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MRÓZ Teresa, Prof. dr hab. Department of Civil Law Faculty of Law, University in Bialystok

SECURING FUNCTIONS OF LINKED CONTRACTS

Мруз Т. Забезпечувальні функції пов'язаних контрактів. *Розглянуто місце пов'язаних контрактів як нового способу забезпечення вимог і ризиків, що виникають у результаті зобов'язань різних прав власності у системі цивільного права. Визначено зростаючу роль правових конструкцій безпеки в умовах ринкової економіки. Підкреслено необхідність забезпечення балансу і захисту інтересів обох сторін договору економічного страхування.*

Ключові слова: економічний ризик, контракт, забезпечення платіжних вимог, обов'язкове страхування, забезпечення кредиту, умовний депозитний рахунок, гарантії страхування.

Мруз Т. Обеспечительные функции связанных контрактов. *Рассмотрено место связанных контрактов как нового способа обеспечения требований и рисков, возникающих в результате обязательств разных прав собственности в системе гражданского права. Определена возрастающая роль правовых конструкций безопасности в условиях рыночной экономики. Отмечена необходимость обеспечения баланса и защиты интересов обеих сторон договора экономического страхования.*

Ключевые слова: экономический риск, контракт, обеспечение платежных требований, обязательное страхование, обеспечение кредита, условный депозитный счет, гарантии страхования.

1. General remarks

In parallel with economic development there are appearing new ways of securing claims and risks that result from obligations of various legal titles. Moreover, in the current economic reality and crisis phenomena, concluding contracts that are related to each other, the so-called linked contracts (coupled). More and more relations of private law, although they are based on principle of equity and autonomy of parties, they demand additional protection and legal security in order to balance property risk (economic risk)

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of the parties of legal relation. Nowadays we can observe the fact that frequently the classic legal institutions are supported by legal constructions created by parties' will that are adjusted to demands of a certain situation of participants of legal turnover. There are also obligations with such high risk that several various securities are applied in parallel. The source of additional legal protection may be the parties' will, as well as the act imposing obligation of concluding certain contracts [1], for example contracts of civil liability insurance of motor vehicles' holders. Such tendency on one hand demonstrates restrictions of freedom of contract principle [2], on the other hand it expresses the need to strengthen another equally significant principle of certainty of turnover that is realized by creditor protection [3]. However, it should be indicated here that even if the act imposes an obligation to conclude a contract, the contract still remains as a legal instrument creating the contents of additional security. Nonetheless, it is clear that some margin of economic risk stays out of reach of possibilities of legal security both contractual and statutory.

In the sphere of contractual relations of obligations the possibility to create untypical relations results from the provision of the article 353^1 of the Civil Code, according to which the parties concluding an agreement are able to shape the relation within their will, however, it cannot oppose to the nature of the relation, the act and principles of social community. The practical advantage of this provision that expresses freedom of contract principle lies in possibility to create relations of obligation with the contents different from dispositive provisions, as well as possibility to establish relations that are not classified in any type indicated in the act. Furthermore, with reference to liability relations established by other reasons than contracts, it is possible to modify their contents by means of the contract concluded by the parties of already existing relation [4]. The Civil Code stipulates the principle according to which parties may decide on the aim and functions of legal relation within the frames determined by imperative regulations.

2. Examples of increasing role of legal constructions of security in market economy

The example of security established in Poland relatively recently by means of act of law and aiming to decrease risk of one party of the contract are the provisions of the Act on the Protection of Rights of the acquirer of a dwelling or a single-family house [5]. This Act regulates the protection of rights of the acquirer in respect of whom the developer agrees to establish a separate dwelling ownership and transfer the ownership of the premises to the acquirer, or to transfer to the acquirer of immovable property including single family house or perpetual usufruct of land and ownership of single family house built thereon and constituting separate property [6]. Before this law came into force practically the entire economic risk was the burden of the future acquirer of the property. The risk was not divided between a developer (professional) and an acquirer, usually a consumer.

Among the ways of acquirer protection determined in imperative provisions, at the first place there is mentioned protection of payments made by acquirer (natural person). According to the article 4 of the Act on the Protection of Rights of the acquirer of a dwelling or a single-family house, the developer provides acquirers at least one of the following protection measures: 1) a closed housing trust account, 2) open housing trust account and the insurance guarantee, 3) open housing trust account and a bank guarantee, 4) open housing trust account.

In this way statutory obligation to conclude a contract with a bank to provide at least one of abovementioned accounts was imposed on developers. A bank keeps records of deposits and withdrawals from such accounts. The right to terminate the agreement applies only to the bank and only for important reasons. Money for the acquisition of a dwelling or a single-family house does not go directly to the developer under the conditions that so far were specified only by a developer but the payment of the deposited funds is based on the type of housing account, or according to the schedule of the developer enterprise specified in the contract (open housing trust account), or once, after transfer the rights indicated in article 1 of the Act on the Protection of Rights of the acquirer of a dwelling or a single-family house to the acquirer. Traditionally, security of claims is divided into "tangible" and "personal". The purpose of this security is to strengthen the position of the creditor, and thereby to reduce the risk of debtor's insolvency. Overall, the tangible security means that the creditor has the right to be satisfied with a specific item of property of the debtor, regardless of whether at the time of investigation of the claim by the creditor it belongs to the debtor, or another person (for example mortgage, pledge). The essence of personal security is reducing the risk of the creditor by obtaining additional debtor, who also holds personal responsibility for the performance. Frequently applied personal security is: suretyship, bank guarantee and credit (loan) insurance. Loan insurance is a combination of two complex legal relations on the basis of which it comes to the realization of banking services and the establishment of an insurance legal relationship [7]. In fact, we have two separate contracts, not a single agreement with an unnamed complex legal character. These agreements are tied, because it is a contract concluded between the bank and the borrower, and another separate insurance contract where the parties are the bank (the policyholder) and the insurer. First of them may be described as the main contract and second one as accessory. Between the main and accessory agreement there is a specific connection, namely the bank makes the loan approval dependent on the consent of the borrower to incur the cost of credit insurance by the bank. It must be noticed that regardless of the will of the parties of loan and insurance agreements, these contracts are characterized by some distinction. Loan agreement may be concluded also where an agreement of loan insurance is not concluded,

therefore it may be realized despite of the lack of insurance contract. The need for the conclusion of the latter results from the specific situation in which the bank determines the granting of a loan from the credit insurance. If these two agreements are concluded, between them undoubtedly exists a relationship of an economic nature, particularly important from the point of view of the creditor (a bank).

In accordance with article 805 paragraph 1 of the Civil Code, the essence of an insurance contract is that the insurer undertakes, in the scope of his activity, to meet specific provision in the event of an accident specified in the contract, and the insurer undertakes to pay the premium. The insurance contract referred in article 805 of the Civil Code is a facade, and is an institution of the general system of economic insurance. It should be indicated that the role of code regulations concerning the insurance companies in Poland is significant [8].

Back to the issue of credit insurance, it should be noted that in practice credit insurance can have the character of transitional security, also called staging insurance. This insurance provides protection until the moment when the bank receives mortgage entry in the land register. Insurance is intended to provide bank repayment of the loan amount, but does not exempt the borrower from the obligation to repay the loan. On the one hand, this solution is beneficial to the borrower because he does not need to seek sureties who fulfill the requirements set by the lender, on the other hand, it causes increase in the cost of credit.

It should be emphasized that the borrower cannot bear the burden of insurance premiums, because the bank as the policyholder is obliged to pay them. The bank is of course entitled to take into account the costs of concluding and performance of a credit agreement as the cost of increased risk of repayment of the loan, in the absence of security for repayment or insufficient security. However, credit insurance contract may not be constructed so that its goal is a total exemption from the risk of lending activities of a bank. In practice, the borrower must expect to face the problem of increased costs in the first stage of repayment. These are additional costs of credit insurance which the bank burdens the borrower. From the point of view of the borrower, the most important issue is the scale of increase of the credit cost. The amount of bridging insurance is related to the amount owed to the bank. In most cases, bridging insurance is taken from the account of the borrower every month. Sometimes it is paid once, by a fraction of a percent of the taken loan, but most often it functions as an increased margin till entering the mortgage. This means that the costs associated with an increased risk of the bank can be charged only for the period when the risk occurs.

In such a case the insurance cover should last up to the date when the registration of the mortgage in the land register becomes valid. The period

of cover for so-called bridging insurance depends not only on the pace of work of the court that makes an entry of mortgage into the land register, as in the case of the acquisition of a dwelling (house), most frequently the credit agreement is concluded in the course of variously advanced building process. In this situation one can wait for the establishment of security a year, two years, or even longer. Mortgage can be established only after completion of the construction and separation of individual units. In accordance with article 813 of the Civil Code, premium is calculated for the period when liability of the insurer lasts. In the event of termination of an insurance relation before expiry of the period for which the contract was concluded, the policyholder is entitled to receive refund of premium for the unused cover. The given example shows that the cost of bridging insurance can significantly increase the loan cost.

When concluding contracts, especially those where one party is a professional and the other is a consumer, standard contracts have widespread use. Banks call them as collections of general principles of lending. They are developed by the economically stronger party in this way that the possibility of influencing the content of the agreement by the borrower is practically excluded. He may agree on the proposed content of the agreement and enter into it or resign. Quite often it occurs that patterns of credit agreements adversely shape the situation of the borrower (consumer) for example by the requirement to establish secure the repayment of the loan in the amount of unexcused. These actions actually mean shifting the risk to the borrower of a bank lending activities. This issue has become a subject of interest to the Office of Competition and Consumer Protection, which dealt with the problem of illegal clauses in the field of credit insurance [9].

Therefore, there was developed the recommendation in co-operation with the Polish Chamber of Insurance and accepted by the Board of the Association of Polish Banks on 22 December 2010. The recommendation regulates general rules of activity of the bank that concludes, on behalf of itself and for its own account, the contract of financial insurance, what means insurance providing cover by the insurer for loss of property of the bank, due to events covered by insurance associated with the loan secured by a mortgage. The beneficiary of such insurance is the lender (bank).

In practice there can be distinguished different types of insurance contracts. The most popular according to the recommendation are:

- bridging insurance – insurance of risks in scope of mortgage payments in the period from the date of payment, up to the date of validation of the entry of the mortgage for the bank in the land register;
- low contribution insurance (the missing own contribution) – insurance risks relating to the repayment of the loan corresponding to the difference between the required own contribution, and the contribution brought by the borrower;

• value of the property insurance – insurance against loss of value of the property securing the loan from the effect of decrease in property values that guarantees to the bank during the insurance period to maintain value of the property as security for the amount of debt;

• legal title insurance – insurance against the effects of legal defects in the property, including real estate charges, which were not identified prior to the conclusion of the credit agreement.

Legal protection of the interests of economically weaker individuals aiming to satisfy their needs of the basic character, and in the frames of such purposes flat should be included, is realized by special legal regulation. Classic legal structures occurred to be insufficient.

3. Conclusion

The market economy is accompanied by the dynamics of functioning legal institutions with securing character, as well as creating new ones. They are formed most of all by the will of the participants of economic turnover, but also by virtue of statutory regulations. An example of the latter is compulsory insurance, however, they have contractual formula [10]. There are also cited the other ways to protect the weaker party of economic turnover. Protection of acquirers of a dwelling or a single-family house (trust accounts, bank guarantees) should be indicated here.

We live in times when entrepreneurs and consumers benefit from bank credits in a massive way. The issue of insurance protection takes more and more place in the national legislation and the legislation of the European Union [11]. A common way to protect credits became so-called bridging insurance associated with granting credit. Basically they function until the moment of establishing the final security in the form of mortgage. Bridging insurance play an important role in the scope of increasing risk burdening the lender. Nevertheless it should be noticed that they generate credit costs as well as may weaken the legal position of the borrower.

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Mróz T. Securing functions of linked contracts.

Background*. Development of market economy demands increase of the role of legal security of claims. There are appearing new ways of securing claims and risks that result from obligations of various legal titles. New legal constructions adjusted to needs of economy, whose aim is to secure claims, are created by intention of participants of legal turnover or by legislator's intention. In the current economic reality and crisis phenomena, contracts that are related to each other are concluded, so-called linked contracts (coupled).*

Review of scientific sources*. Positions used in this article mainly concern economic insurance. The scope of scientific literature concern bridging insurance is still narrow but research that are being conducted will result in more and more publications within this issue.*

The purpose *of the article is to show examples of increasing role of legal constructions of security in market economy and to notice the need to balance and protect interests of both parties of the contract of economic insurance, as these contracts do not always regard interests of both sides equally.*

Results*. Legal protection of the interests of economically weaker individuals aiming to satisfy their needs of the basic character, is realized by special legal regulation. Classic legal structures occur to be insufficient.*

Conclusions*. The market economy is accompanied by the dynamics of functioning legal institutions with securing character, as well as creating new ones. Nowadays entrepreneurs and consumers benefit from bank credits in a massive way. A common way to protect credits became so-called bridging insurance associated with granting credit. They play an important role in the scope of increasing risk burdening the lender.*

Keywords: Economic risk, contract, security of claims, obligatory insurance, security of credit, escrow account, insurance guaranty.