounded or even exerted in dishonesty.

The guarantee represents therefore the amount of money that the petitioner of the attachment will make available to the court, with the purpose, on the one hand, to avoid clearly unfounded attachment requests and on the other to build a fund to compensate the party against which the underwriter distraint measure has been taken, in case the request was dishonest and has caused prejudices to that person.

The civil law Code distinguishes between the situation where the debt invoked is acknowledged through a written document and the one where there is no act to prove the debt.

If the creditor has a written document to prove the alleged debt, at the moment of the approval of the underwriter distraint request they may be forced to pay a guarantee, in an amount established by the court. In this case, the obligation of the claimer-creditor to pay a guarantee, as well as the amount of this guarantee, will be evaluated by the court.

In what concerns the notion of written document, jurisprudence has not reached a unique solution. Therefore, according to one opinion, a written document means any document that, irrespective of its form, includes a mention on the debt supported by the creditor. Another opinion claims that a written document means only that document from which the debt of the creditor results in a clear and categorical manner and which should only be authenticated in order to become complete evidence [11]. It has been considered that an underwriter distraint cannot be granted without any guarantee when the written document does not mention the amount of the requested debt. However, this solution has been criticized, because the law has not taken into account the amount of the debt, but its liquidity, which can only be determined upon the request for an underwriter distraint, and its exact amount will be computed during the lawsuit.

Most authors consider that a written document means a document issued by the debtor or that may be opposed to the debtor, on which the creditor's lawsuit file is based, and which has in itself enough evidence to support the lawsuit. Not any document issued by the debtor and that the court is forced to take into consideration can be regarded as a written document. If such documents are insufficient to prove the claims of the petitioner and the result of the trial depends on the provision of other evidence, the underwriter measure can only be enforced based on a guarantee for half of the claimed amount. The same problem arises in the case of the existence of a beginning of a written proof issued by the debtor [12].

A written document, based on which underwriter distraint can be instituted, under the circumstances where the guarantee is left for the court to evaluate, is not represented by a court decision presented by the creditor, which disposes a payment obligation for the debtor, if this decision is not final and therefore subject to a restatement following a regular appeal. In this sense, the court has decided in a case that "the first court decision, which is not yet final, does not represent an undisputable title that would exempt from a guarantee the party that makes an attachment based on that decision." [13]

Other court decisions have stated that a written document means any document that is not authentic and which mentions even a non-liquid debt. In this sense, it has been decided that it is not compulsory to deposit a guarantee, and the enforcement of this condition is left for the court to evaluate when the obligations of the parties are founded in a contract and the requests of the petitioner are proven by delivery documents annexed to the petition [14].

In all cases, irrespective of the meaning given to the notion of written document, the judge has the sovereign right to evaluate and decide whether or not the document invoked as a debt title meets the conditions imposed by the law.

If the debt is not proven by a document, the creditor can request the underwriter distraint, but because of the much reduced credibility of its request in a suit, they will also have to file a guarantee amounting to half the claimed value. Art. 591, paragraph 2 civil law C. refers to half the value of the debt requested in the lawsuit filed by the creditor [15]. In this case, the amount representing the guarantee has to be deposited before the measure is approved, because at the end the judge has to mention whether this condition was met or not.

Article 591, paragraph 3 civil law C. acknowledges the right to request an underwriter distraint to the creditors that do not have a contingent debt, in certain cases mentioned within limitations: when the debtor has diminished through their actions the guarantees given to the creditor or has not given the promised guarantees, or when there is the risk for the debtor to circumvent from prosecution or to hide or dispel their fortune. In these circumstances, the creditor must prove that they have filed a lawsuit and deposit a guarantee in the amount established by the court.

Considering that Section IV of Chapter I of Book V of the civil law Code, although entitled "On guarantees", rather treats the procedure of bringing a warrantor, several tendencies have developed in law practice concerning the manner of fulfilling the obligation of depositing a guarantee.

Therefore, the possibility to deposit the guarantee as a bank warranty letter has been discussed. In a decision, the former Supreme Court of Justice has made a statement concerning the non-acceptance of bank warranty letters as a means for depositing the guarantee, invoking the fact that the validity period of such an instrument would be incompatible with the purposes for which the measure of depositing a guarantee has been taken [16].

However, legal literature has expressed an opinion according to which the bank warranty letter can serve as

a means of fulfilling the obligation of depositing a guarantee, if it meets the conditions for guaranteeing the purposes for which the measure of depositing a guarantee has been taken [17].

In what concerns the establishment of the amount of the guarantee, there have also been various solutions during the ancient regulation of the warranty measures regarding the correct meaning of the "claimed value" on which the amount of the guarantee should be based. The current regulation bases the amount of the guarantee on the same notion, of claimed value. Generally speaking, the solutions provided by legal practice state that the guarantee is set based on the value claimed in the lawsuit, as half the claimed value [18].

In a commercial context, a guarantee is compulsory in all cases, according to art. 907- 908 com. C., except when the attachment request is made based on a bill of exchange or on another commercial effect to order or to bearer, claimed as unpaid. Since the text does not establish the amount of the guarantee, it has been decided that a guarantee for half the required amount does not apply. It has been evaluated that this amount should be reasonable and sufficient, since the interests of the creditor must also be protected, besides those of the debtor [19].

In what concerns the imposed conditions, fro its edification, the court is entitled to analyze in brief the issue of the eligibility of the main lawsuit, without bringing any prejudice to the essence of the lawsuit [20]. Examining the actual and legal foundations of the lawsuit, as well as the potential defenses of the defendant (for instance, the prescription or the exception of a non-eligibility), the court is able to avoid taking serious measures based on an audacious or doubtful lawsuit.

5. CONCLUSIONS

Underwriter measures that can be taken in a civil lawsuit are the most definite and repressive form of defending the rights of the creditor from the risk for the debtor's patrimony to suffer modifications that may hinder a potential compulsory execution. Besides all these, the legislator has also envisaged other legal means that serve to defend the debt rights and that are named generically preservation measures. Together with underwriter measures, they form the organized system whose purpose is to defend and guarantee the debt rights.

Once the requirements for the application of the underwriter distraint have been met, the request to apply this measure will be judged according to common law, but as an urgent matter and before the main lawsuit. This ensures the right of the claimer to pursue not only obtaining a decision that would give them satisfaction, but also a favorable perspective concerning its fulfillment.

In relation to the main lawsuit, the underwriter distraint – together with the other underwriter measures mentioned in the civil law Code, the underwriter distraint and the legal attachment – is merely an accessory. Therefore, taking into account the purpose of these procedural instruments and their connection to the civil lawsuit, they should be regulated in the future in the general section of the civil law Code and not in the section concerning special procedures or compulsory execution.

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