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Analysis of problems related to the admission of the security measure 'distraints on bank accounts' by consecutive imposing of distraints

The security measure 'distraints on bank accounts' (although from a legal and factual point of view it is more accurate to use the term 'distraint on receivables from banks') is often applied by the court under the condition that the distraint should be imposed consecutively from bank to bank, where the distraint is imposed on another bank account only after ascertaining insufficiency of funds in the first one for payment of the debt. On the one hand, this manner of proceeding aims at protecting the interest of the debtor, but on the other hand, it poses many risks for the creditor and its chance to receive adequate protection of its rights.

The bailiff is obliged to observe the issued security order as it was delivered to the bailiff. The latter shall send a distraint notice to the first bank in the list of banks, which is often the first bank in alphabetical order, but not according to the level of probability of funds availability.

After sending the notice, the bailiff shall expect information from the bank of whether and what amount of funds have been distrained, as well as whether a third person has imposed distraints on the same receivable. In most cases, however, banks are not willing to disclose such information, and the only information they do share is that 'the person is not a client of the bank' or respectively 'imposed distraint, insufficient funds'. These types of response are usually sent to the bailiff after the three-day term specified under Art. 508, Art. 1 of CPC (the Civil Procedure Code).

The insufficient information regarding the distrained amount limits the ability of the bailiff to determine what portion of the secured claim should be blocked at the other banks where distraint is admitted. This requires that the executive body should be more assertive in demanding from the bank to specify the distrained amount. The only successful, though not always, means in such cases seems to be the explicit statement that the respective bank officer may be fined for non-disclosure of requested information. In addition, it should be clearly explained that keeping the bank secret is not applicable in such cases. According to Art. 62, Para. 5 of the Credit Institutions Act, an issued court decision (a judicial act in a broad sense) is among the exceptions with respect to disclosure of a bank secret. The security order to impose the admitted security measures represents a legal instrument requiring from the bank to reveal the lawfully requested information. This conclusion is also confirmed in case law, for example by Ruling of 12.01.2012 on civil case No. 50143/2011 of Sofia

District Court, 27th panel. The Ruling upholds a fine imposed on a bank official at the amount of 1,200 BGN for refusing to present the required information.

Thus, in case of following the procedure of sending reminder letters to the bank or imposing a fine, a few more days pass (in the best scenario), during which the creditor is still unaware of the exact amount of his receivable which is actually secured. Theoretically, out of a claim for 100,000 BGN the distrained amount may be 100 BGN if that was the available amount in the respective bank account to which the first notice was sent.

At the same time, however, the debtor could easily find out that his bank account has been distrained – either when performing a transaction, or by a "helpful" bank official, or through an invitation for voluntary execution. It is logical to assume that in general the debtor could draw an accurate inference and act before the creditor by emptying the rest of its bank accounts. Usually, the necessary time for performing such a procedure is far shorter than the time for which the bailiff could impose distraint on the secured amount by consecutively placing the distraint in the different banks.

Thus, the enforced security measure would prove highly inefficient, and the creditor's interests – considerably harmed. Besides, what usually happens in the meantime is that the term for filing the future claim against the debtor expires. That time proves to be completely insufficient if the term for filing the future claim starts from the issuance of the ruling for admission of security measures, rather than from its serving.

Against the aforementioned, the following key reason for consecutive imposing of distraints may be presented. In case the bailiff simultaneously sends distraint notices to all banks in which distraint is admitted, it is possible that the blocked funds of the debtor may considerably exceed the amount of the secured claim. Thus, the imposed measure will be inadequate to the security need and will unreasonably affect the debtor's assets. With a view to the abovementioned considerable delay by the banks in providing the answer specifying the distrained amount, a too long period of time may pass during which the debtor has no access to its funds. Such a situation is likely to cause delay in the payments to other creditors of the same debtor, thus entailing new damages. A considerable period of time may pass, even if the bailiff takes the due care, and immediately after receiving the notice that the full amount is distrained at one bank requires releasing the distraints at the other banks. To a large extent, this would be to the prejudice of the debtor's interests.

The situations above, as extreme as they might seem, are not at all practically impossible. On the contrary, in fact things often develop this way, placing one party in a highly disadvantageous position at a certain stage in the course of the process. In general, security proceedings are initially developed as unilateral –

at least until the time of the debtor's being notified by the bailiff via the invitation for voluntary execution. This presumption (not necessarily irrefutable), however, does not exclude the possibility that the situation may turn to the advantage of the debtor at the next stage. As stated above, the debtor may be able to prevent the consequences from the actual enforcement of the security measure by withdrawing its funds from the bank accounts before they are distrained. Even if the debtor does not react fast enough to release all his available funds, the debtor may still use a number of lawful instruments to protect its interests.

In case the debtor has suffered damages in relation to the admitted and enforced security measure, the debtor could file a claim for indemnification of such damages by the bailiff who has acted unlawfully. The latter is to juxtapose the possible profits from the clients - creditors for which the bailiff might afford to act *contra lege*, and despite the instructions in the security order – to simultaneously send distraint notices to all banks, with the possible losses under claims for damages. Practice shows that successful claims for damages on those grounds are relatively few, which means that at least for the time being bailiffs have found the right approaches that serves them.

Secondly, however, it should be noted that the court often requires a warranty from the creditor in order to admit a security measure. In general, a warranty is not required only if extremely convincing written evidence is available, and also the requested measures do not appear too heavy for the debtor. The latter has the right to get remedy by this warranty in case the debtor proves to have incurred damages from the unlawfully imposed security measure. This opportunity co-exists with the right to file a claim for indemnification against the creditor on general grounds.

Next, what should be noted as a means of protection of the debtor is the minimum of the debtor's income which is not subject to sequestration (as well as pensions, allowances, scholarships, etc.), and respectively cannot be affected by imposed distraints.

The creditor, on the other hand, does not have reciprocal resources to adequately protect its interests. Against the ability of the debtor to file a claim against the bailiff, no such option is provided for the creditor – usually, the debtor is not insured against damages caused by the lack of payment to his creditors. In fact, should he have been a reliable payer, it would have been hardly necessary to initiate security proceedings to prepare the collection of the amounts due.

Judging by the above, it seems that the debtor's interests are protected to a greater extent than those of the creditor. The debtor, having failed to make the due payments, has given the reason for the occurrence of such an adverse

situation for him, which he could "painlessly" overcome. Moreover, in case the debtor has made payment(s) or has had lawful grounds not to pay, the debtor may receive the warranty provided by the creditor, as well as sue the creditor and the bailiff for damages. On the other hand, the creditor that has paid the security costs ultimately may remain at minus, should he fail to secure its receivable.

All these circumstances should be taken into consideration by the court when admitting the measure "consecutive imposing of distraints" so that the measure will not prove senseless when applied. The creditor, on his part, may better protect its rights by performing preliminary check-ups of the debtor's accounts where funds might be available. The security request may specify only a few banks, rather than all operating banks in the country, as is often the case. If just a few bank accounts are specified, the court would be better inclined to admit simultaneous distraints on these accounts, assuming that the assets of the debtor will not be unreasonably affected. In case the creditor has no information whatsoever of bank accounts, the court should carefully judge, on the grounds of the presented evidence, whether the debtor has other assets, what is the amount of the debt, and whether it corresponds to the number of banks in which a distraint is claimed. An active role in the establishment of these circumstances plays the creditor, risking that its request may be disregarded if admission of the requested measure seems to be disproportionate to the security need.

The balance between the debtor's and the creditor's interests would be best achieved should the banks start to give faster replies to the bailiff's notices. Knowing that the bailiff will receive information of the distraint availability within a short time, the court would be more inclined to admit the simultaneous sending of distraint notices to more banks. The promt and adequate answer would also facilitate the guaranteeing of the debtor's interests. It could be expected that immediately after realising that he has imposed a distraint on funds exceeding the necessary security amount, the bailiff will demand releasing the distraint on the exceeding amount. In order for this mechanism to work out, rather than remain just an idea, the number of fines imposed on bank officials should increase. This should happen with the cooperation of the court, as it is the institution which decides on complaints against the bailiff's actions when imposing such fines. In the presence of established case law on upholding of rulings for imposing of fines for not rendering the necessary cooperation, banks would hardly fail to provide the required information in time. Nevertheless, there are cases where fines have been imposed, but have not served for the providing of information required by the creditor regarding the available distrained amount.

With a view to the above, a conclusion may be drawn that the major role in putting the theory into practice should be played by the court, in its capacity both as an instance on the merits in security proceedings and claims for

damages and as an instance for control and reversal in proceedings of appealing the actions or omissions of the bailiff. The court may be effectively assisted by the other participants in these proceedings, and mostly the legal representatives of the parties. The latter should convince the court by presenting well-reasoned requests and complaints that the mechanical copying of the template of the ruling for admission of security measures in each next lawsuit is entirely ineffective. Each particular security request should be considered with a view to all its specificities, which should be taken into account not only upon deciding whether and what security measures should be admitted, but also upon determining how they should be enforced. Only this way could security proceedings effectively achieve one of their main practical purposes – to avoid a long and expensive claim procedure by stimulating the parties to settle their relations and reach an out-of-court agreement. The latter would ultimately relieve the courts' work, which in itself represents another reason to adopt an extremely attentive approach in considering requests for security of future claims.

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