• INSIGHT | TRUST | PASSION •

LEGAL BRIEFING – Dispute Resolution & Restructuring

by Sotiris Foteas – Partner

Securities over assets: Towards a limited protection?

1 April 2021

s.foteas@aklawfirm.gr

Rights *in rem* and especially securities over immovable property have always been a keystone of the collateral arsenal within the Greek legal order. The prenotation of mortgage (προσημείωση υποθήκης), being ordered by a Court decision on a consensual or non-consensual basis as an interim provisional measure, is acknowledged by the Greek loans market as a traditional mechanism offering security to the creditor and assuring ranking privilege to its beneficiary (through its "upgrade" to mortgage upon specific conditions) in the process of liquidation of the asset. The framework is of course completed by rights in rem *stricto sensu* (mortgage over immovable and pledge over movable property) in their general concept of the Civil Code or versions introduced by special legislation, all the above in parallel with securities provided for by concepts not related to specific assets (e.g. personal guarantee).

Recent case-law

Pursuant to two recent judgements (1056/2020, 264/2020) on the ranking of secured creditors following an auction, the Supreme Court has elaborated with some significant findings on the scope of the constitutional protection of such security rights *in rem*. More precisely, the Supreme Court has pronounced in favor of a *narrow approach* in the protective interpretation of property rights (as provided for in texts of constitutional primacy and/or of relevant supremacy over general provisions), explicitly stating that such protection is not extended to such rights established for security purposes.

This rationale has backed the Court's final ruling to dismiss the allegations invoking the non-conformity to the Constitution of any laws amending the ranking of privileges which are attached to security property rights (namely, the relevant provisions of the Greek Code of Civil Procedure setting or amending the ranking criteria).

In this context, the Supreme Court has introduced a rather unnecessary rupture in the unity of the constitutional protection, on the basis of the *ratio* behind the establishment of the property right. According to the judgement, security property rights deserve less protection than the other property rights. Tracing the protective scope of the Constitution, the Court indeed directly excluded therefrom the "security rights" (εμπράγματες ασφάλειες) rather than the privilege of ranking (προνόμιο) arising therefrom (which would have been reasonable). According to its exact wording, the Court considered that it is out of the protective scope not the privilege of ranking deriving from the right, but the right itself. However, to the extent that *security* is acknowledged by law as a legitimate *causa* for the establishment of specific property rights and is inherent to their notional scope (contrarily to the forbidden transfer of immovable property for such purposes: "καταπιστευτική μεταβίβαση κυριότητας ακινήτου"), this judgment appears to be inconsistent with the doctrine and the case-law of the ECHR. Security is not a *causa* of reduced quality compared to others and does not give rise to limited constitutional protection.

Miswording or conscious narrowing?

As implied above, the matter does not coincide with the judgement on the conformity with the Constitution of the law amending the ranking of privileges. The Supreme Court could easily have ruled in favor of such conformity without any further judgements on the objective scope of the constitutional protection. Amending the practical effect of established rights in enforcement proceedings does not mean *per se* that those rights are not worthy of protection. More precisely, accepting in principle those rights as constitutionally protected does not prevent the general provisions from introducing terms and conditions in the exercise or the efficiency of such rights, even with a retroactive effect. These amendments could have been found in conformity with the Constitution, even if affecting rights that are constitutionally protected *rationae materiae*. In other words, it would have been more convincing for the matter to be delimited not with respect to the objective scope of the constitutional protection (namely, which rights are protected) but in respect with the extent of such protection (namely, which legislative or other statutory amendment constitutes an infringement in the protected notion of the right=how far the limitation of the right may go). The Court provides some relevant findings related to the general public interest requirements and the proportionality principle in order to articulate the judicial control of the limitation, but its explicit wording excluding the "rights" (and not the ranking privilege arising therefrom) from the scope of the protection remains and provokes numerous questions.

Is that judgement an obiter dictum of the Court (in an attempt to effectively support choices made by the law-makers) which opens a "window" to further restrictions in securities in rem or just a simple miswording?

It is now of crucial importance to follow the subsequent case-law and the intention of the law-making bodies.