TRANSITION OF ACCESSORY AND NON-ACCESSORY SECURITIES WITH CESSION BY OPERATION OF LAW (*CESSIO LEGIS*)

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Summary

*Financial and commercial claims are usually secured by personal and real securities in commercial practice. Different types of securities are used, both accessory and non-accessory. The question arises as to how to interpret the provisions on subrogation or cession by operation of law (*cessio legis*) in relation to the transfer of non-accessory securities to the performer of the obligation, particularly in the case of sureties. A surety undertakes to perform a debtor's obligation (not its own obligation) to the debtor's creditor. Consequently, after the performance, the creditor's claim toward the debtor passes onto the surety with all the accessory rights and guarantees. The key question to be answered in this article is whether non-accessory rights pass to the surety as well (who has fulfilled the obligation of the principal debtor), or whether the creditor must make a corresponding (additional) transaction to pass these rights. The article presents key findings in this regard, along with an analysis of the position of the surety in insolvency proceedings.*

Keywords: *subrogation;* cessio legis*; surety; accessory rights; insolvency proceedings.*

1 INTRODUCTION

If an obligation is performed by a person that has any legal interest therein, the creditor's claim with all the accessory rights shall be transferred thereto upon performance by law alone (Art. 275 of the Slovenian Obligations Code (hereinafter:

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OC)).[1] Since financial and commercial claims are usually secured by personal and real securities in commercial practice, the question arises as to how to interpret the provisions on subrogation by operation of law (*cessio legis*) in relation to the transfer of non-accessory securities (in particular fiduciary securities and independent bank guarantees) to the performer (payer). It is accepted that different types of securities are used in commercial practice, both accessory and non-accessory. Their use is balanced in practice. Personal securities are dominated by independent bank guarantees and accessory sureties, while mortgages, other forms of liens (on movables and claims) and fiduciary securities (in particular global assignments of existing and future claims) prevail among the real securities. In certain forms of security, it is irrelevant to whom the performer, who is not also the principal debtor, performs the obligation (the old creditor or the new creditor). In any event, they will be relieved of their obligation by performance. For example, the debtor's performance (*cessus*) to the fiduciary (new creditor) instead of the old creditor in case of an assignment of a claim as security (fiduciary assignment). Although the debtor's performance (payment of the monetary obligation) to the new creditor does not place the debtor in its legal position, it does mean that the debtor's obligation toward the old creditor is fulfilled. Fiduciary security is non-accessory in nature, which means that the new creditors' claim toward the old creditor (with all its accessory rights) does not pass onto the debtor, who has performed its own (and not someone else's) obligation by operation of law. However, it is possible that the debtor acquires the new creditor's claim

1 See the decision of the Supreme Court of the Republic of Slovenia, II Ips 119/2019 of June 19, 2020: "The essential characteristic of subrogation as a claim for reimbursement is that the third party fulfils the foreign obligation; if it had its own obligation, it would not have a claim for reimbursement. In Slovenian legal theory and practice, subrogation is a term which, in the most general terms, denotes a situation where the debtor performs substitute performance to the creditor in place of a specific object of the claim, or where the person who performs the foreign obligation enters the creditor's legal position by virtue of a contract or law. In the first case, we speak of real subrogation, in the second of personal subrogation. It is regulated in The Obligations Code, more specifically in the general part, in the section "Termination of claims". Personal subrogation is the transfer of the creditor's claim to the person who has performed in place of the debtor. The performer replaces the creditor in the contractual relationship, who therefore withdraws completely from the relationship, and the performer takes his place in everything in relation to the debtor. This means that not only the claim but also, as a rule, all accessory claims of the creditor against the debtor pass to the performer of the obligation. It may be statutory or contractual. Statutory personal subrogation is governed by Art. 275 of The Obligations Code, which provides that if a person who has any legal interest in the performance of the obligation performs it, the creditor's claim, with all accessory rights, shall be transferred upon that person, passes to him upon performance by operation of law."
See also the decision of the Supreme Court of the Republic of Slovenia, II Ips 45/2019 of December 5, 2019: "The owner of the thing pledged undoubtedly has a legal interest in the repayment of the obligation in order to avoid having to sell the thing in order to repay the pledgee's claim, and it is the pledgee's interest in the payment of the pledgee's foreign debt that is mentioned in the literature as a typical example of legal subrogation (Art. 275 of The Obligation Code)."
The Obligations Code, Official Gazette of the Republic of Slovenia, no. 97/07 with last amendments no. 64/16.

against the old creditor which is simultaneously secured by the old creditor's claim against the debtor (who acquired the new creditor's claim). In this case, the debtor's obligation (wholly or at least partially) to the old debtor is extinguished by reason of the merger or confusion (*confusio*).

The situation is different for sureties. A surety or guarantor undertakes to perform a debtor's obligation (not its own obligation) to the debtor's creditor. Consequently, after the performance, the creditor's claim toward the debtor passes onto the surety with all the accessory rights and guarantees. Since the surety is usually a person or entity who does not belong to the circle of financial institutions whose solvency is not in doubt, the surety (as a form of personal security) usually appears as an associated form of security in addition to some other (main) form of security. The surety's interest, in the event that it performs the principal debtor's obligation, is therefore in the passing of the (other accessory) security for that (additionally secured) claim together with the secured claim. In other words, the surety's interest is to enter a (secured) creditor's position *vis-à-vis* the principal debtor, whose obligation it has previously undertaken, gaining a more favorable legal position in the event of the insolvency of the principal debtor as opposed to the other possible creditors of unsecured claims.

When the obligation is performed, whether by the principal debtor or the surety, the surety (as a form of security) is terminated. If the obligation is performed by the principal debtor, the surety extinguishes by operation of law, since the extinguishment of the principal right also leads to the expiry of the accessory rights (see Art. 270(2) OC). Both rights are thereby extinguished. However, if the surety makes the performance, that leads to the termination of the surety, but not also the termination of the obligation of the principal debtor (under the rules of personal subrogation).[2] In these situations, the surety enters the legal position of the creditor to whom it has performed. This means that the claim passes to the surety with all accessory rights and guarantees for the fulfilment thereof (see Art. 1018 OC). Subrogation takes place directly by operation of law and results in a change of the creditor. Subrogation is an assignment or cession by operation of law (*cessio legis*). Taking into consideration all the above, the key question to be answered in this article is whether non-accessory rights pass to the surety (who has fulfilled the obligation of the principal debtor) as well, or whether the creditor has to make a corresponding (additional) assignment to pass these rights.

2 BANKRUPTCY AND COMPULSORY SETTLEMENT OF THE MAIN DEBTOR

If the principal debtor ceases to exist due to bankruptcy and there is therefore no legal succession taking place, the surety remains liable for the entire obligation.[3] Significantly, a reduction of the principal debtor's liability in bankruptcy or

2 See also Miha Juhart, and Nina Plavšak, eds., *Obligacijski zakonik s komentarjem, 4. knjiga* (Ljubljana: GV Založba, 2004), 1046.

3 Koper Higher Court, I Cpg 37/2005 of October 20, 2005.

compulsory settlement proceedings does not imply a corresponding reduction of the surety's liability. Therefore, the surety is liable to the creditor for the full amount of its obligation (see Art. 1022(2) OC).[4] This is a derogation from the principle of accession for the protection of the creditor. As a means of personal security, the sureties should therefore be an effective guarantee in the event of the principal debtor's default. A consistent application of the principle of accession in such cases would completely defeat the purpose of the surety, which is why the departure from the said principle is completely justified. The reduction of liability by express agreement between the creditor and the principal debtor outside these proceedings (i.e. where there is no bankruptcy or compulsory settlement proceeding) also results in a corresponding reduction of the surety's liability. In this case, the principle of accession is strictly applied, since the surety's obligation cannot, in general, be greater than that of the principal debtor; if it is agreed that it is greater, it shall be reduced to the extent of the debtor's obligation (Art. 1017(1) OC).[5]

In order to avoid prejudice to the surety, who, as a result of subrogation, becomes a creditor of the insolvent debtor for whom it has guaranteed, Art. 1022(1) OC provides that in the event of the bankruptcy of the principal debtor, the creditor shall be obliged to register the claim and notify the surety of it. Otherwise, it is liable to the surety for the damage caused to the latter as a result thereof. The principle of subsidiarity is also derogated from in the event of bankruptcy, which effectively means that a creditor might not declare its claim in the bankruptcy proceeding and collects the claim directly from the surety. In other words, in the event of the principal debtor's bankruptcy, the creditor can demand performance of the obligation from the surety, even if it has not previously demanded performance from the principal debtor (see Art. 1019(2) OC). The creditor's failure to file a claim in the insolvency proceedings would result in preclusion (loss of the creditor's right and claim), which means that the surety would be unable to claim anything from the insolvent debtor in the bankruptcy estate. In this instance, the surety would not even be eligible for a reduced payment. It is this reduced payment (as damages) that the creditor is then liable for to the surety.[6] Art. 1022(2) OC is particularly relevant in cases where the failure to declare a claim results in the loss of the right and claim. This is especially relevant in the case of claims which are not secured *in rem*. In case of such claims, the Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act (hereinafter: FOIPCDA)[7] either provides for the fiction of a declaration/filing of a claim and a right of separation (see Art. 298a FOIPCDA for a mortgage and a maximum mortgage), or the substantive law rules allow for an out-of-court separate satisfaction of a preferential right to repayment (see Arts. 167, 175, 184, 185, 191,

4 Ljubljana Higher Court, I Cpg 247/99 of October 26, 1999.

5 See Juhart and Plavšak, eds., *Obligacijski zakonik s komentarjem,* 1055.

6 A creditor can claim repayment from a surety even if it did not file a claim (which is also guaranteed by the surety) in the insolvency proceedings. Failure to file a claim shall only extinguish the claim in relation to the insolvent debtor.

7 The Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act, Official Gazette of the Republic of Slovenia, no. 176/21 with last amendments no. 102/23.

204, 208 of the Law of Property Code (hereinafter: LPC)[8] and Art. 282 FOIPCDA). In this respect, the authors of this article submit the following hypothesis, which will be either confirmed or refuted in the following paragraphs: "If the obligation has been secured by a surety and a non-accessory security *in rem*, the creditor, who has received performance from the surety, should make an appropriate transaction by means of which he transfers the security to the surety."

A mortgage may be created to secure one's own or another person's debt (Art. 128(2) LPC), while the surety always guarantees for another person's debt. In case of a mortgage (as well as other liens) for another person's debt, a similar legal relationship as in the case of a surety is established. The only difference is that the pledgor guarantees the foreign debt with the value of the thing pledged, while the surety guarantees the foreign debt with all its assets (unless the surety is limited to a certain maximum amount; the so-called maximum surety). In this respect, a dilemma has arisen in case law concerning from whom a mortgage creditor can claim repayment, namely in cases where the main (personal) debtor, which is a legal person, ceases to exist as a result of bankruptcy, while the pledgee is a person, other than the main debtor. The question is therefore whether the dissolution of the principal debtor also results in the termination of the obligation, consequently leading to the termination of the mortgage which is accessory to the secured obligation (claim). The Supreme Court of the Republic of Slovenia addressed this issue and adopted a legal opinion in 2013,[9] clarifying that the obligations of a capital company which has been the subject of insolvency proceedings are not extinguished by their deletion from the court register following a final decision in the insolvency proceedings. Similarly, the obligations of a capital company which has ceased to exist as a result of its removal from the court register without liquidation, also do not cease. This means that, even in these cases, where the situation is practically the same as in the case of a surety (because the pledgor guarantees the value of the immovable property against another person's debt), the provision of Art. 1022(2) OC (which provides as follows: "The reduction of the principal debtor's obligation in bankruptcy or compulsory settlement shall not entail a corresponding reduction in the surety's obligation, and the surety shall therefore be liable to the creditor for the whole amount of the surety's obligation.") must be applied.

The older case-law view that in the event of the dissolution of a legal person by reason of bankruptcy (and thus its deletion from the court register), the obligation of the debtor in bankruptcy (the principal debtor) is extinguished and, by virtue of its accessory nature, so is the mortgage on the immovable property of a person who is not the principal debtor, was erroneous. The dissolution of a legal person terminates only its liability to perform, but not its obligation. This means that the obligation cannot be enforced against an entity that no longer exists. It can, however, be enforced against a surety or pledgee. This view is confirmed by the regulation of insolvency

8 The Law of Property Code, Official Gazette of the Republic of Slovenia, no. 87/02 with last amendments no. 23/20.

9 Legal opinion of the Supreme Court of the Republic of Slovenia of June 21, 2013, *Sodnikov informator* no. 9 (2013): 5-11.

proceedings over assets, discovered at a later time (see Arts. 380 and 443 FOIPCDA), which states that the obligations of the legal person do not cease upon the termination of the insolvency proceedings over the (main) debtor or upon the deletion of the legal person from the court register without liquidation.[10] A different interpretation would defeat the whole purpose of the security (for another person's debt) and prevent the creditor from securing the risk of default in the very cases where such risks are most frequent.[11]

3 TRANSFER OF RIGHTS TO THE SURETY

In this section, the authors answer the question whether Art. 1027 OC, which governs the situation of the surety's exemption from the creditor's failure to provide guarantees, can be applied only in the case where a certain right secured the payment of a claim which could have passed to the surety in the event of a subrogation by operation of law pursuant to Art. 1018 OC. The mentioned article provides the following: "A creditor's claim, settled by the surety, shall be transferred to the latter with all the accessory rights and guarantees for the fulfilment thereof." Considering all the above, the question remains: do only 'automatically transferable accessory rights' pass to the surety who has fulfilled another person's payment obligation?

It is undisputed that the creditor's claim toward the principal debtor, settled by the surety, passes onto the latter. It is also undisputed, in accordance with Art. 1018 OC, that this principal claim passes together with all accessory rights and securities for its fulfillment (see also Art. 418(1) OC). However, if the creditor abandons a pledge or any other right by which the performance of the claim was secured, or loses it because of its own gross negligence, and thus prevents the transfer of the right to the surety, the surety shall be free of the obligation towards the creditor in the amount that would have been gained through the exercise of the right. This rule applies regardless of whether the right originated before or after the conclusion of the contract of surety (compare Art. 1027 OC).

The question is therefore how to correctly interpret the substantive law laid

10 See also the decision of the Supreme Court of the Republic of Slovenia, III Ips 121/2011 of June 11, 2013: "The enforcement of a claim by a mortgage creditor against the defendant as mortgagee is not subject to the provision on the limitation period for the enforcement of claims against the members of the company that was deleted from the court register, set out in Art. 394(2) of the Companies Act. The dissolution of a company - the debtor - can be compared in essence with the death of the debtor: the decisive common feature of both cases (*tertium comparationis*) in this case is the disappearance of the legal entity which is (was) the holder of the obligation. The way in which the death of the debtor affects the existence of his obligations is regulated by Art. 334 of the Obligations Code (before that in Art. 359 Law on Obligations, Official Gazette of the Republic of Slovenia, no. 88/99 with amendments): the death of the debtor only terminates the obligation if it arose in relation to the personal characteristics of one of the contracting parties or in relation to the personal capacities of the debtor. The view that the extinction, without liquidation, of a personal debtor, a legal person, extinguishes the claims against it, is erroneous."

11 Nina Plavšak, "Razpolaganje s hipoteko in prenehanje hipoteke," *4. dnevi stvarnega in zemljiškoknjižnega prava* (2012): 77-78.

down in the cited provisions of the OC. Does this rule apply exclusively and only to accessory rights, or does it also apply to other guarantees for the performance of the principal obligation which do not have the characteristics of accessory rights (non-accessory protection rights such as unconditional guarantees, land debts, fiduciary securities, conditional transfers of the ownership right, etc.)? In the author's view, it would be incorrect to conclude that only accessory ancillary rights are transferred to the surety. Such a conclusion can be supported both by the views of the commentators on the OC and comparative law arguments, since we are dealing with the relevant provisions of the OC that are identical in substance to those of the relevant rules in other legal orders discussed in this article (see § 774 and § 776 of the German *Bürgerliches Gesetzbuch* (hereinafter: BGB)[12] and § 1358 and § 1360 of the Austrian *Allgemeines bürgerliches Gesetzbuch* (hereinafter: ABGB)).[13]

To protect the surety's position, the OC provides for a clear regulation that the surety is exempted from payment of the obligation if the creditor is at fault for the abandonment of other guarantees. If the claim, guaranteed by the surety, is secured by some other (additional) non-accessory security ('performance security' as defined in Art. 1018 OC), and the creditor is at fault for the abandonment of such security, the surety must be released from liability for the performance of the principal obligation (or part of the principal obligation). The surety's exemption is therefore justified by the creditor's failure to utilize any of the other guarantees, as the very title of Art. 1027 OC shows ('Release of surety because of abandonment of guarantees'). The stated article provides: "If the creditor abandons a pledge or any other right by which the performance of the claim was secured or loses such because of the creditor's own gross negligence and thus prevents the transfer of the right to the surety, the surety shall be free of the obligation towards the creditor in the amount that would have been gained through the exercise of the right." This article applies both where the right originated before the contract of surety was concluded and where it originated after the contract of surety was concluded.[14]

The transfer of rights to the surety (subrogation) takes place by operation of law with respect to the accessory rights securing the principal (main) obligation. The surety gains the legal status of the creditor to whom it has performed. The surety is accessory as well. Thus, claims against other (co-)sureties pass to the surety who has performed (see Arts. 418(1) and 1020 OC). This means that the claim passes to the surety with all accessory rights and guarantees for its performance (Art. 1018 OC). Subrogation takes place directly by operation of law, which results in a change of the creditor. Subrogation is therefore in fact a cession (or assignment) by operation of law (*cessio legis*).

Non-accessory rights, securing the principal obligation in favor of the creditor,

12 *Bürgerliches Gesetzbuch*, Federal Law Gazette, I 3515. with last amendments on December 22, 2023, BGBl. 2023 I no. 411.

13 *Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie*, Official Law Gazette, JGS no. 946/1811. with last amendments on April 17, 2024, BGBl. I no. 33/24.

14 A similar provision can for example also be found in § 776 BGB.

do not pass automatically to the surety who has fulfilled the principal obligation. Therefore, the creditor must carry out an appropriate transaction for the transfer of the non-accessory rights. If the creditor does not make this transfer voluntarily, the surety must enforce the transfer of the non-accessory rights by means of a claim (action). Slovenian and comparative legal theory[15] has resolved the question regarding the fate of non-accessory securities of a creditor's claim (such as land debts, sureties, fiduciary securities, etc.) once the surety has made payment to the creditor. For example, if the creditor's claim is also secured by a land debt and the creditor has received payment from the surety, the surety does not automatically acquire the land debt, but it does acquire the right to request the creditor to transfer the land debt (to request the endorsement and delivery of the land deed as a security in the possession of the surety). We are of course referring to the still existing land debts, as land debts were otherwise abolished by the amendment to Law of Property Code (hereinafter: LPC) in 2013.[16] The creditor may therefore not return the land debt to the principal debtor. The OC's reference to 'accessory rights and guarantees' in Art. 1018 encompasses both accessory and non-accessory rights, i.e. those rights that cannot exist on their own and are transferred together with the secured claim as the main right,[17] as well as those that do exist on their own and can be transferred independently.[18] German case-law and theory, which is highly comparable to the Slovenian system, maintains that the creditor must assign all non-accessory securities to the creditor that made the payment of the principal obligation.[19] It specifically names warranty rights, fiduciary property, assignment as security, reservation of title

15 See more Nina Plavšak, Miha Juhart, and Renato Vrenčur, *Obligacijsko pravo - splošni del* (Ljubljana: GV Založba, 2009), 1155.

16 The Law on Amendments to the Law of Property Code - LPC-A (Official Gazette of the Republic of Slovenia, no. 91/13) abolished land debt. As the amendment could not annul land debts already registered, Art. 5 LPC-A also contains a clear transitional provision: "Land debts created before the entry into force of this Act and land debts registered in the Land Register after the entry into force of this Act on the basis of a land registration proposal filed before the entry into force of this Act shall be subject to the provisions of Arts. 108(2), 110(2), 111 and 192-200 Law of Property Code, Official Gazette of the Republic of Slovenia, no. 87/02." This means that it is no longer possible to (re)create land debts or to convert mortgages into land debts. However, since the amendment could not retroactively interfere (with already acquired rights *in rem*, specifically with already acquired land debts), we still have a number of land debts registered in the Land Register. Yet, it is still permissible to transfer existing land debts by endorsement of a land deed, which results in a change of ownership of this derivative (protective) right *in rem*. In our view, the abolition of land debt was a reckless policy move, made without serious professional judgement. It would have been more appropriate to retain land debt in a slightly modified form in Slovenian property law system. Perhaps in the future, politics, together with the profession, will decide to regulate and re-introduce the reformed land debt in Slovenian legal system.

17 Compare Miha Juhart, and Nina Plavšak, eds., *Obligacijski zakonik s komentarjem, 2. knjiga* (Ljubljana: GV Založba, 2003), 577.

18 See also Peter Ulmer, ed., *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 3* (München: Verlag C.H. Beck, 1980), 785.

19 Walter Erman, and Harm Peter Westermann, eds., *BGB Handkommentar* (Köln: Verlag Dr. Otto Schmidt, 2008), 3279 (commentary of § 774 BGB).

and land debt as such securities.[20] In this respect, German theory and case-law based on § 774 BGB and § 776 BGB (governing the passing of rights and the guarantor's exemption from liability for the creditor's failure to provide insurance) is identical to Slovenian law found in Arts. 1018 and 1027 OC. "*Der Übergang der Nebenrechte folgt den allgemeinen Regeln für die Überleitung kraft Gesetzes (§ 412 and § 401 BGB) oder ist (bei nichtakzessorischen Sicherungsrechten) durch Anspruch geltend zu machen*."[21] ["The transfer/passage of accessory rights follows the general rules for transfer by operation of law (§ 412 in § 401 BGB) or (in the case of non-accessory securities) is enforced by a claim."]. Such a substantive law approach is also appropriate in the Slovenian legal system. Thus, the provisions of Arts. 1027 and 1018 OC must be interpreted in favor of the surety if the creditor is liable for the abandonment of guarantees (for example, because it unreasonably failed to exercise a security). Art. 1027(1) OC protects the interests of the surety. If a creditor, who abandoned a pledge or any other right by which the performance of the claim was secured, or lost such guarantees because of its own negligence, demands payment from the creditor, the creditor may object that its obligation under the surety has been terminated or at least reduced.[22]

In the authors' view, any interpretation that the position of the surety is protected only when dealing with accessory rights, would be contrary to the very meaning (*ratio legis*) of the provisions of Arts. 1017 and 1018 OC. These provisions aim to protect the position of a surety who has fulfilled an obligation to a creditor. This is not the case when the creditor has not acted diligently and has abandoned or lost a security interest in form of a guarantee (or other non-accessory security) due to its own fault.

A creditor (such as a bank) must act with the care of a professional. The parties to a contractual relationship must act with greater diligence in the performance of their professional obligations (the diligence of a good expert; Art. 6(2) OC). The rules of the profession oblige banks not to abandon quality payment securities which can achieve faster repayment of the claim (Art. 1027 in conjunction with Art. 6 OC). Based on the Decision of the Bank of Slovenia on Credit Risk Management in Banks and Savings Banks (hereinafter: BS Decision),[23] the bank must consider credit securities according to their quality, which is reflected in the creditworthiness of the obligor and the other security provider. This is the primary criterion for realization of the security. The bank shall manage credit security effectively on the basis of measures, procedures and policies that enable it to realize these securities in a timely manner and to have reasonable certainty in regard to the amount of repayment and the used securities. The bank should pay special attention to credit securities that are highly volatile in value and/or subject to long-duration realization, in the sense that it

20 Erman and Westermann, eds., *BGB Handkommentar*, 3282-3283 (commentary of § 776 BGB).

21 Ulmer, ed., *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* 785.

22 Juhart, and Plavšak, eds., *Obligacijski zakonik s komentarjem, 4. knjiga*, 1064.

23 Decision of the Bank of Slovenia on Credit Risk Management in Banks and Savings Banks, Official Gazette of the Republic of Slovenia, no. 115/21. Before: Decision of the Bank of Slovenia on Credit Risk Management in Banks and Savings Banks, Official Gazette of the Republic of Slovenia, no. 68/17, 78/19.

should use higher quality security (see Arts. 8 and 21 of the BS Decision).

This position should also be taken with regard to all non-accessory insurances (i.e. in particular fiduciary insurances) and also with regard to reservation of title. In the case of fiduciary securities, the surety who has undertaken the principal debtor's obligation to the creditor is entitled to require the creditor to execute an appropriate assignment to pass the fiduciary security (i.e. an assignment of the fiduciary claims and an assignment of the title as security). Regarding the reservation of title, the Supreme Court of the Republic of Slovenia issued a ruling[24] which the authors of this article believe is erroneous. It stated: "An ownership right (and its reservation) is not an accessory right subordinate to the secured claim and automatically (without express agreement) sharing its fate. However, it must be borne in mind that the surety undertakes the debtor's debt (Art. 1012 OC), which, in light of the sale with reservation of title agreed between the creditor and the debtor, constitutes the fulfilment of a suspensive condition for the transfer of ownership right on the thing, delivered to the buyer. The position, taken in the revision, on the contrary assumes that the condition in question is fulfilled only by payment by the principal debtor, and that the surety, by paying the seller's claim, acquires merely the reservation of title arising from his ownership right. The fallacy of such a view is demonstrated in cases, where the principal debtor fails to pay the surety the claim that passed to it. If the suspensive condition is not fulfilled, the buyer's expectancy right is extinguished, which, if the view of the Supreme Court is to be applied consistently, would mean that the claimant would become the owner of the subject-matter of the contract of sale in respect of which it had undertaken to act as surety only without a proper agreement and without an act of delivery. The law does not provide for such a method of acquiring an ownership right. The analogy offered in the revision, i.e. the analogy with subrogation in respect of a lien (Art. 1018 OC) must be rejected."[25]

An ownership right is an independent right, not an accessory right that automatically passes to the surety who has fulfilled the buyer's debt to the seller. Since the surety is undertaking another person's debt, the surety automatically assumes the legal position of the seller in respect to the secured claim (for repayment of the purchase price). In respect to the reservation of title, the surety is entitled to require the seller to transfer the title, which is to be executed by '*longa manu* tradition' delivery, in accordance with Art. 6(4) LPC.

4 THE POSITION OF THE SURETY IN INSOLVENCY PROCEEDINGS

The surety, by its undertaking, assumes liability towards the creditor for another person's obligation. The position is similar to a lien on a foreign debt. The established view is that the surety's claim against the debtor has the nature of a contingent claim, which is linked to the suspensive condition that the surety will pay that claim to the creditor. This means that the surety's claim against the debtor arises (only) when the

24 Supreme Court of the Republic of Slovenia, II Ips 183/12 of April 15, 2013.
25 Supreme Court of the Republic of Slovenia, II Ips 183/12 of April 15, 2013.

surety pays the creditor the debtor's claim for which it has taken a surety. There are also different views taken in theory, namely that the surety's payment of the claim does not give rise to a new claim, but rather the claim of the original creditor passes to the surety (subrogation with a suspensive condition). This means that the surety's potential (contingent) claim against the principal debtor (before it has paid the creditor the claim it has guaranteed) does not possess the characteristics of a claim under a suspensive condition in the strict sense. It is typical for this claim that the suspensive condition of payment is not linked to the creation of the claim but rather the passing of the claim to the surety. A comparison with an independent bank guarantee shows that the liability of a bank under a bank guarantee issued on first demand (an independent bank guarantee) has different legal characteristics from that of a surety. This liability is non-accessory in the sense that the bank fulfils its own obligation to the beneficiary of the guarantee. This means that, in case of an independent guarantee, the bank does not fulfil a foreign obligation (the obligation of the guarantor).[26] With an independent bank guarantee, the guarantor's obligation (the issuer of the guarantee) arises when the guarantor receives a demand from the beneficiary of the guarantee for payment of the sum of money covered by the guarantee. The beneficiary of the guarantee undertakes agreement to pay (reimburse) the bank the amount of money in respect of which the guarantee is to be drawn if and when the guarantee is drawn. This means that the bank's (guarantor's) claim for reimbursement (recourse) of the amount of the called-up guarantee against the customer only arises when the bank guarantee is called up. Any (potential) claim of the bank (guarantor) *vis-à-vis* the principal of the guarantee shall only arise if (and when) the guarantee is called. Therefore, it has all the characteristics of a claim, linked to a suspensive condition.[27]

The question arises in which situations (if any) it is relevant to take the view that a claim of a surety against the principal debtor does not have the character of a claim, the creation of which is linked to a suspensive condition. If the surety has paid the claim subject to the surety before the commencement of the insolvency proceedings, the claim has already passed to the surety before the commencement of the insolvency proceedings, and the surety can therefore claim it as an unconditional claim in the insolvency proceedings. If the surety fails to declare the claim in time, its claim against the debtor is terminated (Art. 296(5) FOIPCDA). A creditor who is jointly and severally liable for an obligation of the bankrupt debtor or acts as a surety or pledgee, must file the recourse claim in the bankruptcy proceedings even if it has not yet arisen by the time of the commencement of the bankruptcy proceedings, subject to the suspensive condition that, on the basis of the payment of that claim made after the commencement of the bankruptcy proceedings, the creditor will acquire a recourse claim against the bankrupt debtor (Art. 296(2) FOIPCDA). Only a claim by a debtor, who is jointly and severally liable and has paid the creditor a greater proportion of the obligation than its share of the obligation in the internal relationship between the joint and several debtors, has the character of a recourse

26 Vesna Kranjc, *Gospodarske pogodbe* (Ljubljana: Lexpera GV Založba, 2020), 233-234.

27 More specifically Nina Plavšak, "Učinki postopkov zaradi insolventnosti na položaj poroka," S*odobno insolvenčno pravo* (2022): 35-42.

claim. This recourse claim arises only when such a debtor has paid the creditor (Art. 404(1) OC). Therefore, the suspensive condition for payment is linked to its creation. However, the surety or pledgee does not acquire a new (recourse) claim by paying the creditor, but rather the creditor's claim against the principal debtor passes to it. Therefore, according to Plavšak, the suspensive condition relates to its transfer or passing to the surety and not to its creation.[28]

If the claim for which the surety has assumed a surety has not yet been paid by the time the insolvency proceedings against the principal debtor are started, the creditor must file it in the insolvency proceedings pursuant to Art. 1022(1) OC. This means that, in the creditor-surety relationship, it is the creditor's obligation to timely file the claim. Therefore, the creditor cannot absolve itself of liability towards the surety for the possible legal consequences of failing to timely file the claim, even though the surety may also file the claim as a contingent claim.[29] If a creditor timely files a claim in the insolvency proceedings, the surety does not have to file a contingent claim. If, after the start of the insolvency proceedings, the creditor is paid the claim for which it has taken a surety, the claim will pass to the surety by virtue of the assignment (cession) by operation of law, referred to in Art. 1018 OC. The surety will therefore assume the position of a creditor. The surety must notify the receiver of the proceedings of the transfer of the claim and prove the transfer by providing it with evidence of payment of the claim (Art. 57(3) FOIPCDA).[30]

The creditor's or surety's failure to file a claim in the insolvency proceedings results in the following legal consequences: if the creditor fails to file the claim in the insolvency proceedings within the three-month period referred to in Art. 59(2) FOIPCDA, the creditor's claim in relation to the debtor is terminated (Art. 296(5) FOIPCDA). Arts. 1022 and 1027(1) OC provide as follows: "In the bankruptcy of the principal debtor the creditor shall be obliged to register the claim and notify the surety of such; otherwise, the creditor shall be liable to the surety for the damage incurred thereby for this reason. If the creditor abandons a pledge or any other right by which the performance of the claim was secured, or loses such because of the creditor's own gross negligence, and thus prevents the transfer of the right to the surety, the surety shall be free of the obligation towards the creditor in the amount that would have been gained through the exercise of the right." The creditor's failure to file a claim in the insolvency proceedings against the debtor causes the claim to be terminated. Therefore, by such failure or omission, the creditor prevents the transfer of that claim to the surety, meaning that the creditor's failure to timely file a claim causes the surety's obligation to be terminated to the extent in which the creditor would have obtained payment of that claim in the insolvency proceedings against the

28 More specifically, Plavšak, "Učinki postopkov zaradi insolventnosti," 35-42.

29 Art. 1022 OC states: "(1) In the bankruptcy of the principal debtor the creditor shall be obliged to register the claim and notify the surety of such; otherwise, the creditor shall be liable to the surety for the damage incurred thereby for this reason. (2) The reduction of the principal debtor's obligation in bankruptcy or composition proceedings shall not entail a corresponding reduction in the surety's obligation, and the surety shall therefore be liable to the creditor for the whole amount of the surety's obligation."

30 More in Plavšak, "Učinki postopkov zaradi insolventnosti," 35-42.

principal debtor had it timely filed the claim.

In certain cases, there may be competition between the principal creditor and the surety. Such a situation arises when both the creditor and the surety timely file a claim in insolvency proceedings against the principal debtor, since the claim is asserted by two entities (the creditor and the surety) despite there only being one claim against the principal debtor. Plavšak points out that the surety's purpose is to provide the creditor with additional security and thus a better chance of repayment of the claim for which the surety has assumed a surety. Therefore, in insolvency proceedings against the principal debtor, the creditor always has priority over the surety when pursuing this claim.[31] An additional argument to support this view can also be found in Art. 276(1) OC: "During part performance of the creditor's claim the accessory rights by which the performance of the claim is secured shall be transferred to the performer only insofar as they are not required for the performance of the remainder."

This extensive analysis leads us to the following conclusion concerning the question of which situations result in the creditor having priority over the surety. In a compulsory settlement procedure, the creditor has priority in the exercise of the right to vote on the acceptance of the compulsory settlement. In insolvency proceedings, however, the creditor has priority for repayment out of the distribution estate. If both (the creditor and the surety) declare the same claim (the creditor as unconditional and the surety as 'contingent or conditional'), this claim is only taken into account once when calculating the sum of the claims filed against the debtor (and not in a double amount, which is the sum of the two filings by both the creditor and the surety). Therefore, only one of them can exercise the right to vote on this claim. Since the creditor holds the claim, it has priority in exercising its voting rights over the surety, who has not yet become the holder of that claim, since it has not yet passed to the surety. This means that if both cast a ballot for or against the adoption of the compulsory settlement, only the creditor's ballot shall be counted. A certain ambiguity in this regard is caused both by Art. 296(2) and Art. 201(2)(4) FOIPCDA, which provide that the quotient for voting on compulsory settlement in cases where the ordinary claims are related to a suspensive condition shall be 0,5.

Let us consider the following hypothetical situations. First, prior to the start of insolvency proceedings against the debtor, there is an ordinary (unsecured) claim of the creditor for payment of EUR 100,000, for which the surety has taken a surety and has not yet paid the creditor. The claim is filed in the compulsory settlement proceedings by both the creditor as an unconditional claim and the surety as a contingent/conditional claim, the transfer of which is subject to a suspensive condition, that he will pay it to the creditor. Both claims are admitted. In determining the sum of all recognized and probable claims against the debtor (the denominator in the calculation of the voting result), the claim shall only be taken into account once in the amount of EUR 100,000. The ballot paper for the vote on the acceptance of the arrangement is cast by the creditor and the surety, however, only the creditor's ballot

31 Plavšak, "Učinki postopkov zaradi insolventnosti," 35-42.

paper shall be considered in determining the result of the vote.[32]

Second, prior to the opening of the insolvency proceedings against the debtor, there is an ordinary (unsecured) creditor's claim for payment of EUR 100,000, for which the guarantor had taken a surety and, prior to the opening of the insolvency proceedings, had paid the creditor a part of the claim amounting to EUR 40,000. In the compulsory settlement proceeding, the creditor will declare the unpaid part of the claim of EUR 60,000 and the guarantor the paid part of the claim of EUR 40,000. Since these claims are not in competition with each other the creditor may therefore exercise its voting rights in respect of the claim of EUR 60,000 and the surety may exercise its voting rights in respect of the claim of EUR 40,000.[33]

The main creditor also has priority for repayment from the bankruptcy estate. If the surety pays part of the claim to the creditor after the insolvency proceedings have been started, the creditor has priority over the surety in the payment of the remaining claim. Therefore, the creditor's claim is paid in priority at the time of the distribution and the surety may participate in the distribution only after the creditor's claim has been paid in full.

The confirmed composition has legal effect only regarding the claims of creditors against the debtor, but regarding other persons who are liable to the creditor for those claims. The composition has no effect regarding the claims of persons who are liable to the creditor as sureties, jointly and severally liable debtors or as recourse debtors in respect of the debtor's obligation (Art. 213(2) FOIPCDA). The same rule is laid down in Art. 1022(2) OC, according to which a reduction of the principal debtor's liability in bankruptcy or compulsory settlement proceedings does not also imply a corresponding reduction of the surety's liability and the surety is therefore liable to the creditor for the full amount. This rule is in derogation to the general rule laid down in Art. 1017(1) OC according to which the surety's obligation cannot be greater than that of the principal debtor.[34]

5 CONCLUSION

Based on this analysis we reach the following conclusions.

Firstly, the view that only accessory rights pass to the surety is erroneous. Our conclusion is supported by the views of the commentators of the Slovenian OC, as well as comparative legal arguments since the subject-matter of the OC provisions are identical to the relevant comparative regulations (see § 774 and § 776 of the German BGB and figures § 1358 and § 1360 of the Austrian ABGB). The non-accessory rights securing the principal obligation in favor of the creditor do not automatically pass to the surety who has fulfilled the principal debtor's obligation. Therefore, the creditor must make an appropriate transaction for such rights to legally pass. If the creditor fails to make this transfer voluntarily, the surety may enforce the transfer of non-accessory rights by claim (a lawsuit). Slovenian and comparative

32 Plavšak, "Učinki postopkov zaradi insolventnosti," 35-42.
33 Plavšak, "Učinki postopkov zaradi insolventnosti," 35-42.
34 Plavšak, "Učinki postopkov zaradi insolventnosti," 35-42.

theory has adopted a legal framework that resolves the question of the fate of non-accessory securities with which the creditor's claim was secured (such as land debts, guarantees, fiduciary securities, etc.) under circumstances when the surety performs the obligation to the creditor. The OC refers to 'accessory rights and guarantees' encompassing both accessory and non-accessory rights, i.e. those rights that do not exist independently and are transferred together with the secured claim as the main right, as well as those that do exist on their own and are transferred independently. German jurisprudence and theory, which is distinctly comparable to the Slovenian regulation, provides that the creditor must relinquish all the non-accessory securities to the surety who has fulfilled the obligation of the principal debtor. These securities expressly include guarantees, fiduciary property, assignment as security, reservation of title and land debt. In this regard, based on § 774 BGB and § 776 BGB (which regulate the transfer of rights and the surety's exemption from liability due to the creditor's abandonment of guarantees, like Arts. 1018 and 1027 OC), the German theory and jurisprudence stated as follows: "*Der Übergang der Nebenrechte folgt den allgemeinen Regeln für die Überleitung kraft Gesetzes (§ 412 in § 401 BGB) oder ist (bei nichtakzessorischen Sicherungsrechten) durch Anspruch geltend zu machen*." ["The transfer/passage of accessory rights follows the general rules for transfer under the law (§ 412 in § 401 BGB) or is (in case of non-procedural safeguards) enforced by claim."]. This substantive view applies equally to Slovenian law. This means that the provisions of Arts. 1027 and 1018 OC must be interpreted in favor of the surety if the creditor is responsible for the abandonment of guarantees (if, for example, it has unjustifiably failed to use a security). Art. 1027(1) OC protects the interests of the surety. If a creditor who has lost the security through its own fault demands the performance of an obligation from the surety, the latter may object that the surety obligation has ceased or is reduced.

Secondly, the position of a surety who has either not fulfilled or has only partially fulfilled the obligation of the principal debtor to the creditor is weaker than the creditor in the event of the insolvency of the principal debtor (in the case of compulsory settlement or bankruptcy conducted over the principal debtor). Since the purpose of the surety is to provide the creditor with additional security and thus a better chance of repayment of the claim, secured with it, the creditor always takes precedence over the surety when enforcing this claim in insolvency proceedings over the principal debtor. An argument in favor of this conclusion can be found in Art. 276(1) OC: "During part performance of the creditor's claim the accessory rights by which the performance of the claim is secured shall be transferred to the performer only insofar as they are not required for the performance of the remainder." Should the creditor's claim be secured by a surety and a mortgage, and the surety only paid part of the obligation to the creditor, the creditor can secure payment of the balance of the claim from the mortgage before the surety (Art. 276(1) OC). Therefore, the creditor also has priority in repayment from the bankruptcy estate. If, after the start of bankruptcy proceedings, the surety pays part of the claim to the creditor, the creditor has priority over the surety in the repayment of the remaining claim. At the time of division, the creditor's claim is preemptively paid, and the surety may participate

in the division of the bankruptcy estate only after the creditor's claim has been paid in full. In compulsory settlement proceedings, the creditor shall have priority in exercising the right to vote on the acceptance of the compulsory settlement. If both (the creditor and the surety) declare the same claim (the creditor as unconditional and the surety as 'conditional or contingent'), the sum of the filed claims is only taken into account once (and not in double amount, which is the sum of both declarations). Therefore, only one of them can exercise the right to vote in respect of that claim in compulsory settlement proceedings. Since the holder of the claim is the creditor, it has priority in exercising the right to vote over the surety who has not yet become the holder of that claim, since the claim has not yet passed to it. This means that if both cast a ballot voting for or against the acceptance of the compulsory settlement, only the ballot submitted by the creditor shall be considered.

Thirdly and finally, a reduction of the main debtor's obligations in bankruptcy proceedings or in compulsory settlement proceedings does not also entail a corresponding reduction in the surety's obligations. Therefore, the surety is liable to the creditor for the full amount of his obligation (Art. 1022(2) OC). This is a derogation from the principle of accession for the creditor's protection. The surety should therefore, as a means of personal security, be an effective security against the principal debtor's default. This, on the other hand, is an additional argument in favor of the view that the surety must also be protected in certain positions. It is true that the non-accessory rights securing the principal obligation in favor of the creditor do not pass to the surety who has fulfilled the principal debtor's obligation automatically. Therefore, the creditor is required to perform an appropriate transaction for non-accessory rights to legally pass. If the creditor fails to make this transfer voluntarily, the surety can enforce the transfer of non-accessory rights by claim (an action). The surety is also protected by a rule that provides the legal consequences if the creditor abandons the pledge or some other right by which the fulfillment of his claim was secured, or if it loses it due to its own negligence, thus making it impossible for this right to pass to the surety. In this case, the surety is free from its obligation towards the creditor in the amount that would have been gained through the exercise of the right. This rule applies both in the case when the right arose before or after the conclusion of the contract of surety (compare Art. 1027 OC).

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Sažetak

PRIJELAZ AKCESORNIH I NEAKCESORNIH OSIGURANJA KOD ZAKONSKE CESIJE (*CESSIO LEGIS*)

U poslovnoj praksi tražbine su obično osigurane osobnim i stvarnim oblicima osiguranja. Koriste se različite vrste osiguranja, to jest akcesorna i neakcesorna. Postavlja se pitanje kako tumačiti pravila o subrogaciji (*cessio legis*) u odnosu na prijenos neakcesornih oblika osiguranja na ispunitelja obveze, posebice u slučaju jamstva (poručanstva). Jamac se obvezuje ispuniti dužnikovu obvezu (ne svoju) prema dužnikovom vjerovniku. Slijedom toga, nakon ispunjenja, tražbina vjerovnika prema dužniku prelazi na jamca sa svim akcesornim pravima i osiguranjima. Ključno pitanje na koje se odgovara u ovome članku jest prelaze li na jamca i neakcesorna prava (koji je ispunio obvezu glavnog dužnika) ili pak mora vjerovnik izvršiti odgovarajući (dodatni) posao ustupa da bi se ta prava prenijela. U članku su prikazana ključna saznanja u vezi s navedenim, uz analizu pravnog položaja jamca u postupcima u slučaju nesolventnosti.

***Ključne riječi**: subrogacija;* cessio legis*; jamstvo; akcesorna prava; postupak u slučaju nesolventnosti.*

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