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ON CREDITOR'S SUPPLEMENTAL RIGHTS

In this paper, the authors introduce a notion of creditor's supplemental rights that so far has been insufficiently explored by legal theory.

The authors see the supplemental rights as a variety of subordinated (second ary) rights that commonly with creditor's principle right (main prestation) stands on the active side of an obligational relationship (obligation in a wider sense). Such rights follow the faith of the principal right, whereby they may not be disposed of separately. In addition to the circumstances of their onset by operation of law and their limited duration, a joint characteristic of such rights is the absence of their correlation with the debtor's duties.

*If we may say that these qualities appear with other secondary rights (Lat. *genus proximum*), one feature distinguishes supplemental rights from the other of the similar kind – an influence on debtor's proprietary sphere. Through this influence the supplemental rights indirectly assure a claim, contributing thereby to accomplishment of the (subsidiary) goal of an obligation – satisfaction of claim – by either removing the obstacles for the satisfaction, or by preserving and strengthening the prospects for such satisfaction (Lat. *differentia specifica*).*

Accordingly, the authors recognize three separate types of supplemental rights:

- 1) rights by which a creditor removes obstacles for the satisfaction of claim;*
- 2) rights by which a creditor protects his prospects for the satisfaction of claim; and*
- 3) rights by which a creditor enhances his prospects for the satisfaction of claim.*

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1. OBLIGATIONAL RELATIONSHIP IN A BROAD AND NARROW SENSE

According to prof. Konstantinović, *being a creditor means to be authorized to require a debtor to act in a certain way*.¹ “Actionability of creditor’s claim only against certain person qualifies the obligation as a relative right. Only the person being subject to an obligation is required to perform, and it is only towards such an individual that a creditor possesses the title to require performance”.² The essence of a right to a claim consists therefore of the creditor’s power to require performance from the debtor only with respect to a certain specific duty, the so-called – owed conduct³ or, more precisely an owed prestation (Lat. *prestatio*).

The claim is the principal element of an obligational structure. An obligation is customarily defined as a private law relationship, which is voluntarily established and regulated.⁴ The classic understanding of an obligation states it to be a bond existing between not less than two persons, which empower one of them to require something from the other.⁵ In other words, obligation is a legal relation (Lat. *vinculum iuris*) that connects a creditor and a debtor and which constrain the debtor to conduct a prestation towards the creditor, who is in turn entitled to require such a performance.⁶ Consequently, an obligation assumes the power to require a specific behavior from the other party, who thereupon becomes subject to that duty.⁷ An obligation may not consist of a mere creditor’s

¹ Mihailo Konstantinović, *Obligaciono pravo opšti deo* (prepared by V. Kapor according to notes from lectures), Belgrade 1959, 6.

² Julius von Staudinger, Manfred Löwisch, Ulrich Noack, Volker Rieblem, Jan Busche, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einföhrungsge setz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse, §§ 397 432 (Erlass, Abtretung, Schuldübernahme, Mehrheit von Schuldner und Gläubigern)*, Sellier de Gru yter, Berlin 2005, 75.

³ Andra Đorđević, *Sistem privatnog (građanskog) prava*, Belgrade 1996, 395.

⁴ Whereby the author’s attention has been focused here to a contractual obligation. See: Jožef Salma, *Obligaciono pravo*, Novi Sad 2007, 50.

⁵ Benedicte Fauvarque Cosson, Denis Mazeaud, *European Contract Law, Materials for a common frame of Reference, Terminology, Guiding Principles, Model Rules*, München 2008, 39.

⁶ Christian Larroumet, *Droit Civil, Les Obligations*, 1^{ère} Partie, tome III, 1986, 6.

⁷ Compare: Bogdan Loza, *Obligaciono pravo opšti deo*, Belgrade 2000, 19. The subjects of an obligation are to be understood as parties to an obligation relationship. Therefore, there may be one or several persons on both the debtor’s and the creditor’s side when one speaks of a multitude of subjects of an obligation.

right, or of a mere debtor's duty.⁸ A claim and a debt are a unity of opposites.⁹ Debt is an antonym of claim. However, the question is raised in legal theory whether a debt is a *simple mirror reflection of a claim*, or is their interaction so complex as to create a whole bundle of complementary rights and duties for the subjects of an obligation – an obligation relationship.

Our legal doctrine provides no uniform answer on this issue. According to some authors, obligation and obligational relation are identical notions, overlapping in their essence.¹⁰ Another group of authors differentiates between an obligation and an obligational relationship, by claiming that an obligational relationship regularly comprises several claims and certain other rights in addition thereto, while an obligation usually makes only one component of an obligation relationship.¹¹

The German literature is dominated by a standpoint that distinguishes between an obligation relationship in a broad sense (Ger. *Schuldverhältnis im weiteren Sinn*) and an obligation relationship in a narrow sense (Ger. *Schuldverhältnis im engeren Sinn*). An obligation relationship in a broad sense assumes a legal relationship between not less than two persons, through which at least one of such persons is obliged to a performance, or to refraining from performance towards the other one.¹² Therefore, this implies the legal relationship as an organism (Ger. *Rechtsverhältnis als Organismus*), from which a whole range of individual rights and duties may arise.¹³ An obligational relationship in a narrow sense assumes the right to a performance, an individual obligational claim of a creditor towards a debtor.¹⁴ On the other side, any obligation relationship in a broad sense (e.g. a sales contract) contains at least one duties of the debtor that corresponds to one claim on the creditor's part.¹⁵

⁸ B. Loza, 20.

⁹ Stevan Jakšić, *Obligaciono pravo opšti deo*, Sarajevo 1960, 33.

¹⁰ "Obligation and right are two appearances of an obligational relationship, and an obligation in its entirety should be comprehended as a legal relationship..." Radomir Đurović, Momir Dragašević, *Obligaciono pravo, sa poslovima prometa*, Beograd 1980, 14.

"...the notions of obligation and obligation relationship are overlapping, i.e. are synonyms..." Oliver Antić, *Obligaciono pravo*, Belgrade 2011, 69. From the same author, see also: Oliver Antić, "Obligacija: pravna priroda, sadržina i zakon korelacije", *Analiz Pravnog fakulteta u Beogradu* 1/2007, 31.

¹¹ Jakov Radišić, *Obligaciono pravo*, Belgrade 2004, 40 41.

¹² Hans Brox, Wolf Dietrich Walker, *Allgemeines Schuldrecht*, München 2002, 7.

¹³ H. Brox, W. D. Walker, 7.

¹⁴ The object of performance may be both a positive performance and a failure to perform by the debtor. H. Brox, W. D. Walker, 8.

¹⁵ H. Brox, W. D. Walker, 8.

The above mentioned contemplation on the obligational relationship as a complex entity is adhered to also by Austrian theory,¹⁶ which defines it as an *organic unity* (Ger. *organische Einheit*), a *framework relationship* (Ger. *Rahmenbeziehung*), an *organism* (Ger. *Organismus*), a *construction* (Ger. *Gefüge*), *from which individual claims originate*.¹⁷ In that sense, M. Lukas also recognize an obligation in a broad sense – an obligational relationship, being a combination of various types of legal ties within a single legal relationship. On the other hand, an individual obligation to render a performance (Ger. *Leistungspflicht*), i.e. an obligational relationship in a narrow sense, makes a mere component part of such an organism, which also encompasses the secondary obligations and duties. Depending from the point of view, it is being called an obligation or a claim.¹⁸

2. THE NOTION AND CLASSIFICATION OF CREDITOR'S SUPPLEMENTAL RIGHTS

If one accepts the broader comprehension of an obligational relationship, which is advocated by the authors hereof, then the question arises which are the rights being available to a creditor from a contract towards his debtor. The basic rights of any contractual creditor are: 1) the right to performance stipulated by the contract and 2) the right to compensation of damage caused by debtor's nonperformance or undue performance. The right to performance represents a so-called primary contractual right, which arises in the moment of the onset of an obligational relationship, and in its essence is the content of an obligation. On the other hand, the right to compensation of damage is a so-called secondary contractual right, which takes place subsequently and only in case of failure to comply with the primary obligation, which is why one might say that it represents the contents of contractual liability.¹⁹

In addition to being entitled to require a specific prestation or compensation of damage in case of breach of contract, the creditor is also vested with certain other powers. In our legal theory, the most often referred to in the context of *other creditors' rights* are: 1) the rights aimed at securing and enhancing the claim – pledge and suretyship,²⁰ 2) potestative

¹⁶ H. Koziol, R. Welser, *Grundriss des bürgerlichen Rechts, Band II: Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht*, Wien 2007, 3 4.

¹⁷ H. Koziol, R. Welser, 7.

¹⁸ Meinhard Lukas, *Zession und Synallagma*, Wien 2000, 6.

¹⁹ For more, see: J. Radišić, 42. In the similar context, certain authors mention the right of a buyer as a creditor to seek protection from the so called *eviction*. A. Gams, Lj. Đurović, 65.

²⁰ The Serbian Obligations Code SOC (*Official Journal of SFRY*, no. 29/78, 39/85, 45/89 and 57/89, *Official Journal of SRY*, no. 31/93, *Official Journal of SCG*, no.

rights, by which an obligation relationship is established, reversed or terminated (for example, right of pre-emption,²¹ right to choose among alternative prestations, right to revoke the mandate, etc).²² If one assumes the right to performance and the right to compensation of damage to be two flip sides of the principal creditor's right, the other abovementioned rights may be regarded as creditor's subordinated (secondary, accessory, ancillary) rights (Sr. *uzgredna prava*). The main characteristic of these rights is that they are accessory in their nature, because an existence of the claim is a prerequisite for the creation and performance of such rights. In addition to being accessory, the subordinated (secondary) rights of creditors possess another mutual features – exercising of such rights affects the very claim, as the principal right. For instance, if one party in an obligational relation exercises his/her potestative right declaring set-off, the counterclaims of the parties cease in their entirety or a mutual portion thereof.

However, it appears that creditors, in addition to the most often mentioned secondary rights, also control certain rights that have not been recognized appropriately in the legal theory so far. Such creditor's rights are similar to a great extent to the other secondary rights, but also possess certain features that make them stand out as a separate group. In that respect, we propose introduction of a new notion into the legal doctrine, by offering the term *supplemental (supplementary) rights* as a generic name for such creditor's rights. It is our intention to present the notion of supplemental creditor's rights understood as above and systematize them, without any pretension of making an exhaustive list thereof. In that sense, we are of the opinion that creditor's supplemental rights (Sr. *poveriočeva dopunska prava*) possess the following structural features:

a) *Acquisition by operation of law*. The creditor acquires supplemental rights *ipso jure*, and may not waive them in advance. Such rights

1/2003) does not use a single term to designate other rights of creditors towards the debt or, other than the right to performance and to compensation of damage. It is only in one place that the legislation uses the syntagma *accessory rights* (Sr. *sporedna prava*) in order to designate the object of assignment (cession), when emphasizing that by assignment of claim to the assignee also the ancillary rights are transferred, such as the right of priority in collection, mortgage, pledge, rights from guaranty agreement, rights to interest, contractual penalty, etc (SOC, art. 437, para. 1). In order to refer to the same notion, Sketch of the Law of Obligations and Contracts (art. 362) uses the term *secondary rights* (Sr. *uzgredna prava*). By comparing the rights listed in the abovementioned legislation, it appears that the Draft fails to mention the *rights to interest, contractual penalty etc*. However, in both cases such rights are mentioned only as an example, and do not make an exhaustive list. For more, see: Nenad S. Tešić, *Prodaja i prenos potraživanja*, Belgrade 2012, 233 238. In this paper, the notion of secondary rights shall be used in a much broader sense – for *other creditor's rights*, being disposed of by the active party in an obligational relationship in addition to the claim.

²¹ Andrija Gams with Ljiljana Đurović, *Uvod u građansko pravo*, Belgrade 1994, 67.

²² For more, see: J. Radišić, 42.

arise in consequence of the obligational relation itself, without any additional consent of the parties.²³

b) *Accessoriness (dependence)*. Supplemental rights are dependent upon the existence of creditor's principle claim. In that respect, supplemental rights do not differ much from other secondary rights.²⁴ Accessoriness of supplemental rights means that they may neither arise, nor be exercised in the absence of a claim as the principal right. However, whether a particular creditor shall be eligible to conduct a supplemental right towards his debtor often depends on occurrence of different legal conditions. Some of these requirements address the parties in an obligation, while the other pertains to the claim. Therefore, it may be concluded that supplemental rights are not necessarily vested to all creditors with respect to any debtor. For example, supplemental rights set forth in the Bankruptcy Act address debtors being legal entities, wherefore it makes it clear, *argumentum a contrario*, that the creditors possess no such supplemental rights with respect to their debtors being natural persons.

c) *An influence on debtor's proprietary sphere*. A claim is a *direct legal relationship* between a creditor and a debtor.²⁵ However, supplemental rights, as we understand them here, raise the question of creditor's impact on the debtor's assets. It is usually pointed out in legal theory that the creditor "acquires a pledge of the entire debtor's property". Obviously, the term *pledge* in this context does not assume an actual security interest. Instead, such a theoretical construction implies existence of an invisible bond between the creditor, on one hand, and the debtor's assets on the other. Naturally, one may speak here only of a creditor's potential relation with the debtor's assets. A *general pledge* is in a way an *empty threat*, due to the fact that the creditor does not have right to follow (Fr. *droit de suite*), i.e. creditor may not exercise a general pledge against a third party who has acquired the debtor's assets.²⁶

²³ Depending on the act from which they arise, supplemental rights are being granted by the *Serbian Obligation Code* (right to annulment of debtor's legal actions), the *Bankruptcy Act* (right to annul legal actions in bankruptcy procedure, right to file for opening of a bankruptcy procedure), *Commercial Entities Act* (piercing of the corporate veil), *Extrajudicial Proceedings Act* (right to file for declaration of death in absentia), *Family Act* (right to file for division of marital property), *Inheritance Act* (right to initiate the separation of inherited property from the remaining assets of an heir), etc.

²⁴ On division of rights to principal and dependent ones, see more in: Vladimir V. Vodinelić, *Građansko pravo Uvod u građansko pravo i Opšti deo građanskog prava*, Belgrade 2012, 230.

²⁵ Eleanor Cashin Ritaine, *Les cessions contractuelles de créances de sommes d'argent dans les relations civiles et commerciales Franco Allemandes*, Thèse, 1998, 54.

²⁶ On the relationship between a *general pledge* over the entire property of a debtor, which has a changeable and entirely uncertain contents, and a pledge over a specifically designated portion of debtor's property, which is best reflected in the Serbian prov

d) *Reverse influence on principle right.* There is an explicit tie between a claim and the majority of creditor's secondary rights, meaning that by exercising such rights the creditor directly affects the creditor-debtor relationship (right of first refusal, cancellation of lease contract etc.). In contrast, a creditor who activates certain of the guaranteed supplemental rights primarily affects the *debtor's proprietary sphere*, or the debtor's legal relations with third parties, while the consequences of exercising of supplemental rights on principal claim are being only circumstantial. Supplemental rights usually prevent defrauding of creditors and facilitate the execution of claim (recovery of debt).

e) *Absence of correlation.* If we accept that a correlation lies in the very core of the relationship between the creditor and a debtor, then an obligation relationship (in a narrow sense) implies a (full) correlation between a claim and a debt. Entitlement of a creditor to a prestation fully corresponds with the debtor's obligation to perform. In that sense, a lender's claim totally corresponds with a borrower's obligation to repay the loan. However, in an obligational relationship (in a broader sense), there are not necessarily any corresponding duties of the debtor standing against the secondary rights of the creditor. Even if there are some, such duties stand merely in a functional correlation with the creditor's powers. This applies also to the creditor's rights being named herein as supplementary. If we take into account that there is a certain debtor's obligation which is a matching piece of creditor's supplemental rights, then it is an only general and usually negative one, i.e. the one that consists of the debtor's duty to refrain, pursuant to the principle of good faith, from decreasing his own property. Creditor's supplemental rights are hence only complementary with the debtor's duty to abide by a certain invasion into his proprietary sphere.

f) *Limited duration.* Although the matter concerns creditor's rights in relation to the debtor, supplemental rights are not subject to statute of limitations. However, it still does not mean that supplemental rights are permanent. In a certain number of such rights the creditor is precluded from exercising them after expiry of a deadline. For example, creditors of an inheritance estate are precluded if they not demand within three months of the date the estate was opened that the estate be separated from the heir's assets.²⁷ Nevertheless, other supplemental rights are not limited in time, but extinguish naturally by the onset of certain legally relevant circumstances. In that sense, creditor's right to require division of the debtor's community (marital) property ceases, if such separation has already been requested by the spouses themselves.

erb *better a sparrow in hand, than a pidgeon on the tree*, please see: Nenad Tešić, *Registrovana zaloga*, Belgrade 2007, 1.

²⁷ Inheritance Act, art. 225. Motion to contest debtor's legal actions is also tied to an objective deadline. See: SOC, art. 285.

g) *Support to the goal of an obligation.* It appears that in the contemporary law is not enough to emphasize that the creditor is authorized to enforce his claim against the debtor's entire property. This is so because the debtor is entitled to dispose of his assets in any way looking at his "best interest". The legal order therefore puts at creditors' disposal certain subjective entitlement – supplemental rights – being in their nature mostly potestative rights,²⁸ and in some cases absolute rights, by which the creditor preserves his legitimate interest that is inherent to any obligation – the possibility of compulsory enforcement. If we state that any subjective (obligational) right to be followed by a title (Sr. *zahtev*, Ger. *Anspruch*) as the possibility to enforce the claim, then the supplemental rights serve precisely to that title understood in such a sense (*action in a material sense*).

The primary goal of any obligation is a fulfillment, which is in most cases being voluntary. However, supplemental rights come on the scene whenever the debtor's voluntary performance fails. Hence, legislator provides creditors with various subjective entitlements, in order to facilitate the subsidiary goal of the obligation – satisfaction of claim. In other words, if a (voluntary) performance is the main (primary) cause of an obligation (Lat. *causa prima*), then the (enforced) satisfaction is a subsidiary (secondary) cause of an obligation (Lat. *causa secunda*), to which the creditor turns if the achievement of the primary cause of obligation defaults. The role of supplemental rights in an obligational relationship reflects in creation of prerequisites to accomplishment of the subsidiary cause of an obligation understood in the abovementioned sense, i.e. enabling a satisfaction (execution) of claim.

The indirect relation between the creditor and the debtor's property is established precisely through the supplemental rights. Depending on the kind of supplemental rights, the meaning thereof may be threefold: removal of uncertainty with respect to assets the debtor disposes of; preservation of the initial value of the debtor's assets; and additional security and supporting of the creditor's principal right by the debtor's assets, or assets of a third party.

The first group of accessory rights is aimed at achieving certainty in terms of property by which the debtor is liable for his debts. For example, it encompasses the creditor's right to seek the division of debtor's marital property or creditor's right to initiate probate proceedings.

²⁸ Being aware of the limitations in terms of the scope of this paper, we have avoided herein the discussion on the nature and elements of subjective rights, and the dilemma whether the potestative rights (Ger. *Gestaltungsrecht*) are being subjective rights, or only appearing as such, wherefore they should be differentiated from subjective rights. In more detail on the different approaches to subjective rights and the nature of potestative rights: D. Stojanović in: Dragoljub Stojanović, Oliver Antić, *Uvod u građansko pravo*, Belgrade 2004, 197–199, A. Gams, Lj. Đurović, 67.

The second group of accessory rights enables the creditor to preserve the initial value of debtor's assets. For a creditor entering a contractual relationship with other party, the decisive factor in that direction is primarily the solvency of the prospective contracting party, i.e. the estimation of the entire property the latter disposes of at the moment of the stipulation. A creditor expecting fulfillment of an obligation obviously hopes that the initial debtor's assets shall be preserved, or even increased. It is therefore that the legal order grants the creditor certain entitlement with respect to the debtor's proprietary sphere. This group of creditor's supplemental rights encompasses, for example, the right of the creditor to contest debtor's fraudulent conveyance in a bankruptcy and out of it (Lat. *actio Pauliana*).

Finally, the third group includes such supplemental rights that enable the creditor to strengthen his position additionally, e.g. by compelling a third party (non-debtor) to become liable for the debtor's obligations, upon proving the perfection of the conditions set forth by the law. Piercing the corporate veil is a typical example of this class of supplemental rights. Although here the relation between the creditor and the debtor's assets has been pronounced to a lesser extent, it exists nevertheless because the piercing the corporate veil takes place usually when the debtor's assets are insufficient for repayment of debt.

Pursuant to all the aforesaid, it may be concluded that the notion of supplemental rights is a complex one. However, given the primary goal of their establishment, all supplemental rights being available to a creditor may be divided into the following:

1. rights by which the creditor removes obstacles for the satisfaction of claim,
2. rights by which the creditor protects his prospects for the satisfaction of claim, and
3. rights by which the creditor strengthens his prospects for the satisfaction of claim.

The most significant supplemental rights of the creditor in Serbian law shall be discussed in more detail herein below.

3. SUPPLEMENTAL RIGHTS BY WHICH THE CREDITOR REMOVES OBSTACLES FOR THE SATISFACTION OF CLAIM

There are situations in the law when a creditor may not satisfy his claim, because of the debtor's being over-indebted or incapable of repaying his debt as they become due, or because of such a personal status

which makes it unclear what are his assets eligible for enforcement. In such situations, the legal order grants to the creditor certain requests (the supplemental rights) that enable him to remove the obstacles for the execution of claim, and to achieve his legitimate interest thereby.

3.1. Filing the bankruptcy proceeding

In addition to the debtor and the bankruptcy administrator, the creditors also possess the active legitimacy to file a bankruptcy proceeding.²⁹ This supplemental right is limited in two ways: firstly, this right does not belong to every creditor, and secondly, it may not be used against any debtor. In Bankruptcy Law, a difference is made between claims that may be raised in a bankruptcy proceeding with the result of acquiring the right to participate in distribution of the estate, and the claims entitling their holders to initiate the bankruptcy proceeding. The scope of claims that may be raised in the bankruptcy proceeding encompass all claims irrespective of their value, maturity, determination, enforceability, conditionings or contesting, while the creditors who intend to initiate a bankruptcy proceeding over the estate of a debtor must dispose with a claim that is determined in a significantly narrower scope, which must be unsecured, unconditional, mature and undisputable, or even exceed a certain value in some legal systems.³⁰

Creditors may file for bankruptcy only against a debtor who has the passive legitimacy in that respect. In that sense, a proposal for opening of bankruptcy may not be filed against a natural person,³¹ state, autonomous province, unit of local self-government, mandatory insurance funds, etc.³² Hence, the circle of bankruptcy debtors is narrower than the circle of debtors in a general sense accepted by Obligation Law.

In addition to filing a bankruptcy, the creditors are vested with numerous other rights in a bankruptcy proceeding, which may be either individual or collective. Creditors exercise individual rights separately (e.g.

²⁹ Bankruptcy Act, *Official Gazette* no. 104/2009, 99/2011 other act, 71/2012 decision of the Constitutional Court and 83/2014, art. 55. On the material and procedural prerequisites to opening of bankruptcy proceeding upon a creditor's proposal see: Vuk Radović, "Predlog poverioca za pokretanje stečajnog postupka (nevoljni stečaj)", *Pravo i privreda* 1 4/2002, 160 174.

³⁰ On the views accepted in our judicial practice with respect to creditors being entitled to filing bankruptcy see in more detail: Gordana Ajnšpiler Popović, "Poverioci kao podnosioci predloga za pokretanje stečajnog postupka", *Pravo i privreda* 4 6/2011, 303 315.

³¹ In Serbian law, bankrupt debtors may only be legal entities. More on the solutions accepted in comparative legislations, and on the historical overview of bankruptcy proceeding over the estate of a physical persons in Serbia see: Vuk Radović, *Individualni stečaj stečaj nad imovinom fizičkog lica*, Dosije, Belgrade 2006, 27 78.

³² Bankruptcy Act, art. 14.

the right to contest claims of other creditors), while the collective rights are effected by voting jointly with other creditors within the so-called creditors' bodies in the bankruptcy proceeding (creditors' assembly and board of creditors). These rights mainly belong to the category of creditors' supplemental rights.

3.2. Motion to declare death *in absentia*

In Serbian law applies the rule that the party claiming one's death (which may not be proven) in the process of exercising its rights, must obtain in a non-litigious proceeding the court appropriate decision, which declares an absent person to be dead.³³ Both a person having an *immediate legal interest* that a missing person be declared dead and the Public Prosecutor alike may file the motion initiating this procedure.³⁴ It appears to be a dilemma as to what would be the contents of the legal standard of an *immediate legal interest*. According to some authors, an immediate legal interest is owned by any person deriving certain right from the declaration of one's death in *absentia* – e.g. heirs, spouse, creditor whose rights arises if a certain person is not alive anymore.³⁵ The immediate legal interest of such persons may not be disputed. This is so due to the fact that declaration of a missing person presumed dead has the same effect as natural death – the marriage of such person terminates, wherefore rights of third parties tied to such a fact originate and cease, etc.³⁶ Creditors whose rights accrue under the condition of a person's not being alive – e.g. providers in *life care contracts*, or beneficiaries in *life insurance contracts*³⁷ – are surely the persons holding such an legitimate interest. However, the dilemma still remains if a step forward might be made in declaring a missing person presumed dead, so as to acknowledge such a right to creditors whose claim is not derived from the death of a missing person.

³³ A. Stanković, "Proglašanje nestalih lica za umrla po našem pravu", *Pravni život* 7 8/1990, 1151.

³⁴ Extrajudicial Proceedings Act EPA, *Official Gazette of SRS*, no. 25/82 and 48/88 and *Official Gazette of RS*, no. 46/95 other act, 18/2005 other act, 85/2012, 45/2013 other act, 55/2014 and 6/2015, art. 58. A similar rule applies to situations when a person's death may not be proven by a document set forth by the Book of Records Act, in which case the person holding an immediate legal interest and the public prosecutor have the right to file a motion to the court to establish the death of such person by a ruling. See: EPA, art. 70.

³⁵ O. Antić in: D. Stojanović, O. Antić, 139. Other authors do not get any deeper into the defining of this standard. "The procedure may be initiated by any person having an interest granted by the law that the missing person be declared dead." A. Gams, Ljiljana Đurović, 75.

³⁶ A. Stanković, 1153.

³⁷ A contractor of insurance may determine by a contract, or a subsequent legal transaction, or even a will, the person to be entitled to rights from insurance. See: SOC, art. 957, para. 1.

It seems one may argue in favor of completely different approaches. Taking into account that the court verifies the basic conditions for commencing this procedure, concerning primarily the time period over which there were no news on a person's whereabouts³⁸ and bearing in mind the rule that the motion initiating such a procedure must contain the facts supporting the motion and evidence proving such facts or making them probable, as well as that such creditors must support their motion by information verifying their legal interest,³⁹ it appears as necessary to undertake a broader interpretation of the *immediate legal interest* standard, assuming that the right to file a motion in cases like this belongs also to creditors whose claim has been independent from the death of a missing person. On the contrary, arguing that declaration of a missing person presumed dead results not only in proprietary effects, but also in changes in personal statuses of citizens (e.g. termination of marriage), the narrower interpretation of the legal standard the *immediate legal interest* becomes more acceptable, particularly by holding that otherwise the procedure could be initiated by any creditor, irrespective of the value of his claim.

The court is the one acting upon the initiation of the procedure and the one rendering the decision.⁴⁰ Additionally, a custodian is appointed to the missing person, to take care that the interests of the latter be protected in the proceeding.⁴¹ Finally, the initiation of the proceeding is announced in a public notice, inviting the missing person and other persons possessing information on such person to contact the court.⁴² All of the aforesaid leads us to conclude that interests of the missing person have been properly protected. On the other hand, a longtime uncertainty in terms of the personal status of a citizen and the contents of his assets seems to be legally and socially unacceptable.⁴³ Therefore, we are of the opinion that the purpose of legal certainty, which lies in the very foundations of declaration of a missing person dead, calls for the adoption of the standpoint that accepts a broader contents of the *immediate legal certainty* standard”.

³⁸ EPA, art. 57.

³⁹ EPA, art. 59, para. 2.

⁴⁰ Additionally, the court obtains and discusses evidence *ex officio* in order to establish facts as to if and when the missing person died, i.e. whether it is still alive. EPA, art. 60, para. 2.

⁴¹ The custodian is obliged to collect evidence on the facts of being missing and alive of the missing person, and to propose the same to the court. EPA, art. 60, para. 2.

⁴² EPA, art. 61, para. 1.

⁴³ A long uncertainty with respect to the circumstance of one's being alive “creates a myriad of difficulties and affects the proprietary and personal relations of certain parties, and is also unwanted from the standpoint of social circumstances”. Obren Stanković in: Obren Stanković, Vladimir Vodinelić, *Uvod u građansko pravo*, Belgrade 2007, 54.

This maze may be a bit more difficult by raising a dilemma whether a claim of a creditor initiating the declaration of a missing person presumed dead must be indisputable, or does it suffice that the claim of this creditor be made probable. If the presumption is accepted that his claim must be ascertained, due to the fact that declaration of a person presumed dead affects irreversibly the personal statuses of citizens, then the creditor initiating such proceeding must possess an enforceable legal instrument. As opposed to that, accepting the position that the creditor initiating the procedure for declaration of a missing person presumed dead needs only to make his claim probable, would mean that the creditor should accompany his motion by a proof on the grounds of his claim (e.g. a valid loan agreement, or a authentic documents like: bills of exchange, invoices, excerpts from business records etc.). It seems that the supporting arguments in case of this dilemma also lead towards the broader interpretation of *immediate legal interest*, under which the existence of a claim is a procedural prerequisite that suffices to be made probable. In addition to the main reason thereto, which has already been pointed out, it appears that here one needs to take into consideration the indisputable public interest that a state of uncertainty (with respect to one's being alive) be removed from the legal sphere, with as little cost as possible.

Requiring the creditor to conduct a litigation in order to obtain an enforceable legal instrument is unacceptable due to the reasons of procedural economy,⁴⁴ given it to be known upfront that in the end the doubts related to the object of enforcement,⁴⁵ i.e. the problems related to identification of the debtor's assets would require initiation of the procedure for declaration of the missing person dead.⁴⁶ The prolonged ambiguity re-

⁴⁴ Such a procedure usually involves costs of appointment of a temporary representative. In fact, if it turns out in course of a proceeding before the court of first instance that the regular procedure of appointment of a legal representative of the defendant would take long and possibly result in harmful effects on one or both parties, the court shall appoint a temporary representative to the defendant. This solution is particularly employed when the domicile, or place of residence, or the seat of the defendant are unknown, and the defendant has appointed no representative. See: Civil Procedure Act, *Official Gazette of RS*, no. 72/2011, 49/2013 decision of the CC, 74/2013 decision of the CC and 55/2014, art. 81.

⁴⁵ The objects of enforcement are things and rights eligible to be subject to enforcement with the aim of satisfaction of claim *Enforcement and Security Act, Official Gazette of RS* no. 31/2011, 99/2011 other act, 109/2013 decision of the CC, 55/2014 and 139/2014, art.19, para. 4.

⁴⁶ "Where, in filing the motion to enforce, the enforcement creditor calls for enforcement against the entirety of the assets of the enforcement debtor without indicating the means and objects of enforcement, or files a request for obtaining a statement of assets of the enforcement debtor along with the motion, the court shall order enforcement, or security without indicating the means and objects of enforcement. Following the identification of the assets of the enforcement debtor, a order (conclusion) shall be issued to set the means and objects of enforcement." *Enforcement and Security Act*, art. 20, para. 3.

garding the circumstance of one's being alive does not contribute to legal certainty. This is so due to the fact that creditors of a missing person do not know who and with what property shall be liable for the assumed obligations. It seems that initiation of the procedure of declaration of a person's death *in absentia* does not jeopardize the interests of the missing person by itself, but contributes significantly to legal certainty as one of the main goals which an organized legal system strives to achieve. Consequently, a rule according to which this procedure may be initiated by a person holding an immediate legal (creditor's) interest should be interpreted so as to be accepting as sufficient the making of the creditor's claim probable. If this standard is approved in terms of the filing a bankruptcy proceeding (cessation of legal person), there is no reason not to adhere to it also in the sphere of termination of legal subjectivity of a natural person.

3.3. Motion to divide debtor's marital property

In addition to his principal claim, the creditor has a supplemental right to require division of debtor's marital property.⁴⁷ Under the law, beside the spouse and heirs of the deceased spouse, the right to seek the separation of marital property is also vested in creditors of the spouse, whose individual assets were insufficient for repayment of the creditors' claims.⁴⁸ Although the law explicitly speaks of a spouse's creditors, the systemic interpretation of the provision may lead to the conclusion that such an entitlement with respect to assets of unmarried couples, should also belong to creditors of one of the unmarried partners.⁴⁹

3.4. Motion to initiate probate proceeding and exercising of other debtor's rights

Pursuant to the standpoint accepted in French Civil Code,⁵⁰ which is also followed in the *Sketch of the Law of Obligations and Contracts (1969)*, any creditor with a mature claim may exercise in the name and for the account of the debtor such proprietary rights of the latter towards third parties, which are neglected by him to the detriment of his creditor, except those rights that are tied exclusively to one's personality.⁵¹ According to such opinion, *a creditor may issue an affirmative heir's state-*

⁴⁷ On marital property and separate property funds see: Nenad Tešić, "O zajedničkoj imovini supružnika", *Pravni život* 10/2006, 259-277.

⁴⁸ See: Family Act, *Official Gazette of RS*, no. 18/2005, 72/2011 other law and 6/2015, art. 181.

⁴⁹ See: Family Act, art. 4 and 191.

⁵⁰ French Civil Code, art. 1166.

⁵¹ *Sketch of the Law of Obligations and Contracts* drafted by Professor Mihailo Konstatinović, art. 226, para. 1.

ment, require division of estate, accept a legacy, sue to vindicate his individual thing, require performance by a debtor's debtor, but he may not file a motion to divorce or annul a marriage, or establish and contest paternity of the debtor.⁵² In addition to the aforementioned, a creditor could also exercise certain debtor's potestative rights, e.g. the right to choose the alternative prestation, or the right to file a motion to amend or terminate a contract due to changed circumstances (Lat. *rebus sic stantibus*), but he may not, however, require amendment of the amount of installments based on statutory maintenance.⁵³

As opposed to the French law, the Serbian law apparently grants creditors no rights of such a broad scope in terms of exercising debtor's rights. However, even in the Serbian law there are provisions enabling the creditor in particular legal situations to exercise certain debtor's rights. In that sense, pursuant to the *Serbian Obligations Code* a lessor may, in order to settle his claim towards the lessee based on the lease contract, require the sub-lessee to pay directly to him whatever he owes to the lessee on the grounds of the sublease.⁵⁴ The possibility of the creditor to exercise the rights neglected by the debtor are derived in broader sense from the principle of the prohibition of abuse of rights. The features of this principle are visible also in certain other legal situations. For example, the court initiates a probate proceeding *ex officio* upon the receipt of the death certificate from the acting Registrar's Office, but the creditor being an interested party may submit relevant proofs of death of the decedent.⁵⁵ The heirs often do not wish the estate to be distributed, while a creditor is particularly interested therein, e.g. when the court *ex officio* terminates a litigation due to death of a party,⁵⁶ or when a creditor obtains an enforce-

⁵² J. Radišić, 337.

⁵³ V. Stanković, "Poveriočevo ovlašćenje da vrši prava svog dužnika", *Pravni život* 2/74, 27.

⁵⁴ See: S. Perović, 659.

⁵⁵ For more details on the rights to initiate a probate proceeding see: Oliver Antić, *Nasledno pravo*, Belgrade 2011, 379 380.

⁵⁶ This interest is somewhat diminished as a result of the standpoint adopted by the judicial practice. In fact, the ruling on resumption of a proceeding that was terminated due to death of a party does not have to be preceded by a ruling on inheritance, because an estate is inherited by operation of law, while the ruling on inheritance has only a declarative character. See: Ruling of the Higher Court in Požarevac, no. 1 Gž. 1060/2013 dated December 6, 2013.

In another of its decisions, the court states as follows: "In order for a litigation that was adjourned due to the death of the defendant to be continued, it is not necessary that the statutory heirs of the latter be finally declared as such in a probate proceeding. Instead, it suffices that upon the proposal of the opposing party the court summons persons being next of kin of the deceased defendant, who moved to initiate probate proceeding upon his death (heirs presumptive) to assume his role in the litigation." See: Ruling of the Appellate Court in Belgrade, number Gž2. 332/2014, dated June 25, 2014.

able legal instrument against the deceased, whose heirs have still not been determined.⁵⁷

Such examples are not unusual. In an enforcement proceeding, which is conducted by inventory, valuation and sale of movable assets, the movable things being subject to enforcement may have been put under the procedure of customs warehousing as of an earlier date. Should there be a judicial decision rendered in that respect, the customs authorities would be obliged to adhere to such decision, since the court ruling may not be subject to extrajudicial control. The enforcement agent must be enabled to review and appraise the value of such movables, informing him that the seized assets are in the procedure of customs warehousing and are not to be freely disposed with, i.e. that import duties have not been paid. If a public sale has been ordered, such a sale may not be properly conducted prior to putting the object of enforcement into market circulation. Also, the decision of the court rendered in an enforcement proceeding is a legal instrument proving the enforcement creditor's power to file to customs authorities the declaration for releasing the goods into market circulation.⁵⁸

However, a creditor may not require withdrawal of a gift instead of the debtor if the donee shows grave ungratefulness toward a donor/debtor. Similarly, a creditor may not seek compensation for damages for infringement of honor and reputation instead his debtor.⁵⁹

This group of creditor's rights encompasses also the entitlement of the guarantor to exercise set-off the principal debtor's claim against the creditor's claim.⁶⁰ The guarantor is here only a *conditional creditor*, onto whom the creditor's claim towards the main debtor would pass pursuant to the principle of personal subrogation, at the moment when guarantor pays to creditor the debt of the main debtor.

4. SUPPLEMENTAL RIGHTS BY WHICH THE CREDITOR PROTECTS HIS PROSPECTS FOR THE SATISFACTION OF CLAIM

The legal system puts at creditor's disposal certain legal means enabling him to keep his legal position unaltered, in order to prevent

⁵⁷ In more detail on furtherance of enforcement against heirs of an enforcement debtor, see: Nenad Tešić, "Prenos prava i obaveza u okviru načela formalnog legaliteta", *Harmonius – Journal for Legal and Social Studies in South East Europe* 2014, 343–344.

⁵⁸ Decision of the Ministry of Finances, Customs Administration, The Department for Customs Proceedings and Procedures, 148 03.030.01 130/2015, dated March 12, 2015.

⁵⁹ B. S. Marković, 50.

⁶⁰ SOC, art. 1009, para. 1.

fraudulent transfers. The creditor preserves his prospects for the satisfaction of claim, by either preventing the assets of his debtor to be mixed with estate of other persons, or by preventing the debtor's property from becoming insufficient for repayment due to certain legal transactions or decisions of the latter.

4.1. Motion to separate an estate from the property of an heir

According to law, an (inherited) estate encumbered by debts is at the moment of death of the decedent merged with the property previously owned by a heir (Lat. *confusio bonorum*).⁶¹ Interests of the decedent's creditors may become infringed thereby, particularly if the heir has creditors of his own. This is why the legal order grants to creditor the supplemental right to require separation of the estate from the pre-owned property of the heir (Lat. *separatio bonorum*),⁶² i.e. to require formation of a *separate proprietary fund* within the heir's property, which would enclose only the rights from the estate.⁶³ Such *separate fund*, i.e. an appropriate part thereof, becomes thereby subjected to a special legal regime, which precludes the heir from disposing of the separate objects and rights.⁶⁴

Creditors of an heir and creditors of the decedent who have failed to require separation may not collect his claim from the *separate proprietary fund* until all the creditors who have required inventorying and appraisal of the property are paid off.⁶⁵ That way, the creditor having filed for separation acquires priority for payment of his claims from the assets separated from the estate.⁶⁶ However, at the same time, he loses the right to collect his claim from the *pre-owned property* of the heir.⁶⁷ In this way an exception from the general regime of liability of heirs for the decedent's debts is established,⁶⁸ because his liability is narrowed down in

⁶¹ More on this legal institute, see: Dejan B. Đurđević, *Institucije naslednog prava*, 2nd issue, Official Gazette, Belgrade 2010, 329 330.

⁶² See: The Constitutional Court of Serbia, no: Rev 1391/02, dated June 11, 2003, *Judicial Practice from the Field of Property Law Relations*, 92.

⁶³ On separation of estate from the heir's assets, see: O. Antić (2011b), 417 418; D. B. Đurđević, 334 336.

⁶⁴ "...and if he had disposed of such things and rights prior to the separation, such disposal shall remain valid." See: Inheritance Act, *Official Gazette of RS*, no. 46/95, 101/2003 decision of the CC and 6/2015, ar. 225, para. 2.

⁶⁵ See: Inheritance Act, art. 226.

⁶⁶ D. B. Đurđević, 336.

⁶⁷ See: Inheritance Act, art. 227, para. 1.

⁶⁸ In more detail on the limited correlation in relation to liability for debt limited by the scope of proprietary fund see: O. Antić (2011b), 67. See also: D. B. Đurđević, 335 336.

terms of the subject matter thereof, by being limited to *objects and rights* from the estate.⁶⁹

The abovementioned supplemental right belongs to any creditor of the decedent, who makes the existence of his claim probable, along with the jeopardy that the collection of the claim shall be frustrated, or made significantly more difficult.⁷⁰ The secured creditors are exception, the right to separation (*separatio bonorum*) is granted to them only if the value of the collateral has been insufficient for the repayment.⁷¹

4.2. Contestation of debtor's legal transactions

It seems that contestation of debtor's legal transactions as a legal institute has arisen in the historical context of creditors' collective repayment from the insolvent debtor's property. Over time, contestation started to develop as an autonomous institute, independent from collective proceeding of repayment.⁷² Therefore it was already the Roman law that the petition *actio Pauliana* originated from.⁷³ Although stemming from the same roots, the separate development of the two legal institutes resulted in a number of differences between contestation of debtor's legal transactions in bankruptcy and out of such procedure.⁷⁴ Contestation in bankruptcy aims at protecting the collective interests of a bankrupt debtor's creditors, while contestation out of the bankruptcy procedure focuses on protection of such creditor who called for contestation.⁷⁵ The conflict between a collectivistic philosophy of contestation in bankruptcy and the

⁶⁹ Limited liability takes place when a creditor uses for repayment certain items from the property, which belongs to separate proprietary fund (liability limited in object). Unlimited liability is a rule, and the limitation in object applies only when so envisaged explicitly by a contract, or the law. See: Karl Larenz, *Lehrbuch des Schuldrechts, Ersten Band, Allgemeiner Teil*, München 1987, 22-23. On the liability by a portion of assets in case of inheritance, see also: H. Brox, W. D. Walker, 16.

⁷⁰ See: D. B. Đurđević, 335.

⁷¹ Compare: O. Antić (2011b), 418; D. B. Đurđević, 335.

⁷² Božidar S. Marković, *Pravo pobijanja izvan stečaja*, The University of Belgrade School of Law, Belgrade 2014, 22.

⁷³ In Justinian's Code, employment of *actio Pauliana* was permitted against all fraudulent actions of a debtor, which might have assumed either an alienation of a portion of a property, or an omission to undertake a certain action. It was essential that it had resulted in a decrease of the debtor's assets. Dragomir Stojčević, *Rimsko privatno pravo*, Belgrade 1985, 300.

⁷⁴ For more see: Jovan Gucunja, *Pravno regulisanje poverilacko dužničkih odnosa u slučaju prestanka organizacija udruženog rada*, doctoral dissertation, Novi Sad 1980, 334-336; Mihajlo Velimirović, "Stečajno i vanstečajno pravo pobijanja", *Pravni život* 11/2005, 349-356; Mihajlo Velimirović, *Stečajno pravo*, 3rd issue, University Union School of Law and Official Gazette, Belgrade 2012, 133-136.

⁷⁵ The passive legitimacy in a lawsuit for contestation of debtor's legal actions is granted to a person with whom, or in whose favor the contested legal action has been

individualistic concept of contestation out of bankruptcy resulted naturally in two set of rules on contestation.

However, those institutes do possess certain mutual characteristics. It is usually pointed out in theory that contestation is a subsidiary right, since it comes into being when creditors may not collect from the debtor's property.⁷⁶ In the case of contestation out of the bankruptcy, the subsidiarity of such contestation applies to its fullest. However, in case of contestation in bankruptcy, inability to collect is an incontestable presumption because the very opening of the bankruptcy proceeding provides a sufficient basis for the contestation.⁷⁷ The parties eligible to contest in a bankruptcy do not have to prove the insufficiency of assets in the bankruptcy estate for coverage of all liabilities of a bankrupt debtor.⁷⁸

Contestations in and out of a bankruptcy are also tied by another mutual characteristic: the relativity of contestation. In a bankruptcy proceeding, the contested legal transaction does not have any effect in relation to the bankruptcy estate,⁷⁹ while out of the bankruptcy proceeding the contested legal transaction loses its effect only towards the plaintiff and up to such extent to which it is necessary for satisfaction of his claim.⁸⁰ The relativity of contestation means that the contested legal

undertaken. See: Ruling of the Court of Appeals in Belgrade, number Gž. 2209/2011 dated January 30, 2013.

⁷⁶ Tomica Delibašić, *Pobijanje pravnih radnji stečajnog dužnika*, Belgrade 1999, 73; Dragiša B. Slijepčević, "Uslovi i način stečajnog pobijanja po Zakonu o stečaju", *Pravni informator* 4/2010, 17.

⁷⁷ T. Delibašić, 73; D. Slijepčević, 17.

⁷⁸ D. Slijepčević, 17.

⁷⁹ The earlier Serbian bankruptcy legislation had set forth legal actions to be ineffective towards bankruptcy creditors. See: Bankruptcy Act from 1929, art. 27, para. 1. There are views in theory that this solution was more appropriate. See: T. Delibašić, 236.

"Given that the legal effects of contestation of legal actions of a bankrupt debtor also differ from the effects resulting from entering into a voidable legal transaction in line with the provisions of the Serbian Obligations Code, bearing in mind that an annulment of a judicial settlement is to be effective towards everyone, while challenging of a legal action assuming entering into a settlement results only in such action not being effective with respect to the bankruptcy estate of a bankrupt debtor, the court of first instance was correct, contrary to the statements from the appeal, in establishing in the pertinent case that application of the Bankruptcy Act, article 120 did not result in punishment of the creditor (herein: the defendant) for having entered into a settlement. Instead, the final goal was to enable a proportionate repayment of all creditors of the bankrupt debtor (herein: the plaintiff) in a situation where the debtor had been insolvent at the time of entering into the settlement, which in fact has led to opening of the bankruptcy proceeding." Judgment of the Appellate Commercial Court, no. Pž. 1451/2011(1) dated September 28, 2011. *Judicial Practice of Commercial Courts*, bulletin no. 1/2012, 86.

⁸⁰ SOC, art. 284. "The contested legal action is deprived of its effect solely with respect to the contestant, and only to the extent sufficient for satisfaction of his claim."

transaction loses none of its legal effects in an absolute sense,⁸¹ because it does not affect the legal relationship between the (bankrupt) debtor and third parties (objecting the contestation).⁸² It is exactly the limitation of effects of the contested legal action that displays the essence of this supplemental right of the creditor. An authority of the creditor described as above improves significantly his prospects for repayment.

In cases of contestation out of bankruptcy, it was never disputable that any creditor has the right to do it against the insolvent debtor. However, as of the opening of a bankruptcy proceeding the situation changes significantly. It is as of such moment that the bankruptcy administrator becomes the legal representative of the debtor, wherefore the issue understandably arises whether the creditors should at all be awarded the right to contest, or should such right be reserved exclusively for the bankruptcy administrator. In the historical sense, in the beginning, Serbian bankruptcy legislation has primarily awarded to the bankruptcy administrator a monopoly on contestation,⁸³ which had precluded the creditors of the bankrupt debtor from doing the same. Nevertheless, the situation has changed in the postwar legislation, when this right had become granted unambiguously to creditors as well. The same concept is accepted in the contemporary bankruptcy legislation.⁸⁴

Bogdan Đukić, *Preobražajna prava i paulijansko pravo pobijanja*, Belgrade 1935, 59. "Sale and purchase of a real estate property being subject to enforcement, that was effected with the purchaser's knowledge on the fact that the enforcement procedure was in course and with the intention of the seller to prevent thereby his creditors from recovery of their claims shall be deemed as a legal transaction that may be successfully contested up to the amount of the unpaid claim of the seller's creditor." Judgment of the Supreme Court of Serbia, no. Rev. 1131/2004 dated June 30, 2005.

⁸¹ Mihajlo Dika, "Pobijanje pravnih radnji u povodu stečaja", in: Mihajlo Dika (general editing), *Četvrta novela Stečajnog zakona*, Narodne novine d.d., Zagreb 2006, 220.

⁸² Mihajlo Velimirović, "Pobijanje pravnih radnji dužnika u stečaju", *Pravni život* 11/1995, 315; T. Delibašić, 236.

⁸³ Franja Goršić, *Komentar Stečajnog zakona*, Geca Kon a.d., Beograd 1934, 151; SZ, art. 36, para. 1.

⁸⁴ Decree on Dissolution of Enterprises and Entrepreneurs, *Official Journal of FNRY*, no. 51/1953, 49/1956, 53/1961 and 52/1962, art. 48, para. 2; The Compulsory Settlement and Bankruptcy Act, *Official Journal of SFRY*, no. 15/1965, 21/1965, 55/1969, 39/1972 and 16/1974, art. 95, para. 1; Act on Sanation and Dissolution of Associated Labor Organizations, *Official Journal of SFRY*, no. 41/1980, 25/1981, 66/1981, 28/1983, 20/1984, 7/1985, 39/1985, 9/1986 and 43/1986, art. 161, para. 1; Compulsory Settlement, Bankruptcy and Liquidation Act, *Official Journal of SFRY*, no. 85/1989, *Official Journal of SRJ*, no. 37/1993 and 28/1996, art. 112, para. 1; Act on Bankruptcy Proceeding, *Official Gazette of RS*, no. 84/04 and 85/05 other act, art. 107, para. 1; Bankruptcy Act, art. 129, para. 1.

4.3. Contestation of a mutually determined value of contributions in kind into a commercial entity

Contributions to a commercial entity may be made in cash or in kind. Value of contributions in kind must be expressed as a monetary value. It is determined by a mutual agreement by all members of the entity, or by a valuation made by a licensed appraiser.⁸⁵ Protection of creditors of a commercial entity is one of the reasons underlying the introduction of principle of compulsory valuation of contributions in kind.⁸⁶ The purpose of such estimation is to secure that value of contribution corresponds to the value of subscribed shares. Valuation by a licensed appraiser is regulated in detail, and there is no need for a better protection of creditors beyond them. However, additional protection of creditors is necessary in cases where members of a company estimate the contribution in kind by their mutual agreement. This was introduced in Serbian legal system for the first time through the *Commercial Entities Act*.⁸⁷ Pursuant to this solution, if a value of a contribution in kind has been determined by mutual agreement of all company members, and the company is unable to pay off its debts as they become due, a creditor of the company shall be entitled to file a motion before the competent court to determine in a non-litigious proceeding the value of contribution in kind at the time of investment thereof. Should the court establish in a proceeding initiated as above that the value of the contribution in kind has been lower than the mutually determined one, it shall order the member having made such investment in kind to pay out to the company the difference up to the value of his investment having been mutually agreed upon. In that case the burden of proof (Lat. *onus probandi*) in terms of the value of the investment lies with the company member who has made the investment in kind. The right of the creditor to file such a motion ceases upon the expiry of the objective deadline of five years as of the date of investment of the contribution in kind into the company. In other words, it is of no significance the moment when the creditor had obtained knowledge on investment of a contribution in kind into the company, i.e. that its value was not determined realistically. The payment of difference between the realistic and the mutually determined value of the contribution in kind increases assets of a commercial entity, which affects the preservation of a legal position of its creditors.

⁸⁵ Commercial Entities Act – CEA, *Official Gazette of RS*, no. 36/2011, 99/2011, 83/2014 – other act and 5/2015, art. 50, para. 1.

⁸⁶ For more on the mandatory appraisal of contributions in cash in the EU law, see: Vuk Radović in: Mirko Vasiljević, Vuk Radović, Tatjana Jevremović Petrović, *Kompanijsko pravo Evropske unije*, The Belgrade University School of Law, Belgrade 2012, 139 145.

⁸⁷ CEA, art. 59.

5. ACCESSORY RIGHTS BY WHICH THE CREDITOR STRENGTHENS HIS PROSPECTS FOR THE SATISFACTION OF CLAIM

The legal order puts at disposal of a creditor the certain legal means to strengthen his prospects for satisfaction of claim. In the modern law, there are numerous mechanisms in that respect: assuring priority in repayment in favor of particular creditors, retention of debtor's movables for exerting pressure on the debtor and eventually forced collection, strengthening the position of the creditor as compared to all third parties through granting of publicity to his claim, and committing a third party (non-debtor) to become liable for the other person debt, once the creditor proves that the statutory conditions thereto have been met.

5.1. Statutory pledge

Claims from a number of commercial contracts are secured by a lien (statutory pledge),⁸⁸ while in civil and consumer contracts this right is granted to the contractor engaged pursuant to a contract to produce the specific piece of work (Lat. *locatio conductio operis*).⁸⁹ It is essential that the subject matter of pledge serves the purpose of securing the claim that arises from the undertaken work pursuant to which the collateral entered the possession of the creditor (the so-called principle of connexity).⁹⁰ Such a pledge grants priority to the secured creditors by operation of law and requires no additional publicity,⁹¹ both in comparison to the unse-

⁸⁸ In our law, the statutory right of retention belongs to the following creditors: first, a trade representative on the basis of a trade representation contract; second, the commission agent pursuant to a commission contract; third, a warehouse keeper pursuant to a warehousing agreement; forth, a freight forwarder pursuant to a freight forwarding agreement; fifth, controlling agent pursuant to a controlling agreement; sixth, transporters pursuant to a transportation agreement; and seventh, a bank pursuant to a safety deposit box contract. For more on statutory pledge in trade agreements, see: Ivica Jankovec, *Privredno pravo*, 4th edition, JP Službeni list SRJ, Belgrade 1999, 282 288; Mirko S. Vasiljević, *Trgovinsko pravo*, 14th edition, The University of Belgrade School of Law, Belgrade 2014, 62 65; Nikola Gavella in: Nikola Gavella, Tatjana Josipović, Igor Gliha, Vlado Belaj, Zlatan Stipković, *Stvarno pravo svezak 2*, 2nd edition, Narodne novine d.d, Zagreb 2007, 294 303.

⁸⁹ As a means of security to collection of the fee for work and the expended material, as well as the other claims stemming from a contract to produce the specific piece of work, the law sets forth that a contractor (manufacturer) shall be entitled to a pledge over the objects made or repaired by him, and also over other objects delivered to him by the principal in relation to his work, for so long as he holds such objects and does not cease to hold them voluntarily. See: SOC, art. 628.

⁹⁰ I. Jankovec, 285; M. S. Vasiljević, 63 64.

⁹¹ In more detail on the economic reasons for granting priority in collection to providers of important commercial services: Nenad Tešić, *Security Rights in Movables*

cured creditors and all other creditors whose claims are secured on a contractual basis. Although the statutory pledge differs significantly from the remaining creditor's supplemental rights, primarily in terms of its proprietary legal nature, it nevertheless possesses all the basic characteristics of supplemental rights: it is established independently from the will of the parties in an obligational relationship;⁹² it is characterized by accessori-ness (dependence) and the absence of correlation; and it increase significantly the creditor's prospects for satisfaction of claim.

5.2. The right of retention

Provided that certain criteria have been met, the claim as principal right entitles the creditor also to the right of retention (*ius retentionis*).⁹³ This right enables the creditor to retain an object from the debtor's property that the former has been holding in his possession, in order to exert pressure on the debtor,⁹⁴ or publicly sale the retained object wishing to repay his claim.⁹⁵ *The right of retention is granted to any creditor, irrespective of the legal ground and sort of the legal transaction from which the claim has arisen; it is necessary only for the obligational claim to be civil, and not natural.*⁹⁶ It is usually required for the claim to be mature. However, retention may also be undertaken by a creditor whose claim has been immature, should the debtor become insolvent.⁹⁷ The creditor's right

and Claims (Republic of Serbia), Civil Law Forum for South East Europe, Collection of studies and analyses, First Regional Conference, Cavtat 2010, Volume II, 104.

⁹² A statutory pledgee is even granted priority in recovery of debt as compared to the creditors secured by a registered pledge that was established by mutual consent of contracting parties. Such priority right in comparison to a registered pledge exists only with respect to statutory pledge of a transporter, commission agent, freight forwarder, warehouse keeper and contractor (manufacturer). See: Act on Pledge Over Movables Entered Into the Registry, *Official Gazette of RS*, no. 57/2003, 61/2005, 64/2006 corr. and 99/2011 other acts, art. 33.

⁹³ The Serbian Obligations Code uses the term *right of retention* ("pravo zadržavanja") (art. 286 289), while prof. Konstatinović uses the term *right of retaining* ("pravo zadržanja") (Sketch of the Law of Obligations and Contracts, art. 233 236).

⁹⁴ "Creditor of a mature claim, holding in his possession a certain object of the debtor shall be entitled to retain such object until the satisfaction of his claim." See: SOC, art. 286, para. 1.

⁹⁵ "Creditor holding an object of the debtor pursuant to the right of retention shall be entitled to collect his claim from the value of such object in the same manner as a pledgee." See: SOC, art. 289.

⁹⁶ For more on the right of retention, see: Miodrag Orlić in: Obren Stanković, Miodrag Orlić, *Stvarno pravo*, Nomos, Belgrade 1999, 261; N. Gavella in: N. Gavella, T. Josipović, I. Gliha, V. Belaj, Z. Stipković, 561 563.

⁹⁷ See: SOC, art. 286, para. 2. "Only the creditor of a mature claim holding in his possession a certain object of the debtor shall be entitled to retain such object until his claim is settled. Should the debtor become insolvent, the creditor may exercise the right of retention despite his claim not being mature." Judgment of the Higher Commercial

of retention ceases if the debtor provides him a certain security for his claim.⁹⁸

5.3. Entry into public records

Certain contracts entitle the creditor to enter information about this stipulation into the public records, awarding his claim thereby the appropriate publicity. Entry in the form of a notice is made, for example, in case of life care contract.⁹⁹ A similar notice may also be entered in terms of real estate lease contracts.¹⁰⁰ Nevertheless, pursuant to the *Serbian Obligations Code*, entry into public records is not necessary for the effects of the lease towards third parties, because the lessee may raise his title against an acquirer of the leased object. The acquirer may not require the lessee to return the leased object prior to the expiry of the lease period, i.e. prior to the expiry of the notice period if the lease agreement is concluded for an indefinite period.¹⁰¹

5.4. Motion to create a security interest in case of decrease of share capital

Furtherance of the regular procedure of decrease of share capital of a joint-stock company may have a negative impact on the creditors' possibility to collect their claims. Therefore, company law makes this procedure more difficult by introducing the obligation to establish an adequate protection of creditors (security interest), as a necessary prerequisite to a decrease of share capital.¹⁰²

Court, no. Pž. 3087/2007 dated March 20, 2008, *Judicial Practice of Commercial Courts*, bulletin no. 2/2008.

⁹⁸ See: SOC, art. 288.

⁹⁹ Such a remark enables the provider of maintenance to successfully raise his contractual right against all acquirers to whom the beneficiary of the maintenance might have transferred the ownership title over the real estate property being subject to the life long maintenance contract subsequently to entry of the remark. See: Tatjana Josipović, *Zemljišnoknjižno pravo*, Zagreb 2001, 231.

¹⁰⁰ This is why the nature of the rights belonging to a lessee, particularly in cases of long term lease of a real estate property e.g. for 99 years has been subject to vivid discussions. In more detail: M. Orlić, *Pravna priroda zakupa*, doctoral dissertation, Belgrade 1974.

¹⁰¹ This right applies if a lessee holds possession over the object of the lease. However, if the object of the lease has not been delivered to the lessee, and the acquirer has had no knowledge on the lease agreement at the moment of his entering into the contract pursuant to which he acquired the ownership title, the latter shall not be obliged to deliver the object of the lease to the lessee. However, the former shall in that case become entitled to claim compensation of damage. For more on rules applying to alienation of a leased object in Serbian law, see: Slobodan Perović, *Obligaciono pravo*, Belgrade 1990, 660.

¹⁰² CEA, art. 319, para. 1. This creditors' right has been warranted for also by the provisions of the Second Company law EU Directive. See: Directive 2012/30/EU of the

The registry of commercial entities announces the decision on decrease of share capital within a continuous period of three months as of the date of registration thereof. Creditors, whose claims have arisen, irrespective of their maturity date, prior to the expiry of the period of 30 days from the date of announcement of the decision, may request the company in writing to secure such claims until the expiry of the period for announcement of the said decision. The creditors having raised such a request in a timely fashion, who were not provided by the company with a security of their claim within three months, or whose claims have not been paid, are entitled to move before the court to secure their claims. This is so, provided that they prove that such decrease of share capital infringes the repayment of their respective claims. Supplemental right to an adequate protection is not granted to bankruptcy creditors whose claims belong to the first or second rank of priority,¹⁰³ or creditors whose claims have already been secured. The right of the creditors to a security interest in case of decrease of share capital is strengthened additionally by the fact that one of the conditions for entry of changes into the Central Registry, and consequently in the Agency for Commercial Registries, has been the providing of a statement made in writing by the president of the board of directors, or the president of the supervisory board to the effect that creditors have been adequately protected, subject to joint and several personal liability of the issuer in case of subsequently proven falsehood of the statement. Moreover, distributions to shareholders may be made only upon the expiry of the 30 days period as of the date of registration of decrease of share capital.

The above proves the limitations of supplemental rights of creditors to a security interest in case of decrease of initial capital to be manifold: first, the claim must arise within a certain period from the date of announcement of the decision on decrease of share capital; second, the creditor must file in a timely fashion a request for creation of a security interest in writing; and third, the creditor is not to be secured, or fall within the privileged ranks of creditors in a bankruptcy proceeding.

European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, *Official Journal of EU*, L 315/74, 14.11.2012, art. 36. For more on this provision of the Second Directive, see: V. Radović in: M. Vasiljević, V. Radović, T. Jevremović Petrović, 171 172.

¹⁰³ For more, see: Bankruptcy Act, art. 54, para. 4(1 2).

5.5. Motion to take a security interest and the right to contest the decision on merger

Mergers may have a negative impact on the legal status of creditors of all companies participating in such a procedure, irrespective of their being the acquiring or the transferring entities. This is why it was justified to create a mechanism to protect creditors in case of mergers.¹⁰⁴ In Serbian law, a particular right to protection is awarded to any creditor of the company participating in the merger, provided that he fulfils two cumulative conditions: first, that his claim has arisen prior to registration of the merger; and second, that his claim has been jeopardized by the merger.¹⁰⁵ Such creditor is entitled to seek an adequate protection from his debtor (the so-called *ex ante* creditors' protection), and in case he has not been provided with it within 15 days from the date of dispatching the request, he shall become entitled to file a lawsuit (the so-called *ex post* creditors' protection). These rights are not granted to creditors whose claims fall within the first or second payment rank in a bankruptcy procedure, and creditors whose claims have been secured. All the aforesaid indicates a certain parallel between the protection of creditors of a commercial entity undergoing decrease of share capital in a regular procedure, and the protection of creditors in case of mergers.

5.6. Piercing of the corporate veil

The company law rests on two basic principles: the principle of legal separation and the principle of limited liability. The first principle points out that companies are legally autonomous and separated from its members. This principle is followed by the principle of limited liability, *i.e.* irresponsibility of company's owners (shareholders) for liabilities of the entity, being perhaps the most significant characteristic of commercial entities. In practical terms, application of these two principles manifests itself in the following manner: creditors of a commercial entity may require repayment exclusively from the commercial entity being its debtor, and not from the shareholders, or members of the entity.¹⁰⁶ This is the fundamental characteristic of commercial entities, and a privilege granted by the legal system to persons – prospective founders of a commercial entity – who intend to engage in entrepreneurship. However, the privilege of irresponsibility of members for liabilities of the company bears with it

¹⁰⁴ On the systems of creditors' protection, see in more detail in: Tatjana Jevremović Petrović, *Prekogranična spajanja društava u pravu EU*, The University of Belgrade School of Law, Belgrade 2010, page 272 277; T. Jevremović Petrović in: M. Vasiljević, V. Radović, T. Jevremović Petrović, 325 329.

¹⁰⁵ CEA, art. 509 511.

¹⁰⁶ On principle of limited liability of company members: Paul L. Davies, *Gower and Davies' Principles of Modern Company Law*, Sweet & Maxwell, London 2008, 37 40.

a duty to act accordingly. Members of a company may not misuse the principle of irresponsibility for the company's liabilities. In case of abuse, the law protects creditors of the commercial entity by enabling them to collect their claim not only against the company being the debtor, but also against its members.¹⁰⁷ In such situation, one figuratively speaks of *piercing of the corporate veil*, or *lifting of the corporate veil*. The basic consequence of the *piercing* consists of the following: liabilities of the company become liabilities of those of its members who have misused the legal subjectivity of the company. This way the personal assets of members of the commercial entity become exposed to repayment, by becoming liable for company's debts.¹⁰⁸

5.7. Rights of a partners' creditors towards the partnership company

Certain legal means are available only to creditors of partnership company.¹⁰⁹ In that sense, a creditor who has a mature claim against a partner on the grounds of a final and enforceable judgment has the right to require the partnership company in writing to pay out to him in cash what the partner would be entitled to in case of liquidation of the company, but only up to the amount of his claim. Should the company fail to make payment towards the partner's creditor within six months as of the date of submitting of such request, the creditor may file for liquidation the company.¹¹⁰

6. CONCLUSION

Once we stop to observe an obligation exclusively as a relationship between two parties, and acknowledge the circumstance of obligation being an indirect bond between two persons properties, we shall start to un-

¹⁰⁷ For example, the Commercial Entities Act states that a misuse shall arise in particular if such person: uses the company to achieve an objective that is otherwise prohibited for that person; uses or disposes of the company's assets as his own personal property; uses the company or its assets to cause damage to the company's creditors; reduces the company's assets for their own personal gain or for the gain of third parties, although they knew or ought to have known the company would be unable to meet its obligations (CEA art. 18, para. 2).

¹⁰⁸ For more on this institute in our legislation, see: Nebojša Jovanović, "Pobijanje pravnog subjektiviteta kompanija", *Pravni život* 10/1997, 865 890; Mirko Vasiljević, "Probijanje pravne ličnosti", *Pravni život* 11/1995, 17 27.

¹⁰⁹ CEA, art. 124.

¹¹⁰ On the possibilities of collection by creditors of a partner from assets belonging to joint property of a civil partnership, see: Mirjana Radović, "Imovina ortakluka kao imovina zajedničke ruke", in: Milena Polojac, Zoran S. Mirković, Marko Đurđević (eds.), *Srpski građanski zakonik 170 godina*, University of Belgrade School of Law, Belgrade 2014, 284 286.

derstand the continued process of narrowing down of creditor's rights being aimed at debtor's personality on the one hand, and the expansion of creditor's rights in relation to the debtor's assets on the other.¹¹¹ We are of the opinion that the described connection between the creditor and the debtor's assets is to a vast extent based upon the evolution of one set of entitlements, being called herein the creditor's supplemental (supplementary) rights. By their very nature these rights are a variety of subordinated (secondary) rights that commonly with creditor's principle rights (main prestation) stands on the active side of an obligational relationship (obligation in a wider sense).

Creditor's supplemental rights are characterized by accessoriness (dependence), limited duration and absence of correlation between these rights and debtor's duties. In addition, these rights are acquired by operation of law, wherefore they may not be waived by the creditor in advance. If we may say that these qualities appear with other secondary rights (Lat. *genus proximum*), one feature distinguishes supplemental rights from the other of the same kind – *an influence on debtor's proprietary sphere*. Through this influence the supplemental rights making way to (compulsory) enforcement of claims – by either removing the obstacles for enforcement, or by preserving and strengthening the prospects for such enforcement (Lat. *differentia specifica*). Therefore it may be plausibly to conclude that supplemental rights represent in their essence a relation between parties of an obligation: creditor and debtor but in terms of debtor's property.

The primary goal of any obligation is its fulfillment thereof, which is in the vast majority of cases voluntary. However, supplemental rights come into effect in the case of a debtor's non-performance. Hence, supplemental rights appear as subjective rights of the creditors with the aim of achieving the secondary goal of obligation that is guaranteed by the legal order – the satisfaction of claim. In other words if (voluntary) fulfillment is the main (primary) cause of an obligation (Lat. *causa prima*), then the (enforced) satisfaction is a subsidiary (secondary) cause of an obligation (Lat. *causa secunda*), which the creditor turns to in the absence of accomplishment of the primary cause. Therefore, the main purpose of supplemental rights in obligation relations is to create the conditions for the achievement of subsidiary cause of obligation, i.e. to facilitate a satisfaction (execution) of claim.

Supplemental rights, as a rule, prevent the circumvention of creditors (for instance, fraudulent conveyance). Without supplemental rights which entitle creditors to enter into the proprietary sphere of the debtor, the creditor would often be prevented from protection of his legitimate obligational interest, either because the debtor's estate is not entirely

¹¹¹ Compare: B. S. Marković, 18.

specified, which would make it uncertain wherefrom may the creditor collect his claim or due to the fact that, contrary to the principle of good faith, the debtor's assets became insufficient for repayment as a result of debtor's negligent actions or decisions.

Accordingly, the authors distinguish three groups of supplemental creditor's rights:

- 1) rights by which a creditor removes obstacles for the satisfaction of claim,
- 2) rights by which a creditor protects his prospects for the satisfaction of claim, and
- 3) rights by which a creditor enhances his prospects for the satisfaction of claim.