

THE POSSIBILITY OF CONVENTIONAL REPRESENTATION OF A CREDITOR LEGAL ENTITY BY ANOTHER LEGAL REPRESENTATIVE IN THE ENFORCEMENT PHASE

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Abstract

We aim to answer the following question if possible creditor legal representation by proxy another person, during enforcement. The need to find a solution for this issue arose as a result of delivery of Decision No. 9/2016 issued Î.C.C.J., panels for a dispensation of law in civil matters. Part of the answer to this question are undoubtedly of Decision No. 9/2016, specifically the fact that the incidents of enforcement before the judge in court on representation of the legal person is possible only through legal adviser or advocate, within the law, not by an authorized person. Since the Decision. 9/2016 covers only representation before the court shall consider the possibility of this studio extințe considerations set out decision and the facts constituting the premise of this article.

Keywords: *representation, enforcement phase, legal entity .*

1. Introduction

The issue for discussion is based on Decision No. 9/2016 issued Î.C.C.J., panels for a dispensation of law in civil matters. This decision Î.C.C.J., stated that "the interpretation and application of art. 84 para. (1) of the Civil Procedure Code, the application for summons and conventional representation of the legal person before the courts can not be done by proxy legal person or by legal counsel or lawyer up".

We present some of the reasons on which it based its decision mentioned above.

Decision No reasons were invoked. XXII of June 12, 2006, delivered by the High Court of Cassation and Justice - United Sections in the outcome of the appeal on points of law, namely the argument that "the activities of legal consultancy, representation and legal advice and drafting of legal documents, including introduction of actions in court, with the possibility of certifying the identity of the parties, content and date of documents, defense and representation by legal means the rights and interests of individuals and businesses in relations with public authorities, institutions and any Romanian or foreign constitute, where appropriate, specific activities of the legal profession, regulated in art. 3 of Law no. 51/1995 on the organization and the profession of lawyer, republished (2), as amended, the profession of notary public [Art. 8 9:10 in law notaries and notary activity no. 36/1995, republished (3)] or the bailiff (art. 7 of Law no. 188/2000 on bailiffs, republished, with subsequent amendments)". In paragraph no. 28 was held, referring also to Decision No. XXII of June 12, 2006, that "certain legal activities such as legal representation, drafting of legal documents, formulating actions, exercising and justifying legal remedies may be performed by legal advisors, but the provision of such activities are

permitted only as regulated by art. 1-4 of Law no. 514/2003 on the organization and the profession of legal advisor, with completions, ie their capacity as civil servants or employees with individual labor contract, a legal entity of public or private ".

Also in paragraph no. 29 High Court of Cassation and Justice continued playing the reasoning of Decision No. XXII of June 12, 2006 that "since the activities referred not qualify as acts of trade, by reference to the provisions of art. 3 and 4 of the Commercial Code (effective from date of the decision on points of law) (...) they can not be exercised by companies incorporated with such an object, applications for authorization of such companies is inadmissible ".

In its decision stated there was a legal practice in that representation of the legal person by proxy legal person before the bailiff is not admissible and the justification of this case was the need to ensure consistency throughout the proceedings, given that such a prohibition It has already been stated by HCCJ decision to stage the proceedings before the court.

2.1. General considerations on legal representation during enforcement person

By paragraphs 31-34 of Decision No. 9/2016 issued by Î.C.C.J., panels for absolute matters of law, is established that the courts for the legal entity may opt for conventional representation or can stand by the legal representative. In this respect, High Court of Cassation and Justice noted that the situation representation in court legal person can choose only the categories specified in art. 84 para. (1) Civil Procedure Code., legal counsel or attorney, respectively. On the other hand, pursuant to paragraph no. 33 of the decision under review "mandate agreement concluded between two legal effect only in terms of substantive law, not in terms of procedural law governed the matter of representation of mandatory legal rules." Following the

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arguments above, paragraph no. 35 of the decision states that "the activity of conventional representation before the court is a non-commercial activity reserved by lawyers and legal advisors. Or, if they agree on the idea that a legal person to be represented by another person, it concludes, unacceptable, that the representation itself could be object of the trustee.

For the reasons set that decision analysis concerns the situation representation legal person before the court, which follows naturally from the fact that the notification of the application for a ruling to unlock one point of law was made by the Brasov Court strictly on this. However, according to art. 521 par. (1) Civil Procedure Code., complete absolution of points of law only to pronounce on the question of law subject to dispensation.

Regarding the interpretation of Decision No. 9/2016 issued Î.C.C.J., panels for a dispensation of law in civil matters, was put in question whether it is possible creditor legal representation by proxy another person, during enforcement. Part of the answer to this question are undoubtedly of Decision No. 9/2016, specifically the fact that the incidents of enforcement before the judge in court on representation of the legal person is possible only through legal adviser or advocate, within the law, not by an authorized person.

2.2. Considerations on legal representation during enforcement person in front bailiff

Since the Decision 9/2016 covers only representation before the court the question arises whether it is possible to expand its content and representation before the bailiff.

To this end it is necessary to analyze the scope of art. 84 para. (1) Civil Procedure Code which provides that legal entities can be represented conventionally before the courts only through legal adviser or lawyer. The rule established by art. 84 para. (1) Civil Procedure Code is interpreted and applied strictly, so that it can not be extended to the conventional representation of the legal person in situations other than in court. For these reasons, we believe that before the bailiff representing the legal entity is not limited to a lawyer or legal adviser. Moreover, in the absence of the rule laid down in art. 84 para. (1) Civil Procedure Code. Or before the court would not be there any restrictions regarding representation of the legal person.

Of course, we can say on the one hand, the reasons which led to the delivery of Decision. 31-34 of Decision No 9/2016. 9/2016 issued by Î.C.C.J. Such are

the reasons underlying the decision delivery mentioned above are the non-commercial character of conventional representation activities and that these activities are reserved by law for lawyers and legal advisers. This key and retain their validity before the bailiff which could lead to the conclusion that even before the bailiff legal person must be represented by a lawyer or adviser only conventional legal considerations applying by analogy Decision no. 9/2016 pronounced by I.C.C.J On the other hand, as was pronounced and practice, there is a need for consistency in the application of rules on corporate representation.

2.3. Considerations on representation legal person consent enforcement and appeal to execution.

Since the notification of the court with the request for a declaration of enforceability is made by the bailiff, the question arises as to what conditions might censorship as a representative of the legal person which in practice acts as intermediary between the legal person-creditor and attorney / legal counsel who signed the request for enforcement to the bailiff. In this respect, it was noted that as long as the notification of the court is carried out by the bailiff, such a vote can not be achieved by means of a plea lack of representative, but only during checks on a declaration forced, which include checks on the request for enforcement.

However, checks that the court can do during enforcement are limited to checking that the reasons provided by art. 666 par. (5) pt. 1-6 Civil Procedure Code¹. From reading the text of the law said that application for a declaration could be rejected for the existence of other impediments stipulated by law, under art. 666 par. (5) pt. 6 Civil Procedure Code, for lack of proof of the quality of conventional representative signatory of the application for enforcement. Of course it is debatable whether the absence of proof to the quality of representative conventional application for enforcement is a real impediment provided by law according to the real meaning of 666 par. (5) pt. 6 Civil Procedure Code.

The doctrine² consistently stated that the text envisages strict impediments and provided by law ie special legislation temporarily suspending the right to seek or continue enforcement of certain executory contracts³. In light of such an interpretation, without proof quality representative is such an impediment that

¹ Cited legal text provides that the court may reject the application for a declaration of enforcement only if:

1. the application for enforcement is the responsibility of another organ of execution than before it;
2. decision or, where appropriate, the document does not, by law, enforceable;
3. document other than a judgment, does not meet the formal requirements required by law;
4. The amount is not certain, liquid and due.
5. debtor enjoys immunity from execution;
6. Title contains provisions which can not be brought out by enforcement;
7. There are other impediments provided by law.

² G. Boroî (coord.), O. Spineanu-Matei, D. N. Theohari, A. Constanda, M. Stancu, C. Negrilă, D.M. Gavriş, V. Dănăilă, F.G. Păncescu, M. Eftimie, Noul Cod de procedură civilă. Comentariu pe articole, vol. II, Ed. Hamangiu, 2016, p. 430.

³ It considered such a failure impediment requirements of article. 603 par. (3) NCPC, as amended by O.U.G. no. 1/2016. According to art. 603 par. (3) NCPC "if the arbitral award concerns a dispute relating to the transfer of ownership and / or the establishment of another real right

would result in the rejection of the application for a declaration only by an interpretation in full and in any case strictly required by art. art. 666 par. (5) pt. 6 Civil Procedure Code.

Regarding appeal to execution, we appreciate that there may be a reason for its admission that the request for enforcement was filed legal person as proxy another person. The reasons are the same as we have shown above, recitals Decision No. 9/2016 issued Î.C.C.J. It can not be extended to the conventional representation of the legal person before the judge.

At the end of this brief analysis we express our hope that the judicial practice uniform will solve the problem at hand, even if the solution would appear to be without a fracture consistent corporate representation rules. Would like in this context to a possible legislative amendment or decision I.C.C.J legally binding, legal persons may be represented exclusively by a lawyer or legal adviser only before the courts, not before the bailiff. We appreciate that this is the solution that respects equally the letter and spirit of the law, even if a solution contrary there are many arguments opportunity.

We believe that our solution is consistent with those stated by the High Court of Cassation and Justice Decision no. 9/2016. The Court stated in that decision that the reasoning contained in recitals Constitutional Court Decision no. 485 of June 23, 2015, which was declared unconstitutional the provisions of Art. 13 para. (2) sentence II, art. 84 para. (2) and art. 486 par. (3) of the Code of Civil Procedure with respect to claims arising from mandatory preparation and presentation of the appeal by legal persons by a lawyer or legal adviser, can not be applied *mutatis mutandis* to the provisions of art. 84 para. (1) of the Code of Civil Procedure because, in the latter case, the text concerns only the limiting conventional legal person before the court, without prejudice to the legal status of legal representation and without turning obligation representation and assistance councilor legal or lawyer in a condition of admissibility of the action or a barrier to access to justice. Also art. 209 par. (1) of the Civil Code provides that a legal person exercises its rights and fulfills its obligations through its management as of the date of their creation. In the absence of the administrative, until the date of their exercise rights and obligations concerning legal entity shall be made by the founders or by individuals or legal persons appointed for this purpose, as required by art. 210 par. (1) of the civil code. Since the limit in art. 84 para. (1) of the Code of Civil Procedure shall act only where the legal person opts for conventional representation in court, in which case they can choose the only category referred the text said that, without representation conventional

procedural rights of legal person may be exercised by the legal representative.

The decision considerations set Î.C.C.J. showed that a mandate agreement is concluded between two legal entities, this effect only in terms of substantive law, not in terms of procedural law governed the matter of representation of mandatory legal rules. The use of the adverb "only" label art. 84 para. (1) of the Code of Civil Procedure exclusive highlights how conventional corporate representation before the courts, which can be achieved only two categories of representatives nominated by text. This conclusion follows from the phrase "under the law", referring to laws governing the professions of legal adviser and lawyer.

The activity of conventional representation to the court is a non-commercial activities reserved by law lawyers legal counsel. Or, if they agree on the idea that a legal person to be represented by another person, it concludes, unacceptable, that the representation itself could be object of the trustee. Given the mandatory nature of the procedural rules, the interpretation that legal person could be represented in court by another person, including as regards the application for summons is legally unfounded.

The Court's reasoning in the foregoing considerations lead to the conclusion that the problem itself is not legal entities representation by another person in general, but to the courts. High Court made no finding on conventional representation of legal persons before the bailiff as notification was not given this object. Consequently, it must extend to other situations, principles statute the decision cited, especially since in the spirit of the Code of Civil Procedure in force, enforcement, the latter is no longer a part of the civil trial, but a Skin distinct phase resulting in further formulation of the Code of civil procedure and Law no. 76/2012 on the implementation of the Code of Civil Procedure.

3. Conclusions

Since the response to the above, we believe that if a declaration of enforcement, the application for enforcement was lodged legal person by proxy legal person, they will not be rejected for this reason. Notification is perfectly valid executor in case of representation by another person, and a declaration of enforcement shall be made by the bailiff, according to art. 666 par. (1) Civil Procedure Code. That the law assigns bailiff standing in a declaration of enforcement removes any question about the representation of the legal person in the process. It is therefore removed a possible discussion on the lack of representative trustee legal person as bailiff is formulating a declaration of enforcement, and the latter has been duly informed, for

on immovable property, arbitration award will be presented the court or notary public to get a decision court or, where appropriate, a notary authentic. After verification by the court or by the notary public to the conditions and following the procedures required by law and paid by part of the tax on transfer of ownership, it will proceed to registration in the land and will be transferred property and / or the establishment of another real right over immovable property in question. If the arbitration award is forecloses checks referred to in this paragraph shall be made by the court in the proceedings for a declaration of enforcement (Idem, p. 430).

the above reasons, and if request for enforcement was submitted by the legal person by legal representative.

The same solution also applies to the appeal to execution. While it is possible to represent the legal person in front executor by proxy legal person, this can not be invoked as grounds for illegality of enforcement.

Finally, legal representation by proxy legal person is prohibited only in front of the court, regardless of the procedure, so including incidents that may occur during execution.

References:

- G. Boroi, M. Stancu, *Drept procesual civil*, Ed. Hamangiu, 2016;
- G. Boroi (coord.), O. Spineanu-Matei, D. N. Theohari, A. Constanda, M. Stancu, C. Negrilă, D.M. Gavriș, V. Dănăilă, F.G. Păncescu, M. Eftimie, *Noul Cod de procedură civilă. Comentariu pe articole*, vol. II, Ed. Hamangiu, 2016;
- V. M. Ciobanu și M. Nicolae (coordonatori), *Noul Cod de procedură civilă comentat și adnotat*, vol. II, Ed. Universul Juridic, 2016;
- E. Oprina, I. Gărbuleț, *Tratat teoretic și practic de executare silită*, vol. I, Ed. Universul juridic, 2013;
- E. Oprina și V. Bozeșan (coordonatori), *Executarea silită. Dificultăți și soluții practice*, vol I, Ed. Universul juridic, 2016.