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ENFORCEABILITY OF AUTONOMOUS BANK WARRANTIES, IN THE PERIMETER OF BUSINESS-TO-BUSINESS LOANS

The paper focuses on the problematics of the enforceability of autonomous bank warranties and security agreements, accompanying B2B loans, which continuously raised multiple interrogations for legal practitioners. Firstly, the paper approaches the enforceable character of the non-jurisdictional title materialized as a bank guarantee, which is not expressly regulated under European Contract Law. The salient question arises as to whether, under the current provisions of Romanian Law, particularly in the light of the provisions of Article 120 of Governmental Extraordinary Ordinance no. 99/2006, the fiduciary guarantee contracts, concluded by a credit institution, could constitute enforceable titles. Secondly, specific attention is devoted to the issue of identifying enforceable autonomous bank guarantees as an extrinsic enforceability not being incidentally mirrored in the main legal relationship, particularly of the bank credit agreement. Thirdly, the paper examines whether it remains possible for the enforceability deduced from the intrinsic value of the debt specified by the autonomous bank guarantee, to be conjugated with their irrevocable specificity, which would be established between the main contract (as the generator of the executability of the guaranteed bank loan) and the considered personal guarantees (passive solidarity of debtors) as accessories of the B2B credit agreement. Under the current jurisprudence, it remains crucial to establish the autonomous nature of the payment warranties, especially for the autonomous counter-guarantee, as suretyship varieties where the guarantor undertakes to fulfil the debtor's obligations in the hypotheses that the latter fails to perform.

Keywords: enforceability, autonomous bank warranties, B2B loans, creditors, security agreement, suretyship.

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1. INTRODUCTORY REMARKS

Accompanying B2B loans, the autonomous credit warranties continuously raised practical interrogations for legal practitioners, in terms of their enforceability under the current Romanian Civil Code provisions, and implicated vivid debates, several of which are mostly common to other legal systems, such as the French Contract Law.¹ The given French Contract Law was an inspiring source for the Romanian legislator². The paper examines whether it remains possible for the enforceability deduced from the intrinsic value of the debt specified by the autonomous bank guarantee, to be conjugated with their irrevocable specificity, which would be established between the main credit contract³ (as the generator of enforceability of the guaranteed bank loan) and the considered personal guarantees (passive solidarity of debtors) as accessories of the B2B credit agreement.

The legal issue, as it has been formulated, is linked to the assessment of the enforceability of the autonomous warranty, as resulting from the corroborated interpretation of the provisions of Article 120 of the Governmental Extraordinary Ordinance no. 99/2006, and of Articles 2279 and 2321 of the Romanian Civil Code.

Firstly, it is worth noticing that the relevant legal provisions are those of Article 120 of the Governmental Extraordinary Ordinance no. 99/2006 on credit institutions and capital adequacy, according to which the credit contracts,⁴ including immovable or movable property, or personal guarantee contracts, concluded in favor of a bank creditor, constitute enforceable titles⁵. Secondly, the provisions of Article 2279 of the Romanian Civil Code, concerning the taxonomies of personal guarantees also became incidental. They envisage that personal guarantees include sureties, autonomous guarantees, as well as other specific guarantees provided in accordance with the regulations on conventional warranties, as described in Article 2321 of the Romanian Civil Code.

The dilemmatic nature of the legal issues is attributable to the applicable Romanian Civil Code provisions. Under them, the character of the non-jurisdictional enforceable title of the autonomous bank guarantee has not been expressly recognized by the

¹ Cazenove Ch., Deprée D. & Martini H. 2019. *Crédits documentaires, lettres de crédit stand-by, cautions et garanties. Guide pratique*. 3e éd. Paris: Revue Banque, pp. 56-68; Decocq, G., Gérard, Y. & Morel-Maroger, J. 2022. *Droit bancaire*. 3e éd. Paris: Revue Banque, pp. 94-102; Dekeuwer-Défossez, F. & Moreil, S. 2022. *Droit bancaire*. 12e éd. Paris: Dalloz, pp. 71-83; Gijsbers, C. & Théry, P. 2022. *Droit des sûretés*. 1re éd. Paris: L.G.D.J., pp. 112-116; Gobin S. 2021. *Garantie et contre-garantie au service du contrat initial. Contribution à la compréhension des logiques élémentaires en droits civil, bancaire et financier*. Paris: L'Harmattan, pp. 78-84.

² Goicovici, J. 2021. The inapplicability of personal exceptions between joint debtors and creditors under Romanian and French private law. In: Dalvinder, S., Popa Tache, C. E. & Săraru C.-S. (eds.), *Looking for New Paths in Comparative and International Law*. Bucharest: ADJURIS – International Academic Publisher, pp. 85-98.

³ Bénabent, A. 2021. *Droit des contrats spéciaux civils et commerciaux*. 14th ed. Paris: L.G.D.J., pp. 337-341.

⁴ Goicovici, J. 2010. *Dicționar de dreptul consumului*. Bucharest: C.H. Beck, pp. 236-238.

⁵ Țiț, N.-H. 2023. Controverse referitoare la chemarea în judecată a altei persoane care poate pretinde aceleași drepturi ca și reclamantul. *Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi – Stiinta Juridice*, 69(1), pp. 23-37.

legislator, provoking interrogations regarding whether such a character could be inferred implicitly, from an extensive interpretation (thus including autonomous bank guarantees) of the notion of 'personal guarantee' referred to in the text of Article 120 of the Governmental Extraordinary Ordinance no. 99/2006 on credit institutions and capital adequacy or, alternatively, from an extensive interpretation of the notion of 'extended credit securities'. In order to extract the enforceability of the autonomous bank guarantee from its (possible) assimilation (strictly under the aspect of the 'intrinsic' enforceability) to the credit titles, it is worth considering that provisions of Article 640 of the Romanian Code of Civil Procedure stipulate that the bills of exchange, promissory warranties, and other credit securities constitute enforceable securities if they meet the conditions set forth by specific regulations. It seems that the assimilation of the autonomous bank guarantees to personal guarantees would lack pertinency, as their conceptual regimentation in the category of credit titles is equally inadequate. In order to assess the eventual non-enforceable character of autonomous bank guarantees, it is worth recalling that, an extended understanding of the notion of 'personal guarantee' is based on the interpretation of the mentioned legal provisions which has their starting point in their economic functions, since the autonomous bank guarantees were not expressly included by the legislator in the category and were omitted from the taxonomy of non-judicial enforceable titles.

Thirdly, the relevance of Decision no. 43/2021 of the Romanian High Court of Cassation and Justice – Panel on clarifying certain legal matters must also be emphasized, since by that decision, the Supreme Court ruled that the letter of guarantee issued by a credit institution presents the valences of an enforceable title, yet it gains such valences only if it has been issued in order to guarantee a credit agreement contracted by a bank creditor.

The paper argues that approaching the issue whether from the corroborated interpretation of Article 2279 and Article 2321 of the Romanian Civil Code, the enforceable nature of the letter of bank guarantee can be assessed depends on whether, in hypotheses when the autonomous bank guarantee would be correlated to performing obligations generated by a B2B credit contract, the banks issuing the autonomous bank guarantee may be considered to be the debtor of the payment obligation on the creditor's request. However, provisions of Article 120 of Governmental Extraordinary Ordinance no. 99/2006 stipulating that credit contracts, including the fiduciary guarantee contracts, concluded by a credit institution, constitute enforceable titles were designed to be incidental in situations where the credit institutions would be defined as creditors. Congruently, the phrase 'including the personal guarantee contracts, concluded by a credit institution' induces an intrinsic association by virtue of the accessory relationship established between the credit contracts (representing non-judicial enforceable titles) and personal guarantees attached to the credit contract. The latter are considered to stand as non-judicial enforceable titles in favor of the bank creditor, by 'contaminating' their performance with the intrinsic enforceability of the credit contracts. Therefore, these guarantees (except in the case of mortgages) will not be enforceable based on the extrinsic enforceability of personal guarantees.

Nevertheless, the extension of the enforceability of the bank credit agreement, in order to include autonomous guarantees would be blocked or obstructed by their autonomous nature. In the absence of an accessory relationship that would be established between the main contract (as a generator of the obligations whose execution is guaranteed)⁶ and the typical personal guarantees (passive solidarity)⁷, the latter could not be accessories of the 'basic contractual relationship' or of the 'main contractual relationship', extracted from the credit agreement. Therefore, as it will be argued in the following paragraphs, from the perspective of the autonomy of bank guarantee letters (including the causal personal guarantees) the distinction between the enforceability of the credit agreement and the enforceability of the autonomous guarantee operates in cases in which the autonomous guarantee was correlated with the bank credit contracts or other types of credit agreements.

2. REGULATORY FRAMEWORK ON THE ENFORCEABILITY OF THE AUTONOMOUS WARRANTIES

Saliently, the provisions of Article 120 of the Governmental Extraordinary Ordinance no. 99/2006 could not be interpreted in an extensive manner, as to include in its substantial field the hypotheses of contracting the autonomous guarantees, in which case the relation of accessory with the 'main contract' would be absent and as such will not have a legal relevance. Regarding the legal nature of the basic contract, it must be observed that, between the basic contract and the autonomous bank guarantee, there is not an accessory relationship to be established, and aspects such as the ones seen through the lens of 'extrinsic enforceability' (enforceability of the adjacent contract based on the enforceability of the main contract), are not applicable to the autonomous guarantees. Thus, the extrinsic enforceability of credit warranties cannot be incidental, or separated from the enforceability⁸ of the main legal relationship, namely the bank credit agreement.

Consequently, as the paper will argue in the following paragraphs, the only possible version to identify intrinsic enforceability of autonomous bank guarantees remains the intrinsic enforceability deduced from the nature of the claim and the certainty of the creditor's right, as guaranteed by the autonomous bank guarantee, respecting the premises described in Article 632, paragraph 2 of the Romanian Code of Civil Procedure. According to said provision, certain documents constitute enforceable titles. As it has been rightly pointed out in the specialized literature in the case of non-jurisdictional enforceable titles, an indispensable prerequisite is the one referring to intrinsic elements which would allow the creditor to initiate enforcement measures in the event of non-payment.⁹

⁶ Goicovici, J. 2020. Perspectives on the Evolution of the Vendor's Warranty against Eviction in Roman Law. *SUBB Jurisprudentia*, 65(4), pp. 327-365.

⁷ Goicovici, J. 2022. *Dreptul relațiilor dintre profesioniști și consumatori*. Bucharest: Hamangiu, pp. 217-223.

⁸ Țiț, N.-H. 2023. Controverse referitoare la chemarea în judecată a altei persoane care poate pretinde aceleași drepturi ca și reclamantul. *Analele Științifice Ale Universității Alexandru Ioan Cuza Din Iasi – Stiinte Juridice*, 69(1), p. 24.

⁹ Țiț, N.-H. 2020. Încuviințarea executării silite a debitorului consumator-exigențe europene, realități naționale. *Analele Științifice ale Universității Alexandru Ioan Cuza din Iași, seria Științe Juridice*, 66(2), pp. 91-110.

It is worth emphasizing that, in order to establish the certainty of the debt, in the absence of which the non-jurisdictional enforcement title would be inexistent, the creditor's claim for payment is assessed when its undoubted existence results from the enforceable title in an ostensible manner. The same applies to the analysis of the intrinsic conditions of the non-jurisdictional enforceable title.

Among these prerequisites, the assessment of the certainty of the creditor's claim, which remains problematic in the case of the autonomous types of guarantees, is seen through the lens of the essential elements of the creditor's rights, waiving the possibility of invoking exceptions and defences based on the clauses extracted from the main contract (the credit agreement), given the autonomous nature of the guarantee. Neutralizing the exceptions arising from the legal relationship between the guarantee assignor and the beneficiary of the autonomous guarantee (the clause waiving the possibility of invoking the exceptions from the main contract) is not equivalent in any situation to a clause consecrating the certainty of the (guaranteed) claim. The two types of contractual provisions do not only present different legal objects (their causality being differentiated) but also generate dual effects, if not antagonistic or diametrically opposed then at least distanced on the spectrum of contractual effects. The issuer of the autonomous guarantee does not assume the certainty of the guaranteed debt. Therefore, the creditor is expected to prove the existence of the right of payment originating in the credit agreement.

The enforceability derived from the quality of the creditor's rights¹⁰ and respectively, from the nature of the 'main' contractual relationship characterizes bank credit contracts under the current provisions of Romanian law. Namely, it recognizes the existence of non-jurisdictional enforceable titles¹¹ in view of the importance played by these types of contracts in the economic plan or through the lens of the stimulating effect that bank credit has on economic activities, including it as a catalyst for the consumption of products or contracting services by consumers. The enforceability derived from the quality of the bank creditor's rights operating in the field of banking financial services is reserved only for the bank credit agreement and its accessories (ancillary personal guarantees). That type of enforceability would not be extensible, by analogy, in the absence of permissive legal provisions, to cases located at the opposite pole, in which the bank takes the position of the debtor within the framework of an autonomous guarantee. In the latter cases, it is compulsory to assess the enforceability derived from the certainty of the claim, in the content of the non-jurisdictional enforceable title.

Similarly, it must be pointed out that the autonomy of the bank guarantee (in any of its sequential versions, namely the 'first demand guarantee'¹², 'guarantee of performance', 'documentary guarantee' etc.) has direct implications only on the debtor's possibility of invoking the exceptions and defences derived directly from the 'basic' contrac-

¹⁰ Țiț, N.-H. 2020. Considerations regarding the Interpretation of Art. 713 Para. (3) of the Civil Procedure Code. *Analele Universitatii din Bucuresti: Seria Drept*, 2020(1), pp. 25-37.

¹¹ *Ibid.*, p. 34.

¹² Ignacio Hernández Meni I. 2021. La virtualidad de la cláusula de pago a primer requerimiento para definir la naturaleza de las garantías autónomas. La problemática de la calificación jurídica. *Revista de Derecho Civil*, 8(4), pp. 125-159.

tual relationship. Also, such autonomy has implications on the significance of certain and indisputable character of the guaranteed claim.

On the other side of the controversy, as it has been already pointed out on grounds for enforced performance, it appears from the provisions of Article 632, paragraph 2 of the Romanian Code of Civil Procedure that¹³, the certain nature of the creditor's claim is seen as being an indispensable requirement for the autonomous guarantees to constitute enforceable titles.

The inadequacy of admitting the enforceability of autonomous bank guarantees or the (non)recognition of non-jurisdictional enforceable title is also directly correlated to the objective manner of interpreting provisions of Article 2321 of the Romanian Civil Code. According to those provisions, the issuer of the autonomous guarantee cannot oppose to the beneficiary the exceptions based on the pre-existing obligations assumed by the debtor and cannot be held to payment in the case of creditor's manifested fraudulent conduct. As it has been emphasized, the issues of invoking the creditor's manifested abusive conduct and ostensible fraud in the matter of the autonomous bank guarantee continue to raise questions for legal practitioners, partly fueled by the laconism of the legal texts regarding the forms of abuse committed by the beneficiary of the bank guarantee. The questions are also brought up regarding the cases of fraudulent collusion between the interests of the beneficiary of the bank guarantee and the issuer of the autonomous guarantee.

It is also worth noticing that provisions of Article 2321 of the Romanian Civil Code associate the impossibility of invoking the exceptions derived from the initial contractual bond with the possibility of refusing to perform the payment, based on the fraudulent nature of the payment request, thus creating premises for the incidence of a payment refusal, as a blocking mechanism when the creditor was suspected of apparent fraudulent conduct.

The aforementioned provisions of Article 2321 of the Romanian Civil Code stipulating that the debtor cannot be held to payment in case of the creditor's abusive conduct or obvious fraudulent conduct raised polemical comments, which were non-conciliatory. Suspending the performance of the obligation of payment¹⁴ in the case of autonomous guarantees remains a possible solution only to the extent that the creditor's manifested abuse or fraud is proven to affect the legitimate interests of the signatory party of the autonomous guarantee. However, the elements that describe creditor's fraudulent conduct are not easy to determine. It was highlighted that the creditor's fraud or abusive conduct is intertwined with the lack of good faith of the creditor who invokes the guarantee with full knowledge of the fact that the conditions of the guarantee are not met. It must also be observed that admitting that the beneficiary of an autonomous guarantee is entitled to rely on the payment request would depend on the existence or the extent of the debtor's obligation.

¹³ Țiț, N.-H. 2020. The Fate of the Bail Paid for the Suspension of the Enforcement of the Title, under the Conditions of Art. 638 Par. (2) C. Pr. Civ. *Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice*, 66(1), pp. 83-96; Țiț, N.-H. 2018. *Încuviințarea executării silite*. Bucharest: Universul Juridic, pp. 83-87.

¹⁴ Țiț, N.-H. 2021. Protection of Residence in Enforcement Proceedings. *Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice*, 67(2), pp. 105-118.

Thus, the request for payment addressed to the guarantor, seen through the lens of the autonomous guarantee, will be considered inadmissible when it is simultaneously characterized by the awareness of the beneficiary of the autonomous guarantee of the absence of the right to payment. This interpretation confirms a previous jurisprudential direction based on which it was held that the beneficiary of an autonomous guarantee is deprived of the right to payment, and the latter's request for payment will be considered manifestly abusive when the prerequisites of the autonomous guarantee failed to exist due to the beneficiary's culpable intervention. For the issuer of the autonomous guarantee (the debtor in the main contractual relationship), the performance of the obligation may be revocable, to the extent that the latter has already made the payment, and the subsequent debtor may subsequently resort to an action in regress for the restitution of the payment, the effectiveness of which may be blocked by the potential insolvency of the debtor.

Simultaneously, in the field of autonomous guarantees, the manifestly fraudulent nature of the creditor's request may result from fraudulent collusion between the interests of the issuer of the autonomous guarantee and those of the beneficiary of the autonomous guarantee. Regarding the specificity or the inadequacy of the creditor's request, manifested in the context of soliciting payment addressed to the issuer of the autonomous guarantee, it should be noted that the 'unconditional payment' which characterizes the autonomous guarantee mechanism, can be refused in situations of manifested fraud, as it is configured in the text of Article 2321, paragraph 3 of the Romanian Civil Code. In a moderate (quasi-restrictive) interpretation of the legal provisions, the following jurisprudential hypotheses apply to cases of abusive request emitted by the beneficiary of the autonomous guarantee:

- (a) the situation in which the beneficiary of the autonomous guarantee formulates a request for payment based on the guarantee for performance, in the context in which the creditor has previously certified the compliance and performance of the debtor's contractual obligations, as generated by the main agreement;
- (b) when there is, on the part of the guarantee, a beneficiary who is requesting the payment, a unilateral act of recognition of the culpable non-performance of its obligations in the main contractual relationship; and
- (c) when the beneficiary of the autonomous guarantee has expressly agreed with the initial debtor (the issuer of the solicitation based on the autonomous bank guarantee) that a request for payment would not be subsequently issued.

3. ASSESSING THE LEGITIMACY OF THE ISSUER'S REFUSAL OF PAYMENT

The interpretive correlations to the performance of the main contractual obligations are maintained in cases when the exceptions regarding impossibility of invoking the refusal of payment by the issuer of an autonomous guarantee are applied. Similarly, the bank guarantee of payment on first demand, as well as the bank guarantee on conformity of performance, maintain their autonomous character in relation to the contractual

premises between the main debtor and the beneficiary of the autonomous guarantee, in contrast to the benchmarks that would have intervened in the framework of classic personal guarantees. The rejection of the beneficiary's payment request on grounds directly related to the latter's manifested fraudulent conduct¹⁵ remains a valid option for the issuer of the autonomous guarantee, if the issuer does not invoke exceptions based on the main contractual relationship (thus respecting the autonomous nature of the guarantee). The issuer may resort to invoking personal exceptions,¹⁶ since the beneficiary's fraudulent conduct was manifested against the latter's patrimonial interests. As the beneficiary's obvious fraudulent conduct in requesting the payment directly targeted the guarantor, the latter's refusal to pay represents the expression of a minimum caution that must be shown, both by reference to the issuer's economic interests and by reference to the B2B credit relationship with the issuer (the debtor in the main contractual relationship), which can signal to the issuer the existence of justified reasons for payment refusal. The rejection of the payment request is subject to judicial assessment in terms of establishing the pertinent nature of the payment refusal, implicitly or explicitly assessed and constitutes proof of fraud committed by the payee.¹⁷ While invoking the manifested fraudulent conduct of the applicant, the guarantor would not be able to connect the fraudulent conduct aimed at harming the latter's economic interests with aspects derived from the development of the main B2B contractual relationship. On the contrary, as illustrated by decisions of jurisprudence, a certain degree of interweaving persists between the effects of the main B2B contract and the legitimacy of the payment refusal issued by the signatory of the autonomous guarantee.

Comparatively, the aforementioned situation may be exemplified by an issued order for emitting an autonomous guarantee to guarantee the performance of the obligations assumed by a B2B credit agreement, so called the underlying agreement¹⁸. This is especially applicable to hypothesis when the credit agreement had been supplemented by an amendment that increased the amount of the available credit line, which contained a clause regarding the autonomous guarantees issued to cover the risk of non-payment in respect of the additional credit line. The latter becomes applicable for any debits assumed by the beneficiary of the autonomous guarantee, including the complementary amounts from the credit contract which were made available to the debtor in the main B2B contract. Following the negotiations between the B2B parties to adjust the clause regarding the autonomous guarantee due to the increased value of the credit agreement, the beneficiary of the autonomous guarantee who issued a payment request may face the refusal of payment issued by the guarantor/issuer of the autonomous guarantee. The issuer's payment refusal may be considered unfounded, since the premises of stipulating the clauses of the autonomous guarantee do not result in the limitation of the payment

¹⁵ Lasbordes-de Virville, V. 2021. *Droit des contrats spéciaux*. Bruxelles: Bruylant, pp. 217-226; Mainguy, D., 2022. *Contrats spéciaux*. 13th ed. Paris: Dalloz, pp. 181-194; Puig, P. 2019. *Contrats spéciaux*. 8th ed. Paris: Dalloz, pp. 319-327.

¹⁶ Gorlier, V. 2021. *Le droit des contrats spéciaux*. Paris: Ellipses, pp. 183-196.

¹⁷ Quiquerez, A. 2022. *Droit bancaire*. 2nd ed. Paris: Gualino, pp. 246-253.

¹⁸ Lasbordes-de Virville, V. *op. cit.*, p. 228.

commitment strictly at the level of the credit supplement granted to the main debtor, nor could such a limitation result implicitly from the clauses of the autonomous guarantee¹⁹.

Congruently, in the context of the autonomous documentary guarantee, the guarantor is not required to honor the request for payment unless it appears from the verification of the documentation submitted by the beneficiary of the guarantee that the complete and adequate prerequisites are met, according to the principle of documentary rigorosity characterizing the taxonomy of autonomous guarantees. The guarantor's obligation of prudence and vigilance is limited to the verification of the documents presented by the beneficiary of the payment and to their confrontation with those enumerated in the text of the autonomous guarantee. In other words, the formal control of the documentation is, in principle, sufficient for making the decision to authorize the payment. The autonomous nature of the guarantee by reference to the basic B2B contract is tempered by the prohibition of the beneficiary's fraudulent conduct. Yet, the refusal of payment based on suspicions of abuse or fraud remains 'exceptional', following a strict interpretation of these notions. In order to illustrate such a hypothesis, one may recourse to the case where the beneficiary intends to invoke the autonomous guarantee while clearly exceeding the limits of the credit line for which it was established. Thus, if the purpose of establishing the autonomous guarantee was represented by the coverage of a particular, specific risk of non-performance, which was delimited in a precise manner in the content of the main contract, the autonomous guarantee cannot be unilaterally extended by the payment request issued by the beneficiary of the guarantee²⁰ to cover other situations of non-performance initially omitted from the main contract. Similarly, the beneficiary of the autonomous guarantee who issued a payment request addressed to the guarantor for a value that is disproportionately excessive,²¹ as compared to the value of the beneficiary's claim from the main B2B contract, may be held liable for fraudulent conduct.²²

4. INTRINSIC ENFORCEABILITY VERSUS EXTRINSIC ENFORCEABILITY OF AUTONOMOUS GUARANTEES

As opposed to the situation of personal guarantees, the enforceability of suretyship agreements derives from the enforceability of the main bank credit contract. Therefore, in the case of autonomous bank guarantees, there is an extrinsic (ancillary) enforceability to be retained. Simultaneously, the substantial impediments deduced from

¹⁹ Țiț, N.-H. 2021. The Active Role of the Judge in Identifying and Classifying Acts and Facts Brought to Trial. Some Considerations. *Romanian Review of Private Law*, 2021(1), pp.176-177.

²⁰ Ansault, J.-J. and Picod, Y. 2022. *Droit des sûretés*. 4th ed. Paris: Presses Universitaires de France, pp. 314-323; Aynès, L., Aynès, A. & Crocq, P. 2022. *Droit des sûretés*. 16th ed. Paris: L.G.D.J., pp. 117-124; Cabrillac, M., Cabrillac, S., Mouly, C. and Pétel, P. 2022. *Droit des sûretés*. 11th ed. Paris: LexisNexis, pp. 296-238.

²¹ Hausmann Ch. & Torre Ph. 2018. *Les garanties de passif*. 5e éd. Paris: Edition Formation Entreprise, pp. 118-124; Hélaïne, C. & Tafforeau, P. 2023. *Droit des sûretés: sûretés personnelles et réelles*. 2nd ed. Bruxelles: Bruylant, pp. 162-167.

²² Aynès, L., Gautier, P.-Y. & Malaurie, P. 2022. *Droit des contrats spéciaux*. 12 ed. Paris: L.G.D.J., pp. 351-359; Bénabent, A. 2021. *Droit des contrats spéciaux civils et commerciaux*. 14th ed. Paris: L.G.D.J., pp. 267-272; Boustani-Aufan, D. 2022. *L'essentiel du droit des contrats spéciaux*. 4th ed. Paris: Gualino, pp. 284-292.

admitting non-jurisdictional enforceable titles of autonomous guarantees are seconded by a suite of formal impediments, arising from the absence of substantial formalism in this perimeter, starting from the incidence of consensually agreed clauses between the B2B parties.

It must also be noted that the intrinsic nexus between enforceability²³ and the certainty of the beneficiary's rights was emphasized in the perimeter of the autonomous guarantees. Nevertheless, structurally, the autonomous bank guarantee generates a payment obligation that is different from the obligations generated by the initial contractual relationship, thus enshrining a distinct right to claim the payment from that of the creditor in the primary B2B contractual relationship. It was highlighted that, from a substantial perspective²⁴, the enforceable title represents the embodiment of a civil obligation²⁵, being fulfilled in the enforcement procedure in accordance with the provisions of Article 628, paragraph 1 of the Romanian Code of Civil Procedure. In these cases, the factor that determines the existence of the enforceable title is represented by the primary contractual relationship.

Interconnected to the point of an (imperfect) overlap, the notions of 'first demand guarantee' and 'compliant performance guarantee' might be difficult to disentangle in practice. On the other side, as pointed out above, the issue of invoking fraudulent conduct in the matter of enforcing the autonomous guarantees continues to raise questions for legal practitioners, fueled in part by the laconism of the legal texts regarding the forms of abuse committed by the beneficiary of the guarantee or, as the case may be, with regard to the cases of fraudulent connivance between the beneficiary of the guarantee and the issuer of the order to constitute the autonomous guarantee (fraud against the private interests of the signatory of the counter-guarantee)²⁶. The said matter is approached in the text of Article 2321 of the Romanian Civil Code. The doctrinal discussions are fueled especially by the interpretation of the third paragraph of Article 2321 of the Romanian Civil Code, according to which the issuer cannot oppose to the beneficiary the exceptions based on the pre-existing obligation or contractual relationship assumed by the issuer of the guarantee and cannot be held to payment in case of the beneficiary's couplable request for payment or obvious fraudulent conduct.

It is important to note that the text of Article 2321 of the Romanian Civil Code associates the impossibility of invoking the exceptions derived from the initial contractual relationship and the possibility of refusing payment based on the abusive or fraudulent nature of the

²³ Țiț, N.-H. 2020. The (In) Applicability of the Provisions of Article 127 of the Code of Civil Procedure in Determining the Competent Court to Solve the Request for Approval of Forced Execution. *Romanian Journal of Compulsory Execution*, 2020(3), pp. 58-71.

²⁴ Țiț, N.-H. 2022. A Potential Legality Problem of the Enforcement Procedure: The Prorogation of Jurisdiction in the Case of the Bailiff. *Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi – Stiinta Juridice*, Vol. 68(1), pp. 145-163; Țiț, N.-H. 2021. Certain Aspects Regarding the Parties' Agreement in Civil Procedure. *Challenges of the Knowledge Society*, 14(1), pp. 305-310.

²⁵ Țiț, N.-H. 2021. Extension of Legal Pursuit - An Incidental Execution? *Romanian Review of Private Law*, 2021(2), pp. 254-268.

²⁶ Țiț, N.-H. 2021. The Active Role of the Judge in Identifying and Classifying Acts and Facts Brought to Trial. Some Considerations. *Romanian Review of Private Law*, 2021(1), pp. 174-199.

payment request in an expression that, using the game of conjunction, creates the premises of a mandatory procedure concerning the guarantee of performance upon the beneficiary's request. The procedural effects and the obligatory effects of the issuer's refusal to pay to seem to describe the procedural tandem in which the exception of fraudulent conduct would serve as a mechanism by which the signatory of the guarantee would be able to reject the request for payment formulated by the beneficiary of the autonomous guarantee, while preserving the autonomous nature of the guarantee by reference to the main contractual relationship the performance of which is subject to the autonomous guarantee.

Nonetheless, the taxonomy of autonomous bank guarantees comprises two seemingly overlapping legal figures, which are merely distinguishable: the autonomous guarantee of 'payment on first demand' and the guarantee of 'compliant performance', while the differentiation of the two mechanisms generates difficulties for legal practitioners. In situations when the autonomous guarantee refers to the 'unconditional payment', the mechanism describes the autonomy of the guarantee by referring to the debtor's exceptions based on the primary contractual relationship; both types of autonomous bank guarantees, the payment guarantee at the first request and the guarantee of compliant execution have an autonomous nature. Thus, payment cannot be conditioned by referring to exceptions derived from the main contract or from the contractual B2B relationship established between the beneficiary of the autonomous guarantee and the issuer of the order establishing the autonomous bank guarantee, as that is a characteristic that both types of the mentioned autonomous guarantees share.

5. SUSPENDING OF PAYMENT IN THE CASE OF AUTONOMOUS GUARANTEES

The suspension of payment in the case of autonomous guarantees remains possible only to the extent that the beneficiary's manifest abuse or manifest fraud is proven. Yet, the conceptual elements that describe this mechanism are, most often, not easy to determine in practice, as it was highlighted that the beneficiary's fraudulent conduct may be intertwined with invoking the guarantee when the specific prerequisites are not met²⁷. As held in jurisprudence, the request for payment addressed to the guarantor in the perimeter of the autonomous guarantee will be considered abusive when it is simultaneously characterized by the awareness of the beneficiary of the autonomous guarantee of the absence of its right to payment²⁸ and by the issuer's knowledge of the latter's fraudulent intent. Confirming a previous jurisprudential trend in which it was held that the beneficiary of an autonomous guarantee is deprived of the right to payment, and the latter's request for payment will be considered manifestly abusive when the prerequisites for which the guarantee was agreed failed to be met due to the beneficiary's intervention through an action or omission which was imputable to the beneficiary²⁹. Therefore, the

²⁷ Farhi, S. 2022. *Droit des contrats spéciaux*. 4th ed. Paris: Gualino, pp. 271-289.

²⁸ Denis, P. 2022. *Contrats spéciaux*. Paris: Anthemis – Commission Université Palais, pp. 312-339.

²⁹ *Ibid.*, p. 347.

signatory of the autonomous guarantee or the issuer of the payment order generating the guarantee, who possesses the quality of debtor in the primary contract³⁰ may resort to a redress mechanism for the restitution of the payment, the factual effectiveness of which may be blocked by the possible insolvency of the payee.

Similarly, in case of autonomous guarantees backed by (autonomous) counter-guarantees, the manifestly abusive nature of the beneficiary's request for payment requires proving the existence, at the time when the request for payment under the autonomous counter-guarantee was issued, of a fraudulent collusion between the interests of the first-rank guarantor (the beneficiary of the autonomous counter-guarantee) and the beneficiary of the first-rank guarantee (the issuer of the order for generating the guarantee), or of fraud aimed at damaging the patrimonial interests of the subsequent rank guarantor³¹ (the signatory of the bank letter of counter-guarantee).

Regarding the specific elements of the fraudulent conduct manifested in the context of the request for payment addressed to the signatory of the counter-guarantee, it should be noted that the 'unconditional payment' which is a characteristic of the autonomous guarantee mechanism can be refused in situations of manifest abuse or manifest fraud, as configured in the text of Article 2321, paragraph 3 of the Romanian Civil Code.

There are potential discrepancies when it comes to the possibility of invoking the refusal of payment by the signatory of an autonomous guarantee, which is based on the exceptions extracted from the main contract. Despite them, the interpretive correlation with the performance of the main contractual obligations would be maintained, both for the bank guarantee of payment on first demand, as well as for the guarantee of compliant performance, which maintains their autonomous character in relation to the contractual premises between the main debtor and the beneficiary of the autonomous guarantee, in contrast to the benchmarks that would have intervened in the framework of classic personal guarantees. When refusing the payment request for the beneficiary on grounds directly related to the beneficiary's manifest fraudulent conduct, the signatory of the autonomous guarantee would not resort to exceptions based on the main B2B contractual relationship, although a certain degree of interweaving persists between the effects of the main contract and the legitimacy of the refusal to pay issued by the signatory of the autonomous guarantee³².

Fraudulent collusion or connivance between the beneficiary of the autonomous guarantee and the issuer of the guarantee may justify a payment refusal, according to the provisions of Article 2321 of the Romanian Civil Code, which perfectly respects the symmetry with the counterpart provisions on the guarantor's right to reject the payment in case of manifest fraud on the part of the beneficiary or of collusion with the issuer of

³⁰ Goicovici, J. 2021. The Distributive Classification versus the Homogeneous Classification and the Negotiating Authorisation in the Field of Commercial Agency Contracts. *Romanian Review of Private Law*, 2021(1), pp. 361-383.

³¹ Goicovici, J. 2015. Garanțiile ascendente, în reglementarea Noului Cod civil. *Curierul Judiciar*, 2015(3), pp. 135-138.

³² Simler, Ph. 2015. *Cautionnement: garanties autonomes, garanties indemnitaires*. 5th ed. Paris: LexisNexis, pp. 74-83.

the order establishing the guarantee's interests. Since, for the guarantee issuer, it might be difficult to determine if it was a deliberate, intentional omission on the beneficiary's part, or the latter's conduct was characterized by unjustified negligence³³ in performing the contractual obligations, the mechanism of the manifest fraud reprisal is apparently difficult to decipher³⁴. Defined as representing malicious collusion between the patrimonial interests of the contractual parties or defrauding the legitimate interests of a third party, the collusion of interests has not been expressly mentioned by the Romanian legislator as a legitimate reason for the refusal of payment issued by the signatory of the counter-guarantee³⁵. Yet, it implicitly represents one of the hypotheses in which the issuer of the counter-guarantee can refuse payment if the premises for a legitimate refusal are substantially met³⁶.

While the reprisal of the creditors' abusive exercise of payment rights in the perimeter of autonomous bank guarantees is not subject to a specific regulation, general provisions are derived from the text of Article 15 of the Romanian Civil Code, according to which no right can be exercised pursuing the aim of harming or damaging another party's legitimate interests or in an excessive and unreasonable manner, contrary to contractual good faith. On the other hand, similar solutions may be extracted from the provisions of Article 1353 of the Romanian Civil Code, according to which the creditor who causes damage to third parties while exercising the rights is liable for repair requests unless his/her rights were not exercised in a manifest couplable manner. It was emphasized that the exercise of a right within the mentioned limits protects the holder against any responsibility for the damages that it could cause, while the exercise in an abnormal manner, by diverting the right from its typical, legitimate purpose, constitutes an abuse of right, with the consequence of the obligation to repair the damage thus caused to other parties, either through the mechanism of contractual liability or through the prism of tort liability³⁷.

When it comes to the manifestation of the abusive nature of the payment request addressed by the beneficiary of an autonomous counter-guarantee in practice it was held that, in this regard, the creditor's couplable conduct materialized in addressing the payment request to the second guarantor (the signatory of the counter-guarantee) cannot result exclusively from the manifestly abusive nature of a similar payment request addressed to the primary guarantor. Rather, it involves proving the existence, at the time of issuing the request for the counter-guarantee payment, of a collusion between the legitimate interests of the first-rank guarantor (beneficiary of the autonomous counter-guarantee) and

³³ Goicovici, J. 2019. Co-Active Performance, Good Faith versus Creditor's Fault in the Matter of the Obligation of Moderating the Damage. *Romanian Review of Private Law*, 2019(3), pp. 183-196.

³⁴ Goicovici, J. 2015. Culpă creditorului în moderarea prejudiciului, conform Noului Cod civil. *Analele Universității de Vest din Timișoara-Seria Drept*, 2015(1), pp. 24-35; Goicovici, A. J. 2014. *Creditele pentru consum și de investiții imobiliare. Comentarii și explicații*. Bucharest: C.H. Beck, pp. 81-89.

³⁵ Legeais, D. 2022. *Droit des sûretés et garanties du crédit*. 15e éd. Paris: L.G.D.J., pp. 216-219.

³⁶ International Chamber of Commerce (I.C.C.). 2022. *Pratiques internationales standard relatives aux garanties sur demande. Soumises aux RUGD 758 - Version bilingue anglais-français*.

³⁷ Wéry, P. 2020. *Les rapports entre responsabilité contractuelle et responsabilité extracontractuelle*. Wavre: Anthemis, pp. 78-82.

the beneficiary of the first-rank guarantee. While the guarantor may resort to personal exceptions, the issuer of the autonomous guarantee cannot resort to any of the exceptions deduced from the primary contractual relationship that generated the guaranteed obligation. Neither the nullity of the primary contract nor its resolution or termination, nor the non-compliant performance of the primary obligations can be invoked in order to justify a payment refusal. However, as a corrective (or counteracting) element of equity, the guarantor can reject the beneficiary's payment request in case of manifest fraud on the part of the beneficiary or of unjustifiable collusion with the issuer of the guarantee's patrimonial interests.

In the cases of superposing the effects of an autonomous counter-guarantee over those of an autonomous (primary) guarantee, it would be taken into account that the counter-guarantee has an autonomous nature, both in relation to the substantial contractual nexus from which the principal debtor's obligation was generated, as well as in relation to the first-rank guarantee. Consequently, in order for the payment request addressed to the second guarantor under the counter-guarantee to be considered abusive, it is necessary to simultaneously prove the fraudulent conduct committed by the beneficiary of the counter-guarantee (the first-rank guarantor), as well as the existence of fraudulent collusion between the primary guarantor and the beneficiary of the primary guarantee. The excessive nature of the payment request made by the beneficiary of the first-rank autonomous guarantee (resulting from the instrumented evidence) does not directly contaminate the autonomous nature of the payment request made by the beneficiary of the counter-guarantee, the latter being inadmissible only if fraudulent collusion between the legitimate interests of the primary guarantor and those of the beneficiary of the primary guarantee is proven.

Similarly, it was held that the guarantor (of secondary rank, based on the counter-guarantee) who complied with the request for payment formulated in good faith (not having a fraudulent character and not being based on a manifest abusive exercise of payment rights) cannot request the restitution of the payment, on the grounds that there is a case of non-performance of obligations by the debtor from the contract in which the guaranteed obligation originates.³⁸ In principle, the counter-guarantor who made the payment has a right of regress³⁹ for the recovery of the amount paid, against the primary guarantor (who, in turn, has a right of recourse against the issuer of the autonomous guarantee).

6. CONCLUSIONS

The autonomous guarantee of payment at the first request implies the existence of the guarantor's commitment to make the payment independently from the development of the effects of the basic B2B contract. The guarantor would not be able to challenge

³⁸ Aynès, L. Gautier, P.-Y. and Malaurie, P. 2022. *Droit des contrats spéciaux*. 12 ed. Paris: L.G.D.J., pp. 412-426; Boustani-Aufan, D. 2022. *L'essentiel du droit des contrats spéciaux*. 4th ed. Paris: Gualino, pp. 118-126.

³⁹ Mégret, G. 2011. *Les recours du garant. Contribution à l'étude du cautionnement et de la garantie autonome en droit interne*. Marseille: Presses Universitaires d'Aix-Marseille, pp. 91-103.

the request for payment on the basis of the exceptions extracts from the main contract. Thus, the autonomy of the letter of bank guarantee by reference to the contractual or substantial source of the guaranteed obligation, together with its corollary – the non-enforceability of the exceptions derived from the primary legal relationship – justifies the retaining of the guarantor’s liability to pay. Congruently, the guarantor will be required to make the payment up to the concurrence of the amount established by the parties, without being able to oppose the beneficiary of the payment of any of the exceptions deduced from the clauses of the primary contract, the effects of which are indifferent in terms of performing the autonomous guarantee, with the notable exception of cases of fraudulent conduct imputable to the payment requester.

When transposing these conceptual benchmarks for the case where the first-ranking guarantor benefits, in turn, from an autonomous counter-guarantee, it should be noted that the beneficiary’s obviously fraudulent conduct might manifest collusion between the interests of the first-ranking guarantor who takes advantage of the counter-guarantee, and the patrimonial interests of the issuer of the abusive payment request, addressed to the guarantor from the autonomous counter-guarantee. Nevertheless, resorting to evidentiary efforts of assessing the couplable nature of the beneficiary’s request for payment remains crucial, in the hypotheses in which the issuer of the autonomous guarantee invokes the non-performance of obligations by the debtor from the B2B contract in which the guaranteed obligation originated. The identification of enforceable autonomous bank guarantees, the enforceability of which might be incidentally mirrored in the prerequisites of the primary contractual relationship, might present practical difficulties for the beneficiary of the autonomous guarantee. It depends on the non-fraudulent character of the beneficiary’s payment request whether it remains possible for the enforceability deduced from the intrinsic value of the debt specified in the autonomous guarantee to be conjugated with the irrevocable nature of the autonomous guarantee. Similarly, the issuer’s rejection of the payment request remains admissible in cases of fraudulent collusion between the legitimate interests of the primary guarantor and those of the beneficiary of the autonomous guarantee.

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