



ORIGINAL PAPER

Brief Comments on The Regulation of the Lien in The Moldovan Republic

Iulia Alexandra Bosneanu¹

Summary:

The article aims to analyze the provisions of the Civil Code of the Moldovan Republic regarding the legal regime of the lien and its applications expressly regulated by law. Observing the norms regarding this legal institution, we identified some notable distinctions compared to the conception of the Romanian legislator.

Keywords: *connexity, lien, debt.*

¹ Postdoctoral researcher, Faculty of Law, University of Craiova, 0769601276, Romania, Email: iulia.bosneanu@gmail.com.

The express regulation of the lien as an independent legal institution can be found in the fourth section of the chapter referring to the means of guaranteeing the execution of obligations. The legal provisions are included in the first title of the third book of the Moldovan Civil Code, entitled "Obligations" and include references to the conditions of exercise, effects and termination of the lien.

Most of these legislative texts have a wording almost identical to that of the Romanian regulations, but at the same time the differences in approaching the legal regime of the lien are visible.

§1. The legal nature of the lien

The main doctrinal debate regarding the right of lien has always been that of its real or personal nature. The legislative text on the opposability of the lien states that it can be opposed to third parties without fulfilling any publicity formality, which means that we can consider that its effects go beyond the contractual sphere. Although the lien has as object corporal goods and is opposable *erga omnes*, as in the Romanian legal system, the Moldovan legislation is much clearer.

As long as the chapter in which we identify the provisions regarding the lien includes other sections that regulate the penalty clause and the earnest, we consider that this guarantee mechanism is a simple means to coerce the debtor, a sanction with comminatory effect, and not a collateral guarantee, even imperfect. (Stătescu and Birsan, 2008: 429).

§2. The constitution and limits of the right of lien

Article 960 of the Civil Code of the Republic of Moldova contains general provisions on the lien. The field of application of this mechanism is established by a text similar to that of the legal norm found in article 2495 paragraph (1) of the Romanian Civil Code. "*He who is liable to remit or return a good may retain it as long as the creditor does not compensate him for the necessary and useful expenses he has incurred for that good and for the damage which the good has caused.*" (article 2495 paragraph (1) of the Romanian Civil) According to this legislative text we observe that the Moldovan legislator preferred not to include legal connection in the area of lien application. Thus, only an objective connection between the good and the claim invoked is strong enough to justify the refusal to handover the good. This intrinsic connection of the claim with the good is caused by the causal link between the latter and the impoverishment of the creditor. The diminution of the lienor's patrimony can occur either on the basis of a lawful fact (unjust enrichment of the debtor by the repairs and improvements of the good during his detention by the creditor), or by causing a damage whose material cause is the good itself.

The main condition for invoking a right of lien is therefore the existence of the traditional *debitum cum re iunctum* between the claim raised and the property withheld for comminatory purposes. Of course, the creditor must in turn be required to remit or return the property, so that both parties involved have the status of creditor and debtor to each other. While the lienor is the debtor of an obligation to do, the one entitled to restitution has an obligation to give to the lienor.

Although the basis of the obligation to remit or return the property, which the lienor refuses to execute until the indemnity, may or may not have a contractual basis,

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we notice that the framework regulation states that the provisions on the lien are residual. This presupposes that the person liable for restitution has the right to refuse performance of his obligation only in so far as the contractual provisions do not provide otherwise. Such a legal provision is not found in the Romanian regulations. The consequences of the dispositive and residual nature of the legal norm are that, on the one hand, the legal mechanism cannot be regarded as a legal guarantee since its benefit can be waived, and on the other hand even if we are talking about a claim for damages, which generates material connection, the latter seems to be grafted on a contractual legal relationship existing between the parties, therefore on a legal connection.

Another essential feature is the accessory character of the lien towards the claim invoked by the one who refuses the handover is also highlighted in the Moldovan regulation in the content of article 960 paragraph (2), in that the right of lien is ineffective when the creditor of the restitution puts at his disposition the amount claimed or offers a guarantee. Refusal to handover is unjustified whenever the claim is extinguished by the real payment offer or the creditor becomes the beneficiary of another guarantee, which he considers sufficient, consenting to the establishment of the latter (see article 2499 para. (1) Romanian Civil Code)

The cases in which the creditor cannot successfully invoke a right of lien are the same as those considered by the Romanian legislator, being first of all about the illicit ground of the material possession exercised by the creditor of a *debitum cum re iunctum* and about the good's immunity for seizure. This concerns the tangible property that could be the object of the lien and implies the impossibility of its forced pursuit, despite the fact that it has intrinsic value, for reasons that seek to protect a legitimate interest. This immunity of the property may be the effect of its inalienability established by law or by agreement of the parties. At the same time, certain categories of movable property cannot be subject to enforcement as they are indispensable to the debtor or closely related to his person.

The creditor's subjective position is also an important criterion when it comes to the general application of a comminatory mechanism that allows the refusal to perform one's obligation without the intervention of the court. Therefore, the holder of bad faith will be able to exercise a right of lien only when there is an express legal provision regarding such a right .

Among the causes of exclusion of the right of lien in the perspective of the Moldovan legislator is the prescription of the principal action, if this sanction intervenes after the moment when the creditor could exercise this right. The legal disposition containing this provision is analogous to the one contained in article 2505 of the Romanian Civil Code on which we expressed our point of view in the sense that the extinctive prescription of the invoked right of claim cannot intervene before the emergence of the right of lien in the patrimony of the creditor *ope legis*, that is under the law (Bosneanu, 2019: 273).

However, the extinguishment of the right of lien can be said that it takes place once the property returns to the possession of the restitution creditor or the right titular, unless the lienor regains the property as an effect of the same legal cause.

Examining the express regulation of the way for extinguishing this legal means of guarantee, we find two relevant issues regarding the legal regime of the lien. First of all, in order to invoke the right of lien, it is not imperative that the debtor of the claim be the owner of the property, but may be the holder of a dismemberment or a personal right of use. Secondly, in order to avoid the extinctive effect caused by the loss of material

detention, it is necessary for the lienor to recover the property on the basis of the same legal relationship. Which implies the existence of a framework agreement executed successively, but seen as a single contract in its own, which includes several services of the lienor in connection with the same good (Aynés, 2005: 246).

§3 Effects of the lien according to the Civil Code of the Republic of Moldova

The first of the provisions in art. 962 of the above mentioned normative act refers to the opposability of the right of lien towards third parties in general, without fulfilling any publicity formality, like the Romanian regulation (see article 2498 para. (1) Romanian Civil Code). The publicity of the right of lien is therefore made without its entry in a publicity register by the simple legal fact of the material detention exercised over the retained property.

However, the problem of the opposability of the lien in relation to the other creditors who pursue the good for capitalization is solved in the same defective manner, as in the Romanian law. The retaining creditor cannot oppose the initiation of a foreclosure procedure on the property he holds, but he will be able to participate in the distribution of the price according to the rank that the law confers, bearing the competition of the other creditors. Observing the provisions of the Civil Code, we find that from the point of view of the Moldovan legislator, the lienor is in all cases an unsecured creditor without a preferential right over the price of the property held for comminatory purposes. The confining effect produced on the debtor remains his safest way to realize the claim.

The third paragraph of article 962 of the Moldavian Civil Code refers to the possibility of the lienor to regain possession of the property when it is involuntarily dispossessed by third parties, unless the divestiture occurs for the initiation of the forced pursuit. The normative text is very similar to the provisions of article 2499 paragraph (2), since it provides that : "*Dispossession of property contrary to the will does not extinguish the right of lien. The party exercising this right may request the return of the property, under the reserve of the rules applicable to the extinction prescription of the principal action and the acquisition of the movable property by the bona fide possessor*". Therefore, it is in question the right of the lienor to regain effective control over the property in respect of which the claim arose, when the latter does not come out of his hands as a result of the will to waive the guarantee. From our point of view, the fact that the legislator puts at the disposal of the creditor an action for the recovery of the good cannot be equivalent to a right of pursuit specific to the real collateral guarantees (Bosneanu, 2019: 190). .

From the above, we notice that the regulation of the prerogatives of the lienor is almost the same as in the Romanian legal system. However, we were struck by the following legal provision: *only if the creditor simultaneously performs the obligation secured by the right of lien or provides sufficient enforcement assurances to the lienor or if the lienor is latish in accepting the performance provided by the creditor.*(article 962 paragraph (4) Moldovan Civil Code) This legal norm is one of German inspiration because the legal mechanism described is the same as the one identified in article 274 of the German Civil Code. Whenever the creditor of the restitution formulates a legal action by the decision of admission of the request, it will be ordered that the lienor may refuse the execution of the latter until the obligation guaranteed by the right of lien is

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extinguished simultaneously or by real offer. An alternative to the performance from the claimant of the restitution is to provide other sufficient guarantees for the subsequent payment of the claim. Thus, even if he is obliged in court to return the property, the retaining creditor cannot be deprived of the benefit to which he is entitled, as the judgment will also oblige the plaintiff in return to pay damages under the sanction of lack of legal effects for the court decision.

Paragraph 274 of the Bürgerliches Gesetzbuch provides: " (1) *In relation to the obligee's action, the assertion of the right of retention only has the effect that the obligor is to be ordered to perform against receipt of the performance due to him (performance concurrently).* (2) *On the basis of such a judgment, the obligee can pursue his claim without effecting the performance owed to him by way of compulsory enforcement if the obligor is in default of acceptance (Paragraph 274 of the German civil Code)* Therefore, we can conclude that the restitution of the encumbered asset can be reached only by performing the guaranteed obligation or by declaring that the debtor is ready to do it.

The dominion he exercises over the good makes the lienor have the obligation to preserve the good by behaving as a *bonus pater familias*, according to the objective criterion for establishing responsibility according to his care for his own goods (Bosneanu, 2019: 245). There is also provision which states this aspect as part of the general regime of the lien.

Moreover, article 963 of the Mold Civil Code, obliges the lienor to collect the fruit as a conservation measure and despite the fact that he is a precarious holder, the law requires that the civil fruits be imputed to his claim. We consider that this option of the Moldovan legislator can only be an advantageous one for both the lienor and the creditor of the restitution, as long as the obligation is extinguished having as consequence the relieving of the asset (Vidu, 2010: 66).

§3 Lien applications expressly regulated by the provisions of the Moldovan Civil Code

Like the Romanian legislator, the Republic of Moldova prefers a unitary conception on the legal relations of private law, stating that the provisions of the Civil Code apply to both professionals and those who do not have this quality (see article 3 Romanian Civil Code).

The professional is defined as follows : *any natural or legal person governed by public or private law who, in the context of a civil legal relationship, acts for purposes related to the activity of entrepreneur or professional activity, even if the person does not aim to obtain a profit from this activity.* (article 3 paragraph (2) Moldovan Civil Code).

Thus, the provisions regarding the lien also apply if the lienor is a professional. In fact, most of the lien applications found in the code involve legal relationships arising from contracts in which the lienor may be in the exercise of an enterprise or may act professionally.

a. One of the applications of the right of lien that is not found regulated separately in the Romanian Civil Code is the one referring to the fiduciary. Instead, the Moldovan legislator largely regulates this hypothesis in Article 2148 of the Civil Code. The trustee may retain the portion of the estate that will be transferred, if necessary to settle the trust's debts, the trustee's claims against the estate, the expenses related to the

transfer, division or sale of the right, when such debts, rights or costs are related. of the part of the fiduciary patrimony mass to be transmitted to the beneficiary. The lien is extinguished if the person requesting the resolution of the trust pays all the secured claims.

The trustee is always a natural or legal person having the quality of a professional due to the complexity of the effects of the trust, regardless of how it is set up. The Romanian regulations contain express provisions in this regard, stating that : *“(1) Any natural or legal person may be a constituent in the contract of trust. (2) Only credit institutions, investment and investment management companies, financial investment services companies, legally established insurance and reinsurance companies may have the status of trustees in this contract. (3) Public notaries and lawyers may also have the quality of trustees, regardless of the form of exercising the profession”* (article 776 of Romanian Civil Code).

Although in the Romanian Civil Code system the trustee could invoke the provisions of article 2495 para. (1) which establish the applicability in principle of the lien, whenever there is a connection between the claim and the good, we believe that through the provisions of art. 791 para. 2. Civil Code, according to which, the merging of the fiduciary patrimonial mass in the patrimony of the beneficiary or of the constituent will take place only after the payment of the fiduciary debts, the legislator is lacking any utility for invoking the lien in this matter.

b. The obligation to preserve the sold good in case if , due to the fault of the contractor, the seller is obliged to take such a measure, has as a correlative the right to compensation for storage after the term initially established for delivery. Article 1133 paragraph (4) of the Moldavian Civil Code. gives him a right of lien until the resulting expenses are reimbursed. We consider that this legislative text is a takeover on the level of domestic law of the provisions of the Vienna Convention on the International Sale of Goods within Article 85 of this source of international law.

c. The right of lien on the goods stored until the payment of the remuneration and the storage expenses is expressly provided both for the regular deposit and for the non-payment of the hotel services. The provisions of Article 1564 in the Code refer to the situation of goods in hotels and other such premises, the content of the legal norm being very similar to that of the Romanian Civil Code. The similarity exists also regarding the hotelier's faculty to capitalize the goods in order to satisfy his claim from the price obtained following the forced execution.

d. Unlike the Romanian regulations, where the legislator preferred to grant the entrepreneur a legal mortgage (see article 1869 Romanian Civil Code), the Moldovan code retains the traditional place of lien in this matter. Movable property produced or improved under the enterprise contract may also be retained by the contractor in their possession during the execution of the contract, the secured claim referring to the price of the enterprise. However, the lien does not operate when there is a bad faith on the part of the contractor, who knew that the owner did not agree with the production of the good or the improvements made to it. Sanctioning abusive behavior, contrary to the will of the beneficiary is a consequence of the application of the imperative of good faith in contractual relations, (see Article 1358, Moldovan Civil Code).

e. Regarding the contract of carriage, there are two legal provisions regarding the right of lien of the carrier. The first reference is found in the section with general provisions and concerns the right of lien on luggage (in the case of the transport of

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persons), and the property until the payment of the transport tax established by agreement of the parties, (see art. 1416 para. (3) Moldovan Civil Code).

In the case of the transport of goods, the law returns with a special, more comprehensive provision, granting the carrier a right of lien to guarantee the reimbursement of all costs arising from the contract. Obviously, given the essential role of detention, the right of lien takes effect as long as the assets are in the possession and control of the creditor, (see article 1447 Moldovan Civil Code).

The mechanism of guarantee of the right of lien finds its utility for the professional creditors especially regarding the forms that the mandate without representation takes in the commercial activity.

The Moldovan Civil Code regulates this type of contract in a chapter called "Contracts for the marketing of another's products". The common provisions provide that this falls within the field of the *"commercial agency contract, the professional commission contract, the franchise agreement and the distribution contract, as well as other contracts under which a self-employed party undertakes to use skills and efforts to place the other party's products on the market."* (article 1687 para.(1), Moldovan Civil Code).

The regulation of the right of lien by a special legal disposition in this matter is the subject of article 1698 Moldavian Civil Code in the same section applicable to all the contracts mentioned above. The party undertaking to place another's products on the market has a right of lien to guarantee the right to damages, remuneration and compensation. The lien in this case has only the movable property on which the creditor exercises a material detention under the contract, and is extinguished when the co-contractor fulfills his obligations.

f. Finally, we will refer to the invocation of the right of lien within the gratuitous loan agreement, because although it is in essence a disinterested act, which does not bring any patrimonial benefit to the lender, the borrower will still be able to retain the property covered by the contract. It can be invoked exclusively to compel the bailer to reimburse the extraordinary, necessary and urgent expenses incurred in order to preserve the good that the bailee has in use. (article 1240, Moldovan Civil Code). In so far as the expenses were not urgent and did not have the strict effect of preserving the property, the creditor will not be able to invoke the lien, preventing the owner from exercising his prerogatives. Therefore, the right of lien does not arise in the case of improvements or compensation for damage caused by property during performance of the contract.

On the other hand, the Romanian Civil Code completely excludes the emergence of a right of lien regarding the bailment agreement independent of the nature of the expenses incurred by the one who enjoys the free use of the property (see article 2153 Romanian Civil Code). We consider that this approach is far too radical and we share the view that the preservation of the property by the borrower fully justifies the lien until the time of reimbursement of expenses.

§4. Conclusions

Examining comparatively the regulation of the right of lien in the two civil codes, Romanian and Moldovan, we observe an increased degree of similarity, which proves the common cultural and social values of these states.

However, the distinctive elements refer to aspects of major importance, which we have identified above. The most important of these is that the lien cannot be qualified as a real collateral guarantee, but rather a sanction for non-performance of obligations,

which is based on the law, but can be excluded by the will of the parties. The comminatory effect of the refusal to handover is what ensures the function of guarantee of the lien. Opposability to third parties is not sufficient to turn the lien into collateral, especially if it does not apply to other creditors pursuing the asset.

In conclusion, the general legal regime and the applications of the right of lien as found in the provisions of the Civil Code of the Republic of Moldova reflect the specific doctrine of Roman-Germanic law.

Acknowledgment:

This work was supported by the grant POCU / 380/6/13/123990, co-financed by the European Social Fund within the Sectorial Operational Program Human Capital 2014 - 2020.

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Article Info

Received: August 16 2022

Accepted: August 30 2022

How to cite this article:

Bosneanu, I.A. (2022). Brief Comments on The Regulation of the Lien in The Moldovan Republic. *Revista de Științe Politice. Revue des Sciences Politiques*, no. 75, pp. 127 – 134.