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LEGAL BARRIERS IN THE LENDING ACTIVITY OF THE COMPANIES IN ROMANIA

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Abstract:
The purpose of this paper is to present some elements of the Romanian legislation which could create problems to the clients - legal entities during the lending process. This aspect was analysed through the study of the Romanian applicable legislation. The aspects appraised refer both to the limitations of the law related to the capacity of contracting credits and to the limitations related to underwriting and guarantees. This way the legislative barriers are created for lending. These barriers are added to the other economical and financial restrictions that banks practice in the lending relations, making the access to financing heavier. These legislative barriers hold off the realization of the market convergence of the Romanian bank towards the EU one.

Key words: legal barriers, loan, real estates, lands, attorneys, bank guarantee, business interest, non-resident legal entity, donation, right to use, property

JEL classification: G21, K12, K29

I. INTRODUCTION

First, there are some considerations related to the capacity of the companies to contract and to grant the bank credits. There is a series of interdictions and limitations concerning the loan contracting and their guarantee. This thing derives especially from the application of the Law no. 31/1990, republished, the Law of companies. There are also additional conditions to be fulfilled in case the borrower or the guarantor is a non-resident legal entity.

A part of the legislative limitations related to the guarantees also refer to the required documents which could prove the property of the goods taken as guaranties. These ones are specific for the Romanian legislation and their absence could hold off or even block the lending process.

Some real estates acquired during the former regime have special particularities which make them practically impossible to use as guarantees. The lands have also particularities related to their occupancy and consequently they have to be extremely carefully examined whether they are eligible as guarantees.

The theme was inspired by the discontent of the companies related to the access to financing through bank credits, by the research of the Romanian legislation related to the particularities of the occupancy of some real estates and lands which could possibly grant the bank loans.

II. THE CAPACITY OF THE COMPANIES TO CONTRACT AND GRANT THE CREDITS

II.1. GENERAL CONSIDERATIONS UPON THE ROMANIAN COMPANIES

The trade companies are legal entities incorporated in order to obtain profit by the respect of the limits of the practice capacity as stated in the articles of incorporation. The legal entity can only have the rights corresponding to its objective, under the law, to the incorporation document or to its statute.

The legal entity exerts its rights and fulfils its obligations through its bodies. The legal documents elaborated by the legal entity's bodies, within their conferred powers, are the legal documents of the legal entity itself.

The resolutions upon the points on the agenda cannot be adopted unless published according to the legal provisions, provided that all the shareholders were present or represented and none of them opposed or contested this resolution.

The branches/agencies/other secondary facilities are dismemberments without legal personality, thus they cannot be independent in contracts. They need mandate from the company in order to be able to conclude legal documents.

The non-submission of the balance sheet at the Trade Register is punished by the Law 31/1990, republished, the law of companies, by the company dissolution, in case this non-submission was not due to the cease of activity (no more than 3 years) which was announced to the tax authorities and registered in the Trade Register.

The administrators having the right to represent the company cannot transmit it unless expressly assigned to them [1]. The attorneys having the right to represent the companies in their relations with third parties are those recorded in the Trade Register, with specimen of signature submitted at the bank. These ones can be different from the persons mandated to operate the company's accounts. According to the legal applicable provisions, the relation between the company and the administrators is a mandate relation.

The mandate is transmissible only if this is expressly allowed by the one who assigned the mandate. That is why the administrators can transmit the representation right of the company for third parties by signature only if this right was expressly conferred to them by the articles of incorporation or by a resolution of the competent statutory body.

II.2. INTERDICTIONS AND LIMITATIONS FORESEEN BY THE LAW CONCERNING THE LENDING ACTIVITY AND THE GUARANTEE OF THE CREDITS

A trade company cannot procure its own shares, either directly or through persons who act on their own behalf, unless the Extraordinary General Meeting of Shareholders decides that, with the respect of the above mentioned conditions [2]. Thus, banks cannot finance or re-finance the procurement of its own shares by a trade company.

If the guarantee established in the bank's favour has as object the companies assets, the analysis of the way of having procured those shares will be considered, being known the fact that its own shares procured by the violation of the provisions [3] related to the trade companies will be alienated within at the latest one year after their subscription, in the way decided by the Extraordinary General Meeting. Those not alienated within this delay will be cancelled, the company being bound to decrease its joint stock correspondingly.

A company cannot establish guarantees so that a third party to subscribe or to procure its shares. The real guarantees for stocks and shares upon its own shares, either directly or through persons who act on their own behalf, but on the company's account, is assimilated to the procurement of its own shares.

The administrator/manager having, in a certain operation, either directly or indirectly, interests contrary to the company's ones must notify the other administrators and the financial auditors in this respect and must not participate to any deliberation concerning this operation.

The administrator/manager has the same obligation if, in a certain operation, this one knows that his wife, relatives or relatives by affinity up to the forth degree of kinship inclusively are interested in [4]. The associate/shareholder who, in a given operation has, on his account or on somebody else's account, interests contrary to those of the company, cannot participate to any deliberation or decision related to this operation.

If the associate disrespects the legal provisions, he is liable for the damages caused to the company in case when, without his vote, the required majority wouldn't be fulfilled [5]

This interdiction will be considered for the check-up of the fulfilment of the voting conditions for taking the decision to guarantee some facilities of a company within the granted companies.

If not otherwise provided by the articles of incorporation, the administrator can alienate, respectively procure goods for or from the company (including rental or leasing operations), with a value over 10% of the net assets of the company, only after the approval of the Extraordinary General Meeting [6].

In its activity, a credit institution cannot involve or permit the connection to its activity, lending operations of some share companies' administrators through operations such as:

- direct or indirect guarantee, in whole or in part, of some loans awarded to the administrators, once with or after the award of the loan.;
- direct or indirect guarantee, in whole or in part, of the administrators' execution of any other personal obligations towards third parties;
- procurement by onerous title or payment, in whole or in part, of a debt which has as object the loan awarded by a third party to the administrators or any other personal service for these ones.

A joint stock company cannot guarantee a credit taken by another trade company if the administrator of the joint stock company (or the spouse, relatives or relatives by affinity up to the forth degree including) is also the administrator of the other company or holds alone or with his spouse, relatives or relatives by affinity up to the forth degree inclusively, a quota of at least 20% of the joint stock of the other company [7].

These interdictions will not be applied if the awarded guarantees are for a total amount smaller than 5.000 euros or if the operation is concluded by the joint stock company under the conditions of the current practice of its activity and the operation clauses are not more advantageous to the above mentioned persons this interdiction operation on, besides those that, usually, the company practices for third persons.

Concerning the possibility of a trade company to guarantee a loan taken from another trade company it must always be considered that the guarantor company must **justify a commercial interest** for the establishment of the guarantee, otherwise the guarantee document being absolutely void and any interested person can request the determination of this nullity before the court of law.

According to the law, a legal entity (and implicitly a trade company) can perform only those activities that include the objective of that legal entity, the established activities in the trade company's object of activity.

Moreover, any legal document must fulfil the fundamental condition concerning the clause (purpose) of the legal document which must exist, be real, licit and moral. The act of guaranteeing in order to be validly concluded (for the fulfilment of the fundamental condition concerning the cause (purpose)) must lead to the procurement of a profit, prove the existence of a real economical/financial interest which could be quantified and increase to the level of the value of the guarantee that the guarantor company makes for the loan company (the value of the loan company's services towards the guarantor company should be approximately equal to the value of the guarantee established by the guarantor company).

The economical interest between the loan company and the guarantor company cannot be presumed unless the guarantor company has included the lending activities in its object of activity.

For the existence of an economical interest, the economical operations performed between these companies, considering the counter-performance periodicity and proportion must be mutually advantageous. In the absence of the economical interest of the guarantor company, there is the possibility to affect the validity of the guarantees proposed to be established by these one in the bank's favour.

The evidence of the economical interest is a de facto issue and must result from the analysis of the economical relations between the parties, based on economical/financial data.

The economical/financial interest condition could be fulfilled by the existence of some economical contracts between the guarantor company and the loan company under which the loan company performs important services for the guarantor company and the value of these services is important enough so that the interest for the award of a guarantee to be similar to the one to be justified.

Having in view the legal value of the credit contract, under which the property if transferred upon the loan amount by the borrower, the lending document is considered an instruction document. Consequently, if the articles of incorporation don't provide otherwise, the resolution for contracting a leasing will be taken by the Extraordinary General Meeting of Shareholders. The decision for the establishment of the guarantees will be taken by the Managing Board if the value of the guarantees does not exceed half of the accounting value of the company's assets at the date of the legal document signature.

The resolution of the general meeting of shareholders issued abroad must be signed before a notary public or an attorney at law, must bear the apostille or must be super-legalized and must be accompanied by a translation performed by a sworn translator whose signature has to be legalized by a notary public in Romania.

The conclusion of the legal documents by which the assets within a company's patrimony would be procured, rented, changed or established as guarantee, whose value exceeds half of the accounting value of the company's assets at the date of the conclusion of the legal document can be done only after the approval of the Extraordinary General Meeting of Shareholders [8].

It must be underlined the fact that, in case of several connected guarantee contracts would be concluded each one having as object goods of a smaller value, but the overall value exceeding the threshold established by the law could be considered as forming in fact a single operation and its provisions can become applicable.

In case of listed companies, the resolution of concluding the legal document will be taken with the approval of the Extraordinary General Meeting of Shareholders if the value exceeds 20% of the accounting value of the company's assets at the date of the conclusion of the legal document.

The articles of incorporation of a trade company are concluded under private signature, will be signed by all the associates or, in case of public subscription, by its founders. The authentic form of the articles of incorporation is mandatory when:

- among the subscribed assets there is a land as contribution to the joint stock;
- a company is incorporated in partnership or in simple partnership;
- the share company is incorporated by public subscription.

II.3. SUPPLEMENTARY CONDITIONS TO BE FULFILLED IN CASE THE BORROWER OR THE GUARANTOR IS A NON-RESIDENT LEGAL ENTITY

In case the borrower or the guarantor is non-resident legal entities, the banks will request supplementary documents:

- excerpt from the Trade Register from the country where the borrower is registered showing the shareholders structure, the administrators and the fact that the company is legally operating, apostilled /super-legalized and translated by a sworn translator by the Ministry of Justice whose signature was legalized by a notary public.
- the resolution of the statutory body for the signature of the credit contract and of the guarantees;
- authentic power of attorney for the signatories who are not acting as legal representatives or for which the law in the residence country requires such a power of attorney, apostilled/super-legalized and translated by a sworn translator whose signature was legalized by a notary public

In addition the banks will analyse the following:

- if the company is registered and is operating in conformity with the legal regulations applicable in the country of origin;
- if the persons who sign the credit contract can enter valid obligations on the company's behalf concerning the awarded credit and the corresponding guarantees;
- if the resolution of a statutory body is required in order to sign the credit contract and the guarantees and to check-up of the fulfilment of the substantive and formal conditions of that resolution.

III. LEGISLATIVE LIMITATIONS CONCERNING THE GUARANTEES

III.1. REQUIRED DOCUMENTS FOR THE ESTABLISHMENT OF GUARANTEES

The analysis of the property right involves the check-up of the property history upon the asset which cannot be performed unless the documents corresponding to these guarantees are analysed. That is why the companies must submit to the bank a series of documents such as:

- the property titles for the real estates, including those of the previous owners (the property chain), which are, if applicable: the sale and purchase agreements with the evidence of the entire price payment, the exchange contracts, the donation contracts, transactions, court decisions (final and irrevocable), construction permits, urbanism certificates, construction contracts, final acceptance protocols, dismemberment or annexation authentic documents, title attestation certificates, assignment contracts, joint ventures, encumbrance documents, superficies, other titles occurred in that real estate history;
- updated cadastral documents and the documents had in view once with certain changes (annexations, dismemberments) occurred in that real estate's situation;
- notifications from the urban register in case when certain changes of the mail address occurred;
- any permits, authorizations and agreements required by the law for the change of the destination class of the real estates, for their transfer from the outside of the built-up area in the built-up area or for land improvement works;
- in case when the real estate proposed as guarantee is a historical monument, the proof for the exertion of the state's pre-emption right must be submitted according to the legal applicable provisions;[9]
- the tabulation report;
- the information excerpt from the Land Register where the real estate is registered. The information excerpt does not block the Real Estate Register, which means that any time after its issue new records in the Real Estate Register can be performed. A Real Estate Register excerpt issued long time before the date of the analysis of the documentation by the bank is not relevant since between the date of its issue and until the date of the analysis it is possible to have performed multiple registrations in the real estate Register. That is why the submission of a updated Real Estate Register excerpt in the stage of the property analysis is necessary, this way being able to avoid the situations in which the date of the parties' appearance before the notary in order to mortgage, the initial legal opinion does no longer correspond to the real legal situation of the real estate. Since there is not a legal term generally valid for such an excerpt, for the analysis of the property we can admit as updated Real Estate Register excerpt an excerpt whose validity doesn't exceed 30 days.
- the tax certificate attesting that the estate is unencumbered (required before the notary when signing the mortgage);
- the Real Estate Register excerpt for authentication. The authentication excerpt blocks the cadastral number the application refers to for a period of 10 working days. The term is calculated starting the registration date and hour of the application in the special entry register and up to the end of the tenth day. During this period, the law forbids all registrations in that Real Estate Register besides those requested by the notary public who asked for the issue of the excerpt. The tabulation operation has publicity/opposability effect of the rights towards third parties, is submitted to rectification and does not represent an establishment of rights. That is why the Real Estate Register excerpt does not replace the titles;[10]
- the documents attesting the property of the movables (purchase contracts, invoices, acceptance /installation/start-up protocols, IDs and registration certificates for vehicles, accounting affidavit for the registration of the movable in the accounting evidence, inventory journal);
- any other documents relevant for the legal analysis.

The existence on the property chain, of a void document, will affect all the subsequent documents, that is why the check-up of the property history confers a high degree of certainty for the bank guarantee.

The check-up of the property history will be done up to the first owner. In case when lots of properties were based on privatisation, reconstitutions/constitutions or retrocessions and having in view that, according to the law these operations were based on, there are still possible claims made by the former owners, a check-up of the property chain is justified.

The establishment of an amount limit, depending on which the property chain should or should not be checked-up or the limitation of the check-up to a number of documents/transactions back on the property chain is a risky issue and also an aspect of the bank's lending politics. That is why certain banks will check-up the entire property chain, others will not do that and others will establish limits of the credit from where a chain, two chains or all the transactions on the property chain will be check-up.

In case the seller of a real estate is a legal entity, the bank will also check-up the following:

- the legal existence of the legal entity at the date of the document (excerpt from the trade register)
- the existence of the legal and statutory resolutions concerning the alienation of the real estate
- the legal representation of the company at the conclusion of the contract (through the administrator or any other mandated person)
- if the seller - legal entity - has as object of activity the development of real estate projects, the authorized object of activity will be checked-up;

These check-ups are aimed to eliminate the risk that the alienation document to be defective from the consent point of view.

According to the provisions of the tax procedure code for the alienation of the title upon buildings and lands there must exist a Tax residence certificate [11] attesting the payment of all the tax obligations to the local public administrator, under the penalty of cancellation of the alienation document.

According to the legal provisions, the tax attestation certificate is issued within maximum two working days since the date of the request made by the tax payer and can be used by the tax payer during the month of its issue. The tax attestation certificate issued after the 25th of each month is valid during the entire following month.

According to the legal provisions [12], the owners who alienate the apartments or spaces having another destination than the one of habitation are bound to prove the payment up to date of the contributions to the homeowners' association, under the penalty of absolute nullity when elaborating the forms of alienation.

III.2. PARTICULARITIES OF THE ROMANIAN LEGISLATION REGARDING THE REAL ESTATES

For the apartments purchased under the Law no.4/1973 concerning the development of habitations, the sale of habitations from state fund to the population and the building of private property rest houses (abolished by the Decree-Law no.61/1990 concerning the sale of houses build from state funds to the population), the Decree-Law 61/1990 concerning the sale of houses build from state funds to the population and the Law no.85/1992 concerning the sale of habitations and spaces having another destination built from state funds and from funds of the economical units or state budgets, the proof of the title will be made with the following documents:

- the title issued by the Financial Administration;
- the sale and purchase/incorporation agreement accompanied by the delivery and receiving document;

- the loan contract (in case the real estate was integrally paid by credit awarded by CEC) accompanied by the proof of having paid the credit and the radiation of the mortgage on CEC favour)

For these apartments, the award of that land is done under the law, by order of the prefect [13].

Concerning the common elements of the apartments within a condominium the following will be considered:

- the common elements of a condominium are held by the owners of apartment in quota, proportional to the surface of apartment held;

- the description in the property documents of the quota is not unitarily performed, this quota expression being a percentage, the surface indicated in square meters or by general formulation/

In case of real estates submitted to retrocession acquired under the Law 112/1995 for the regulation of the legal situation of certain real estates used as habitations, transferred in the state property or under the law 10/2001 concerning the legal regime of the real estates abusively taken over during the period 6.03.1945 – 22.12.1989, we hereby distinguish two ways of having acquired the property right:

- the situation in which the former owners/inheritors/successors by right of these real estates used as habitations, transferred as such in the state property or in the property of other legal entities after 6.03.1945 benefit from their restitution in nature, by the re-acquisition of the property right upon the apartments in which they live as lessees or of those that are unoccupied. The real estates acquired this way can be proposed and taken as guarantee.

- the situation in which the property upon the real estate was acquired by physical entities who were lessees at the date of enter into of the law.

Notwithstanding the fact that the law limited the interdiction to alienate these real estates for a period of 10 years since the buying date, the expiry of this period does not eliminate the risk to return the real estate in the patrimony of the former owners and consequently few banks will take as guarantee such real estates since their legal situation is generating risks which cannot be prevented or don't cover the contract.

Under the land law [14] two way of acquiring property rights upon the lands:

- by the reconstitution of the property right,

In this manner of acquiring property right, the law giver didn't regulated restrictions regarding the conclusion of disposal documents. From this point of view, these lands can be accepted as guarantees, without other conditions.

- by the constitution of the property right

In this manner of acquiring property right, this one cannot be alienated by living trusts for 10 years, considered since the beginning of the year following the one in which the alienation of property was made, under the penalty of absolute nullity of the alienation document. In case when from the documents submitted it results that the land was alienated by the violation of the legal provisions, this one will not be accepted as guarantee.[15]

The lands acquired under the Law 341/2004 – acknowledgment to the heroes-martyrs and fighters who brought their contribution to the victory of the Romanian revolution in December 1989, cannot be alienated for 10 years calculated from the acquisition date. As consequence, if during those 10 years there has been a transfer of property upon such a land, this document concluded by the violation of the legal provisions is void and the land cannot be accepted as guarantee.

Thus, a part of the real estates in Romanian cannot be taken as guarantees since there is not the certainty that on the property chain there is not an invalid document.

Regardless the way of acquiring the property of lands, there will always be checked-up the existence of an access to the public road. If the lot of land proposed as guarantee does not have direct access to the public road, there will be made the proof of the existence of the right of way, respectively: the document by which the right of way was established, the cadastral documentation for the lot upon which the right of way (servient tenement) was established in the land favour

proposed as guarantee (dominant tenement), the ruling by which it was registered in the real estate publicity registers of the right to way (both for the dominant tenement and for the servient tenement), the cadastral documentation for the lot that represents the access way to the public road.

In case of the constructions in process of edification, since there are supplementary associated risks which derive from the lack of knowledge of the future evolution of the construction (whether it will be finalized, whether the authorized project will be complied with, whether it will be accepted and tabulated, whether it will be extended according to the bank mortgage, whether privileges of some potential financers will occur), the acceptance as guarantee of such real estates will be done according to the risk politics of each bank).

The constructions raised/in process of raising on a land held by title of superficies. In this case, the specific character is given by the fact that the owner of the land and the owner of the construction raised on that land are different. There are distinctive real estate Registers for the land and for the construction.

The check-ups concerning the right to property upon the land and upon the construction raised on the land with the respect of the above mentioned, mentioning that the real estate can be accepted as guarantee in case both the owner of the land and the owner of the construction mortgage their real rights.

In case of the constructions in process of raising, since at the end of the construction, these ones will be recorded in a real estate Register different from the real estate Register of the land, the bank will have no control upon the future construction, not being able to record any right and any interdiction in relation to the construction at the moment of the credit award and that will allow the owner of the real estate to alienate or even mortgage the construction in the favour of another creditor, the bank will not accept as guarantee the lands in connection to which there is a superficies right and the construction is not ended and tabulated in the real estate Register.

The constructions raised on a land held by concession title can be accepted as guarantee provided that the raised real estate does not represent a returned product. According to the law, this product will pass into the patrimony of the concession provider, unencumbered, at the termination of the contract upon completion.

In case the construction is accepted as guarantee for the decrease of the risk it is necessary to fulfil the following cumulative conditions:

- the consent of the concession provider for the establishment of mortgage;
- the concession contract includes a clause regarding the unconditioned transfer of the concession right upon the land to the new purchaser, in case of alienation of the construction;
- the owner agrees to grant to the bank any compensation, damage or any such amount of money collected from the concession provider further his taking over, of any reasons and by any means, of the construction raised on the concession provider's land with the bank's right to immediately notify the debtor;
- some banks request to the clients-beneficiaries of the right to concession to deposit into an escrow account the due royalty until the expiry of the concession term or until the entire refund of the facility.

The constructions in process of rising on a land held with right to concession cannot be accepted as guarantee since they represent future goods and the Civil Code doesn't recognize the future real estates.

III.3. PARTICULARITIES OF THE ROMANIAN LEGISLATION CONCERNING THE ACQUISITION OF THE PROPERTY RIGHT UPON SOME GOODS

For the real estates proposed as guarantees which are acquired under donation contracts, it is necessary to analyse, besides the validity conditions (object, form, capacity) of this contract and its effects by the conditions of cancelling the donation, having in view that the irrevocable character of a donation concerns not only the contract's effects, but also its essence, being a condition of validity to its creation.

That is why the donation contract is absolutely void and the good cannot be accepted as guarantee by the bank in the following situations:

- when the donation can be cancelled for ingratitude or for unjustified disrespect of the donor's obligations; [16]

- the donation is under the condition of payment by the grantee for the future debts of the donor (even if the donor died, since this right is transmitted to the inheritors), the donor can reserve (for himself or for a third party) only the right to use or inhabit that property;

- the donation is made with the mention of the right to unilaterally terminate the contract;

- it is acquired by donation between the spouses (including the quota of common elements), the cancellation being done by unilateral decision of the donor's spouse any time, even after the death of the grantee.

The exception is represented when the donation becomes effective and cannot be cancelled after the death of the donor's spouse, the cancellation action being a personal action and not being able to be exerted by inheritors or creditors of the donor, which means that the good can be accepted as guarantee if at the date of the analysis the donor's spouse is no longer alive.

Thus, for the acceptance as guarantee of the real estates acquired by donation contract, a case-to-case analysis will be performed and the proposed guarantee will be accepted if:

- none of the above mentioned clauses is in the contract;

In the Real Estate Register there is no mention related to the cancellation of donation for ingratitude or action for the reduction of the excessive liberties;

- the donation is unencumbered

- there will be produced the proof that at the date of donation the donor had at least one child alive;

There will be produced the proof for the donor's death if the donation was made between spouses and concerns their common elements.

In case the goods proposed as guarantee are acquired by caretaking contract (or sale and purchase agreement with caretaking clause), the banks consider the clauses that could lead to the cancellation of the contract, case in which the bank's guarantee would be affected too.

The caretaking contract has a random character, since the caregiver (the debtor of the caretaking obligation) depends only on the uncertain life duration of the beneficiary (creditor of the caretaking obligation) but also on his daily needs or any other factors which could influence the extent of the services (health condition). This aspect is important because in case of the disrespect of the caretaking obligation, the beneficiary can request the cancellation of the contract, case in which the good will re-enter, with retroactive effect, in his patrimony. Once with the contract cancellation, the rights acquired by third parties under the cancelled contract remain without legal support, also being cancelled with retroactive effect.

In case the sale and purchase contract with caretaking clause which, by its nature, is a contract under cancellation condition, the beneficiary can anytime request the cancellation of the contract for the disrespect of the caretaking obligation by the caregiver.

Even in the case of alienation of the real estate by the caregivers, the caretaking obligation subsists in the caregivers-sellers' charge, these ones not being able to sell the real estate/the property right unless under the same conditions they hold it themselves, respectively affected by a cancellation condition.

Having in view the effects of the contract cancellation for the non-compliance of the caretaking obligation (the termination of the contract with retroactive effect), the goods acquired as such can be accepted as guarantee under the condition of transforming the caretaking obligation into an obligation to pay a certain amount of money in the following manners:

- the replacement of the caretaking obligation with the payment of a price and definition of the contract as sale and purchase one, in this case the price must be real and serious (set and according to the time period when the caretaking services were effectively provided) and in the novation document to perform the express mention concerning its collection;

- the replacement of the caretaking obligation with an obligation to pay a periodical amount of money (life annuity).

In case of granting with real estates with the reservation of the right to use a property there must be considered the fact that the right to use a property is composed by the attributes of possession and use, under the conditions in which the owner of a real estate sells the nude property and reserves the right to regularly use it during his life *(the right to use a property being essentially temporary).

In case when not only the bare owner mortgaged the real estate, the bank, as mortgagee, could valorise by forced execution only the bare property, with the continuous preservation by the purchaser/winner of the right to use the property.

On the other hand, in such a case, it is difficult to make a proper evaluation of the real estate. The acceptance as guarantee of the real estate affected by a right to use it is not, under these conditions, a solution for the bank.

Nevertheless the acceptance as guarantee of a real estate affected by a right to use it becomes possible in one of the following variants:

- the beneficial owner expressly renounces to his right,
- the beneficial owner mortgages the right to use the property in the bank's favour, the right to use it being a real right.

IV. CONCLUSION

The access to credits of the companies is facilitated by a good financial situation of the applicants and by the existence of the solid material guarantees. These aspects are carefully analysed by the banks. There is a rumour among the bank specialists that no credit will be awarded without a mortgage, but on the other hand the banks cannot award a credit based only on the existence of a guarantee.

From the analysis made it resulted that, even if some companies have a consistent patrimony composed of movables and real estates, these ones are not eligible as guarantees for bank loans out of several reasons.

Seeking for the reasons, we have determined the fact that taking them as guarantees the banks expose themselves to the risk of not being able to forced execution. Going forward, we can determine that:

- the banks cannot finance or re-finance the procurement of a trade company's own shares,
- a company cannot establish guarantees in order to subscribe or procure its own shares by a third party, this thing being assimilated to the procurement of its own shares;
- a joint stock company cannot guarantee a credit with a value higher than 5.000 euros taken from another trade company if the administrator of the joint stock company (or spouse, relatives or relatives by affinity up to the fourth degree of affinity) is also the administrator of the other company or holds alone or with his spouse, relative or relatives by affinity up to the fourth degree of affinity a quota of at least 20% of the other company's joint stock;
- there is not the possibility that a trade company could guarantee a credit taken by another trade company unless justifying the commercial interest for the establishment of the guarantee;
- the conclusion of the legal documents by which the goods in the patrimony of a company would be procured, alienated, exchanged or established as guarantee, whose value exceeds half of the accounting value of the company's assets at the date of the legal document can be done only after the approval of the Extraordinary General Meeting of Shareholders
- in case the borrower or the guarantor are non-resident legal entities, the banks will request supplementary documents such as: excerpt from the Trade Register from the country where the borrower is registered, the resolution of a statutory body concerning the signature of the credit contract and of the guarantees, etc.

- the analysis of the property right involves the check-up of the history of property upon the real estate, the existence on the property chain of a vid document affecting all its subsequent documents;

- in case the seller of the real estate is a legal entity, other aspects related to the legal existence of the legal entity at the date of the conclusion of the document will be considered, the existence of the legal and statutory resolutions concerning the alienation of the real estate or the legal representation of the company for the conclusion of the contract,

- in case the property upon the real estate was acquired by physical entities who had the quality of lessees at the date of the entrance into of the Law 112/1995 or of the law 10/2001, the real estate cannot be taken as guarantee,

- some lands cannot be taken as guarantee due to the fact that under this law these ones cannot be alienated,

- the donation contract is absolutely void and the goods cannot be accepted as guarantee by the bank in several cases,

- a real estate affected by the right to use cannot be taken as guarantee.

That is why the award of a loan granted with real estates becomes bureaucratic by the multitude of the documents that must be submitted and in certain cases there is impossible due to the legislative barriers established during the time.

ENDNOTES

[1] art. 71 din Law no. 31/1990, republished, The Companies Law
[2] art. 103 - 109 din Law no. 31/1990, republished, The Companies Law
[3] art. 104^{1} din Law no. 31/1990, republished, The Companies Law
[4] art. 144^{3} si art. 152 din Law no. 31/1990, republished, The Companies Law
[5] art. 79 si art. 127 din Law no. 31/1990, republished, The Companies Law
[6] art. 150 din Law no. 31/1990, republished, The Companies Law
[7] art. 144^{4} din Law no. 31/1990, republished, The Companies Law
[8] art. 153^{22} din Law no. 31/1990, republished, The Companies Law
[9] Law no. 422/2001, republished, concerning the preservation of the historical monuments
[10] art. 24 din Law no.7/1996, republished, The land register ad real estate publicity law
[11] art. 113, alin.4 din GO nr. 92/2003 concerning the tax procedure code: 2 for the alienation of the property right upon buildings, lands and transportation means, the tax payers must submit the tax attestation certificates attesting the payment of all the local tax obligations due to the local public administration authority where the alienated taxable good is registered". The documents by which the buildings, lands, transportation means are alienated by the violation of this provision are void by right.
[12] art. 20, §1 and 2 of the Law no. 230/2007 concerning the incorporation, organization and functioning of the homeowners' associations, "the owners alienating apartments or spaces having a different destination from that of housing are bound to prove the up to date payment of the contribution quota to the homeowners' association funds. The notaries public will not authenticate the alienation documents without a certificate from the part of the homeowners' association representing the up to date payments of the contributions to the homeowners' association funds, issued in original copy under the president's and administrator's signature, with the mention of their surname and first name, bearing the homeowners' association seal. The alienation documents concluded by the violation of these obligations are void by right."
[13] art. 36 §. 2 of the Land Law no.18/1991, „the state property lands situated in the built-up area of the cities, awarded according to the law for eternal use or for use during the existence of the construction, in order to build personal property houses or once with the purchase from the sate of such houses, are transferred in the property of the current owners property, at their request, in whole or, if applicable, proportional to the quota held from the construction"
[14] art. 8, alin1 of the Land Law no.18/1991, republished,
[15] Land Law no.18/1991, republished
[16] art. 1020 of the Law no. 287/2009, republished, Civil Code

REFERENCES

1. Law no. 4/1973 concerning the development of housing constructions, sale of housing, from the state fund to the population and the construction of personal property rest houses
2. Law no. 31/1990, republished, The Companies Law

3. Land Law nr.18/1991, republished
4. Law no. 85/1992 concerning the sale of housing and spaces used with another destination built from the state's funds and from the funds of economical units or state budgetary units
5. Law no.112/1995 for the regulation of some real estates used as housing, transferred in the state's property
6. Law no.7/1996, republished, Law of Land register and real estate publicity
7. Law no. 10/2001 concerning the legal regime of some real estates abusively taken over during the period 6.03.1945 – 22.12.1989
8. Law no. 422/2001, republished, concerning the preservation of the historical monuments
9. Law no 341/2004, acknowledgment to the heroes-martyrs and fighters who brought their contribution to the victory of the Romanian revolution in December 1989
10. Law no. 287/2009, republished, Civil Code
11. Law no. 230/2007 concerning the incorporation, organization and functioning of the homeowners' association
12. Law no. 71/2011 for the application of the Law no. 287/2009 concerning the Civil Code
13. Decree–Law no. 61/1990 concerning the sale of housings built from state funds to the population