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UTICAJ STEČAJA I PRIVREMENIH MERA NA MEĐUNARODNI DOKUMENTARNI AKREDITIV

Ni posle više od četvrt veka pravni koncepti i pitanja iz ovog clanka objavljenog u Jugoslovenskom bankarstvu br. 6 iz 1984. godine nisu izgubili od aktuelnosti. Čak iako je dokumentarni akreditiv otada kroz UCP evoluirao u smislu da više nema opozivog akreditiva, vrednost ovog rada nije umanjena.

times past, times present

IMPACT OF BANKRUPTCY AND INJUNCTIONS ON INTERNATIONAL LETTERS OF CREDIT



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Not even after more than a quarter of a century legal concepts and issues addressed in this article published in Jugoslovensko bankarstvo magazine No. 6 from 1984 have lost their relevance. Even though the documentary credit has evolved since then through UCPs in the sense that there is no more revocable letter of credit, the value of this paper has not been diminished.

Poslovni partneri u međunarodnoj trgovini žele što veću sigurnost u pogledu ispunjenja uzajamnih ugovornih obaveza. Tu sigurnost ugrožavaju prostorna udaljenost stranaka i (ne)mogućnost realne procene kreditne sposobnosti poslovnog partnera. U međunarodnoj robnoj razmeni pojavljuju se još različitost pravnih sistema, divergirajući trgovački običaji, unapred nesagledive državne mere, smetnje u odnosu valuta i drugo, kao faktori koji u još većoj meri kriju u sebi opasnosti i znače nesigurnost.¹ Radi uklanjanja navedenih opasnosti i svođenja na minimum dejstva faktora rizika, poslovni partneri ugovaraju plaćanje posredstvom međunarodnog dokumentarnog akreditiva, gde na mesto kupca stupa akreditivna banka, koja garantuje plaćanje, ukoliko se prethodno ispune određeni uslovi.

U poslednje vreme bilo je u našoj dnevnoj štampi objavljeno nekoliko slučajeva stečaja inostranih partnera, sa težim posledicama po naše izvoznike. Zato je zanimljivo da se ispita položaj stranaka u poslu međunarodnog akreditiva nakon otvaranja stečaja nad imovinom nekog od učesnika u poslu akreditiva.

U našem pravnom sistemu je institut stečaja regulisan u Zakonu o sanaciji i prestanku organizacija udruženog rada iz 1980. godine. Stečajni postupak je vrsta izvršenja, i to generalnog, ili opšteg izvršenja na imovini insolventnog dužnika. U stečajnom postupku se pleni, odnosno oduzima pravo upravljanja celokupnom imovinom stečajnog dužnika radi zajedničkog i srazmernog namirenja svih poverilaca.² Stečaj je posebnim zakonima i na sličan način regulisan u pravima većine drugih zemalja.

Stečaj i međunarodni dokumentarni akreditiv

Pravne posledice otvaranja stečajnog postupka nastaju danom isticanja oglasa o otvaranju stečajnog postupka na sudskoj tabli i one deluju do okončanja postupka. Za materiju akreditiva su naročito važne posledice otvaranja

stečajnog postupka na nalog i na ponudu za zaključenje ugovora, kao i na ugovor.

Nalozi i ponude stečajnog dužnika gube važnost ako do otvaranja stečajnog postupka nisu bili prihvaćeni. U toku stečajnog postupka načelno se ne mogu zaključivati novi pravni poslovi. Dopušteno je okončanje započetih poslova čije završavanje je neophodno da bi se sprečilo nastupanje štete na imovini stečajnog dužnika. Novi ugovori se mogu sklapati samo radi unovčenja imovine stečajnog dužnika. Dvostrani teretni ugovori, zaključeni sa stečajnim dužnikom pre otvaranja stečajnog postupka, ostaju na snazi. Međutim, stečajni upravitelj ima pravo da odustane od ugovora, osim kada je jedna od ugovornih strana već u celosti ispunila svoju ugovornu obavezu.

Otvaranjem stečajnog postupka sva potraživanja stečajnog dužnika postaju dospelim, a nenovčana potraživanja se pretvaraju u novčani oblik. Za imaoca akreditivne menice zanimljiva je odredba člana 42. Zakona o menici iz 1946. godine, prema kojoj on ima pravo na regres prema meničnim dužnicima u slučajevima stečaja nad imovinom trasata, i to pre dospeća menice. Ako se menica ne sme podnositi na akcept, onda imalac menice ima pravo na regres pre dospeća u slučaju otvaranja stečaja nad imovinom trasanta. Poverioci stečajnog dužnika se pozivaju da svoja potraživanja prijave u roku od 30 dana od dana objavljivanja oglasa u Službenom listu SFRJ.

Poverioci stečajnog dužnika se dele na privilegovane, tj. na poverioce stečajne mase koji se namiruju u punom iznosu, i na nepriviligovane, tj. na poverioce koji se namiruju srazmerno raspoloživoj stečajnoj masi. Kod nas je ukinuto svrstavanje u poverilačke redove, pa su svi nepriviligovani poverioci svrstani u jedan red i njihova potraživanja se smatraju jednakim. U nekim zemljama postoji svrstavanje poverilaca u redove, pa se poverioci nižeg ranga namiruju srazmerno ostatku stečajne mase tek nakon potpunog namirenja nepriviligovanih poverilaca višeg ranga.

¹ Eisemann/Eberth: "Das Dokumenten Akkreditiv im Internationalen handelsverkehr", Verl. Ges. Recht u. Wirtschaft mbH, Heidelberg, 1979, str. 37

² Velimirović: "Prestanak organizacija udruženog rada", Pravni fakultet, Novi Sad, 1977, str. 67.

Business partners in international trade strive for the highest possible safety in terms of fulfilling the mutual contractual obligations. This safety is jeopardized by the distance between the parties and the (in)ability of realistic assessment of the business partner's creditworthiness. What is also present in the international commodity exchange are the differences in legal systems, divergent trading customs, unforeseeable government measures, currency-wise hindrances, etc., as the factors which pose even greater threats and cause insecurity¹. In order to eliminate the above mentioned dangers and minimize the effects of risk factors, business partners arrange payments by means of international letter of credit, whereby the issuing bank, guaranteeing the payment, acts on behalf of the buyer, if certain conditions are previously met.

Several cases of bankruptcy of foreign partners, with serious repercussions for our exporters, have recently been featured in our daily papers. Therefore, it is interesting to examine the position of the parties participating in the international letter of credit transaction, after the insolvency proceeding is launched with one of the participants in the letter of credit transaction.

In our legal system, the institute of bankruptcy is regulated by the Law on Financial Rehabilitation and Liquidation of Organizations of Associated Labour from 1980. Insolvency proceeding is a type of enforcement, the so-called general enforcement, over the assets of the insolvent debtor. Within the insolvency proceeding, the insolvent debtor is seized, i.e. taken away the right to manage its entire assets, with a view to a multiple and proportionate settlement of receivables of all creditors.² Insolvency proceeding is regulated by special laws in a similar way in the legal systems of most countries.

Bankruptcy and international letters of credit

Legal consequences of launching a bankruptcy proceeding arise on the day the announcement about the launch of a bankruptcy proceeding is put on the court notice board, and are in effect until the completion of the procedure. What is particularly important in terms of letters of credit are the consequences of launching a bankruptcy proceeding on the order and the offer for contract conclusion, as well as on the contract itself.

Orders and offers of the insolvent debtor lose their validity if they have not been accepted by the time of bankruptcy proceeding launching. In the course of a bankruptcy proceeding, generally speaking, proper new transactions cannot be concluded. It is allowed to conclude already started transactions whose completion is necessary in order to prevent the damage to the insolvent debtor's assets. New contracts may be concluded only for the purpose of cashing in the assets of the insolvent debtor. Bilateral *quid pro quo* contracts, concluded with the insolvent debtor prior to the launch of the bankruptcy proceeding, remain in effect. However, the insolvency administrator has the right to terminate the contract, except when one of the contractual parties already fully met its contractual obligations.

Once a bankruptcy proceeding is launched, all receivables of the insolvent debtor become matured, and the non-monetary receivables turn into monetary. What is interested for a holder of a letter of credit bill of exchange is the provision of Article 42 of the 1946 Bill of Exchange Law, according to which this holder has the right of recourse towards bill of exchange debtors in case of bankruptcy of the drawee, even if the bill of exchange is not matured yet. If the bill of exchange must not be submitted for acceptance, then the bill of exchange holder has the right of recourse before maturity in case of bankruptcy of the drawer. The creditors of the insolvent debtor

¹ Eisemann/Eberth: "Das Dokumenten Akkreditiv im Internationalen Handelsverkehr", Verl. Ges. Recht u. Wirtschaft mbH, Heidelberg, 1979, p.37

² Velimirović: "Prestanak organizacija udruženog rada", Pravni fakultet, Novi Sad, 1977, p.67

2.1. Stečaj nad imovinom nalogodavca

2.1.1. Uticaj stečaja na osnovni ugovor

Kada je nad imovinom nalogodavca otvoren stečajni postupak, onda može da nastane nekoliko situacija. Ukoliko je nalogodavac ispunio svoju ugovornu obavezu u celosti, onda je njegov ugovorni partner - korisnik akreditiva takođe dužan da ispuni svoj deo obaveze. Ugovor ostaje nedirnut. Suprotno ovome, kada je korisnik akreditiva ispunio svoju obavezu u celosti, onda on više ne može da zahteva ispunjenje od nalogodavca, već svoje potraživanje, koje je sada i dospelo, može samo da prijavi stečajnom upravniku kao nepriviligovani poverilac.

Drukčije je kada još nijedna ugovorna strana nije u celosti ispunila svoju ugovornu obavezu. Onda poslovni partner stečajnog dužnika ima pravo da opstanak ugovora uslovi zahtevom da ugovorne obaveze u potpunosti prvi izvrši stečajni dužnik. Tako bi se poslovni partner stečajnog dužnika pretvorio u privilegovanog poverioca, pa bi u potpunosti obezbedio svoje potraživanje. Međutim, kada stečajni upravnik neće da udovolji zahtevu poverioca, onda poverilac ima pravo da raskine ugovor i da istakne zahtev za naknadu štete zbog neispunjenja, ali svoje potraživanje može da prijavi samo kao nepriviligovani poverilac. Kada stečajni upravnik odabere neizvršenje, onda poverilac uvek ima pravo na naknadu stvarne štete, ali ne i na izgublenu dobit, s tim što se smatra nepriviligovanim poveriocem.

Uticaj stečaja na nalog za otvaranje akreditiva

Pravna posledica otvaranja stečajnog postupka je da nalog za otvaranje akreditiva gubi važnost, ukoliko akreditiv nije ranije bio otvoren. Zato banka u ovom slučaju neće ni otvoriti akreditiv. Ako je akreditivno pokriće primila unapred, ona će be biti obavezna da ga vrati stečajnom dužniku - u stečajnu masu. Pre toga banka ima pravo da se naimiri za svoja potraživanja po osnovu provizije i eventualnih troškova po tom akreditivu. U tu svrhu ima eventualno založno pravo na pokriće akreditiva.

Stečajni upravnik nalogodavac može naknadno da osnaži nalog za otvaranje akreditiva. Banka je u tom slučaju privilegovani poverilac stečajne mase, kako za iznos pokrića

akreditiva, tako i za svoju proviziju i troškove. Ako se odluči na otvaranje akreditiva, onda će se posao akreditiva normalno odviti.

Banka će se naći u neugodnom položaju ako je pre otvaranja stečajnog postupka već prihvatila nalog i otvorila akreditiv. Ako je akreditiv bio opoziv, banka će ga svakako odmah opozvati, ali će opoziv biti moguć samo ako akreditiv još nije bio isplaćen od isplatne banke. Neopozivi akreditiv ostaje na snazi uprkos stečaju nad imovinom nalogodavca, pa će banka svoje troškove i proviziju moći da naplati samo iz stečajne mase kao nepriviligovani poverilac. Po banku je još nepovoljnije ako nije primila pokriće akreditiva ili ga je primila samo delimično, jer će i za iznos pokrića akreditiva biti samo nepriviligovani poverilac stečajne mase. Ukoliko se predviđa honorisanje akreditiva akceptom menice, onda će akreditivna banka morati da snabde menicu svojim akceptom i da je isplati po dospeću. Ako je nalogodavac akceptnog akreditiva već akceptirao menicu pre otvaranja stečaja, onda takva akreditivna menica postaje dospelom danom otvaranja stečajnog postupka, pa će akreditivna banka morati da je isplati remitentu, a za iznos isplate će biti nepriviligovani poverilac stečajne mase. No, kada se realizuje otvoreni akreditiv, tada akreditivna banka dolazi u posed akreditivnih dokumenata, nad kojima ima založno pravo. Od kvaliteta akreditivnih dokumenata zavisi, da li će akreditivna banka moći da se namiri iz te zaloge, i do kog iznosa, kao i da li će moći da spreči prelazak robe u državinu stečajnog dužnika.

Stečaj nad imovinom banke

Pre otvaranja akreditiva nalogodavac ima pravo da povuče nalog za otvaranje akreditiva; to pravo mu nije uskraćeno otvaranjem stečajnog postupka nad imovinom banke. Ukoliko još nije preneo pokriće akreditiva, on ga neće ni prenositi. Za pretrpljenu štetu može da postavi odštetni zahtev kao nepriviligovano potraživanje. Akreditivi se neće otvoriti preko te banke, ali nalogodavac ostaje u obavezi iz osnovog ugovora da otvori akreditiv - preko neke druge banke. Nalogodavac će biti u teškom položaju ako je unapred preneo pokriće akreditiva jer će ovaj iznos moći da prijavi samo

are invited to report their claims within 30 days from the day of publishing the announcement in the Official Gazette of the SFRY.

The creditors of the insolvent debtor can be privileged, i.e. the creditors of the insolvent estate whose claims are to be settled in full amounts, and non-privileged, i.e. the creditors whose claims are to be settled in the amount proportionate to the available insolvent estate. Our country abolished the classification into creditors' orders, hence all non-privileged creditors are classified in a single order and their claims are considered equal. In some countries the creditors are classified into orders, hence the lower-ranked creditors are settled proportionately from the remaining insolvent estate only after the higher-ranked non-privileged creditors are settled.

Bankruptcy of the applicant

Impact of bankruptcy on the underlying contract

When the applicant is undergoing a bankruptcy proceeding, then there are several potential scenarios. If the applicant fully met its contractual obligations, then its contractual partner – letter of credit beneficiary is also bound to meet its part of obligations. The contract remains intact. In contrast, when the letter of credit beneficiary fully meets its obligations, then he cannot demand from the applicant to meet his part of obligations. He can only report his claims, now matured, to the insolvency administrator, in the capacity of a non-privileged creditor.

The situation is different when none of the parties have fully met their respective contractual obligations. In that case, the business partner of the insolvent debtor has the right to condition the extension of the contract's validity by requesting the insolvent debtor to be the first to fully meet the contractual obligations. Thus, the business partner of the insolvent debtor would turn into a privileged creditor, and would fully secure his claims. However, if the insolvent debtor refuses to meet the creditor's request, the creditor has the right to terminate the contract and file a request for breach of contract remuneration, yet he can only report his claims as a non-privileged creditor. If the insolvent debtor chooses not to effect the payment, the creditor always has the

right to the compensation of real damage, but not to the lost profit, being considered a non-privileged creditor.

Impact of bankruptcy on the letter of credit issuing order

The legal consequence of launching a bankruptcy proceeding is that the letter of credit issuing order becomes null and void, if the letter of credit was not issued beforehand. Hence the bank shall refuse to open the letter of credit in this case. If it received the letter of credit coverage in advance, it will be bound to reimburse it to the insolvent debtor – as part of the insolvent estate. Prior to that, the bank has the right to settle its claims in respect of fees and potential costs incurred by the concerned letter of credit. For this purpose, the bank enjoys potential right of pledge on the letter of credit coverage.

Insolvency administrator of the applicant may subsequently enforce the letter of credit issuing order. In that case, the bank acts as a privileged creditor of the insolvent estate, both in respect of the letter of credit coverage amount, and of its fees and costs. If the bank opts for issuing the letter of credit, then the letter of credit transaction will be conducted normally.

The bank will find itself in an awkward position if it had accepted the order and issued the letter of credit before the bankruptcy proceeding was launched. If the letter of credit was revocable, the bank will certainly revoke it immediately, but the annulment will be possible only if the letter of credit has not been paid out yet by the paying bank. The irrevocable letter of credit remains valid despite the bankruptcy of the applicant, hence the bank will be able to charge its fees and costs only from the insolvent estate as a non-privileged creditor. What is even more unfavourable for the bank is if it did not receive the letter of credit coverage or if it did receive it partially, because, even it will act only as a non-privileged creditor of insolvent estate for the letter of credit coverage amount. If the letter of credit is expected to be honoured by the bill of exchange acceptance, the issuing bank will have to accept its bill of exchange and to honour it upon maturity. If the applicant of the acceptance letter of credit already accepted the bill of exchange prior

kao nepriviligovano potraživanje; pošto novac nije individualno određena stvar on neće imati izlučno pravo.³

Ako nalogodavac ne opozove nalog za otvaranje akreditiva, onda stečajni upravnik banke može da bira između izvršenja i neizvršenja. Kada odabere neizvršenje, onda je pravna situacija kao u prethodnom stavu. U suprotnom slučaju banka može da otvori akreditiv koji će se zatim moći normalno odviti jer korisnik akreditiva postaje poverilac sa privilegovanim statusom. Nakon honorisanja akreditiva banka na dokumentima ima založno pravo, a nalogodavac stiče izlučno pravo. Nalogodavac je isto tako poverilac sa privilegovanim položajem.

Nalogodavac ne može više da opozove nalog za otvaranje akreditiva koji je bio otvoren pre otvaranja stečajnog postupka nad imovinom banke. Njegovi dugovi postaju dospel, a potraživanja će moći da prijavi kao nepriviligovani poverilac. Stečajni upravnik banke neće moći da opozove akreditiv koji je banka otvorila kao neopozivi, ali će takav akreditiv verovatno ostati neiskorišćen jer bi korisnik akreditiva bio poverilac banke sa nepriviligovanim statusom. Ukoliko bi podneo dokumenta, ona bi se honorisala samo srazmerno potraživanjima iz stečajne mase, i to nakon okončanja stečajnog postupka. Ali, ako bi dokumenta bila honorisana pre otvaranja stečajnog postupka, banka bi mogla da ih zadrži kao zalogu, s tim što bi nalogodavac imao pravo da izlučnom tužbom dođe do dokumenata a preko njih i do robe.

Slična pravna situacija nastaje kod otvaranja stečajnog postupka nad imovinom potvrđujuće banke, ali je jasno da to ne utiče mnogo na posao akreditiva, jer u obavezi ostaje akreditivna banka kojoj će se korisnik akreditiva obraćati za honorisanje. Stečaj nad imovinom drugih banaka nema uticaj na posao akreditiva; u obavezi ostaju akreditivna i eventualna potvrđujuća banka. Ovi stečajevi bi imali nekog uticaja samo na odnose između banaka, ali ne bi dirali u prava i obaveze nalogodavca i korisnika akreditiva.

Stečaj nad imovinom korisnika akreditiva

Odnos akreditivne banke i korisnika akreditiva nije dvostran i teretan. Banka ima samo obaveze, dok korisnik akreditiva ima samo prava i ovlašćenja. Zbog toga je stečaj nad imovinom korisnika akreditiva u principu bez uticaja na posao akreditiva. Ukoliko je akreditiv bio opoziv, banka i nalogodavac će verovatno nastojati da ga odmah opozovu.

Neopozivi akreditiv stoji na raspolaganju stečajnom upravniku korisnika akreditiva koji može da bira između izvršenja i neizvršenja. Kada se odluči za izvršenje, on će banci podneti akreditivna dokumenta, što dokazuje da je izvršio osnovnu obavezu iz kupoprodajnog ugovora, pa će banka biti dužna da iznos akreditiva isplati u korist stečajne mase. Kada se odluči za neizvršenje, akreditiv će ostati neiskorišćen.

Kada bi se dogodilo da korisnik akreditiva podnese dokumenta na naplatu pre otvaranja stečajnog postupka, koja banka još nije honorisala, banka će biti obavezna da iznos akreditiva isplati u korist stečajne mase.

Stečaj nad imovinom prvog korisnika kod prenosivog akreditiva

Ovde mogu da se pojave razne situacije, ali je osnovno da je banka u teškom položaju kada stečajni upravnik odabere neizvršenje. Drugi korisnik akreditiva, ili više njih, moći će nesmetano da uživaju na njih prenet deo neopozivog prenosivog akreditiva, a banka neće moći da se za takve isplate naplati iz osnovnog akreditiva ako joj je za to potrebno sadejstvo prvog korisnika, jer će prvi (osnovni) akreditiv da ostane neiskorišćen. Isplaćene iznose će banka moći da prijavi samo kao nepriviligovano potraživanje od stečajne mase. Nešto što je povoljnije po banku kada se radi o pravom prenosivom akreditivu, jer će banka moći da se naplati iz osnovnog akreditiva bez pomoći prvog korisnika akreditiva. Iznos isplate po prenetom akreditivu bio bi manji od iznosa osnovnog akreditiva za iznos marže prvog korisnika akreditiva, pa bi nalogodavac došao do jeftinije robe. Pošto bi ovo bilo ravno izvršenju na imovini stečajnog dužnika, to bi

³ Zahn: „Zahlung and Zahlungssicherung im Aussenhandel“, Berlin - New York, 1976, str. 198.

to the bankruptcy proceeding launch, such a letter of credit bill of exchange matures on the day of bankruptcy proceeding launch, and the issuing bank will have to honour it to the payee, being a non-privileged creditor of the insolvent estate for the amount paid. However, when an issued letter of credit is realized, the issuing bank comes into possession of letter of credit documents, over which it has the right of pledge. It depends on the quality of letter of credit documents whether the issuing bank will be able to settle its claims from this pledge, and in which amount, and also whether it will be able to prevent the goods from coming into possession of the insolvent debtor.

Bankruptcy of the bank

Prior to the letter of credit issuing, the applicant has the right to withdraw the letter of credit issuing order; this right remains valid despite the launch of a bankruptcy proceeding over the bank's assets. If the letter of credit coverage was not transferred, it will not be transferred at all. The applicant may file a remuneration request for the incurred damage, as a non-privileged claim. The letter of credit will not be issued via that bank, but the applicant remains bound by the underlying contract to have the letter of credit issued via another bank. The applicant will find itself in a tough position if the letter of credit coverage was transferred beforehand, because it will only be able to report it as a non-privileged claim – since money is not an individually defined concept, the applicant will have no secured rights.³

If the applicant does not revoke the letter of credit issuing order, the insolvency administrator of the bank may choose between execution and non-execution. If he chooses non-execution, the situation is legally the same as in the previous case. In contrast, the bank may issue the letter of credit that will then be normally conducted, since the letter of credit beneficiary gains the status of a privileged creditor. After honouring the letter of credit, the bank has the right of pledge on the documents, and the applicant gains the secured rights. The applicant also enjoys the status of a privileged creditor.

The applicant cannot revoke the letter of credit issuing order that had been issued before the bankruptcy proceeding was launched. His debts are now deemed matured, and he can report his receivables as a non-privileged creditor. The bank's insolvency administrator will not be able to revoke the letter of credit that the bank issued as an irrevocable l/c, but such a letter of credit will probably remain unutilized because the letter of credit beneficiary would bear the status of a non-privileged creditor of the bank. If he submitted the documents, they would be honoured proportionately to the insolvency estate, and only after the completion of the insolvency proceeding. However, if the documents were honoured prior to the bankruptcy proceeding launch, the bank could keep them as a pledge, in which case the applicant could gain the documents, and through them, the goods, by filing a secured-rights lawsuit.

A similar legal situation occurs when the bankruptcy proceeding is launched in the confirming bank, but clearly, this does not have a major impact on the letter of credit transaction, since the issuing bank remains liable, and the letter of credit beneficiary will turn to it for the purpose of honouring. The bankruptcy of other banks does not impact the letter of credit transaction; the issuing bank and the potential confirming bank remain liable. Their bankruptcy would only have some impact on the inter-bank relations, but would not influence the rights and obligations of the letter of credit applicant and beneficiary.

Bankruptcy of the beneficiary

The relationship between the issuing bank and the letter of credit beneficiary is not bilateral and encumbering. The bank has only liabilities, whereas the letter of credit beneficiary has only rights and authorizations. Therefore, the bankruptcy of the letter of credit beneficiary, in effect, bears no influence on the letter of credit transaction. If the letter of credit was revocable, the bank and the applicant will probably tend to revoke it promptly.

The irrevocable letter of credit is at the

³ Zahn: "Zahlung und Zahlungssicherung im Aussenhandel", Berlin – New York, 1976, p. 198

nalogodavac postao dužnik stečajne mase za iznos te marže.

Slični problemi i rešenje mogući su i kod otvaranja stečajnog postupka nad imovinom korisnika originalnog akreditiva po čijem nalogu je bio otvoren podakreditiv, s tim što banka može da dođe u još težu situaciju, jer je skoro redovan slučaj da su akreditivna dokumenta po podakreditivu nepodobna za naplatu iz originalnog akreditiva.

Plenidbe i privremene naredbe

Plenidbe

Po prirodi stvari predmet prinudnog izvršenja u poslu akreditiva mogu da budu samo dokumenta ili novac. Ukoliko dokumenta ne bi sadržavala hartije od vrednosti, onda se plenidbom praktično ne bi dobilo ništa. Novac, kao predmet prinudnog izvršenja, može da bude u vidu pokrića akreditiva, koji se nalazi kod neke od banaka, ili kod korisnika akreditiva kada je akreditiv već honorisan. Izvršenje mogu da zahtevaju poverioci nalogodavca ili korisnika akreditiva, kao i sam nalogodavac, ili korisnik akreditiva.

Za poverioce nalogodavca se kao predmet prinudnog izvršenja pojavljuju:

1. Pokriće akreditiva koje je nalogodavac preneo na banku, kada akreditiv još nije korišćen, ili je korišćen samo delimično;
2. Dokumenta, kada je akreditiv iskorišćen, ili je bio delimično korišćen; i
3. Prava iz osnovnog ugovora nezavisno od akreditiva.

U poslu međunarodnog dokumentarnog akreditiva je neosporno da se pokriće po akreditivu, koje se nalazi kod neke banke, ne može pleniti sve dotle dok akreditivu ne istekne rok trajanja, odnosno dok se ne opozove, ako je akreditiv bio otvoren kao opoziv. Inače bi akreditivna banka bila nezaštićena, pa bi se moglo dogoditi da joj se zapleni pokriće akreditiva koji još traje za korišćenje i kojeg bi ona morala honorisati.

Kada se banci uruči nalog za prinudno izvršenje, ona ne bi mogla više da udovoljava zahtevima nalogodavca za produženje rokova

ili za povećanje akreditiva. Postoje mišljenja da bi se kod opozivih akreditiva mogao prinuditi nalogodavac ili banka na oslobađanje pokrića akreditiva, koje bi se zatim moglo pleniti. Takva mišljenja se ne mogu prihvatiti, jer je akreditiv otvoren u korist korisnika akreditiva. Pokriće akreditiva bi se moglo pleniti tek ako korisnik akreditiva propusti da se koristi svojim pravom, pa akreditiv ostane neiskorišćen, ili ako se korisnik akreditiva izričito saglasi sa opozivanjem akreditiva, jer, ovde se u suštini pleni pravo nalogodavca na povraćaj pokrića akreditiva. Nalogodavac ima pravo da po svom nahođenju opozove opozivi akreditiv, ali se on na taj korak ne može prisiliti.⁴

Kada se posao akreditiva normalno odvije, onda više ne postoji pokriće akreditiva koje bi se moglo pleniti. Zato sada postoji pravo nalogodavca na uručenje akreditivnih dokumenata, koje se da pleniti. Ovo bi bilo interesantno samo ako bi se posredstvom zaplenjenih dokumenata moglo steći državinu i svojinu na robi, pa i to samo onda kada dotična roba nije već preopterećena. Nakon uspele plenidbe bi se dokumenta morala predati sudskom izvršitelju s tim što bi banka pre toga na njima imala založno pravo.

Pravo iz osnovnog ugovora nezavisno od akreditiva se ovde spominje samo radi potpunosti i radi toga da se ukaže na mogućnost da nalogodavac i korisnik akreditiva sporazumno mogu da izigravaju nalog za prinudno izvršenje, koji bi bio usmeren samo na pokriće akreditiva ili na dokumenta. Plenidba može da bude efikasna onda kada poverilac nalogodavca simultano zahteva plenidbu svih triju prava.

Za poverioce korisnika akreditiva su kao predmet izvršenja zanimljiva dva prava:

1. zahtev za isplatu iznosa akreditiva, i
2. prava korisnika akreditiva iz osnovnog ugovora nezavisno od akreditiva.

Ovlašćenje korisnika akreditiva za prezentaciju akreditivnih dokumenata se ne može pleniti, međutim kada korisnik akreditiva podnese akreditivna dokumenta, onda on stiče pravo na isplatu iznosa akreditiva koje se može pleniti. Korisnik akreditiva vrlo lako može da

⁴ Zahn: „Zahlung und Zahlungssicherung im Aussenhandel“, Berlin - New York, 1976. str. 187

disposal of the beneficiary's insolvency administrator who may choose between execution and non-execution. If he chooses the execution, he will submit the letter of credit documents to the bank, proving that he fulfilled the underlying obligation from the sale-purchase agreement, after which the bank will be bound to honour the letter of credit amount to the insolvent estate. If he opts for non-execution, the letter of credit will remain unutilized.

In case the letter of credit beneficiary submitted the documents, still not honoured by the bank, for collection, prior to the bankruptcy proceeding launch, the bank shall be bound to honour the letter of credit amount to the insolvent estate.

Bankruptcy of the primary beneficiary concerning transferrable letters of credit

Various situations can occur in this case, but the main thing is that the bank is in a difficult position when the insolvency administrator opts for the non-execution. The second beneficiary, or several of them, will be able to unconditionally enjoy the part of the irrevocable transferrable letter of credit transferred to them, and the bank will not be able to receive such payments from the underlying letter of credit if this requires the participation of the primary beneficiary, since the first (underlying) letter of credit will remain unutilized. The bank will be able to report the disbursed amounts only as a non-privileged claim to the insolvent estate. The situation is a bit more favourable for the bank if there is a proper transferrable letter of credit, because the bank will be able to collect its claims from the underlying letter of credit without the assistance of the first beneficiary. The amount paid in respect of the transferred letter of credit would be smaller than the amount per letter of credit by the margin amount of the first beneficiary; hence the applicant would gain the goods for a lower price. Since this would equal an execution on the insolvent debtor's assets, the applicant would become a debtor of the insolvent estate in the concerned margin amount.

Similar problems and solutions are possible regarding the launching of a bankruptcy proceeding in respect of the assets of the first beneficiary, to the order of whom the

subordinate letter of credit was issued. The bank may find itself in an even worse position because it frequently happens that the letter of credit documents in respect of the subordinate letter of credit are unsuitable for collection based on the original letter of credit.

Seizures and injunctions

Seizures

Due to the nature of things, the subject of a forced enforcement of a letter of credit transaction may be either documents or money. If the documents do not include any securities, then practically nothing would be gained by the seizure. Money, as the subject of an enforced performance, may be in the form of the letter of credit coverage, which is deposited with one of the banks or with the beneficiary when the letter of credit is already honoured. The enforcement may be requested by the applicant's or beneficiary's creditors, or by the applicant or beneficiary themselves.

For the applicant's creditors the subject of the forced enforcement may be the following:

1. Letter of credit coverage transferred to the bank by the applicant, when the letter of credit is not yet utilized, or has been utilized only in part;
2. Documents, when the letter of credit is utilized, or has been utilized only in part;
3. Rights according to the underlying contract, independently from the letter of credit.

In the international letter of credit transaction, it is indisputable that the letter of credit coverage, placed with a bank, can only be seized after the letter of credit's validity expires, i.e. after it gets revoked, if the concerned letter of credit was issued as irrevocable in the first place. Otherwise, the issuing bank would be unprotected, and it may happen that it has the letter of credit coverage seized, even though the concerned letter of credit is still open for utilization, and which it would then have to honour accordingly.

When a bank is sent the enforced performance order, it can no longer meet the applicant's requests for the extension of deadlines or for the letter of credit amount increase. Some experts think that in case of revocable letters of credit the applicant or

osujeti takav pokušaj plenidbe, jer može da ostavi akreditiv neiskorišćen.

Upravo zbog toga što postoji ta mogućnost, ovde se spominje pravo korisnika akreditiva iz osnovnog ugovora, koje se da pleniti. Tako bi se sprečilo da se nalogodavac i korisnik akreditiva dogovore za neki drugi način plaćanja, pa da sporazumno osujete pokušaj plenidbe. Dakle, da bi plenidba uspela poverilac i u ovom slučaju treba da zahteva simultano prinudno izvršenje nad oba prava korisnika akreditiva.

Privremene naredbe

Privremene naredbe u poslu akreditiva bi mogle da budu usmerene na:

1. privremenu naredbu zabrane isplate iznosa akreditiva, i
2. privremenu naredbu zabrane povraćaja iznosa akreditiva.

Dopustivost primene privremenih naredbi je kod posla kreditiva veoma sporna, jer kada bi se one olako primenjivale onda bi akreditiv izgubio poverenje. Toga su svesni sudovi koji se u većini slučajeva ne odlučuju na izricanje privremenih mera.⁵

Protiv dopustivosti privremenih mera se izjašnjava i pravna nauka,⁶ jer što bi vredela neopozivost akreditiva, kada bi se kod suda mogla ishoditi zabrana isplate iznosa akreditiva.

U našem pravu dozvoljeno je izdavanje privremenih naredbi, pa će banke eventualno morati da se povinuju izvršnom zahtevu i neće moći da isplate iznos akreditiva, odnosno neće smeti da nalogodavcu vrate pokriće akreditiva u slučaju da akreditiv ostane neiskorišćen. Narodna banka Jugoslavije je svojevremeno obavestila inostrane korespondente da će jugoslovenske banke poštivati sve odluke naših sudova u pogledu privremenih zabrana.

Zaključak

Razmatranje uticaja stečaja pokazuje da bi najveću opasnost po normalno odvijanje akreditivnog posla predstavljao stečaj akreditivne banke. Utešno je što se ova mogućnost skoro

nikad ne ostvaruje. Stečaj nad imovinom nalogodavca ne ugrožava odvijanje akreditivnog posla ali predstavlja opasnost za akreditivnu banku, naročito kad joj pokriće akreditiva nije bilo doznačeno unapred. Najmanji uticaj na posao akreditiva ima stečaj nad imovinom korisnika akreditiva.

Primena plenidbe u poslu akreditiva je nesporna i opravdana, uz izvesne ograde radi zaštite interesa banaka. Pleniti se mogu prava nalogodavca i prava korisnika akreditiva. Pokriće akreditiva je izuzeto od plenidbe do isteka roka trajanja akreditiva. Banke imaju založno pravo na akreditivna dokumenta, na iznos korišćenja po akreditivu i na pokriće akreditiva, radi namirenja svojih troškova i provizije po dotičnom poslu akreditiva.

Primena privremenih naredbi je u poslu akreditiva vrlo osporavana. Postavlja se dopustivost ovih mera, s obzirom na neopozivost akreditiva i na odvojenost pravnih odnosa u poslu akreditiva. Zatim, ovde postoji i čisto praktičan aspekt: akreditiv se, po pravilu, odvija mnogo brže nego što je neko u stanju da izdejstvuje primenu privremenih naredbi. Međutim, primena privremenih naredbi je u poslu akreditiva dozvoljena, samo sudije treba da vode računa da se one ne bi smele masovno primenjivati kako se ne bi doveo u pitanje privredni smisao posla akreditiva. Privremene naredbe bi mogle da ostanu rezervisane samo za slučajeve očigledne prevare, jer nijedan pravni institut, pa ni posao akreditiva, ne treba da pruža zaštitu nesavesnim licima, pošto „*fraus omnia corrumpit*“.

Vidi se da institut međunarodnog dokumentarnog akreditiva obezbeđuje vrlo dobru poziciju korisniku akreditiva u slučajevima otvaranja stečaja nad imovinom nekog od ostalih učesnika u poslu, i da plenidbe i privremene naredbe predstavljaju više teoretsku mogućnost, što upućuje na zaključak da naši izvoznici treba da ugovaraju plaćanje putem dokumentarnog akreditiva uvek kada je to objektivno moguće, kako ne bi bili izloženi dejstvu ovde razmatranih atipičnih pojava u akreditivnom poslovanju.

⁵ Rosenberg: „Pravo međunarodnih plaćanja u poslovnim transakcijama“, svezak drugi, Informator, Zagreb, 1975. str. 110

⁶ Zahn: „Zahlung und Zahlungssicherung im Aussenhandel“, Berlin - New York, 1976. str. 162, i Eisemann Eberth: „Das Dokumenten - Akkreditiv im Internationalen Handelsverkehr“, Heidelberg, 1979, str. 167

the bank may be forced to release the letter of credit coverage that could subsequently be seized. Such opinions cannot be accepted, because the letter of credit is issued in the name of the beneficiary. The letter of credit coverage could be seized only if the beneficiary passes the opportunity to use up his right, and thus the letter of credit remains unutilized, or if the beneficiary directly consents to the letter of credit annulment, since, in effect, it is the applicant's right to recover the letter of credit coverage that is being seized in this case. The applicant has the right to revoke the revocable letter of credit of his own will, but he cannot be forced to that step.⁴

When the letter of credit transaction takes place without any problems, then there is no letter of credit coverage to be seized. Therefore, the applicant now enjoys the seizable right to be handed the letter of credit documents. This right would be interesting only if, by means of seizing the letter of credit documents, one would gain tenure and ownership of goods, and even that on the condition that the concerned goods are not already overburdened. After the successful seizure, the documents would have to be submitted to the court bailiff, prior to which, however, the bank would have the right of pledge over these documents.

The right from the underlying contract, irrespective of the letter of credit, is mentioned here only for the sake of comprehensiveness, and for the purpose of indicating the possibility that the applicant and the beneficiary may agree to issue the enforced performance order that would be directed only at the letter of credit coverage or at the documents. The seizure may only be efficient when the applicant's creditor simultaneously demands the seizure of all three rights.

For the beneficiary's creditors two rights are interested as the subjects of enforcement:

1. Request for letter of credit amount disbursement; and
2. Rights of the beneficiary according to the

underlying contract irrespective of the letter of credit.

The authorization of the letter of credit beneficiary concerning the presentation of letter of credit documents cannot be seized, but, when the beneficiary submits the documents, he then gains the seizable right to receive the payment of the letter of credit amount. The beneficiary may easily hamper such a seizure attempt, because he may leave the letter of credit unutilized.

It is exactly due to this possibility that we hereby mention the seizable right of the beneficiary according to the underlying contract. Thus, the applicant and the beneficiary would be prevented from agreeing on some other means of payment, hence hampering the seizure attempt on purpose. So, in order for the seizure to be successful, the creditor in this case, too, needs to demand the simultaneous forced enforcement over both rights of the beneficiary.

Injunctions

Injunctions related to the letter of credit transaction could be directed at the following:

1. Injunction to ban the letter of credit amount disbursement; and
2. Injunction to ban the letter of credit amount recovery.

The acceptability of the injunctions implementation in case of letter of credit transactions is debatable, because if they were to be implemented too easily, the letter of credit would lose its credibility. Being aware of this, the courts in most cases do not opt for passing the injunctions⁵.

Legal science is also against the acceptability of injunctions⁶, because the irrevocable letters of credit would lose their point, if the courts were in the position to issue a ban on letter of credit amount disbursement.

According to our legal system, it will be permitted to issue injunctions, meaning that the banks will potentially have to obey the

⁴ Zahn: "Zahlung und Zahlungssicherung im Aussenhandel", Berlin – New York, 1976, p. 187

⁵ Rosenberg: "Pravo međunarodnih placanja u poslovnim transakcijama", Volume II, Informator, Zagreb, 1975, p. 110

⁶ Zahn: "Zahlung und Zahlungssicherung im Aussenhandel", Berlin – New York, 1976, p. 162, and Eisemann/Eberth: "Das Dokumenten Akkreditiv im Internationalen Handelsverkehr", Verl. Ges. Recht u. Wirtschaft mbH, Heidelberg, 1979, p.167



executive request and will not be able to disburse the letter of credit amount, i.e. they will not be allowed to return the letter of credit coverage to the applicant if the letter of credit remains unutilized. At one point, the National Bank of Yugoslavia informed its foreign corresponding banks that the Yugoslav banks will respect all decisions passed by our courts concerning injunctions.

Conclusion

This consideration of the impact of bankruptcy shows that the largest threat for the normal letter of credit transactions is represented by the bankruptcy of the issuing bank. It may be comforting to know that this possibility almost never gets realized. The bankruptcy of the applicant does not jeopardize the letter of credit transaction, but it does pose a threat to the issuing bank, especially when the letter of credit coverage was not submitted in advance. The lowest impact on letter of credit transactions is exerted by the bankruptcy of the beneficiary.

The implementation of seizures in letter of credit transactions is unquestionable and justifiable, with certain restraints for the sake of protection of banks' interests. What may be seized are the applicant's and beneficiary's rights. Letter of credit coverage is exempt from seizure until the expiry of the letter of credit's validity. The banks have the right of pledge on letter of credit documents, on the letter of credit utilization amount, and on the letter of credit coverage, with a view to settling their costs and

fees in respect of the concerned letter of credit transactions.

The implementation of injunctions is rather disputed in letter of credit transactions. The permissibility of these injunctions has been questioned, given the irrevocable nature of the letter of credit and the separated legal relations in letter of credit transactions. Furthermore, this issue also has a purely practical aspect: the letter of credit, as a rule, takes place much more quickly than someone is capable of procuring the implementation of injunctions. However, the implementation of injunctions is permitted in letter of credit transactions, although the judges need to take care that they should not be implemented on a mass scale, in order to avoid jeopardizing the commercial purpose of the letter of credit transaction. Injunctions may remain reserves for the cases of obvious fraud, because no legal institute, including letters of credit, should provide protection to unscrupulous persons, since "fraus omnia corrumpit".

It may be observed that the institute of international documentary letter of credit provides a rather sound position to the beneficiary in case of bankruptcy of one of the remaining participants in the transaction, and that seizures and injunctions represent more of a theoretical possibility, which points to the conclusion that our exporters should arrange payments by means of documentary letter of credit whenever it is objectively possible, so as to avoid the exposure to the impact of the herewith considered atypical phenomena in respect of letter of credit transactions.