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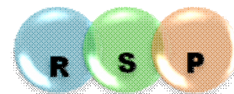

ORIGINAL PAPER

The Efficiency of the Lien regarding the Realization of the Professional Creditor Claims

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Summary:
According to the monistic conception on private law adopted by the enforcement of the new civil code, the provisions of this normative act are applicable to the entire sphere of legal relations in which the parties are equal to each other.
The variety of forms for guaranteeing the execution of obligations is the main way to ensure the realization of claim rights. Under these conditions, even for creditors who have the quality of professional, the lien can prove effective, thanks to the comminatory effect and its statutory characteristic.

Keywords: *lien; professional; debt; security.*

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The general applicability of the Civil Code is provided for in Article 3 of this normative act, the consequence being that the legislator abandoned the dualistic conception on private law, including traders in the wider sphere of the concept of "professional" and preferring a fusion of commercial law in the provisions of civil law. The legislator's choice is explained by the fact that in both commercial and civil legal relations, neither party can impose its will, and in order to give rise to, extinguish or modify rights and obligations, the agreement of their will is necessary. (Ungureanu and Munteanu, 2017: 110).

The monistic conception has been criticized by the specialized literature, as it ignores the specifics of commercial relations, reason for which the commercial law has kept its individuality in doctrine as a sub-branch of civil law (Capernaum, 2019: 22).

1. The professional, subject of civil legal relations

The unification of private law was achieved by the emergence of the concept of “professional”, considered to be a natural or legal person operating an undertaking, as defined in the last paragraph of Article 3 of the Civil Code.

The operation of an undertaking presupposes above all the exercise of an activity constantly and organized according to its own rules applied systematically (Cărpenaru, 2019: 35). Due to its systematic and organized nature, the activity becomes a professional one, at the risk of the person or persons involved. The object of the undertaking may be the production, administration or maintenance of goods or the provision of services. It is important to note that in order to represent an enterprise, it is not necessary for the activity to have a lucrative purpose, materialized in making a profit.

The main distinction between the two types of enterprises, civil and commercial, is the purpose pursued in carrying out the activity. Thus, the civil enterprise is the one in the exercise of which the profit is not pursued, and the economic one aims at obtaining the profit.

Due to the fact that the term “professional” must be understood in a broader sense, which does not only involve the conduct of commercial activities, the doctrine stated that the activities of civil enterprise are those specific to the liberal professions exercised in exchange for fees, which are not profit. (Cărpenaru, 2019: 38). Consequently, even the activity carried out within a civil enterprise can have a lucrative purpose. However, the main forms of organization of a civil enterprise are associations and foundations, which are nonprofit.

According to the concept of the new Civil Code, the trader is the professional who operates in accordance with the legal provisions an economic enterprise. (Cărpenaru, 2019: 40). At the level of positive law, art. 6 of Law 71/2011 qualifies as traders the natural persons or the legal persons subject to registration in the Commerce Register according to the provisions of art. 1 of Law no. 26/1990 regarding the Commerce Register, the tie-breaking criterion being, therefore, a formal one.

The general application of the civil code presupposes that its norms will be incidental, regardless of the quality of the subjects of the legal relationship, if they are in the exercise of an enterprise or are simple individuals.

For this reason, we considered it useful to analyze the effectiveness of the legal regulation of the lien in relation to the increased risks of the professional creditor and the need to benefit of securities for the realization of his claims.

In fact, this *sui generis* form of guarantee was considered effective in the field of commercial legal relations, even under the dual system, some applications found an express regulation in the Commercial Code.

2. General legal framework of the lien

The general legal regime of the lien was brought to the level of the positive law only on the occasion of the adoption of a new Civil Code.

The seat of the matter is represented by articles 2495-2499 of the Civil Code falling within Chapter VI of Title XI entitled "Privileges and Securities". Although these normative provisions have not put an end to all the doctrinal discussions on the specificity of the treated legal institution, they still manage to clearly establish the legal characteristics of this guarantee right.

As for the object of the lien, it must be said that, unlike other legal systems, the Romanian legislator does not exclude real estate from its sphere of incidence, but it is true that in the case of professionals it is much more likely that encumbered property is movable. These assets can be tangible or intangible, in which case the property rights are incorporated in titles of credit, financial instruments, such as securities available to the lienor. Instead, by holding the representative titles of the goods, the lienor has under his control the goods that he does not hold in their materiality. Moreover, in German-inspired legal systems, the exercise of the lien over mobile assets is referred to by law.

French law, however, approaches the lien on intangible assets in a completely original way, through the fictitious lien, recognized to all those who benefit from a pledge without dispossession according to art. 2286 para (4) French Civil Code. In this way, the issue of exercising a lien over receivables and accounts with financial instruments can be raised. (Malaurie and Aynès, 2021: 278-279) However, given the new vision of the Romanian legislator on the security without dispossession, namely its qualification as a mortgage, the issue of a legal fiction of this kind cannot be raised.

Although it is not expressly excluded by the provisions of the new Civil Code, the retention of intangible assets is much harder to imagine in our legal system, if we take into account the provisions in art. 2389 of the same normative act, which refers to the object of the movable mortgage. The enumeration is not a limiting one, comprising a multitude of goods that can give the certainty of the realization of the claim for the guarantee of which they were encumbered, which is essential for the professional creditor. In addition, the competition between the mortgagee and the privileged lienor depends only on the fulfillment of the publicity formalities, and the mortgage confers on its beneficiary, including the right to pursue the encumbered property.

Referring to the intangible assets as an object of the lien, we will point out that the goodwill is qualified, according to the provisions of the new Civil Code, as an affectation patrimony.

The qualification of the lien as a real right has long been a constant for the legal literature, even in the conditions in which the main prerogative presupposes a passive conduct of the creditor (Stătescu and Bîrsan, 2008: 429). The first argument in this regard relates to the way in which the right holder exercises his attributes, namely through his own power over the encumbered property, without resorting to another person to whom he should impose a certain conduct. Next, the main feature of a security right is its enforceability against third parties completely outside the legal relationship which gave rise to the secured right of claim.

The problem of the *erga omnes* opposability of the right of retention was clarified by the legislator in the content of article 2498, which establishes as a rule the opposability of the retention before third parties, even in the absence of fulfillment of some publicity formalities. Despite this, the creditor will not be able to oppose the initiation of a foreclosure on the object of his guarantee by any other creditor.

This presupposes the inapplicability of the lien to the pursuing creditors, a solution that is in total disagreement with the jurisprudential and doctrinal statements prior to codification. As the other creditors are the third parties to whom the lienor could oppose the refusal to hand over in order to keep his guarantee, it is obvious that the provisions of art. 2498 par. (2) are a justifiable regression only by underestimating the detention exercised by the detainee. In particular, insofar as the express regulation represents an opportunity to emphasize the specificity of the lien with the risk of disadvantaging the rest of the creditors. The legislator's choice is all the more controversial, as it does not distinguish between creditors benefiting of collaterals and unsecured ones.

Even if, in the event of a forced pursuit of the seized property, the lienor will not be able to exercise his right of guarantee in the usual passive way, if the encumbered object is a movable property, the lienor will be able to participate in the price distribution from the position of beneficiary of a privilege.

The opposability of the lien to other creditors is also an important issue in a collective proceeding, such as insolvency or bankruptcy of the debtor. Unlike other legal systems, the current domestic regulation does not consider the lien as a security that can be invoked in the procedure, but the lienor of a movable property will enjoy the preference that his special privilege gives him. (Bosneanu, 2019: 239**)**.

By contrast, the French Commercial Code contains a number of legal provisions relating to the exercise of the lien and its effects in the event of the debtor becoming insolvent, whether he is in the observation period or the judicial liquidation of the latter. (Albiges and Dumont-Lefrand, 2015: 287). When the encumbered property is sold by the judicial liquidator, the claimant's claim is imputed *ipso iure* on the price obtained as a result of the capitalization. Moreover, recent jurisprudence holds that this mechanism, equivalent to a privilege, is also incidental in the case of real estate *corpore alieno* in the possession of the creditor. (Court of Cassation Commercial Chamber 30 Jan. 2019, F-P+B, n°17-22.223:2019 commented out by Blandin Y, 2019)

The creditor's passivity as the main characteristic of the lien was, for part of the French doctrine, a sufficient argument to say that the lienor could continue to exercise his right of guarantee, opposing it to other creditors, even without prior declaration of the claim at the beginning of the collective proceedings (Aynés, 2005: 306).

According to art. 2495 paragraph (1): *"The one who has to hand over or return can withhold a good while creditor fails to perform its obligation emanated from the same legal relationship or, where appropriate, as long as the creditor does not, he shall compensate for the necessary and useful expenses which he has incurred for that good, or for the damage which the good has caused him.* "

This definition reveals three other characteristics of retention, which we will briefly analyze. The main advantage of the lienor is that his security right is based on the law, so that he can exercise it without going to court. If a contentious procedure is reached, the application will take the form of an action to establish lien, for which reason the judge will not be able to make factual assessments as to the appropriateness of

recognizing the right for the plaintiff, but will only verify the conditions necessary for his emergence *ipso jure* in the creditor's patrimony (Bosneanu, 2019: 161).

On the other hand, like any other security interest, the lien is ancillary to the claim whose enforcement guarantees it, a feature from which it derives its indivisibility.

Therefore, in order to be able to claim a lien, the creditor must be the holder of a certain, liquid and due claim, which has not been extinguished in any of the ways provided by law, because the guarantee cannot have an independent existence.

Due to the particularity of the lien to be a guarantee exercised through a conduct of passivity, the characters of the secured claim were interpreted permissively by the literature and reflected in jurisprudence, the most important aspect being the certainty of the secured claim, without which refusal to surrender loses all legitimacy (Bosneanu, 2019: 89-96).

The indivisibility of the lien can be said to be a very important argument to prove its effectiveness as a guarantee mechanism and to argue that the refusal to handover is not, in this case, a manifestation of the exception of non-performance of the contract.

This characteristic of collateral presupposes that the partial payment of the secured debt or its division does not affect the lien, and the refusal to handover, as a way of coercing the debtor, may be successfully opposed till the full settlement of the claim, even when the good is the object of a co-ownership, or a partial loss of it occurs (Pop, Popa and Vidu, 2012: 856)

The controversies identified in the literature on the legal nature of the lien were due to the uncertainty related to the prerogatives it confers on the creditor. As we have already said, the main conduct allowed to the detainee is to refuse to hand over the property, as long as it is in his detention, which is, therefore, an inaction. For this reason, the lien was an imperfect real guarantee devoid of the usual prerogatives of such an accessory right (Stătescu and Bîrsan, 2008: 429). In addition, the status of precarious holder, who uses the refusal to return the property as a means of coercion to the debtor, does not give the lienor the right to use the property or to reap the benefits.

However, we must not lose sight of the special movable privilege granted to the lienor as the holder of a *debitum cum re iunctum* by the enactment of a new civil code (art. 2339 Civil Code, art. 2342 Civil Code)

3. Applications of the lien in legal relations with professionals

Even if the framework regulation was not sufficient to remove the traditional qualification of retention as an imperfect collateral, at least the legislator confirmed the extension of its application area beyond the classic *debitum cum re junctum* identified in the objective connection between debt and retained property. Thus, according to the legal definition, the notion of connexity between the encumbered property and the claimant's claim must be interpreted *lato sensu*, so as to include in addition to the material link, determined by the fact that the property itself is the cause of the claim, also the abstract juridical connection represented by the same legal ground of the obligation to deliver and the obligation of the debtor.

Although the general applicability of the lien has been established, whenever there is a connection between the claim and the property in the material possession of the creditor, the legislator imposed certain limits, establishing by mandatory legal rules that, in certain situations, the refusal of handover from the creditor becomes illegitimate

and, as such, this conduct cannot be authorized as a way of expressing a subjective right (art. 2496 Civil Code).

In the following we will turn our attention to the main legal relationships that can give rise to a lien and in which the creditor has the quality of a professional.

Given the predominantly contractual nature of legal relationships arising out of the operation of an undertaking, it is easy to imagine that the basis of a professional's right of retention will often be a juridical or mixed connection

As the notion of connectedness, we must add that the French legal system the source of juridical connexity is interpreted and expanded beyond the parties' agreement regarded *strictly speaking* towards the concept of a framework convention which, according to the will of the parties, comprises several legal operations of the same kind (Mazeaud, Mazeaud and Chabas, 1999: 193).

§1 Varieties of the mandate contract

A mandate is a contract by which a party appointed as proxy concludes one or more legal acts on behalf of the other party named principal. On the occasion of the enactment of a new Civil Code with a monistic conception, the legislator expressly provided that the mandate can be of two types, with representation and without representation.

Given the object of the mandate contract, the conclusion of such legal acts as a representative as an object of activity within an enterprise is very common.

The lien of the proxy is regulated by art. 2029 of the Civil Code, being an application of the general principle found in art. 2495 Civil Code The wording of the legal norm is very comprehensive, as follows: *"In order to guarantee all his claims against the principal arising from the mandate, the agent has a lien over the goods received during the execution of the mandate from the principal or on his behalf."*

The proxy may, therefore, retain any property, whether movable or immovable, in his possession at the time of the conclusion of the contract, received from the principal or from third parties, until all claims arising in his favor have been extinguished, including that relating to remuneration. what he deserves. The mandate will always be onerous, in the event that the proxy is a professional, even if this contract is by its nature a disinterested act (art. 2010 Civil Code). The law makes no distinction, but the value of the property in the hands of the proxy must not be disproportionately high in relation to the amount of claims he has against the proxy, as it may be considered abusive detention.

If the proxy receives remuneration in exchange for his services, the contract will be *ab initio* bilateral proving that the right of retention in this matter may arise even on the basis of bilateral legal relations, without being confused with the exception of non-performance. contract (Bosneanu, 2019: 298).

Although in the operation of an enterprise, mandate contracts with representation may be concluded, which is specific to the commercial activity consists in concluding mandates without representation, which may take different forms depending on the legal operation to which it refers.

The definition given by the legislator of the mandate without representation is contained in article 2039 paragraph (1) Civil Code, and the main difference from the usual mandate is that the proxy acts in his own name and on behalf of the principal. Thus, the legal effects will occur in the latter's patrimony, even if the one who will conclude legal operations with third parties will be the proxy (Moțiu, 2014: 242).

The main form of the mandate without representation is the commission, which involves the purchase or sale of goods or the provision of services by the commission agent who acts professionally on behalf of the principal, in exchange for a commission. The specialized literature appreciates that the conclusion of commission contracts is advantageous for the traders party to the contract, but also for third parties with whom the commissioner enters into legal relations (Moțiu, 2014: 238).

Due to the frequency of the commission in the commercial activity and its legal nature, the commissioner is granted a lien regulated separately in art. 2053 of the Civil Code. As the holder of a lien, the commissioner shall have a guarantee for all claims which he may invoke against the principal. It is primarily a question of the payment of the commission, but also of the claims for compensation for the expenses incurred in the performance of the contract and for covering any damage suffered. The right to refuse to handover in order to compel the debtor is exercised over the goods in his possession during the contract.

In order to emphasize the risks assumed by the commissioner and to provide him with adequate legal protection, the legislator gives him preference even over the unpaid seller, who usually overrides the privilege of the retainer. The solution is justifiable by the fact that the obligations assumed towards third parties by the legal operation concluded under the commission will be executed by the commissioner, who has a personal responsibility, even if the correlative rights are not born in his patrimony. (Moțiu, 2014: 240).

As varieties of the commission contract, the Civil Code regulates consignment and dispatch.

However, by way of derogation from the provisions of art. 2053, the consignee may not exercise a lien on the goods received in the consignment or on their price, in the absence of a contrary stipulation (art. 2062 Civil Code). The connection required by the legislator is also present in the case of consignment, reason for which the insertion in the contract of a clause that allows the retention of the goods handed over for sale does not determine a contractual nature of the lien exercised.

At the same time, the sender is not the holder of a lien as long as the goods are not in his possession, being handed over to the carrier with whom he concludes a contract on behalf of his principal, as the main obligation arising from the transportation contract. Thus, the carrier is the one who will be able to suspend the delivery of the transported goods until the settlement of the receivables encumbering the transport (art. 1980 Civil Code). In this case, due to the reciprocity and interdependence of the obligations, the refusal to handover will be a manifestation of the exception of non-execution.

Beyond the varieties of the mandate, the lien regulated in this matter will be incidental according to the doctrine as well regarding to the agency contract. The agent will thus benefit of the provisions of art. 2029, as they are compatible with the nature and effects of the agency contract (Cărpenaru, 2019: 560).

Legislative texts that regulate by a special provision the lien in the matter of contracts such as the mandate (art. 401), the commission, (art. 434), the transport contract (art. 451), are found in the Swiss code of obligations. Among the creditors who benefit from an increased attention from the legislator are the salesmen (art. 349 e and 350a) and the agents (art. 418o).

§2. Tenancy, lease and deposit

By the effect of these special contracts, the derived object of the juridical operation concluded by the parties falls into the hands of the tenant, lessee or depositary over whom they exercise precarious detention, therefore one detention for another, while being obliged to return the goods held at the end of the contract.

The emergence of a right of retention derived from a mixed connection as a result of these contracts has been consistently allowed in judicial doctrine and practice prior to the adoption of the new Civil Code. During the performance of the contract, the owner of the goods may be required to incur expenses for their maintenance or improvement, as he may even suffer damage caused by those goods.

Therefore, it is easy to notice that there is a material connection between the claims invoked by these creditors and the assets they hold through the effect of concluding the contract, as defined by the provisions of art. 2495, in the sense that they are incorporated into the asset, or it represents a damage whose effective cause is the good, in which case the basis of liability will be a tort. This objective link between the compensation due to the debtor of the obligation to repay and the property held is accompanied by an intellectual connection determined by the contractual legal relationship from which are resulting the obligations of both parties.

Professionals, traders and non-traders can conclude leases as lessor but also lessee on movable or immovable property. This time we emphasize the quality of tenant of the professional and his ability to exercise a lien when making improvements to the property he uses under the contract. Thus, we consider that in the operation of an enterprise the conclusion of leases is vital, giving the tenant the opportunity to use the property of another, in exchange for a rent, to exercise their usual activity, including establishing the headquarters as an element of identification of the legal entity. (Piperea, 2019: 561)

However, the last paragraph of Article 1823 of the Civil Code. provides that the lien may not be exercised when improvements to the property are made without the consent of the lessor. We consider that this legal provision is an application of the general rule according to which the possessor in bad faith cannot invoke a lien in the absence of an express legal stipulation (art. 2496 para. (2) Civil Code).

From a lessor 's position, the trader enjoys in Swiss law by right to a lien on the movable property brought by the lessee within the commercial premises rented to guarantee the payment of rent and the guarantee for rent by the latter. This form of lien has a detailed regulation of its opposability to third parties and derogates from the general framework in that the lienor does not exercise direct material control over the goods brought into the leased space. Only the movable assets on which the lessor is convinced that they are the property of the lessee are subject to this lien.

The lease contract is a tenancy whose object is the real property but also the movable one intended for agricultural exploitation (art. 1836 Civil Code) Considering this aspect, it becomes obvious that the lessee will always have the quality of a professional.

About the deposit we can say that it is an imperfectly bilateral contract, only when it is concluded free of charge. Otherwise, if the depositary is a professional to whom a remuneration is due for the service provided, the contract will become a bilateral one. We appreciate that the example of a remunerated deposit can be found even in the case of renting safe deposit boxes. (art. 2196 Civil Code).

With regard to comparative law, we can point out the professional status of the creditor if the goods are in a warehouse. According to Article 485 (3) of the Swiss Code of Obligations, the warehouse keeper has a lien to guarantee all his claims, which he bears on the goods in his possession or which he may dispose of by documents incorporating the encumbered goods.

The absence of a special text on the lien of the depositary has been attributed to the regulation of a general applicability whenever a *debitum cum re iunctum* occurs. The nature of the connection will be mixed again, as the expenses incurred for the execution of the contract benefit the deposited good, while the depositary is the debtor of a personal obligation to return the good (Deak, Mihai and Popescu, 2018: 43-44).

Instead, the current legislator made clarifications related to the exercise of lien in the matter of the hotel deposit, ordering that the hotelier will not be able to withhold the personal effects without commercial value and the client's documents to guarantee the payment of the price. We consider that this restriction of the applicability of the lien on goods brought to the hotel is due to the fact that it is very likely that its exercise will become abusive, given the short duration of the contract. By refusing to handover documents, the debtor's freedom of movement could also be restricted.

A specific effect of the lien exercised by the hotelier is provided by article 2136 and refers to the possibility of the lienor to capitalize the goods that are in his detention according to the incident rules in case of forced pursuit of movables This legal provision is an exception by which the holder of the lien is granted a right to capitalize the property, as a prerogative of this guarantee which usually requires passive conduct with comminatory effect. Therefore, the removal of the goods in the hands of the hotelier for sale is not related to the special privilege granted to the lienor, it does not imply the competition with other creditors, but only the satisfaction of the claim from the value of the goods sold through the bailiff.

We note that the lien arising from the hotel deposit has a long tradition in both continental and Anglo-Saxon legal systems, thanks to the obvious connection between the price due by the customer and the goods brought to the hotel and in connection with which were provided the hotel services.

The reason for this legal provision can only be the professional quality of the hotelier and the will of the legislator to protect his interests, giving up, at least regarding this creditor on the traditional French influence upon Romanian civil law.

At the same time, it is important to note that there is an express provision that the norms on hotel storage apply by analogy to goods brought to hospitals, sanatoriums, sleeping wagons, boarding houses and other such places.

The lien arising for the guarantee of hoteliers' claims is provided for separately in Swiss law under Article 491 in the Code of Obligations, which also considers the position of the hotelier to be analogous to that of the lessor of commercial premises.

§3 **The sale-purchase contract and the works contract**

Selling and buying operations are among the most common activities carried out in a systematic and organized way by individuals or legal entities.

According to the doctrine, the distinction between commercial and civil sales consists in the resale intention of at least one of the co-contractors. Therefore, by concluding these contracts, the movement of goods and services takes place, leading to the emergence of trade (Piperea, 2019: 407)

Traditionally, the seller's refusal to hand over the good sold before payment of the price has been considered by the legislator from 1864 as one of the applications of the lien (Voicu, 2001: 80). However, the perfect bilateral nature of the sale-purchase contract has led us to conclude that in this case the refusal to handover is only a form of concretization for suspending the effects of the contract by invoking an exception of non-performance (Bosneanu, 2019: 294).

Therefore, being a contractual mechanism derived from the reciprocity and interdependence of the obligations assumed by the parties, there can be no question of an *ius in re aliena.*

On the other hand, in order to qualify the legal nature of the refusal to deliver, in this context it must also be taken into account that in the case of movable property the unpaid seller is the beneficiary of a special privilege as well as the lienor. Given that there are two preferential causes in competition, it is clear that the legislator intends to distinguish between the exercise of a lien and the legal position of the seller to whom the price for a movable property is due.

As the sale-purchase of movables is the most common contract, the recognition of a privilege for the unpaid seller is not a novelty, but the cause of preference arises only when the property is sold to an individual who is not in the exercise of an enterprise. As such, we note that in legal relationships in which at least the buyer is a professional, the property sold will not be encumbered by a privilege so as not to affect the activity undertaken by the latter.

The importance of this contract in the commercial activity is also demonstrated by the conclusion of an international convention whose object of regulation is the international sale of goods. We are talking about the UN Convention concluded on April 11, 1980 in Vienna and to which Romania became a party by its ratification by Law 24/1990.

The rights of the unpaid seller, if by agreement of the parties the payment of the price and the delivery of the goods must take place simultaneously, are provided by Article 85. This legal provision must be interpreted as meaning that the seller cannot be obliged to deliver the goods before the payment of the price, which is why he will take measures to preserve them if there are in his possession even *corpore alieno.* Of course, the storage costs, which are closely related to the goods in their materiality, will be borne by the buyer, and their return will also be guaranteed by the right to refuse delivery.

Regarding the lien exercised over merchandise, it is interesting to note that, according to French case-law, if the debtor has free access to stocks of stored goods, those cannot be considered to be in detention and at the disposal of the lienor. In order to be entitled to a lien, the assets must be in the care of employees who are liable only to the creditor. (Malaurie and Aynès, 2021: 279)

On the other hand, under the old Romanian Civil Code, certain legal provisions were seen as the basis of a lien of the buyer, who may also be a professional (Bosneanu, 2019: 295).

About these, we consider that we could speak of a real lien in case of retention of the property until the full reimbursement of the expenses incurred and compensation for damages suffered as a result of eviction or admission of an actio redhibitoria. The legal relationship arising from the triggering of the warranty for defects or eviction against the seller is of a non-contractual nature, having its source either in a lawful or unlawful act. Even in the conditions in which the intellectual connection will

subsist, the existence of a material liaison between the buyer's claim and the good in his possession as an effect of the contract of sale cannot be overlooked.

The services contract is the agreement by which the contractor undertakes to perform at his own risk a certain material or intellectual work or to provide a certain service to the beneficiary in exchange for a price. The definition given by the legislator shows the professional quality of the entrepreneur.

Due to the effects of this contract, it is difficult to distinguish it from other contracts that give rise to similar obligations for the parties. In the context of our article, we appreciate the importance of distinguishing the company from the sale, and the criterion established even at the legislative level is that of the mediated goal pursued by the parties at the conclusion of the contract, which in the matter of the enterprise is represented by the execution of the work and not getting the product as an outcome (Moțiu, 2014: 191).

We consider that the material connection between the manufactured good or the good on which a work was performed and the contractor's claim for payment of the price is obvious, since all the expenses he incurs are incorporated in the good on which the work is performed. Thus, the effect of the enterprise contract will be a mixed connection between the price of the work and the goods or services resulting from the execution of the contract, and the legal basis of the right of lien determines its emergence *ope legis* when the conditions provided by art. 2495 Civil Code (Moțiu, 2014: 196). This application of the lien is widely recognized in French case-law. For example, a decision fairly recent French Court of Cassation states that there is an intellectual connection between the possession exercised by the beneficiary on a machine located on the construction site, that belongs to the entrepreneur, and his claim consisting in the return of advance payments made before the debtor entered in a judicial liquidation procedure. The motivation was that both obligations of the parties arise at the conclusion of the same contract, even if the possession of the property and the claim for restitution are not effects of the enterprise contract pursued *ab initio* by the co-contractors. (Court of Cassation Commercial Chamber pronounced on 17 Feb. 2021, n°19-11132, in Malaurie and Aynès, 2021: 283)

Various forms of particular lien are also recognized in English law for the contractors, service providers (Popesco, 1930: 49). In the United States, Mechanic's lien is one of the oldest and most well-regulated forms of lien, and can be used on both real or personal property. This has the legal nature of a privilege, and its exercise involves the intervention of the court that will order the sale of the encumbered goods. (Contractors State License Board California, 2021).

However, in Romanian law, the entrepreneur also benefits from a legal mortgage, the effects of which cannot be compared with those of the lien which is why efficiency of the latter in this contract is negligible and is reduced to the situation where the entrepreneur would not enroll the mortgage in the publicity register to third parties.

§ 4. Exercising of the lien by non-trader professionals

The legislator's new view on the concept of running an enterprise extends the area of legal relationships with professionals beyond the realm of business operations. As long as the activity of a holder of rights and obligations is carried out on a professional basis, the purpose pursued or the legal form of organization is irrelevant. (Cărpenaru, 2019: 38)

Thus, the object of the civil enterprise is represented by the activities specific to the liberal professions carried out according to a normative act that regulates the organization and exercise of the latter.

The holder or members of the profession shall enter into a contract with the client to whom he makes his knowledge available according this convention.

For a very long time, French doctrine and jurisprudence have argued that documents held by professionals as a result of such contracts may be subject to a lien, given the operation of this guarantee, regardless of the intrinsic value of the property detained. (Cabrillac and Mouly:2002: 559-560).

We consider that there is indeed a juridical connection between the claim whose object is represented by the payment of the remuneration (fee) and the goods that are in the possession of the professional on the occasion of concluding and executing the contract between the parties. Under these conditions, the right of lien will exist whenever all other requirements provided by law are met.

The main prerogative of professionals, such as the accountant, the lawyer, the architect, will be to refuse to hand over the goods that belong to the debtor, but are in their possession as an effect of the service contract, if the law does not expressly prohibit such conduct.

There can be no exception to non-performance, as even if there is a perfect bilateral contract, it is very likely that the performance of the obligations will not be simultaneous, in the sense that the professional will perform the contract before the payment of the fee.

Of these applications, the most debated in comparative law has been the exercise of the right of lien by solicitors on documents belonging to their clients (Legros, 1939: 29-31).

The French legislator provides in the content of art. 444-75 that the lawyer may exercise a right of lien over all documents in connection with the case in which he was employed. Their remission to a public or ministerial official will always be of a provisional nature, being justified by a legitimate interest. The official is therefore obliged to return the documents in question to the lawyer when they are no longer needed.

As the legal assistance contract may cover a number of activities specific to the legal profession, we do not consider that it should be treated as a mandate contract, although the proxy enjoys a special legal provision recognizing his right of lien.

The legal profession Statute stipulates in Article 149 paragraph (2) that: *"If the client owe to the lawyer arrears of fees and expenses incurred on his behalf, the lawyer has liens on assets entrusted, except documents original that have been made available.*

We note that this legal norm is very similar to the one provided in the matter of the mandate, observing, therefore, the juridical connection between the fee, the expenses made in the interest of the client and the goods that the lawyer owns with his consent. However, by way of exception, the lien may not encumber the original documents at its disposal. This limitation aims to prevent the occurrence of a situation in which the pressure exerted on the client becomes abusive, including leading to the prevention of the exercise of the liberties and non-patrimonial personal rights of the client. In this context, the exercise of the right of lien would be contrary to the professional duties of a lawyer.

Article 144 of the Statute contains a much more interesting legal provision, as it has been interpreted as a case of application of the lien on intangible assets (Pop, Popa and Vidu, 2015: 603)

The above-mentioned legal provision states that*: "If there is a risk that a client will give the funds held by the lawyer such a destination that the lawyer can no longer collect the due fee, the lawyer has a right of lien on them to cover the fee due. This provision does not entitle the lawyer to withhold funds in order to compel the client to accept his fee claims. The part of the fee that is the subject of the dispute will in this case have to be deposited in -a special account, and the lawyer will have to propose in the shortest possible time to the client solutions for settling the conflict regarding the fee, within the limits of the law and the status of the profession"(*Article 144 of The Lawyer Proffession Statute).

The funds held by the lawyer may be subject to lien, where there is a risk that they will be assigned a destination that would prevent the latter from collecting the fee agreed by the parties.

If there is a dispute between the lawyer and the client regarding the fee, the part of the remuneration that is the subject of the misunderstanding may be deposited in a special account, under the control of the lawyer. The incorporeal nature of the balance of the bank account and the lawyer's ability to dispose of this balance presupposes the acceptance of the existing thesis in French law on the abstraction of detention and its transformation into a virtual blocking power (Aynés, 2005: 62). Thus, will be retained in this special account only the amounts necessary for the full payment of the fee claimed to be due, while the rest of the funds will be transferred to the client.

At once, the legislative text states that the funds cannot be withheld to force the client to accept the lawyer's claims regarding the fee, which is why they will be deposited with a third party, banking institution, until the dispute is resolved by law.

There is an express provision in French law according to which the right of lien may be exercised by other categories of professionals for the payment of regulated sums of money due as consideration for the services provided as well as for the reimbursement of any expenses incurred. Thus, art. 444-15 of the French Commercial Code refers not only to lawyers, but also to notaries, bailiffs and judicial bidders.

4. Conclusions

The emergence of the connection, as defined by law, in legal relationships with professional creditors is quite common, and their backup is often contractual.

From our point of view, the comminatory effect produced by the exercise of the right of lien and the fact that this guarantee has a legal ground and represents a means of private justice are sufficient arguments to prove its effectiveness in any context.

Of course, the recognition of a movable privilege for the benefit of the lienor adds a right of preference to the passive nature of the lien, precisely to come to the aid of professionals upon the disappearance of the dualism of private law.

The refusal to hand over the property, whether it is an expression of the exception of non-execution or a real lien, is always within the reach of the professional, taking into account the need for celerity and the frequency of many legal acts concluded in the operation of an enterprise, which contradicts the rigidity of conventional securities.

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