

CONNEXITY AS A CONDITION FOR THE CREATION OF THE RIGHT
OF RETAINING POSSESSION IN COMPARATIVE LAW

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Abstract

The subject of the work is a critical analysis and evaluation of the condition of connexity, i.e. the legal connection that exists between the secured claim and the debtor's property, which certain foreign regulations standardize as a necessary condition for the establishment of right of retaining possession (*ius retentionis*). At the opposite pole is Serbian law, as well as the regulations from neighboring countries, which in their legal texts have completely eliminated the condition of connexity in the adopted concept of a single regulation of civil and commercial right of retaining possession. The aim of the paper is: locating different types of connexity in comparative law, then classifying different models of regulation in relation to this condition, as well as finding reasons for the domestic legislator's waiver of the condition, which was a prerequisite for the emergence of civil retention in Serbian law for a long time (until the adoption of the Law on Obligations). The author assesses that the condition of connexity is part of the legal tradition of those regulations that separately regulate civil and commercial right of retention, but that the best solution is the one that completely eliminates connexity. It is in line with: the modern tendency to maximize the scope of retention – based on the easy conditions of establishment; with the solutions of new regulations, which do not introduce this condition; with domestic positive law; and finally, in accordance with the solution of European Union “soft” law, which the national solution should be harmonized with.

Keywords: security right in rem; right of retaining possession; connexity; civil and commercial *ius retentionis*.

1. Introduction

The right of retaining possession, i.e., retaining debtor's property is a special legal real guarantee authorizing the creditor of a due claim to retain the debtor's property in his possession in order to pressurize him to settle the debt, as well as to primarily settle from the value of the retained property, under certain legal conditions⁶¹¹. Typical legal conditions for the emergence of this legal guarantee are: due claim, property suitable for retention and its immediate possession that does not depend on the debtor's will. Apart from these conditions, certain foreign regulations envisage additional conditions for the emergence of the

⁶¹¹ Pavićević, A. (2016). Right of retaining possession. Doctoral dissertation. Kragujevac, Faculty of Law, University of Kragujevac.

right of retaining possession-such as a condition of connexity⁶¹², i.e., legal connection that has to exist between the secured claim and possession of the debtor's property. Both in domestic and neighboring countries' doctrines this condition is generally seen as disputable⁶¹³ or controversial⁶¹⁴, mostly in terms of the scope of required connexity, but certainly not in terms of the expediency of the precondition for the existence of the right of retaining possession. Namely, with all traditional significant European regulations, a condition of connexity is understood as an essential premise for the constitution of the right of retaining possession. Apart from this, regulations of Anglo-Saxon legal system insist there is a condition for the existence of connexity, whose scope varies depending on whether it is a *particular* or *general lien*⁶¹⁵. The difference between certain regulations lies in the type of required connexity and the way its interpretation affects higher or lower possibility of establishing the right of retaining possession.

On a completely opposite side, there are Serbian and neighboring countries' regulations, which, according to their legal texts, have completely eliminated the condition of connexity in the adopted concept of unique civil and commercial regulations of the right of retaining possession. This problem setting is quite interesting for scientific research for the purpose of finding reasons why domestic legislator should give up the condition, that has been serving for a long time as a precondition for the emergence of civil right of retaining possession in Serbian law, until Law on Obligations⁶¹⁶ was passed. Reasons of domestic legal tradition, that was obviously abandoned in a positive law, as well as different regulation of this condition, seem to be a reason enough to examine expediency of domestic solution *de lege lata*. Inasmuch, this is the reason for questioning the author of the Preliminary Draft of Serbian Civil Code⁶¹⁷ (that will have an impact on the potential future Serbian law), that keeps the same (negative) position towards the condition of connexity as a precondition for the right of retaining possession. Eventually, the condition for the right of retaining possession, to which foreign doctrine (of almost all countries from our sample) gave a lot of space, seems to be an inevitable subject of analysis in our research, despite the fact domestic doctrine shows no interest in this field.

Therefore, the aim of the thesis is to critically analyze different types of connexity in Comparative Law, by classifying different models of legislative arrangement in relation to this condition, then finding reasons for domestic legislator to give up the condition for the emergence of the right of retaining possession and to conceive the most adequate proposal for Serbian law *de lege ferenda*.

2. Models of regulations according to their relation towards the condition of connexity

Basic division of all legal solutions given their relation towards the importance of the existence of legal connection between the claim and the retained property is comprised of: 1) regulations according to which the condition of connexity *is a condition sine qua non* in general right of retaining possession in a civil law; 2) regulations according to which *there is no condition* for connexity. Significant consequence of these two conflicting stands is related to a different scope of the permitted establishment of the right of retaining possession in these regulations, based on diverse theoretical principles, which measure the level of needed protection for collided interests of a creditor and a debtor.

⁶¹² The term connexity originates from the German pandectists of the 16th century, as a collective term for different cases of connected (cross) claims - as those arising from the same legal basis. Elekes, N. A. (1929). *De quelques différences dans l'application du droit de rétention d'après la jurisprudence française et allemande* (pp. 53). Paris.

⁶¹³ Vizner, B. (1978). *Komentar zakona o obveznim (obligacionim) odnosima* (Knjiga 2, pp. 1144). Zagreb.

⁶¹⁴ Petrić, S. (2004). *Institut prava retencije u hrvatskom i usporednom pravu* (pp. 265). Split.

⁶¹⁵ Sykes, E. J. (1978). *The Law of Securities* (pp. 561). Sydney.

⁶¹⁶ See: § 471 Austrian Civil Code (ABGB). The Law on Obligations of the Republic of Serbia "Official Gazette of the SFRY", no. 29/1978, 39/1985, 45/1989, 57/1989; "Official Gazette of the FRY", no. 31/1993; "Official Gazette of SCG", no. 1/2003.

⁶¹⁷ The text of the Preliminary Draft Civil Code of Serbia (whose legal fate is currently uncertain) retrieved from: https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacr-gradjanskog-zakonika-republike-srbije.html. In the following text: The Preliminary Draft of the CCS.

2.1. Legal systems acknowledging the condition of connexity

A comparative analysis of different legal texts shows that despite various formulations of the needed legal connection between the claim and the retained property (as an object of retention), most of the regulations from our sample prescribe the condition of connexity, as an essential element of this factual set. It includes: French, Italian, German, Austrian and Swiss Civil regulation of the right of retaining possession.⁶¹⁸ That is why the connexity itself was chosen as a criterion for determining «the right measure» for proportionate protection of the interests of a creditor and a debtor (favored and affected party by the right of retaining possession).

A common thing to all the regulations from this group is the existence of various types of connexity appearing as a rule, or as an exception in certain legal solutions. In order to clarify the meaning and the scope of each type, we primarily have to display potential divisions and to explain each type of connexity separately, in a way that is generally accepted in the doctrine. Only then we can analyze particular models of regulations and types of connexity they recognize.

A question that drew attention to the jurists of all regulations is not the expediency of the existence of connexity (which is almost never questioned), but the typology of connexity types and the most adequate way of formulating this restriction. Literature⁶¹⁹ assesses that connexity is far more significant in the countries of Roman legal circle, than in other regulations. However, the fact that a condition of connexity is necessary even in all other regulations from this first group, allows us to discover common characteristics of connexity, being the cases where the existing legal connection is estimated as a suitable one for constituting the right of retaining possession.

2.1.1. Types of connexity in legal theory

Types of connexity in literature is traditionally and most commonly divided into: legal (subjective, intellectual) and material (objective).⁶²⁰ However, there are more and more authors who break down this division into several types of connexity⁶²¹ such as: 1) material, 2) legal,⁶²² 3) conventional (contractual) and 4) industrial-economic.⁶²³

However, it seems to us that these types of connexity could be firstly divided into those typical for: 1) *civil* or 2) *commercial legal traffic*. Thus, the first three aforementioned types of connexity (legal, material and conventional), are typical for civil traffic while so-called industrial-economic one is typical for commercial. Whereby, a condition of connexity with the civil right of retaining possession (for all three types), is always more strictly set than the condition for commercial right of retaining possession (industrial-economic connexity). In the presentation, we will firstly start with the most strictly defined legal connection (material connexity), followed by the broadest connection (industrial-economic connexity).

1. *Material (objective) connexity* is usually defined in the doctrine as *debitum cum re iunctum* (a debt connected to the retained property).⁶²⁴ Here we talk about a situation in which a secured claim by the right of retaining possession is directly connected to the property in two ways: 1) when a retainer had expenses related to that property (indispensable or useful); or 2) when that property caused him damage. In both cases, creditor-retainer's property suffered certain losses due to the retained property, which the debtor has to compensate, but until he does so, the creditor has the right to retain "property that owes" or "harmful property" or possibly sell it in order to settle the debt. Justification for this type of connexity is *fairness*, as

⁶¹⁸ Art. 895 Swiss Civil Code (ZGB)

⁶¹⁹ Petrić, S. (2004), pp. 265-284.

⁶²⁰ Marty, G. & Raynaud, P. (1971). *Droit civil*, Tome III, Les sûretés la publicité foncière (pp. 22-27). Paris; Catala Franjou, N. (1967). *De la nature juridique du droit de retention*. *Revue trimestrielle de droit civil*, pp. 18-32.

⁶²¹ Lavine, A. L. (1963). *Modern business Law* (pp. 607). New York: Prentice-Hall Inc.

⁶²² *Dictionnaire du droit privé de Serge Braudo*, retrieved from: <http://www.dictionnaire-juridique.com/definition/droit-de-retention.php>; Basso, P. (2010). *Il diritto di ritenzione* (pp. 46): Giuffrè Editore.

⁶²³ Vizner, B. (1978), pp. 1145.

⁶²⁴ Planiol, M. & Ripert, G. & Boulanger, J. (1949). *Traité élémentaire de droit civil II* (pp. 598). Paris.

the connection between the claim and the retained property is not based on any other previous legal affair; an individual who retains property in his possession did not predict he would become the creditor. Since the creditor was unable to secure himself, recognition of the legal right of retaining property is a guarantee and a "serious hope that his debt will be repaid"⁶²⁵.

2. *Legal (subjective, intellectual) connexity*⁶²⁶ relies on subjective element: on the same legal relation⁶²⁷ from which the claim and the retained property originate. Most often, it is a concrete contract⁶²⁸, but it can also be more widely defined, such as a "range of successive legal affairs"⁶²⁹; "set of legal relations"⁶³⁰; "one commonly internal living relation"⁶³¹ or "the one rising up from the nature of mutual claims"⁶³². The doctrine⁶³³ highlights famous Goldschmidt's definition of legal connexity in a situation when: "a claim or counterclaim belong to the same set of relations, that by nature or the will of the participant form a natural-voluntary unity assuming that will, or otherwise principles of fairness and conscientiousness would be violated". Generally, it may be concluded that legal connexity, broadly understood, is considered as particularly justified between the same individuals who are connected by *repeated operations of the same nature*.

3. *Industrial-economic connexity* is the type of connexity called legal relation *ex dispari causa* in foreign legal doctrine, i.e. in a situation when the claim and the possession of the retained property come from the same legal bases (or factual situations). Here we talk about the existence of a permanent, continuous business and economic relationship between the parties that justifies mutual retention of property, regardless the basis. Such formulation is typical for commercial laws, even including Swiss legal solutions (that has regulated civil and commercial right of retaining possession in a unique way).

Ratio legis of such broadly defined connexity is the need of merchants to maintain mutual trust because otherwise, by arranging the pledge, or other means of real security, co-creditor's solvency would be doubted which would later undermine mutual business relations. Derogation from narrowly understood condition for connexity, as a connection among the same legal relation, is here replaced by the "set of business relations" between trading partners, which is considered understandable.

4. *Contractual (conventional) connexity* is defined by the French doctrine as a possibility harmonized with disposition of the will of civil law parties.⁶³⁴ Conventional connexity is named as such, because it arises from the contract whose only subject is - creating the right of retaining possession. The example when administrative documents of a vehicle are submitted to the bank that has financed its purchase, as a guarantee for the repay is a typical case study in the doctrine. Unlike the pledge, such contractual right of retaining possession has weaker effect and narrower content in French law: "it is not preferential right to sell the retained property, it is the ability to block the delivery of the retained property".

2.1.2. Legal systems in which connexity is narrowly understood

In this part of the thesis, we have divided countries into the groups according to the criterion whether the concrete type of connexity is interpreted in a broader or a narrower way (namely in both groups there are basically the same types of connexity).

The first group encompasses French and Italian legal solutions, since the condition of connexity is strictly set there (in different ways). Significance, almost rigidity of conditions of connexity in these two

⁶²⁵ Catala Franjou, N. (1967), pp. 30.

⁶²⁶ Marty, G. & Raynaud, P. (1971). *Droit civil, Tome III, Les sûretés la publicité foncière* (pp. 22-27). Paris.

⁶²⁷ Lorenc, R. (1966). *Pravo zadržanja (ius retentionis)*. Doktorska disertacija. Beograd; Lorenc, R. (1978). *Enciklopedija imovinskog prava i prava udruženog rada, Tom drugi* (pp. 1277). Beograd.

⁶²⁸ Planiol, M. (1917). *Traite elementaire de droit civil, Tome Deuxieme* (pp. 776). Paris.

⁶²⁹ Catala Franjou, N. (1967), pp. 25.

⁶³⁰ *Ibid.*

⁶³¹ Enneccerus, L. & Kipp, T. & Wolf, M. (1927). *Lehrbuch des Bürgerlichen Rechts* (pp. 84). ed. 23-27, I-2, Marburg.

⁶³² Vizner, B., (1978), pp. 1145.

⁶³³ Catala Franjou, N., (1967), pp. 25.

⁶³⁴ *Ibid.*

legal doctrines, can be displayed both in certain legal formulations and in court verdicts, but especially in a generally accepted understanding of the doctrine that the condition of connexity is central, or even the most important⁶³⁵ when it comes to conditions for establishing the right of retaining possession. Thus, it is assessed that: connexity "is drawing contours of the right of retaining possession, giving legitimacy to the entire institute", because by connecting the claim and the retained property it "creates some kind of a pledge for repaying the opposed debt"⁶³⁶. French authors accentuate that accepting the right of retaining possession without the condition of connexity would lead to: broad range to this private court procedure, so the right of retaining possession encourages the creditor to "get hold of the debtor's property" in any possible way in order to carry out retention, or the debtor will be motivated to entrust his property to the factitious creditor in order to "evade" the right one.

The long-term common thing in French and Italian civil law was a regulation of connexity through a series of casuistic provisions that acknowledge the right of retaining possession to some categories of creditors. For the first time since 2006 French legislator has regulated the right of retaining possession via general norm⁶³⁷, and formulated its structure according to the types of connexity thanks to which the right of retaining possession has been acknowledged. Thus, the traditional rule, according to which the right of retaining possession in French law cannot emerge if there is no legal connection between the secured claim and the retained property, has been confirmed. That connection, as explicitly prescribed, can be: *legal*⁶³⁸, *material*⁶³⁹, but also *conventional*. However, this distinction is hard to be adequately implemented in practice, as there is also the so-called *mixed connexity* (when legal and material simultaneously exist).

In a part of the French doctrine⁶⁴⁰, there is an important difference between these two types of connexity: material can oppose to everyone, and legal connexity exclusively to the debtor of the claim. However, in more recent French doctrine⁶⁴¹, such argumentation has been abandoned, with argument that the right of retaining possession is the same in both institutes, with always same legally recognized effect. At the same time, legal connexity is defined by the French doctrine as a rule, material connexity as an exception, and conventional only as a possibility that is in accordance with the disposition of the will of civil law subjects⁶⁴². Factitious right of retaining possession is stated as an exception, because condition of connexity is lacking.

On the other hand, Italian regulation⁶⁴³ is introducing the condition of connexity through the right of retaining possession of conscientious holder of another's property⁶⁴⁴, that rests on material connexity. Apart from "Roman legal circle" regulations⁶⁴⁵, this group also involves one from "German legal circle". Regulation of Austrian civil right of retaining possession also very narrowly determines the condition of material connexity (the only one it recognizes), individually naming permitted cases of the right of retaining possession⁶⁴⁶. *Ratio* of such a strict defined connexity, as a precondition for the right of retaining possession, is recognized by the local doctrine⁶⁴⁷ in the necessary assurance of the principle of good faith (*bona fides*).

⁶³⁵ Marty, G. & Raynaud, P. (1971), pp. 22.

⁶³⁶ Henry X. et alia (2010). Code Civil (pp. 2247). Paris: Dalloz.

⁶³⁷ Art. 2286 French Civil Code (CC)

⁶³⁸ Enneccerus, L. & Lehmann, H. (1950). Recht der Schuldverhältnisse, Tübingen.

⁶³⁹ Art. 570, art. 867 CC

⁶⁴⁰ Dictionnaire du droit privé de Serge Braudo, retrieved from: <http://www.dictionnaire-juridique.com/definition/droit-de-retention.php>.

⁶⁴¹ Catala Franjou, N., (1967), pp. 17-26.

⁶⁴² *Ibid.*

⁶⁴³ Gardani, D. L. (1998). Voce Ritenzione, in Digesto delle discipline privatistiche-sezione civile (vol. III, pp. 65). Torino, Utet.

⁶⁴⁴ Art. 1152 Italian Civil Code (ICC). Basso, P. (2010), pp. 139.

⁶⁴⁵ Dusi, B. (1940). Istituzioni di diritto civile (II vol, pp. 143). Torino; Rugiero, R. & Maroi, F. (1942). Istituzioni di diritto private (pp. 770). Milano.

⁶⁴⁶ § 471 Austrian Civil Code (ABGB). Stipković, Z. (1972). Pravo retencije i neki slični instituti. Zbornik Pravnog fakulteta u Zagrebu, god. XXII (3), 288.

⁶⁴⁷ Gschnitzer, F. (1968). Sachenrecht (pp. 204). Wien.

2.1.3. Legal systems in which connexity is broadly understood

The second group of regulations where the establishment of the right of retaining possession is conditioned by connexity of the claim and the retained property includes two from our sample: 1) Swiss and 2) German civil law. Nevertheless, even in these regulations, the existence of *legal connection* between the secured claim and the retained property (or performance) «*as internal reason justifying the entire institute*»⁶⁴⁸ is considered necessary. The difference between these two regulations is reflected in the way it is defined and by its scope.

1. German civil law defines⁶⁴⁹ legal connexity as a rule, and material as an exception. Although the claim, as well as the «obligation has to come from the same legal relation»,⁶⁵⁰ assessed by the doctrine as relatively «strict requirement», the extensive interpretation will show that the effect is the same as in the Swiss civil law. In that way, German doctrine⁶⁵¹ highlights that "the same legal affair relation should not be identified with the same legal affair" from which the claim and possession of the property come from, but also as: "internal joint living relation" between performance and non-performance. Even if by the broadest interpretation, a connection between two reciprocal claims cannot be found, German legal practice waives the right to retain debtor's property (or performance)⁶⁵².

2. On the other hand, Swiss regulation leaves no dilemma when it comes to broader interpretation of a condition of connexity, since the only requirement is that the retainer's claim is "*by its nature somehow related to the retained property*"⁶⁵³. With this formulation, Swiss legislator has set the broadest formula of permitted connexity in Comparative Law, including all types of connexity, i.e. the aforementioned and possible connection between the claim and the property, but not more than that. Namely, Swiss jurists⁶⁵⁴ emphasize that this involves following cases of permitted retention, based on the existing "adequate internal connection" for the claims such as: 1) the claim for compensation of the costs related to the property and compensation for damage caused by the property (*material connexity*); 2) the claim coming from the same legal relation (*narrowly understood legal connexity*); 3) the claim coming from the same factual relation (Article 716 of the Swiss civil law - *broadly understood legal connexity*), as well as in German civil law; 4) the claim coming from the set of the same legal or factual relations (here connexity could be called *complex*); and finally 5) the claim and the property are connected by a joint purpose, temporal or some other natural general connection (connexity defined in the broadest way, that could be called *natural*).

Actually, such a model of condition for connexity with the civil right of retaining possession is considered the most adequate, given that: it insists on the existence of certain legal connection between the claim and the property, thus proportionally protecting the interests of a debtor/non-merchant; while simultaneously defining connexity broad enough to be most liberally interpreted by the judge. Namely, each connection (even a simple factual one) is considered enough to connect the means and the subject of security in a legal way, for the purpose of protecting creditor's interests. On the other side, connexity is nevertheless an essential condition-as a kind of corrective to the violation of the principle of the parties' disposition.⁶⁵⁵

Speaking about the commercial right of retaining possession in the Swiss regulation, connexity as the condition for its constituency, is even more widely set⁶⁵⁶; it is the so-called industrial-economic type that justifies the right of retaining possession in cases when "possession of the property and secured claim came

⁶⁴⁸ Breuer, A. (1904). Das Zurückbehaltungsrecht des bürgerlichen Gesetzbuch (pp. 19). Inaugural-Dissertation. Bonn.

⁶⁴⁹ Art. 273 par. 1 German Civil Code (BGB)

⁶⁵⁰ Petrić, S. (2004), pp. 274.

⁶⁵¹ Palandt, O. & Bassenge, P. (2002). Bürgerliches Gesetzbuch: Beck.

⁶⁵² Fikentscher, W. (1976). Sachenrecht (pp. 238). Berlin - New York.

⁶⁵³ Art. 895 ZGB

⁶⁵⁴ Tuor, P. & Schnyder, B. (1979). Das Schweizerische Zivilgesetzbuch (pp. 738). Zürich.

⁶⁵⁵ See: art. 2082 par 2 CC; art. 2794 ICC

⁶⁵⁶ Art. 895 par. 2 ZGB

from mutual commercial traffic between the parties". This kind of the right of retaining possession has two conditions: 1) that subjects are professional merchants and that 2) the claim and possession of the property come from mutual commercial business.

2.2. Legal systems which are not familiar with the condition of connexity

The group of regulations which do not require condition of connexity (neither for commercial, nor for civil right of retaining possession), includes primarily domestic, but also regulations of the countries with a common legal tradition as Serbian (Croatian, Montenegrin, North Macedonian, Slovenian and Bosnian regulation). Domestic doctrine is vaguely interested in reasons that motivated domestic legislator to allow such a broad implementation of the right of retaining possession⁶⁵⁷. However, it is stated that such a solution is keeping up with modern trends and general tendency to commercialize civil law. By eliminating the condition of connexity, the possibility of applying the right of retaining possession in practice is higher, since it became obvious it would be unjust to favor only creditors/merchants because of their profession.

Croatian doctrine assesses that this group of regulations accepts the model of commercial right of retaining possession of the Swiss, Austrian and German commercial law. However, the other mentioned group of regulations (that do not require connexity as a condition for the right of retaining possession), is aware of deviations from this rule and requires connexity in two cases, when connexity is the consequence of circumstances under which the right of retaining possession is implemented: 1) the right of retaining possession of the conscientious retainer (material connexity)⁶⁵⁸; and 2) the right of retaining possession of the host over the property brought by the guest to the facility, for the purpose of collecting claims, i.e. accommodation costs and other catering services (legal connexity)⁶⁵⁹.

However, majority of foreign doctrines (French, German, Italian and Austrian), consider this is the exact condition for connexity that can justify the emergence of the right of retaining possession, especially in relations between non-traders. According to these authors' assessment, while industrial- economic connexity always exists with commercial traffic, characterized by a series of successive, often identical businesses between the same merchants, this reciprocity (connexity) with civil traffic that does not require the condition of connexity is artificially «stretched». The fact that a non-merchant retains the property of another non-merchant that he holds on a completely different basis (without any connection to his claim), according to this part of the doctrine, is not enough for creating the connection between two individuals and two different debts. Namely, judging by the arguments of these authors, the merchants are mutually related by continuity of their commercial transactions, while non-merchants have no spatial-temporal-legal-economical continuity in carrying out certain debtor-creditor relations. They are spontaneously becoming parties according to certain civil law relations, and in their case private exertion of justice should be additionally justified. For this reason, all other regulations from our sample do the same, insisting on the existence of any kind of connexity.

On the other hand, the aforementioned reason is the one which makes the right of retaining possession between the non-merchants initially less available, because there is no continuity in their relation; it is more difficult for them to get hold of the debtor's property, because, unlike merchants, they do not constantly do business with him. Introducing the condition into the factual set for the emergence of the right of retaining possession, would certainly make it harder for non-merchants to establish the right of retaining possession. Having in mind that the right of retaining possession is not often established in practice, anyway, introduction of condition of connexity would additionally reduce it, leaving creditor's interests unprotected.

2.2.1. A critical review of solutions for the states not familiar with the condition of connexity

The reason why domestic legislator opted for elimination of connexity as a precondition for the right of retaining possession, is, in our opinion, his intention to maximally protect the creditor's interest in a

⁶⁵⁷ Tuor, P. & Schnyder, B. & Schmidt, J. (1995). *Das Schweizerische Zivilgesetzbuch*, 11. Aufl. (887). Zürich.

⁶⁵⁸ Art. 38 par. 7 Law on the foundations of property relations, "Official Gazette of the SFRY", no. 6/80 and 36/90, "Official Gazette of the FRY", no. 29/96 and "Official Gazette of RS", no. 115/2005.

⁶⁵⁹ Art. 728 Law on Obligations

situation when: any claim is endangered; retaining the debtor's property purchased on any basis is possible, if non-issuance of the property can reach its purpose which is a debt settlement. Some general idea, that might represent justification of such broadly permitted right of retaining possession is fairness, embodied through the general principle of Roman law *do ut des*.

The principle of process economy also justifies the retention of the debtor's property, whose possession is purchased on any basis, even if there is no relation to the emergence of the secured claim. Avoidance of connexity is certainly practical, but a question on the other hand is how fair the final outcome is. Especially in regulations that strengthen the right of retaining possession by settling from the value of the retained property.

Nevertheless, the doctrine mainly considers positive aspects of removing condition for connexity from the establishment of the right of retaining possession. In that context the following arguments are most frequently presented⁶⁶⁰: 1) modernization of the institute of the right of retaining possession demands more liberal interpretation, followed by elimination of this condition; 2) insisting on connexity leads to "ossification of the institute"; 3) the goal of the institute is a constant expansion of the scope of its application (towards as many subjects as possible and to as wider circle of claims as possible), without limitations; 4) the condition of connexity is essential in regulations of casuistic type where there is no legal general idea of the right of retaining possession, and 5) the need for alignment with the concept of commercial right of retaining possession.

It is certainly possible to counterargument previously mentioned advantages that eliminate connexity as a precondition for the right of retaining possession and after we present them, we will try to determine which solution is more justified for future Serbian law: with or without connexity.

1. It is true that modernization of the institute of the right of retaining possession is crucial, but it does not have to involve abolishment, it allows more liberal interpretation of setting the condition of connexity. Swiss regulation is the right example for this, as it conceives the condition "in the most liberal way", without giving up the natural relation between the claim and the property, which is a confirmation of legitimacy of the right of retaining possession (in neither of the two traffics involved).

2. "Ossification of the institute" is certainly undesirable and it might not be caused by insisting on the condition of connexity, but rather by its rigid interpretation. Legal standard is the technique by which this limitation is adequately set in Comparative law (concretely in the Swiss civil law), leaving space for the judge to adapt this legal formulation, by extensive interpretation, to the needs of time and evolution of the right of retaining possession. On the other hand, one could pose the following question: Is introduction of the condition of connexity really necessary, if our extensive interpretation of this connection will make us to gradually "get rid of it"?

3. The purpose of this institute should be finding out new areas where it can be potentially applied, but not at any cost, and especially not at the expense of basic civil law principles, such as: the principle of the autonomy of will, legal security, protection of trust in legal traffic, fairness, conscientiousness and honesty, proportionate protection of parties' interest, etc. Those principles are even more questionable if the right of retaining possession is implemented without condition of connexity, as additional limitation. On the other side, we have to observe that part of these principles is already disputable by the very existence of the right of retaining possession, so one can not claim that condition of connexity is exactly the one that additionally annul these principles. Claiming that principles of conscientiousness and fairness correct, in a sufficient way, too broad right of retaining possession in practice, by replacing the condition of connexity in domestic practice,⁶⁶¹ is not completely true statement.

Finally, some authors' stands might be seen as dangerous for legal security, because according to them, the creditor is allowed to exert private justice, to connect two completely different claims and debts using self-protection, or to realize one through the other, on his own initiative, against the other party's will and without involvement of the court. This is the argument which is not strictly connected to connexity, but to the right of retaining possession itself-which we cannot renounce for sure. Such an argumentation is not

⁶⁶⁰ Bonnecase, J. (1930). *Traité théorique et pratique de droit civil, supplément* (tome V, pp. 664). Paris.

⁶⁶¹ Cf. Petrić, S. (2004), pp. 283.

enough to draw a conclusion that introducing the condition of connexity creates "better image" of the right of retaining possession. In our opinion, settling of a concrete claim is highlighted here, which is the reason of the existence of the right of retaining possession. The retained property is not significant as such, it could be any possible item, only if the creditor can settle from its value.

Finally, retention is not the institute whose purpose is to ensure proportionate protection of the creditor and the debtor's interests, it serves to protect creditor's interests. Conditions stipulated by law should only channel the emergence of the right of retaining possession in the sense that: the property is not seized, that it is not retained contrary to morality and good customs, that it is not a due claim (as in that case there is no need to implement the right of retaining possession), etc. Therefore, here we talk about minimum conditions, and the connexity is not part of that minimum, since it enormously hinders civil right of retaining possession. Further, the right of retaining possession would no longer be possible in practice, if the connexity is the one to be insisted on.

4. The fourth argument can also be criticized: the theory according to which casuistic regulation of the right of retaining possession (nowadays it is only Italian) insist there is a condition of connexity, as they do not have a general legal concept of retention, does not withhold. There are two reasons for this: a) even regulations with general concept of the right of retaining possession also insist on condition of connexity,⁶⁶² b) new French regulation of the right of retaining possession (after 2006 and 2008 reform) introduces for the first time general legal concept of the right of retaining possession⁶⁶³, while still insisting on condition of connexity. However, this is only "statistical" observation, more related to the legal tradition of certain countries, then to the substantial argument for the condition of connexity.

5. Finally, fifth and the last argument, previously mentioned in favor of eliminating the condition of connexity, is the most debatable one. According to some opinions, condition of connexity would only be an obstacle to swiftly, efficiently solve creditor-debtor relations, while for non-merchants it can only serve as a useful corrective to the legitimate implementation of the right of retaining possession, reduced in situations where certain legal connection exists between the claim and the retained property. According to some other opinions, the interests of the creditor of each unsettled due claim should be equally protected, regardless his profession, so there is no reason to favor the merchant, by abolishing conditions for connexity-which, at least, in our opinion, is truly logical stance.

3. Conclusion

Concluded by the above mentioned, we can find a lot of arguments "for" and "against" the condition of connexity in Serbian future law.

1. Some think that the condition of connexity should be reintroduced into the factual set for constituting the right of retaining possession, with several additional justifications in domestic system: 1) it would mean returning to the old legal tradition;⁶⁶⁴ 2) in this way the model of Swiss civil law which is the role model for creator of Law on Obligations, would be more adequately "followed up" and 3) in this way domestic solution would be harmonized with the longest and most significant European legal regulations in legal tradition, since dominant model of regulation of the right of retaining possession implies the condition of connexity, as a legitimate corrective to the scope of the civil right of retaining possession. Introduction of condition of connexity might be expedient, but in different ways for commercial and civil right of retaining possession, and that would imply: 1) industrial-economic connexity (or complete elimination of this condition) for commercial right of retaining possession and 2) introducing the condition of connexity as a "natural connection", the same as in the Swiss law. That would be a precondition for civil and legal right of retaining possession, including possibility to contract the opposite: the absence of connexity in a particular case.

⁶⁶² These are: Austrian, German and Swiss law.

⁶⁶³ Art 2286 CC

⁶⁶⁴ These are: ABGB, BGB, ZGB, CC and ICC.

However, this solution is logically advocated by those countries which separately regulate civil and commercial right of retaining possession, and since this is not the choice of Serbian legislator (both in domestic positive law and in future proposals), this may be the reason for dismissing this approach. The fact is that certain number of countries from our sample, dismissed the condition of connexity, including Law on Obligations.

2. Second option is to maintain the current solution (establishing the right of retaining possession without the condition of connexity), but along with correction stipulated by 2011 Draft, which might be the best option, as it would imply fewer changes of the settled solution, and because returning back the condition of connexity could be also understood as a step back. Besides that, a part of the doctrine estimates that the reason why some legislators insist on the condition of connexity is the absence of general norm to eliminate the need for conditioning the right of retaining possession by connexity. Given that domestic positive law, as well a future proposal contains general norm on the right of retaining possession, this is a reason more for the regulation of the right of retaining possession to be left without the condition of connexity.

Namely, the Preliminary Draft of Civil Code⁶⁶⁵ regulates this issue identically as the Law on Obligations. The condition of connexity is not mentioned there, so we unambiguously conclude that it is not essential for the emergence of the right of retaining possession. It means that the creditor will be able to retain any debtor's property in his possession, on any legal basis, independently from the source of a secured claim. On the other side, solution of 2011 Draft⁶⁶⁶ explicitly explains that condition of connexity is not part of factual set needed for the emergence of retention. This solution sets the rule, but also a permitted exception: the right of retaining possession *ex lege* without connexity is a rule, arranged connexity is an exception (with the so-called conventional right of retaining possession). A progress in the said legal proposal is conceptualization of contractual right of retaining possession, i.e. contractual connexity, as a possibility for contractors to potentially protect the interest of the creditor (as a party affected by the right of retaining possession).

Key element of this approach that does not require the existence of connexity, is in our opinion, that the creditor is always the creditor, whether he is a merchant or not, as in both cases his claim is endangered. Apart from this, the argument according to which connexity protects the debtor/non merchant, in order to proportionally protect interests of the creditor and the debtor, is not entirely correct. Namely, there is no proportion when it comes to protection of two parties' interests in this civil and legal relation, since this is not about two sides, whose *bona fides praestare* should be extra protected. Debtor's interest should not be additionally protected by introducing new conditions, as it will make the right of retaining possession difficult to establish, because the debtor is "guilty", i.e. the one who brought himself in that position by not having settled the due debt. The right of retaining possession is the means for protecting the creditor, and for restoring the balance previously disturbed by the debtor. Conditions serve only to prevent the unlawful outcome while establishing the right of retaining possession, and not to additionally protect the debtor, because the very idea of accepting the right of retaining possession only implies that we chose to protect the creditor *a priori*. The better and more efficient this protection is, the better the right of retaining possession is conceived-which is the benchmark of its expediency.

Due to the all above, we consider the best solution is the one that completely eliminates connexity, as a condition for establishing the right of retaining possession, as it is in accordance with: contemporary tendency to maximize the scope of the right of retaining possession, easing the conditions for its establishment (rather than making it more difficult); solutions of new laws which do not introduce this condition with Serbian positive law (Law on Obligations), and finally the European Union solution, which the national solution should be harmonized with.

⁶⁶⁵ Cf. art 477 Draft Civil Code of Republic of Serbia and art. 286 par. 1 Law on Obligations of Republic of Serbia

⁶⁶⁶ Art. 522 par. 4 Draft Code of Property and Other Real Rights of Republic of Serbia from 2011., retrieved from: <https://ius.bg.ac.rs/wp-content/uploads/2020/10/NACRT-ZAKONIKA-O-SVOJINI.pdf>.

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