JUDICIAL INSURANCE GUARANTEE AND EFFECTIVE PROTECTION OF LABOR CREDIT: PROPOSAL OF DYNAMIC AND FLEXIBLE INSURANCE MODEL

SEGURO GARANTIA JUDICIAL E PROTEÇÃO EFETIVA DO CRÉDITO TRABALHISTA: PROPOSTA DE MODELO SECURITÁRIO DINÂMICO E FLEXÍVEL

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ABSTRACT

Developed in the field of security guarantees in labor trials, the article started from the recognition that the current regulatory framework, rigid and precarious, does not provide a balanced composition of legitimate interests of creditor and debtor. In view of this problem, was assumed as a primary objective the construction proposal of a model capable of providing effective and efficient protection to credits from employment relationships. For that, as a method, it started with the structural and functional analysis of judicial guarantee insurance from a procedural and contractual perspective (positive law system analysis); then, was examined the correlation between the times of the process and the effectiveness of the right of credit, performed in statistics and jurisprudence fields (data and cases analysis); subsequently, were formulated basis for the current model improvement. As a result, it was identified that, in the proposed model, more in tune with good insurance technique, rigidity must give way to dynamism and flexibility, to allow the good payer access to differentiated and favored conditions in the provision of insurance guarantees, without unprotecting the creditor. From a procedural perspective, this model can contribute to the balanced and efficient

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composition of creditor and debtor interests and in the contractual dimension serve as a stimulus for the development of the market in this insurance field.

Keywords: Judicial guarantee. Insurance guarantee. Appeal deposit. Executive warranty. Flexible insurance.

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RESUMO

Desenvolvido no campo da prestação de garantias securitárias no processo do trabalho, o artigo partiu do reconhecimento de que o atual quadro regulatório, rígido e precário, não propicia a equilibrada composição de interesses legítimos de credor e devedor. Diante desse problema, assumiu-se o objetivo primordial de propor a construção de modelo apto a conferir proteção efetiva e eficiente a créditos decorrentes de relação trabalho. Para isso, como método, iniciou-se com a análise estrutural e funcional do seguro garantia judicial em perspectiva processual e contratual (exame do sistema de direito positivo vigente); em seguida, examinou-se a correlação entre os tempos do processo e a efetividade do direito de crédito, realizada nos campos da estatística e da jurisprudência (análise de dados e casos); na sequência, formularam-se bases para o aprimoramento do modelo atual. Como resultado, identificou-se que, no modelo proposto, mais afinado com a boa técnica securitária, a rigidez deve ceder lugar para o dinamismo e a flexibilidade, para permitir ao bom pagador o acesso a condições diferenciadas e favorecidas na prestação de garantias securitárias, sem desproteger o credor. Esse modelo pode, na perspectiva processual, contribuir para a composição equilibrada e eficiente de interesses de credor e devedor e, na dimensão contratual, servir de estímulo para o desenvolvimento do mercado desse ramo securitário.

Palavras-chave: *Garantia do juízo. Garantia securitária. Depósito recursal. Garantia executiva. Seguro flexível.*

1 INTRODUCTION

The judicial procedure, by definition, involves the composition of conflicting interests. In the exercise of this substitute activity, prudence and a balanced distribution of duties and burdens are required, even if, in the areas of the work process, there is a need for a certain special and differentiated protection of workers' rights, a social and procedural actor who, in the common case, presents a vulnerable condition in relation to the adverse party.

This particular characteristic results from the imposition of encircling the credits resulting from a labor relationship, covered with food nature, with reinforced guarantees, in order to provide effective satisfaction. In fulfilling this purpose, however, it is necessary to seek the appropriate balance with the - also - legitimate interests of the debtor. In this sense, the effectiveness of the employee's credit claim, as a guide to guiding the jurisdictional activity, should be in line with the efficiency represented by the imperatives of optimal accommodation of the parties' interests in cooperative procedural concert, despite the differences that lie at the root of the conflict situation.

Therefore, the process of materializing the fundamental right to adequate judicial protection - in favor of plaintiff and defendant, creditor and debtor, although with a differentiated normative burden - involves the prudent convergence between effectiveness and efficiency. Thus, regarding the provision of guarantees, the balance of interests transits through the protection of the credit claim in accordance with the prohibition of imposing undue or excessive legal and economic burdens on the debtor.

In this context, the present investigation is aimed at the examination of the guarantee insurance in the areas of the work process. Thus, as a general design, the research focuses on the construction of a prototypical model of security guarantee that embodies the approximation between effectiveness and efficiency as a counterpoint measure to solve part of the derived impasses: of the traditional and inefficient static and rigid model of guarantee provision in the current Brazilian procedural legal order; of the current precarious regulatory regime and not very attuned to the technical assumptions of insurance.

In a specific way, three objectives are assumed. From the outset, the structural and functional dissection of the legal guarantee insurance in double perspective: procedural, in the capacity of security procedural guarantee; contractual, in the condition of procedural security guarantee. Then, the examination of the correlation between the passage of time of the process and the effectiveness of the credit derived from labor relationship, also carried out in two axes: first, predominantly statistical; next, jurisprudential, from the analytical cut-off of the treatment in respect of the legal guarantee insurance with a predetermined term of validity. Finally, the formulation of a dynamic and flexible security model.

Congruently with the particular objectives of the research, the article is divided into three segments. In the inaugural portion, with a predominantly descriptive purpose, two mutually complementary discursive paths are followed: the examination of the insurance guarantee as an institute of the process, based on the positive legal order (centrifugal approximation, from the process to the contract); the analysis of the guarantee insurance from the elements of the security technique (centripetal linkage, from the contract to the process).

In the subsective segment, we begin by collecting quantitative elements related to the effects of the passage of time on the satisfaction of labor credit and start by analyzing the evolution of the jurisprudence of the Superior Labor Court (TST) on legal guarantee insurance, in particular the issue of security guarantees linked to a predetermined term of validity, especially in the regulatory context of that security product. In the last installment, with exploratory purpose, the article enters into the critical indication of bases for the formulation of a model for achieving efficient effectiveness through dynamic and flexible security guarantees.

2 THE LEGAL GUARANTEE INSURANCE: BASIS, CONTENT AND FUNCTION

Aimed at the panoramic understanding of the structural and functional profile of the judicial guarantee insurance, this segment begins with the descriptive examination of the sectors of the positive procedural law system in which it accommodates. In the subsective fragment, still with the primarily narrative purpose, the judicial guarantee insurance is soon dissected as a security product, with the analysis focused on the legal elements of formation and operation of insurance contracts.

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2.1 THE LEGAL GUARANTEE INSURANCE AS A SECURITY PROCEDURAL GUARANTEE

It is advisable, at first, to explain the development of the judicial guarantee insurance within the Brazilian positive law system, in particular from the perspective of the work process.[3] For the purpose of exposure, a description is proposed divided into five periods. First of all, reference is made to the pre-training period prior to 21 January 2007, the date on which Article 2 of Law 11.382 of 2006 entered into force, which now provides for the admission of the guarantee insurance in the civil execution, by means of the legislative reconstruction of Article 656, § 2nd, 1973[4] CPC.

The embryonic stage followed: from 21.1.2007 to 13.11.2014, date immediately prior to the beginning of Article 73 of Law 13.043 of 2014, which, by amending four articles of LEF, now provides for the admission of the guarantee insurance court in the tax execution process[5] , preferential integrative path in the executive cycle of the work process, in the form of article 889 of the CLT[6] .

The cycle of affirmation and development, from 14.11.2014 to 17.3.2016, dates immediately prior to the beginning of the CPC of 2015, followed by the brief stage of consolidation, from 18.3.2016 to 10.11.2017, is set in motion, the date immediately prior to the inauguration of Law n. 13,467, of 2017. In this evolutionary quadrant, for the purpose of substitution of pledge, the legal guarantee insurance was equated to cash, with the following condition: "provided that in value not less than the constant debit of the initial, increased by thirty percent", in the form of article 835, § 2, supported by the sole paragraph of Article 848, which deals specifically with the replacement of the pledge.

Then came the phase of normative emancipation, from 11.11.2017 onwards, with the formal entry of the procedural figure in the CLT system, with deepening and acceleration from 17.10.2019, due to the regulatory discipline established by the Joint Act (AC) n. 1, of 2019, of

3 All references to primary normative acts come from the Portal da Legislação da Presidência da República (BRASIL, 2020c). In this condition, fit the six acts of this nature, and respective amendments, with devices mentioned or transcribed throughout the text, here indicated in ascending chronological order: Consolidation of the Labor Laws (CLT - Decree-law n. 5.452, 1943), 1973 Code of Civil Procedure (CPC 1973 - Law n. 5,869, 1973); Law on Tax Executions (LEF - Law n. 6,830, 1980); Law n. 8,177, 1991; Civil Code (CC - Law n. 10,406, 2002); Code of Civil Procedure 2015 (CPC - Law n. 13,105, 2015). Identical record holds for the mentions to the Federal Constitution of 1988 (CF) and respective amendments (EC).

4 "The party may request the replacement of the pledge: [...]. § 2º. The pledge can be replaced by a bank guarantee or legal guarantee insurance, in a value not less than the constant debit of the initial, plus 30% (thirty percent)". As a precedent, the Superintendency of Private Insurance structured the insurance guarantee as a security product in the regulatory environment (Circular n. 232, 2003, for example), but with little widespread employment due to the resistance of the Judiciary (GOLDBERG; PINTO, 2012, p. 89-90)founded, above all, on the absence of express provision in the positive procedural legal order.

5 Within the Union, the employment of the guarantee insurance is regulated by Ordinance n. 164, of 2014, of the Attorney General's Office of the National Treasury.

6 Note that the integrative criterion chosen presents structural inconveniences, with the consequent need for systemic and hermeneutic debugging. The following points of tension between Law No. 6.830 of 1980 and the CLT are indicated: the first one is for the purpose of conducting an extra-judicial enforcement procedure - in this case, the certificate of the active debt - representing an obligation to pay a certain amount, it is always, by definition, definitive; whereas the second, in the common case, operates with execution as the procedural stage aimed at fulfilling the obligation portrayed by the judicial instrument, including benefits to do, not do and deliver things, on admission of provisional execution. In other words: in the Labor Court, the enforcement process of extrajudicial enforcement order for the payment of certain amount, although possible, in the form of article 876 of the CLT, represents the exception, and not the rule (SCHIAVI, 2016, p. 48), as revealed by the statistics (CAMPOS; DI BENEDETTO, 2015, p. 11-12). Examples: the tax execution of pecuniary penalty imposed by the supervisory body of labor relations and the execution of claims arising from commitment to conduct adjustment.

TST[7] (BRAZIL, 2020f). By entering this normative system, he retained the primary function of ensuring execution, in the form of Article 882. In addition, it began to play a new role (similar, but not identical to that): guarantee for the purpose of filing appeals, according to article 899, § 11[8].

The scheme provided for in the CLT, however, differs from the discipline provided for in the areas of civil enforcement and tax enforcement. First, a functional distinction is identified. As demonstrated, in the labour process, in the case of a judgment for the payment of the sum, there is room for the presentation of legal guarantee insurance to replace the deposit needed to prepare the filing and the processing of appeals, figure strange to other executive modalities.

Secondly, the dissimilarity lies in the criteria for defining the value necessary for the security cover to produce the guarantee effect[9]. In the tax execution, the amount is determined by the value of the case, composed by the original debit (Article 2, § 2, II, of LEF), plus, as each case, monetary update, default interest and "other charges provided by law or contract" (idem, and Section IV, and Article 6, § 4).

By specifically dealing with the civil enforcement of extrajudicial title for certain amount, the CPC establishes that the judicial guarantee insurance should reach figure "not lower than the constant debt of the initial, plus thirty percent". In this mode of execution, the debit indicated in the original application is composed of the nominal original value of the payment instalment plus monetary correction and default interest, in a convergent sense with the provision of Article 292, I, of the CPC, relating to the action for recovery of debt[10]. Thus, in execution, as a rule, there is monetary expression correspondence between the executive claim (economic advantage initially intended) and the value of the cause, and which serve as a basis for calculating the importance required for the recognition of the insurance guarantee effectiveness.

Suitably adapted, the application of similar criteria finds room in the sentence-fulfilment phase, using the reciprocal integrative rules provided for in the single paragraph of Articles 318,513 and 771. In this environment, the insurance guarantee - as a substitute for the pledge - can provide ballast to the application for the assignment of suspensive effect to challenge the enforcement of the judgment, with the aim of stopping the practice of certain acts of execution, in the form of Article 525, § 6 [11]. In addition, the security product could gain ground to enable the execution of the implementation of the bond requirement established by

7 Inspired by the regulatory model foreseen by Ordinance n. 164, of 2014, of PGFN, for the guarantee insurance in tax execution, Article 12 of AC n. 1, of 2019, of TST, determined the adaptation of the security guarantees submitted since the beginning of the validity of Law n. 13.467, of 2017 (BRAZIL, 2020f). The regulation was modified by AC n. 1, of 2020, of the TST, in force since 29.5.2020 (BRASIL, 2020g).

8 "The Recursal deposit may be replaced by bank guarantee or legal guarantee insurance".

9 At this point, the validity and effectiveness of the insurance guarantee must not be confused. The former occupies a preponderantly "exoprocedural" dimension, while the latter transits primarily through the "endoprocedural" field. To change as children: the lack of efficacy in the guarantee - and for the - process does not compromise, for itself and in itself, the validity of the insurance guarantee.

10 It should be noted that "collection" and "execution", although they share certain characteristics, are not confused: execution is singularized, for example, by the possibility of expropriation of property.

11 Thus, with the use of regulatory integration resources, it is concluded that the pledge guarantee involves replacement by the offer of insurance provided for in Article 835, § 2, of the CPC, which, in this case, moreover, would perform a guarantee function. Similarly, the insurance guarantee serves as the basis for the executor to request the assignment of suspensive effect to enforceable embargoes (CPC, article 919, § 1).

Article 520, IV, of the CPC, as a condition for the authorization of the practice of satisfactory acts in provisional sentence compliance.

In the CLT's executive guarantee scheme, the effectiveness of the insurance is linked to the discounted execution value, included in it the expenses of the process (costs, for example). The final part of Article 882 of the CLT refers to Article 835 of the CPC. Thus, the requirement - or dispensation - of an increase of thirty percent can open up room for doubt. In this step, two interpretative scenarios emerge.

In this sense, in the first scenario (requirement of increase), the remission would be related to the full system of replacement of the pledge established by article 835 of the CPC. In this sense, in order to equate insurance with pledging money, the coverage should reach the running debt and at least thirty percent more. In the second (exemption from accrual), the normative remission would concern only the establishment of the "preferential order" itself, and not the substitution regime.

By this understanding, there would be a legislative option to establish the ordinal binding for the pledge (and only for it), without, however, requiring that increase in the insurance guarantee. Thus, in this hermeneutic context, the CLT would accept insurance as a "direct guarantee", parallel to the pledge, and not as a substitute for it. The TST, however, determines that the insurance guarantee effectiveness depends, rather, on the addition of at least thirty percent, according to Article 3, I, of AC n. 1, 2019) (BRASIL, 2020f)[12].

2.2 THE LEGAL GUARANTEE INSURANCE AS A PROCEDURAL SECURITY GUARANTEE

The legal guarantee insurance, as a security product, has a peculiar content. In essence, it brings together the elements commonly found in insurance contracts, such as hedged risk, premium, claim and indemnity. In this technical dimension, it is regulated by Circular n. 447, of 2013, of the Superintendency of Private Insurance. In the functional scope, however, especially in an evaluation conducted from the perspective of procedural insertion, the insurance is coming from figures such as bail. Consequently, the insurance guarantee exhibits a bivalent nature: it preserves, with temperaments, the essential security characteristic, but, at the same time, it has a reliable purpose.[13]

This particular characteristic reveals interesting integrative potential: as an idea of a general order, whenever it is foreseen the admission - or the requirement - of bail, there is, in principle, the possibility of replacing it with insurance guarantee. In a more elastic extrapolation, a similar proposition would find, in theory, some comfort in relation to the requirement of a guarantee deposit, as in the case of a termination action proposal (article 836 of the CLT

12 To this end, the regulatory rule invokes Jurisprudential Guidance No. 59 of the SBDI-II of the TST, which contains a reference to Article 835 of the CPC. A caveat comes into play here: the aforementioned jurisprudential understanding was built, amended in 2016, from the perspective of the indirect application - by simple integration - of the CPC in the work process, before, therefore, the inauguration of the emancipation phase of insurance guarantee as an institute endowed with direct forecast in the CLT's own normative body, an open stage, as pointed out, on 11.11.2017.

13 Informative of Jurisprudence n. 483, of 2011, of the Superior Court of Justice (Special Appeal n. 1.224.1995, Fourth Panel, judged on 13 Sep. 2011): "[...] the guarantee insurance, unlike most insurance, is not attached to the mutualismo and the actuary. Indeed, in view of the uniqueness of this type of insurance, which is very close to bail, the policyholder takes out insurance by which the insurer guarantees the interest of the policyholder in relation to the obligation assumed by the policyholder and therefore cannot, the absence of payment of the premium is alleged by the insurer. [...]" (BRAZIL, 2011).

and article 968, II, of the CPC). In a related field, the security product could appear as a conventional guarantee for the legal business of payment instalments executed by the parties on the basis of Article 190 of the CPC.

Within the security technique, damage insurance, established on behalf of others (FRANCO, 2009, p. 310), to protect legitimate interest of third parties regarding the satisfaction of credit claims, approximating it, in this analytical angle, to civil liability insurance (Article 787 of the Civil Code)[14] In essence, insurance protection is returned to the creditor of - if any - obligation to pay. Consequently, as a rule, the worker appears as the beneficiary of security protection.

However, insurance can - and must - reach other actors in the process, since they are recognized as creditors "to whom the law confers executive title" (CPC, article 778), such as, for example, the Union (in the case of tax credits, such as social security contributions and costs of the proceedings), lawyers (fees) and experts (idem), in the form provided for in Article 3, I, of AC n. 1, of 2019, of TST (BRASIL, 2020f).

In this sense, on the subjective level, the interests of three categories of persons are legally interwoven, in two conditions: In the strictly procedural dimension, the creditor (or, in a more indented sense, the exehot) is found; the debtor (idem, executed); the third guarantor, who may be liable and who, in the case of a claim, acquires the condition of execution (CPC, Article 779).[15]

From a security perspective, they are, respectively (ALMEIDA, 2018, p. 31-32): the insured (or, in the event of the occurrence of the accident, the beneficiary), in favor of those who establish the coverage of the risk of default, as the ultimate holder of the interest safeguarded[16] by the insurance; the policyholder , as the one who, by paying a certain price (premium), concludes the insurance contract to offer it as a legal guarantee; the insurer, the legal person who, in exchange for receiving the premium, it assumes the risk of default of the insured. The components of the triad maintain, in pairs, a relationship with each other, which, in a meeting, conform to the triangular legal relationship of judicial guarantee insurance (ALMEIDA, 2018, p. 32).

Furthermore, in the sense of more open understanding, in the institutional field, the establishment of insurance "in favor" of the judiciary itself is recognized as an organic structure responsible for the implementation of the fundamental right to adequate judicial protection, in line with the idea stemming from the traditional expression "assurance of judgment[17]".

14 In the regulatory scope, it is defined the product "Insurance Guarantee: Insured - Public Sector" as the "insurance that aims to ensure the faithful fulfillment of the obligations assumed by the policyholder vis-à-vis the policyholder by reason of participation in bidding, in the main contract relevant to works, services, including advertising, purchases, concessions or permissions under the Powers of Union, States, Federal District and Municipalities, or even the obligations assumed due to: I - administrative proceedings; II - judicial proceedings, including tax executions; III - administrative installments of tax credits, registered or not in debt; IV - administrative regulations".

15 This characterization derives from the conjugated interpretation of the following, in analogue and finalinical sewing: "Enforcement may be promoted against: [...]; III - the new debtor who has assumed, with the consent of the creditor, the obligation resulting from the instrument permitting enforcement; IV - the guarantor of the debt held in an extrajudicial capacity; V - the responsible holder of the asset linked by a security in rem to the payment of the debit; [...]".

16 Defined as "debtor of labor obligations that must provide security in the judicial process", as AC n. 1, from 2019, do TST, article 2, X (BRAZIL, 2020f).

17 No caso do depósito – ou de seguro garantia judicial – recursal, o papel da Justiça do Trabalho acerca-se da atuação de escrow agent, na gestão de escrow account (conta de compromisso), com destinação dependente do resultado do julgamento recurso garantido. O Agente exerce uma função de Seguinte: "Um terceiro encarregado de deter ativo ou conteúdo enquanto um desacordo sobre os ativos é resolvido ou um evento desencadeando o uso dos ativos ocorre. Uma vez que

In a convergent sense with the purpose of protecting the credit claim of third parties (workers, primarily), the exercise of private autonomy in the legal guarantee contract is limited to the following normative profile: the prohibition of the provision of relief, apportionment or any co-participation of the insured or the policyholder in the event of a claim (Article 10 of Circular No. 477, 2013, of Susep); the prohibition of provision of grace (idem); the need to take out insurance at the first absolute risk (idem, article 9) (BRASIL, 2020e), understood as "where the insurer is fully liable for the loss up to the amount of the insured sum, no apportionment clause shall apply in any event" (IRB, 2011, p. 198); the exclusion of the contract exception not fulfilled with the derogation from the general insurance regime with the requirement that the insurance contract contains provision for the waiver of the application of Article 763 of the Civil Code[18], so that the possible state of default regarding the payment of the prize cannot compromise the security indemnity (idem, article 11, § 1, and article 3, IV, AC n. 1, of 2019, of the TST); the impossibility of resilience and termination of the contract, unilateral or bilateral (Article 3, § 1, of the aforementioned normative act of the TST)[19] (BRAZIL, 2020f).

The risk supported by the insurance corresponds to possible and eventual total or partial default of debit, possibly due to the title of executive in training (insurance as a non-recursal deposit) or in execution (insurance as a guarantee of execution). In this way, the legal insurance business involves - or may involve - double uncertainty. Firstly, as a manifestation of insurance in general, the vagueness about the occurrence of the accident. Eventually, however, uncertainty can override the legitimate interest itself shielded by insurance.

As has been shown, the legitimate interest is in the credit claim. However, due to the characteristics and purposes of that security product, the credit claim may be substantially modified. Indeed, from the debtor's perspective, the offer of insurance guarantee is related to the purpose of access to contradictory: [20]in the case of legal guarantee insurance Return: to extend the cycle of training of the enforcement order; in the case of insurance enforceable judicial guarantee, to allow the opposition of embargoes to execution (CLT, article 884). Consequently, depending on the content of the adversary exercised in appeal or embargoes and the corresponding judgment, there is the possibility of structural compromise of the mandatory legal relationship concerning the credit claim covered by the insurance.

In this line of understanding, the judgment of the appeal, with the production of substitutive effect (CPC, Article 1.008), or the embargoes to execution, may result in the collapse of the credit, with the recognition, for example, of the: non-existence of the obligation (extinction of precariously constituted credit); unenforceability of the title (allocation of an debeatur), unenforceability of the obligation (idem); passive illegitimacy of the executed (shake of the wanted debeatur); active illegitimacy of the exehot (ruin of the debeatur Cui), and so on.

a situação para o depósito termina, este terceiro-parte entrega os itens garantidos conforme especificado no acordo de custódia" (THE LAW DICTIONARY, 2020).

18 "The insured person who is in arrears in the payment of the premium will not be entitled to compensation if the claim occurs before its purging".

19 Although the normative act mentions, improperly, the impossibility of "termination". From the point of view of good legal technique, as the termination operates in the field of nullities, the normative act could not allow the preservation of null contract. It takes care, therefore, of prohibition of resilição (empty denunciation) and resolution (full denunciation, for non-compliance).

20 As shown above, in the civil procedure executive system, the insurance guarantee - as a substitute for the pledge - fulfils a different function: it does not directly connect with the opening of contradictory, but with the possibility of granting suspensive effect to the challenge to the execution of a judgment or to the embargoes to the execution, in the form of Articles 525, § 6, and 919, § 1, of the CPC, respectively.

The disturbance of the credit claim may be partial if the decision determines the qualitative (change of the quid debeatur) or quantitative (reduction of the quantum debeatur) resizing on the grounds, for example, the exclusion of a certain portion of the scope of the conviction or the recognition of over-execution in the calculation of default interest. In this way, therefore, the insurance guarantee is linked to the legitimate interest marked by precariousness, resolved according to the outcome of the trial of the appeal or the embargoes to execution.

The possibility of qualitative and quantitative resizing of the credit claim can operate in the opposite direction, with the addition of installments or the increase of the value, with the ranking of the procedural condition of the insured debtor. Such a framework may derive, for example: from the appeal of the plaintiff; from the judgment of the appeal of the decision - "judgment" - from the settlement filed by the creditor (CLT, article 884, § 3, final part[21]); the application of a procedural penalty in the course of the appeal or enforcement process, such as a fine and compensation on grounds of bad faith litigation or the commission of an act contrary to the dignity of the justice system; in the case of a determinative judgment, of the supervenient and gradual acquisition of the requirement, by maturity, of new portions of successive tract derived from legal relationship of continued tract (CLT, article 892)[22].

The security cover covers only "[...] the nominal maximum value guaranteed by the policy [...]" (Article 7 of Circular No. 477 of 2013 by Susep) (BRASIL, 2020e), which delimits the indemnity (FRANCO, 2009, p. 309). Regardless of the discussion on the legality of the thirty percent increase requirement, the regulatory requirement establishes, for executive guarantee insurance, that "the insured amount shall be equal to the original amount of the debit executed [...], duly updated by the legal indexes applicable to labor debts on the date of completion of the deposit" (AC n. 1, 2020, of the TST, Article 1, I); and for the insurance non-recursal guarantee, the value of the conviction, applying the limit laid down in Article 40 of Law No. 8.177 of 1991 (idem, II). It is also required that the insured amount, for the purpose of possible compensation, is updated according to the calculation criteria provided for in the legislation of regency (idem, III) (BRASIL, 2020g).

The obligation to indemnify falls on the amount to which the insured was obliged by the policy, in the form of Annex I of Circular n. 477, 2013, of Susep - General Condition 6.6 (BRASIL, 2020e). The update includes monetary correction and interest on late payments (ancillary instalments). Strictly speaking, in the scenarios described above, the alteration of the (main) debt is promoted, with accessions of qualitative or quantitative order: it is not taken care, therefore, of simple updating of the primitive debt by accessory portions.

Consequently, in principle, these additions do not fall within the scope of the security cover, therefore dependent on the new agreement of the insurer, by means of endorsement (Article 7, §§ 1 and 2, Circular n. 477, 2013, of Susep) (BRASIL, 2020e), as the "document, issued by the insurer, through which data and conditions of a policy are changed, in agreement with the insured person" (SUSEP, 2020), within its term (IRB, 2011, p. 93). However, there would be a field to build integrative interpretation in the sense that the 30% increase require-

21 "Only in embargoes to the attachment can the executed challenge the settlement sentence, fitting to the execution equal right and in the same term". In the common case, it takes care, strictly speaking, of interlocutory decision, with the solution of incident question, and not of sentence, in the sense of the word.

22 "In the case of successive benefits for an indefinite period, the performance shall initially include the benefits due until the date of entry into performance".

ment is based precisely on the possibility of extending the credit claim, as complications and vicissitudes inherent to the risks incurred in an insurance contract, which define it.

The risk covered, however, is not properly confused with the eventuality or precariousness of the credit claim, but with the possibility - or probability - of default. Consequently, the risk of default is exposed to the creditor - or potential creditor - of an obligation to pay a certain amount recognised in a formal instrument or consolidation process, as is the case in the case of judicial guarantee insurance.

Thus, in the work process, as a rule, the risk falls on the person of the worker and other creditors of obligations arising from the enforcement order[23]. In a convergent way with the risk included in the security cover, the claim materializes due to the configuration of the default status of the obligation, in whole or in part. With the qualitative and quantitative adjustment of the debt or, at least, the identification of the uncontroversial portion of the debt, the claim occurs due to the absence of accuracy to the official call for payment, within the period provided in the procedural legislation. In the case of insurance, due to the need to make it compatible with the traditional deposit [24]system, the claim occurs - or should occur - as described below.

the consolidation of the obligation to pay a certain amount and, with the possible settlement procedure (CLT, Article 879), the quantitative settlement of the credit claim, taking place with the final decision, it is for the debtor to pay the sum corresponding to the non-recursal deposit, observed, logically, the forces of the claim, in the case of partial reform of the original judgment, within the period specified therein, or, in the case of absence of an estimate, which the judgment of the liquidation shall lay down;[25]

Faced with the debtor's[26] recalcitrance, the claim is configured, understood as "the default of the policyholder's obligations covered by the insurance or the judicial determination to collect the amounts corresponding to the policy" (Article 2, IX, of AC n. 1, of 2019, of TST) with the consequent processing of the security indemnity, defined as the "payment by insurers of the insurance obligations, from the characterization of the claim" (idem, Article 2, III) (BRASIL, 2020f). In the case of a consolidated debit with a quantitative expression higher

23 From a theoretical point of view, they do not pose legal obstacles to the constitution of an obligation to pay a certain amount against the worker, either as the plaintiff or as the defendant. In this way, he himself could avail himself of the judicial guarantee insurance as a substitute for deposit or pledge

24 Regulated by the Normative Instruction (IN) n. 3, of 1993, of the TST, and amendments (BRASIL, 2020h).

25 IT is therefore essentially a proposal to adapt the procedure laid down in Item IV "e" of IN n. 3 of 1993 to the TST, which prescribes the following: "with the final judgment of the decision settling the conviction, will be released in favor of the execution of the amounts [of deposit Recursal] available, within the limit of the amount enforced, continuing, if applicable, the execution by remaining credit, and authorizingif the survey, by the executed, of the values that happen to rise" (BRASIL, 2020h).

26 To take care of the characterization of the claim, Article 10, II, "a", do AC n. 1, from 2019, do TST, contains more stringent provision, to make it coincide "[...] with the final decision of the final decision or by reason of judicial determination, after the trial of the guaranteed resources" (BRAZIL, 2020f). It is understood, however, that as a rule the solution indicated in the final part of the normative precept should prevail, with the regular opening of procedural opportunity for the debtor-insured to make the payment related to the non-recursal guarantee, by notification. Strictly speaking, although the adapted application of the idea of interpellation by time (dies interpellat pro homine) can be admitted, the simple supervenience of the final judgment cannot automatically correspond to the state of inadequacy, particularly in cases where the lack of liquidity of the object of the conviction is combined with the partial appeal brought by the debtor insured. In addition, in line with the General Condition 6.5.1 of Annex I of Circular n. 477, of 2013, of Susep, the occurrence of the final decision is part of the "expectation of a claim" (BRASIL, 2020e), thus considered as "verification by the insured person of the possibility of occurrence of a claim" (Act n. 1, of 2019, of TST, Article 2, II) (BRASIL, 2020f), and not in the claim itself, "characterized by non-payment by the policyholder, when determined by the judgment, of the executed value, subject of the guarantee" (General Condition 6.5.3) (BRASIL, 2020e).

than the amounts corresponding to deposits with a non-recursal purpose, the process shall continue with the execution of the remaining balance.

Once the general elements on the structure and function of the legal guarantee insurance in procedural and contractual terms have been drawn up, the correlation of the security guarantee will be examined more closely from the point of view of the time involved in the proceedings, including more time-consuming analysis of the timing of the claim and the term of the policy.

3 THE LEGAL GUARANTEE INSURANCE AND THE TIME(s) OF THE PROCEEDINGS IN THE CONTEXT OF THE LABOUR EXECUTION: TENSIONS AND DIVERGENCES

The time element plays a central role in process development (ANDOLINA, 2009, p. 259). By definition, the procedure consists of the successive coordination of acts addressed for the purpose of producing and delivering the due judicial benefit in a reasonable time[27]. For this, time assumes the condition of marker of the system of extinction of opportunities for the practice of process acts, with the phenomena of preclusion and the thing judged.[28]

Thus, in this section, we begin by examining the relationship between the passage of time and the effectiveness of the executive activity of the Labor Court to the realization of the credit claim recognized in favor of the worker. Then, the descriptive analysis of the - still ongoing - process of settling the case-law of the TST regarding the validity and effectiveness of the legal guarantee with a fixed term of validity, with the subsequent review of the regulatory technique adopted by it in AC n. 1 of 2019 for the characterisation of the claim, in view of the general legal framework for damage insurance

3.1 TIME AND EXECUTION OF WORKING RELATIONSHIP CREDIT

In the context of ordinary law, the integration of the satisfactory judicial activity into the operative content of the fundamental right to a reasonable duration procedure (CPC, Article 4) is recognized. This right, moreover, emerges duties of cooperative concert among all the actors of the process (article 6).[29]

27 In this context, time is a constituent element of the fundamental right to judicial and administrative proceedings with reasonable duration and speedy processing (Federal Constitution, Article 5, LXXVIII)

28 In the form of Article 223 of the CPC, "Upon expiry of the period, the right to practice or amend the procedural act, regardless of a judicial declaration, is extinguished, but the party proves that it did not do so for a just cause".

29 By the way, the judicial authority appears as the prime addressee of the duties irradiated by the fundamental right to a reasonable procedure, in the form of the general duty provided for in Article 139. Since the original formation (1943), the CLT operates in a similar sense: "The Labor Courts and Tribunals will have ample freedom in the direction of the process and will watch over the rapid progress of the cases, being able to determine any necessary diligence to clarify them" (Rule 765). It should be noted, moreover, that the broad freedom of conduct of the process acts as a means put at the service of the slight progress of the process.

In the execution processes or in the satisfactory stage of the demand, in the condition of great bottleneck of the justice system (BRASIL, 2019, p. 126 and 221)[30], the element time seems to present a categorical correlation with the possibilities of achieving the purpose of the execution: to promote the effective satisfaction of the credit claim arising from the instrument permitting enforcement[31].

In this sense, the further away from the point of obligation, the fewer concrete chances of effective conversion of the credit claim printed on the title in what the procedural jargon designates as "the good of life", especially in the case of the work process, where the medium and long-term vicissitudes connected with the exercise of entrepreneurial activity may completely compromise the effectiveness of the executive jurisdictional tutelage, identified, for example, by the so-called "survival rate[32]" and the average lifetime of business[33].

In the field of labour relations, the problem takes on a more dramatic shape: in the common case, workers resort to jurisdiction only in the event of - or at the time of - the termination of the contractual relationship, which in a sense turns out to be the Labour Court, according to the expression found, in "Justice of the Unemployed"; [34]the credits under discussion, as a rule, are of a food nature , necessary, therefore, for the worker to provide the most elementary level needs [35](SAMPAIO, 2009, p. 13) connected with their own survival.

30 According to Justice in Numbers, "The Judiciary had a collection of 79 million pending lawsuits down at the end of 2018, and more than half of these lawsuits (54.2%) referred to the execution phase", with "clear trend of stock growth" (BRASIL, 2019a, p. 126).

31 In a technical study on the state of Brazilian tax execution, Queiroz e Silva (2016, p. 9) points out that "the temporal distance between the launch of the tax credit and its collection contributed to the debtor's asset depletion" and, further, reinforces: "the temporal distance between launch and execution favors the undoing of the debtor's assets, substantially reducing the chances of successful execution" (QUEIROZ E SILVA, 2016, p. 9). In a similar line, still on tax execution, the Justice in Numbers notes that "end up coming to the Judiciary old debt securities and, consequently, less likely to recovery" (BRASIL, 2019a, p. 131).

32 Two years after the constitution, the survival rate corresponded, on average, in 2014, to 76.6% of the companies (BRASIL, 2016, p. 16-17). In other words: almost the fourth part of the companies in general did not exceed the two-year operation mark. In the microenterprise segment, at the same time, the rate reached only 55% (BRASIL, 2016, p. 24). The data on microenterprises, in the context of this investigation, point to an even worse scenario, as they bring together about half of the workforce occupied. In addition, the crisis that hit the Brazilian economy after 2014 (time of data collection), may reveal an even more critical situation.

33 In 2015, on average, the Brazilian company had only 10.9 years of existence (IBGE, 2017, p. 22). In the same year, a mortality rate of 15.7% was identified (IBGE, 2017, p. 24). Changing as kids: of the existing set of companies on 31.12.2014, 15.7% ceased to exist throughout 2015. From 2008 to 2014, the annual mortality rate ranged from 14.6% (2013) to 20.7% (2014) (IBGE, 2017, p. 24).

34 Not without a reason. In 2020 (with data until April), according to the "Ranking of Most Recurrent Subjects in the Labor Court", the four most frequent topics necessarily relate to the termination of the employment contract: "prior notice"; "fine [compensation, in rigor] 40% of FGTS"; "fine under Article 477 of the CLT"; "fine under Article 467 of the CLT" (TST, 2020b). These same four subjects occupied the forefront in the calculation relative to 2018 (BRASIL, 2019b, p. 62) and 2019 (TST, 2020b). And according to Justice in Numbers 2018, "in the Labor Court, with 12% of the total of lawsuits filed, there is a concentration on the subject "severance pay for termination of the employment contract" - the largest quantity of new cases of the Judiciary [as a whole]", although "this occurs because the Labor Court has fewer possibilities to register in the National Tables, generating, consequently, data more concentrated in a single item" (BRASIL, 2019a, p. 204).

35 Special attribute recognized, moreover, by rule of the Federal Constitution: to discipline the legal regime of enforcement of obligation to pay a certain amount imposed by the Judiciary to the Public Treasury, article 100, § 1, assigns the condition of "food nature" to claims "[...] arising from wages, salaries, earnings, pensions and supplements thereto, pension benefits and indemnities for death or disability, based on civil liability [...]".

In Labor Court, with data from April 2020, the processing of execution, [36]between the beginning and the end, lasts, on average, about a thousand days[37], and this after the constitution of the executive title, which, in average, considered the procedural cycle Recursal, takes about another thousand days (TST, 2020c) [38].

The duration of the processing does not in itself mean the achievement of the satisfactory purpose of the execution[39], with the actual fulfilment of the set of obligations represented by the title. In fact, they affect events such as the atypical extinction of the execution and suspension due to the absence of identification of the debtor's whereabouts or, in the form of Article 921, IV, of the CPC, due to the absence - or insufficiency - of available assets.

3.2 THE HIGHER COURT OF EMPLOYMENT AND INSURANCE LEGAL GUARANTEE: JURISPRUDENCE CLAUDICANTE, REGULATORY ASSERTIVE

As demonstrated, in the work process, the explicit provision of admission of the guarantee insurance occurred in November 2017, at the time of the beginning of the validity of Law n. 13.467, from 2017. Before that, from the application of the systemic integration rules provided for in articles 769 and 889 of the CLT, the jurisprudence of the TST had been accepting this type of guarantee, but still in an erratic and inconsistent way.

In the pre-training stage, prior to 21.1.2007, there are no decisions regarding the subject under analysis. In the next stage, from that date until 13.11.2014, there is a pronounced tendency to refuse insurance as a suitable means of guarantee, mainly due to the non-compliance of the preferential ordinal scale of the pledge in cash[40] and the forecasted term for the security coverage, [41]invoking, in general, the application of Súmula n. 471, I, of the TST itself.[42]

36 The release of the statistical summary presents, among others, the following limitations: it does not distinguish the execution as a stage of a process (execution of a judgment, par excellence) of the autonomous process of extrajudicial enforcement (execution of an undertaking to adjust conduct, for example); it makes no difference as to the nature and content of the object of the performance (obligations to pay, to do, not to do and to deliver, basically). In addition, the data do not specify or demarcate the stability of the enforcement order (provisional and final execution), details of which are known, by the public, could provide more adequate understanding of the effects of time on the effectiveness of execution. The Internal Affairs General of Labor Justice, in the system e-Gestão, raises data with greater degree of clipping, as, for example, on the "extinct executions - other" (Item 90.096), with coverage on the "executions terminated without having been extinguished in full compliance with the agreement, the total extinction of the debt obtained by the executor, the application of the statute of limitations or the fulfilment of the obligation to do or not to do" (TST, 2020a).

37 Thus, considering only the temporal scale, the misadventures of the worker find parallel in the tour experienced by the mythical Persian queen Sherazade.

38 In 2019, the average term reached 1,687 days (TST, 2020c). In addition, the historical series started in 2004 shows a strong trend towards an increase in the medium term. There was a slight fall in 2012 (682 days), with a resumption of growth between 2013 (961 days) and 2015 (1,315), with further slight falls in 2016 (1,121) and 2017 (1,026), followed by a sharp rise in 2018 (1,300) (TST, 2020c).

39 In line with Article 924 of the CPC, "Execution shall be extinguished when: I - the original application is rejected; II - the obligation is satisfied; III - the executed obtain, by any other means, the total extinction of the debt; IV - the execution waiving the claim; V - the intercorrent prescription occurs".

40 Example: RO-0116400-46.2009.5.15.0000, SDI-2, Rapporteur Minister Alberto Luiz Bresciani de Fontan Pereira, DEJT 19.4.2011.

41 Example: AIRR-0133400-06.2006.5.15.0084, Sixth Panel, Rapporteur Invited Judge Cilene Ferreira Amaro Santos, DEJT 7.11.2014.

42 "Não fere direito líquido e certo do impetrante o ato judicial que determina penhora em dinheiro do executado, em execução definitiva, para garantir crédito exequendo, uma vez que obedece à gradação prevista no [então vigente] artigo 655 do CPC [de 1973]". De passagem, nota-se que o processo de sedimentação desse entendimento terminou em 20.9.2000, com a aprovação da Orientação Jurisprudencial n. 59 da SDI-II, com ulterior conversão na súmula (agosto de 2005), em época anterior, portanto, à positivação do seguro garantia judicial na ordem jurídica processual. Em outras palavras: a formação da Súmula n. 471, I, não levou em conta – nem poderia levar – o impacto decorrente da legislação superveniente que permitiria a substituição da penhora em dinheiro pelo seguro garantia.

In the subsequent phase, from 14.11.2014 to 17.3.2016, the previous trend was initially preserved by the use of similar grounds. However, in the final segment, there is a shift in understanding, and the insurance guarantee is accepted as an appropriate substitute for the pledge in cash, at least in provisional execution[43]. With the arrival of the next cycle, from 18.3.2016 to 11.11.2017, it is consolidated the acceptance of the substitution of the attachment in cash by the security guarantee in provisional execution[44], although it was maintained, as a rule, the refusal in definitive execution[45]. In addition, during that period, in June 2016, in the wake of the summary review process carried out at the beginning of the CPC's validity in 2015, there was a relevant milestone for the jurisprudential shift, with the amendment of the Jurisprudential Guidance n. 59 of SDI-2, which now expressly provides for equivalence guaranteeing money and insurance[46].

However, the inflection point, to admit the substitutive effectiveness of the guarantee insurance in definitive execution, seems to have survived only in March 2017 [47], with the decision rendered in Case n. 0020901-94.2016.5.04.0000[48], jurisprudence that, at this point, it remains stable[49] from this inflexive milestone on [50], including after the beginning of the validity of Law n. 13.467, from 2017, period in which a broad process of understanding formation regarding the judicial guarantee insurance begins. By the way, the modality of non-recursal insurance will lead to the development of the TST jurisprudence about the employment of the security guarantee in general, allowing it to fulfill the relevant role of uniformization of the interpretation of the ordinary labor legal order, through the trial of review appeals and especially embargoes (functional competence of SDI-1).

In the period prior to 11.11.2017, with the insurance provided only for the executive guarantee, there was no broad institutional space for the solution of ordinary controversies, due to the limited access to the special judicial instance, in executions, to cases of direct violation of the Federal Constitution (CLT, article 896, § 2, and Summary n. 266 of the TST). Thus, in that period, the controversies reached the TST only in exceptional cases, in the degree of ordinary appeal in warrant of security. Thus, although through analogical integration, there may be scope to apply to the executive guarantee [51]certain legal solutions built to resolve impasses on the Recursal modality.

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43 Examples: RO-1000612-51.2014.5.02.0000, SDI-2, Rapporteur Minister Luiz Philippe Vieira de Mello Filho, DEJT 11.3.2016; RO-0021773-80.2014.5.04.0000, SDI-2, Editor Minister Luiz Philippe Vieira de Mello Filho, DEJT 8.4.2016.

44 Example: RO-0010385-59.2015.5.18.0000, SDI-2, Rapporteur Minister Delaide Miranda Arantes, DEJT 30.9.2016.

45 Example: RO-0010385-59.2015.5.18.0000, SDI-2, Rapporteur Minister Delaide Miranda Arantes, DEJT 30.9.2016.

46 "Mandado de segurança. Penhora. Carta de fiança bancária. Seguro garantia judicial. [...]. "A carta de fiança bancária e o seguro garantia judicial, desde que em valor não inferior ao do débito em execução, acrescido de trinta por cento, equivalem a dinheiro para efeito da gradação dos bens penhoráveis, estabelecida no artigo 835 do CPC de 2015 (artigo 655 do CPC de 1973)".

47 Interesting scenario: contrary to expectations, it should be noted that the modification of OJ n. 59 of SDI-2 preceded - and, more than that, led - the change of the jurisprudential framework

48 RO-0020901-94.2016.5.04.0000, SDI-2, Rapporteur Minister Antonio Jose de Barros Levenhagen, DEJT 31.3.2017.

49 In line with the normative command deriving from Article 926 of the CPC: "The courts must standardize their jurisprudence and maintain it stable, fair and consistent".

50 Exemplos: RO–0021527-16.2016.5.04.0000, SDI–2, Relator Ministro Alberto Luiz Bresciani de Fontan Pereira, DEJT 11.4.2017; RO–0021757-58.2016.5.04.0000, SDI–2, Relator Ministro Antonio Jose de Barros Levenhagen, DEJT 28.4.2017; RO–0021468-28.2016.5.04.0000, SDI–2, Relator Ministro Douglas Alencar Rodrigues, DEJT 12.5.2017; RO–0021531-53.2016.5.04.0000, SDI–2, Relatora Ministra Delaide Miranda Arantes, DEJT 26.5.2017; RO-21507-25.2016.5.04.0000, SDI–2, Relatora Ministra Maria Helena Mallmann, DEJT 26.5.2017, e assim por diante.

51 Example: AIRR-0001349-07.2010.5.01.0205, Sixth Panel, Rapporteur Summoned Judge Américo Bede Freire, DEJT 8.5.2015.

The case-law debate has also been about the term of the security guarantee. During the process of insurance insertion in the areas of the work process, within the scope of the TST, it was not accepted, as a rule, the guarantee effectiveness of the policy recorded by a predetermined term clause. In short, it was understood that precariousness compromised the very fulfillment of the purpose of the guarantee, connected with the satisfaction of the credit claim arising from the enforcement order , requiring at least a policy with reasonable term.

In a more recent period (2019 onwards, in particular), decisions coexisted in both directions[52], even after the beginning of AC n. 1, 2019, on 16.10.2019 (BRASIL, 2020f) [53]period in which, however, there seems to be a more pronounced trend in the acceptance of the predetermination of the term, in line with regulatory discipline.

Within the scope of the regulation, for the purpose of preserving the efficiency of the guarantee (and thus protecting the holder of the credit claim), an unorthodox operating regime has been constructed. For this, in a technical reality construction activity, the moment of occurrence of the accident shifted, according to article 10 of AC n. 1, from 2019 (BRASIL, 2020f). More specifically, five hypotheses of occurrence were created, guided by two parameters: due to the inadequacy (material criterion) and due to the duration (temporal criterion). Thus, in the first case, the claim materializes: "with non-payment by the holder of the executed amount, when determined by the judge" (executive guarantee insurance - Article 10, I, "a") and "[...] by reason of judicial determination, after the trial of the guaranteed resources" (Recursal guarantee insurance - Article 10, II, "a", final part).

In the second case, the occurrence of the claim occurs in the following cases: "with the failure to comply with the obligation of, up to 60 (sixty) days before the end of the term of the policy, to prove the renewal of the guarantee insurance or submit new sufficient and suitable guarantee" (insurance executive guarantee - article 10, I, "b"); idem (insurance guarantee Recursal - article 10, II, "b") [54]and, finally, in the form examined in the previous section, "with the final decision" (idem - article 10, II, "a", first part).

The regulation is supplemented by the provision that "proof that the policy has been renewed is the responsibility[55] of the applicant or the executed party and that it is unneces-

52 Example of refusal: AIRR-0002039-45.2016.5.13.0026, Second Panel, Rapporteur Minister José Roberto Freire Pimenta, DEJT 5.4.2019 (in this case, it is observed that the term of the insurance will expire only on 20.6.2023). Example of acceptance: RR-0010025-52.2014.5.01.0059, Sixth Class, Rapporteur Minister Katia Magalhaes Arruda, DEJT 13.9.2019, in which it was established that "the existence of a period of validity in the insurance guarantee does not invalidate it, since the existence of time limits in the policies is typical of insurance". Example of acceptance with caveat: RR-1000110-66.2016.5.02.0704, Third Panel, Rapporteur Minister Alberto Luiz Bresciani de Fontan Pereira, DEJT 27.9.2019, with the indication that in the case of "[...] given term of validity of the policy [...]" the guarantee "[...] shall be renewed or replaced before maturity"

53 Example of persistence regarding refusal: RR-0011652-45.2015.5.15.0131, Second Panel, Rapporteur Minister José Roberto Freire Pimenta, DEJT 14.2.2020. The same rapporteur: RR-1001402-19.2018.5.02.0057, DEJT 5.6.2020, and AIRR-0001055-87.2017.5.12.0015, DEJT 19.6.2020, among others.

54 The accident forecast set up by the risk of non-renewal of insurance seems to be inspired by Article 10 of Ordinance n. 164, of 2014, of PGFN, with almost identical wording. There is only a slight difference: "obligation to renew insurance" (PGFN) and "obligation to prove the renewal of insurance" (TST).

55 Correctly, it takes care of the legal position of the policyholder as a task, because it relates the provision that is up to him to, in his own interest, maintain the condition relative to the Recursal or executive guarantee. However, contradictorily, in Article 10, I, "b", and II, "b", it is mentioned the "obligation to [...] prove the renewal of the guarantee insurance or present new sufficient and suitable guarantee".

sary to summon him to regularisation" (Article 10, sole paragraph)[56]. If the claim occurs, in any event, the insurer is summoned to pay the corresponding compensation (Article 11).[57]

The material criterion, related to the set default status, converges with the nature of the credit interest protected by the security coverage. The temporal criterion, however, to some extent, seems to force the limits of insurance compliance and operation in general, especially when taking into account the application of other measures derogating from the corresponding legal regime under the Civil Code, examined above.

In essence, the criterion laid down in the Regulation converts into a claim the simple possibility of terminating the security guarantee itself, without immediate adherence to the interest covered by the insurance, related to the risk of default of credit claim. In a heuristic way, the following presumptive chain is established: the imminence of extinction of the guarantee is equivalent to its own extinction (sixty days in advance); the extinction of the guarantee is equivalent to the inadequacy itself [58].

Moreover, the displacement of the claim over time changes the very nature of the interest safeguarded by the insurance and, consequently, the risk assumed by the insurer: in a sense, it leavesto protect the credit claim itself in order to protect the guarantee itself that would override that claim. Similarly, the appropriate risk by the insurer would no longer be limited to the state of default referring to the credit claim, but would cover the risk relating to the simple absence of renewal of the insurance contract itself and, by extension, the risk of revocation of the lien or enforceable guarantee.

In this sense, it could not be recognized, in principle, that the insurance protects the legitimate interest of the policyholder in the provision of a non-recursal or executive guarantee. In a certain interpretative sense, however, there could be a place to defend the idea that it is insurance on behalf of others with the functional vocation of protecting the legitimate interest of the creditor as to the right to rely on the protection of a non-recursal or executive guarantee.

From the point of view of the security technique examined above, however, the contract of insurance on behalf of others is for the benefit of those who appear as the holder of the credit claim. Regardless of this discussion, from the point of view of the creditor, the regime established by the regulation supplements the guarantee related to the satisfaction of the credit, as if to the form of assertive reinforcement.

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56 The rule is contrary to the procedural duty of cooperation, with reach over all actors in the process, including the Judiciary (CPC, Article 6). In the case of the Judicial Guarantee Insurance, linked to the objective extrinsic assumption of preparation, the inconsistency with that duty is more evident. In the event of the expiry, or imminent expiry, of the term of the security guarantee during the processing of the appeal, even after the trial (CPC, 933, § 1º), would oblige the rapporteur to summon the applicant to provide new security (security or not)in the form of Article 933, head, and, by analogy, Article 1.007, § 2, both of the CPC. According to this understanding, the recognition of defection would occur only in the case of absence of timely accuracy for the regularization of the preparation.

57 "Once the claim has been established, the magistrate who is in charge of the proceedings shall determine to the insurer the payment of the enforced debt, duly updated, within 15 (fifteen) days, under penalty of continuing against it the execution in the file itself, without prejudice to any administrative or criminal penalties for failure to comply with a court order". As a seed for a timely investigation, the following question is recorded: the payment of the security indemnity, in substitute condition (indemnity as compensation for damage)would it interfere with the legal nature of the obligation originally to be enforced for tax purposes?

58 The regulatory technique ends up trapping the policyholder and the insurance agent: strictly speaking, either the warranty contract is renewed (with the creation of the legal obligation to renew the insurance) or the claim is incurred, which is therefore, compromises the randomness inherent in security arrangements. According to Tavares (2017, p. 121), the current regulatory framework may represent a "dysfunctional and antirandom [...] situation due to the commitment of the insurer to compensate without risk, in the event of not renewing the policy and the policyholder does not replace the guarantee".

In this particular analytical angle, the regulatory regime results in double layer protection, overlapping: on the external layer, immediate protection, the guarantee of the guarantee, against the risk of inadequacy (guarantee maintenance requirement; "metaguarantee"); in the inner part, of mediate safeguard, the protection of the credit claim itself, against the risk of default.

Despite this, regulatory heterodoxy may open up room for questions relating to legality (and therefore legal certainty), in addition to being able to compromise the viability of the judicial guarantee insurance as a security product from which the Labor Court itself can reap institutional benefits for the efficient realization of fundamental rights related to the satisfactory jurisdictional activity. Thus, in the next section, possibilities of improvement of the security guarantee regime in the work process are examined.

4 THE LEGAL GUARANTEE INSURANCE AND THE PROTECTION OF THE WORKER'S CREDIT CLAIM: AN EFFICIENT REGULATORY CONFLUENCE PROPOSAL

In order to provide special and effective protection to the holder of the credit claim - commonly of a food nature -, the regulatory framework under the TST restructured the conformative basis of the legal guarantee insurance, distancing it to some extent, the legal system of insurance in general and the more orthodox security technique.

Despite the existence of sound foundations, linked, above all, to the realization of workers' rights, the strengthening of the protective system carried out in this way can, after all, serve as a factor of insecurity and issue signal of discouragement for the dissemination of security instruments as a guarantee in the work process.

In other words, the regulatory regime may result in premium increases or even more cautious behavior by insurance agents. As a result, narrowing the field of operation of the security guarantee would represent an institutional setback, with the return of the inefficient traditional system of attachment, expropriation and disposal of assets being further strengthened.

The improvement of the system of security guarantees in the work process can go through several complementary paths. The first of them, connected with the principle of legality and legal certainty, consists in conducting the judicial guarantee insurance for the environment of the ordinary positive law system (law in the strict sense), in addition to the simple generic provision in the procedural legal order. Care is therefore taken to discipline it in law, as a security product, on certain points of tension that distance insurance in general, without, of course, entering into details, which can - and should - remain in the regulatory environment, with greater dynamism and technical expertise. In this sense, there is the Senate Bill n. 543, from 1999 (BRAZIL, 2020d), approved in it, and currently in progress in the House of Representatives as Bill n. 2.851, from 2003 (BRAZIL, 2020a), prepared for vote in plenary.

In accordance with the wording approved by the initiating legislature, the following deadlocks are solved, for example, at the legal level: the prohibition of the use of the exception of

the unfulfilled contract (Article 5) [59]and the corresponding duration, as a rule, the duration of the obligation supported by the guarantee (Article 8[60]), which eliminates that little technical penalty of fictional displacement of the claim in time because of the simple "risk of risk" by approaching the end of the insurance term.

In addition, it would be appropriate to amend Article 2[61] to add the express provision of coverage on the obligation arising from a decision or legal proceedings. Another point worthy of attention is the harmonization of the security regime with the permanent possibility of consensual solution of demand[62]: in this field, the insurance guarantee should not act as a factor of discouragement.

Consequently, as a measure to preserve the conciliatory vocation of Labor Justice, it could be foreseen that the novation of the debt, by virtue of transaction legal business, does not compromise the guarantee effectiveness of the insurance, observed, however, as a ceiling, the value of the initial cover, thus derogating from the general rule in Article 364 of the Civil Code.[63]

The second possible improvement path involves the construction of a dynamic and flexible security assurance model, with increased effectiveness and production of efficiency gains for all stakeholders. In this regulatory paradigm: it preserves - and accentuates - the purpose of protection of the credit law (of workers, especially, with food quality), with the institution of a mixed system of guarantees; (re)The legal guarantee insurance is close to the ordinary security technique, highlighting the more evident presence of the economic, financial and actuarial balance guidelines.

More specifically, the dynamic securitisation model starts from the identification of the probability of occurrence of accidents (non-compliance with the obligation), with the consequent creation - and maintenance - of accident boards. For this, using information and communication technology tools, the pertinent data, many of them routinely raised by the Labor Justice (TST, 2020a), must be statistically correlated.

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59 "The delay or default of the policyholder in payment of the premium does not affect the rights of the policyholder, continuing the policy in force. Sole paragraph. In the event of delay or default in the payment of any portion of the premium, the maturity of the others will occur, and the insurer may resort to the execution of the counter-guarantees".

60 "The insurance contract shall be valid from the date of commencement fixed in the policy until the termination of the guaranteed obligation. § 1º. The term of the insurance contract may be formalized by the return of the original of the policy by the insured or by his written declaration, certifying the fulfilment of the guaranteed obligation. § second. The term of the insurance contract will also be terminated by a statement from the policyholder to the insurer who, in this case, will notify the policyholder to rule within 30 (thirty) days, regardless of the failure to demonstrate compliance with the obligation. § third. The policy may establish a certain term of validity for the insurance contract, in cases authorized by the official agency of supervision and control of the activity".

61 Seguro-garantia é aquele pelo qual a seguradora garante ao segurado o fiel cumprimento de uma obrigação do "tomador, decorrente de lei ou contrato, até o valor fixado na apólice". Em rigor, a obrigação decorrente de decisão judicial não deixa de decorrer de lei. No entanto, por imperativo de precisão, registra-se sugestão de emenda: "Seguro-garantia é aquele pelo qual a seguradora garante ao segurado o fiel cumprimento de uma obrigação do tomador, decorrente de lei, de contrato ou de decisão ou processo judicial, administrativo ou arbitral, até o valor fixado na apólice". A expressão "de decisão ou processo" justifica-se pela necessidade incluir as obrigações representadas por título executivo judicial (CPC, artigo 515) e extrajudicial (CPC, artigo 784). A extensão para o processo administrativo – em relação à imposição de sanção pecuniária, por exemplo, – poderia permitir que o devedor obtivesse certificação de conformidade antes mesmo do eventual ajuizamento de execução fiscal.

62 According to Article 764 of the CLT, "Individual or collective bargains submitted to the Labor Justice will always be subject to conciliation

63 "The novation extinguishes the accessories and guarantees of the debt, whenever there is no stipulation to the contrary. [...]". For the same reason, the analogue application of Article 787, § 2, by which civil liability insurance is prohibited, should be rejected "[...] to the insured person to acknowledge his responsibility or confess the action, as well as to compromise with the injured party, or to indemnify him directly, without express consent of the insurer".

In this data collection, the following elements related to the passage of time can be included, among others: the average duration of the cognitive cycle of the process (from the proposition of the demand to the final judgment of the judgment[64]); the average duration of the execution process (extrajudicial execution) or of the executive stage of the claim (idem, judicial); the average time of existence and survival of the companies in the industry, possibly correlated with the actual working time of the debtor-borrower.

To obtain a portrait endowed with a higher degree of reliability, one can adopt a geographical cutout. Thus, the possibility of criterion arises, the calculation by area of coverage of each Regional Labor Court (elements "a" and "b", in particular) and by State or municipality (idem, "c"). In addition, certain parameters of material and personal order may be added, such as the branch of economic activity carried out by the debtor, according to the National Classification of Economic Activities, and the nature and object of the obligation covered by the guarantee, by, for example, opposing between instalments arising from a contract of employment which is being performed and a contract of employment which has been terminated.

The rigorous statistical treatment of these elements may result in the establishment of accident indices and/or degrees of inadequacy risk. In this sense, there would be space to examine the possibility of adopting a model inspired by the objective equation of risks related to health, safety and work environment, in the system for calculating social security contributions by the SAT/RAT regime (Work Accident Insurance and Environmental Occupational Risk).

The above picture gives dynamism to the security system. On another side, however, it is advisable to lend flexibility. The dynamic character is related to accidents and risks of general order, considering the set of agents acting in the economic domain. The flexible conformation consists in starting from that dynamic framework and, without losing objectivity, in a complementary way, adapting it to the particular condition of the debtor-borrower[65] , adopting as a source of inspiration, in this segment, the work developed by Feitosa and Cruz (2019, p. 12-14) in the field of Tax Law, for the equation of impasses in the relationship between the Tax and the taxpayer, with the necessary adaptations to the particular context of provision of procedural security guarantee.

Thus, security malleability acts on the following operational axes: as a general guideline, to maintain the effectiveness of the protection arising from the guarantee insurance; to provide the "good debtor-borrower" with better conditions of access to competitive security products (the most expensive premiums, for example); consequently, to serve as an incentive for economic agents in general to adopt behavior compatible with the acquisition or main-

64 In order to mitigate the statistical bias, the calculation should, as far as possible, be based on the processes that result in the recognition of the enforceability of the obligation, without including, therefore, cases of anomalous extinction, for purely procedural reasons, and so on.

65 Although with fundamentals and purposes that do not entirely coincide, the article of CLT 899 contains predictions that approach the idea of flexibility, by reducing or waiving the provision of collateral. "The value of the Recursal deposit will be halved to non-profit entities, domestic employers, individual micro-entrepreneurs, micro-enterprises and small businesses"; § 10. "Beneficiaries of free justice, philanthropic entities and companies in judicial recovery are exempted from the deposit". In the same line of operation, regarding the waiver of the provision of executive guarantee: "The requirement of the guarantee or pledge does not apply to philanthropic entities and/or those that make up or composed the board of these institutions" (CLT, article 882, § 6).

tenance of the "good debtor-taker" status (and, with this, to be able to count on that favored regime[66]).

The quality of "current good debtor-borrower" (in the process in which it is intended to offer guarantee) is largely due to the past condition of "good payer". In this line of reasoning, the "good payer", in general, reveals the tendency to fit himself as a suitable and reliable debtor. The objective determination of this condition could result, for example, from the institution of scoring system, to take into account the historical performance of the debtor regarding the regular, adequate and timely fulfillment of obligations before the Labor Court.

It could also compose the evaluation of the previous behavior of the debtor the illicit occurrences, for example: the practice of act against the dignity of the justice system (CPC, articles 774 and 918, single paragraph, among others); the filing of appeals with the purpose of postponement, with the unnecessary addition of time to the process, element that, as demonstrated, acts in the opposite direction of satisfactory effectiveness, and noncompliance with procedural duties in general (CPC, article 77, among others).

In a similar way, failure to comply with the duties of the process would not only lead to an endoprocedural reprimand, but could, indirectly, radiate effects for other processes, with exoprocedural scope, therefore: the punishment applied in a given process would result in the reduction of the transgressor's performance grade, thus reflecting the access regime to provide guarantees under different conditions.

In the same vein, in the case of compliance with the duties of the case, the conduct of the procedural person could be placed on the basis of a positive procedural sanction system, measure that would encourage the staff member to behave appropriately as a litigant not only in the small and finite context of a case, but before the justice system as a whole (encouragement for procedural compliance).

An indication of the condition "good payer" comes from the National Bank of Labor Debtors (BNDT) and the Labor Debt Negative Certificate (CNDT), in the form provided for in article 642-A of the CLT. Thus, in general, in the guarantee procedure, the debtor-borrower enrolled in the BNDT would have less favored condition than the one that can display CNDT[67].

The result of the implementation of a dual-edge system - dynamic and flexible; general and particular - could have repercussions on the legal regime of provision of non-recursal and executive guarantee, with scope not only on the judicial guarantee insurance. In the case of the security guarantee, the debtor-taker's performance note would exert influence - positive or negative - in two dimensions: private, vis-à-vis the insurance market, and public, vis-à-vis the justice system (Labor Court, in the case under study).

66 As a reinforcement argument for the admission of malleable executive guarantee, it is pointed out the investigation carried out by Campos and Di Benedetto (2015, p. 18), in which it was identified that the opposition of embargoes to execution in the Labor Justice (dependent, as a rule, of provision of guarantee) does not appear frequently or integrate the catalogue of the most worrying problems related to the ineffectiveness of executions. According to them (2015, pp. 20 and 45-46), the problem lies primarily in the voluntary inadequacy of the debtors, regardless of the presentation of guarantees as a means of access to the contradictory: "In short, when studying the embargoes (to the execution and of third parties), it is perceived that the sub-phase in which they are impelled [opposites, in fact] does not present serious problems for the advancement of the phase of labor execution. This is because embargoes are quite rare in courts of all sizes. [...]", so that "the embargoes do not seem to hinder, seriously, the executions in the Labor Justice" (CAMPOS; DI BENEDETTO, 2015, p. 18).

67 Assim, a apresentação de seguro garantia executivo, como substituto da penhora, pode servir como porta de acesso para a CPDT, com efeitos de CNDT.

Together with the insurance market, the influence would come from the direct correlation between the performance of the debtor concerned and the access to insurance contracts under competitive conditions (to lower premiums, for example, as pointed out). Before the Labor Court, there are numerous possibilities to calibrate the guarantee system according to the debtor's history.

The good performance of the debtor-borrower could allow access to less stringent regime. In this sense, for example, there would be space to accept legal insurance with a predetermined term without this, in itself, representing an increase in the risk of default. Thus, for example, according to the statistical tabulation constructed in the form stated above, the minimum term of the policy could oscillate to the taste of that set of variables, based, above all, on parameters of passage of time.

Still on the term of the coverage, as an integrative resource, based on the thirty percent increase in the value of the debt (discussed above)there would be a requirement to increase the duration over the average duration of the process or execution phase. The very requirement of time adjectification may vary according to the historical performance of the debtor-borrower: thus, the agent with previous good performance could present a guarantee with shorter duration, managing to obtain a lower value premium. The lodging of appeals - which, by definition, represents the prolongation of the procedural legal relationship - could result in a requirement to add warranty time by means of a security endorsement.

A bolder step, based on that set of statistical elements, would be to provide for the possibility of waiving part of the guarantee, with the reduction of the own value of the cover, which in that case would not reach the whole debit, advantage that would be justified and based on the identification of the low degree of risk of inadequacy. In any case, however, the proposed improvement of the system is accompanied by the provision of security and procedural rearguard, aimed at protecting the interests of creditors.

Beforehand, it is noted that the security rearguards themselves can be flexible in their modulation, being more or less rigorous, depending on the identification of the risks involved. This system of guarantor escort includes the requirement of reinsurance contracts and the parallel application of procedural instruments to increase the effectiveness of the process, even if they do not place themselves, directly, as a condition for the acceptance of the judicial guarantee insurance.

Parallel instruments are subject to the mitigation of the impact of the passage of time on the process, for example by requiring the immediate payment of the uncontroversial portion of the debt and the efficient application of the idea of progressive transit , with the processing of final execution [68]for the plots not discussed on appeal and for the main debtor pending appeal proceedings against subsidiary debtors, except, logically, in cases of possibility of production of the so-called objective or subjective expansive effect, respectively.

In addition, security countermeasures must include the regulation of the Labor Execution Guarantee Fund (FGET), with creation determined by Article 3 of Constitutional Amendment No. 45, 2004, but still pending regulation (CAMPOS; DI BENEDETTO, 2015, p. 41-45)[69] : in the

68 In this sense, the Summary n. 100, II, of the TST.

69 It questions the state of legislative inertia in the Direct Action of Unconstitutionality by Omission n. 27, proposed in 2014 by the National Association of Labor Prosecutors (STF, 2014). And since then the state of jurisdictional omission prevails,

event of the expiry of the term of the guarantee insurance accompanied by the state of default of the debtor, the satisfaction of the claim would come from resources of that fund, without prejudice, in that case, of the right of return against that debtor, for compensation.

Part of the cost of the FGET could come from the security system itself. Specific tax (IOF)[70] is levied on insurance operations. Given the impossibility of direct tax linkage to certain expense[71], opens up as a possibility to replace the full or partial tax by general social contribution or intervention[72], with collection attached to the fund.

5 CONCLUSION

The actual satisfaction of labor-related claims depends on the provision of certain special procedural protection measures in favor of the creditor-worker, with scope on credit guarantees. This creditor, as a rule, is in a situation of vulnerability: the data found in the research indicate that, in the Labor Court, there is a marked predominance of demands that take care of matters related to the extinction of the contractual legal relationship.

The system of special procedural protection, however, must be guided by the balanced equation between legitimate conflicting interests of creditor and debtor, in order to provide both of them with the optimal realization of the fundamental right to adequate judicial protection. Amid this scenario, the investigation focused on the examination of the Institute of Insurance Judicial Guarantee in double operative perspective (procedural and contractual), in the modalities of executive insurance and insurance Recursal, in it finding little efficient and needful improvement regime.

Inefficiency arises, above all, from a certain regulatory paradox. On the one hand, the current regulatory framework on judicial insurance is based on the premise of strengthening the protection of the worker's credit right, based on strict regulatory rules which, to a significant extent, derogate from the general structural design of damage insurance outlined in the Civil Code. However, on the other hand, the objective - or intention - of supplementing the protection given to the worker's credit right seems not to be able to offer satisfactory practical results: the formal inclusion of legal guarantee insurance in the areas of the work process does not yet have a noticeable impact on the effectiveness of the credit or on the reduction of the average duration of execution in the work process, context in which the time factor acts as a central element in the probabilities of debt compliance.

Given this diagnosis of inefficiency of the insurance guarantee scheme in the work process, the research took care to identify elements for the reversal - or at least the attenuation - of this situation. In this activity, it was noted that the solution to the problem may be the establishment of a dynamic and flexible security model, based on the probabilistic examina-

because the action continues without decision. The matter is part of the object of Bill n. 4.597, from 2004, pending before the Chamber of Deputies (BRASIL, 2020b).

70 CF, article 153, V.

71 CF, article167, IV.

72 CF, article 149.

tion of credit claims, including to re-approximate the insurance guarantee of the elementary structural conformation of this type of contract, marked by randomness.

In this proposal, the elements of dynamism and flexibility of the guarantee insurance are associated with the evaluation of the previous behavior of the debtor as to the correct and punctual addition of credits derived from the labor relationship, to identify the "good payer". To this end, the institution of scoring system and/or establishment of categories of inadequacy risk, operationalized from the statistical treatment of data produced by Labor Justice and other sources, public and possibly private, is proposed.

The dynamism, specifically, determines that the assessment of the condition of good payer should occur continuously, as a measure to encourage the preservation of that quality and to enable the identification of any change in the degree of default risk associated with a particular obligor. Based on the identification of inadequacy risk, dynamically assessed, flexibility should lead to the establishment of differentiated and favored security regimes to benefit the agents that have the status of good payer, in line with the following statement: the lower the risks of non-compliance, the less stringent the requirements for the provision of guarantees. In order to maintain the special protection afforded to credits arising from employment relationships, the dynamic and flexible security model should receive reinforcement from the rear guarantee system, such as the provision of reinsurance contracts and the integration of that model into the FGET, still pending regulation.

In this sense, the proposal for a dynamic and flexible legal guarantee model has at least two great virtues: from a procedural perspective, it contributes to the balanced and efficient composition of the legitimate interests of the creditor and debtor (benefits the good debtor without unprotecting the creditor); from a contractual point of view, it can serve as a stimulus for the development of the market of this security arm.

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