APPLICABILITY OF LAW NO. 77/2016, IN RELATION TO THE RELEVANT JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF ROMANIA IN THE SITUATION OF A FORCED EXECUTATION BEFORE THE ENTRY INTO FORCE OF THE LEGAL TEXT

PhD. student **Bogdan Sebastian GAVRILĂ**[1]

Abstract

This paper seeks to establish a suitable working hypothesis for the situation mentioned in the title, referring to the fact that on many occasions the practice of the courts was not constant, leading to diametrically opposed solutions in similar cases, with very significant effects on the litigant parties. It is the case where some of the debtors, whose claim has been admitted by the court, all obligations arising from a bank loan contract subject to a forced execution having ceased, were no longer obliged to cover the difference between the principal debt due and the amount of money earned from the forced sale of the mortgaged property. On the other hand, other debtors, whose case regarding the extinction of the debt due to the forced execution of the mortgaged property, was dismissed, since the remission of the good was not voluntarily, and who were found in the situation where the forced execution was continued for the remaining debit after the distribution of the proceeds from the sale of the adjudged asset. The debt was usually employed penalizing interest and thus the forced execution proceedings continued until all outstanding amounts were extinguished. The analysis will follow the applicable law and jurisprudence of the Constitutional Court of Romania, the relevant doctrine and jurisprudence, in order to identify an appropriate solution to the problem of law.

Keywords: *Law no. 77/2016, Constitutional Court of Romania, decision no. 623/2016, previously sold immovable asset.*

JEL *Classification*: K14, K39, K41

1. Introduction

The article shall attempt to analyse the legal situation that has led to a different practice among courts, which have come up with solutions with significant effects on law subjects, in some cases extremely beneficial but in accordance to the relevant legal provisions, and in others, capable of attracting serious economic difficulties for some of the parties involved.

Consideration will be given to those erroneous examples of the judicial practice, in concretely establishing the effects of the Constitutional Court of Romania (C.C.R.) interpretation of Law no. 77/2016, in establishing a useful point of view regarding the legal issue.

The primary role of the legal text was to help the segment of borrowers who faced serious economic difficulties and are no longer fit to meet their contractual obligations initially agreed upon at the onset of their manifestation of will. The interpretation of C.C.R. aimed to limit possible abuses committed by those debtors who speculated the legal provisions to leave contractual loan agreements, without an objective reason for doing so. Instead, the most vulnerable debtors, which were executed earlier, prior to the entry into force of the law, and to whom the legal provision is directly intended for, must be given an adequate consideration of their legal situation, in compliance with the legal text and the case law of the Constitutional Court of Romania.

2. The legal texts

Firstly, the provisions of the Civil Code of 1864[2] stated in article no. 969 that : "*Legally established conventions have the power of law between the Contracting Parties. They may be revoked by mutual consent or by lawful cases"*. In most of the situations, loan agreements were concluded while these legal provisions were in place.

[1] Bogdan Sebastian Gavrilă – Doctoral School of Law, Bucharest University of Economic Studies, Romania, gavrila.bogdan.sebastian@gmail.com.

[2] The Civil Code was decreed on 26 November 1864, promulgated on 4 December 1864 and implemented on 1 December 1865.

Under the provisions of 1864 the Civil Code of 1864[3] the theory of unpredictably was based on the provisions of art. 970 which stipulated that: "*Conventions must be executed in good faith. They oblige not only on what is expressly written, but on at all consequences, what equity, habit or law implies by its nature*". The study will also take into account the incidence of provisions on unpredictability, in full compliance with the C.C.R. rulling no. 623/2016.

The provisions of the Law no. 77/2016[4] which are to be analyzed, have the following content: art. 1: "*This law applies total the legal relationships between consumers and credit institutions, non-banking financial institutions or the assignment of claims on consumers*". Article 3: "*By way of derogation from the provisions of Law no. 287/2009 on the Civil Code, republished, as subsequently amended, the consumer has the right to extinguish the debts arising from the credit agreements with all the accessories, without additional costs, by paying the mortgaged property in favor of the creditor if within the stipulated term to art. 5 par. (3) the parties to the credit agreement do not reach another agreement*". Article 5 (1): "*For the purposes of this Law, the consumer shall, by means of a bailiff, a lawyer or a notary public, a notice informing him that he has decided to transfer ownership of the immovable property in order to settle the debt arising from the mortgage credit agreement, detailing the conditions of admissibility of the application as set out in Article 4*". - Art. 8 par. (5): "*The right to ask the court to declare the extinction of debts arising from credit agreements also belongs to the consumer who has been subjected to the forced execution of the mortgaged property, irrespective of the holder of the claim, of the stage in which it is or of the form of enforced execution shall be continued against the debtor.*"- Article 10: „*(1) Upon the conclusion of the translative property contract, respectively from the date of pronouncing the final court decision, according to the provisions of art. 8 or, as the case may be, of art. 9, any debtor's debt to the creditor will be extinguished, the latter being unable to request additional amounts of money*". Article 11: "*In order to balance the risks arising from the credit agreement, as well as from the devaluation of immovable property, this Law shall apply to both the Contracts of credit outstanding at the time of its entry into force and of contracts concluded after that date*".

In Decision no. 623/2016[5] the C.C.R. analyzed the purpose of the Law no. 77/2016: "*The legislator considered the rebalancing of the benefits provided that, during the execution of the contract, there was a risk in addition to the natural risk accompanying a credit agreement and in which neither party is guilty of the occurrence of the event*."

In regards to the applicability of this law to forced executions started prior to the entry into force of Law no. 77/2016, the Constitutional Court [6] has stated that "*art. 11, first paragraph of Law no. 77/2016 ... also applies to ongoing contracts. The phrase "in progress" has been used by the legislator to cover the case provided by Article 8 (5) of Law 77/2016, ie when the enforcement phase started before the law enters into force*".

The role of the court in applying the provisions of Law no. 77/2016 entails, according to the case-law of the C.C.R.[7] verifying the fulfilment „ *... of the condition of notification to the creditor as provided by Law no. 77/2016, the fulfilment of the criteria provided by art. 4 of the law, in applying the theory of unpredictability in art. 7 of the law, respectively art. 8 at times within art. 9 of the same law*. " The Court has stated in relation to art. 8 par. 5 that "The e*xecution of a debtor's obligation may in principle take place in two ways: voluntarily or by forced execution. The causes for forced execution are the same as those that cause the debtor to pay the property with which he guaranteed the loan. The legislator regulated the same solution for identical situations. Payment for payment may also be in the forced execution stage, and the violation of the res judicata of the court ruling that has given effect to forced execution cannot be maintained, since it does not seek to resolve the merits.*

[3] The Civil Code was decreed on 26 November 1864, promulgated on 4 December 1864 and implemented on 1 December 1865.
[4] Law no. 77/2016 regarding the payment of immovable assets in order to settle the obligations assumed by credits, published in the Official Gazette of Romania of 13.05.2016.
[5] Decision no. 623 of 25 October 2016 on the objection of unconstitutionality of the provisions of art. 1 par. (3), Art. 3, art. 4, art. 5 par. (2), art. 6-8, in particular art. 8 par. (1), (3) and (5), art. 10 and Art. 11 of Law no. 77/2016 on the payment of immovable property in order to settle its obligations under loans and the law as a whole.
[6] *Idem*.
[7] *Idem*.

Even at this stage, the court may judge whether the conditions for the existence of unpredictability are fulfilled".

In the situation under discussion, in Decision no. 29 of 2018 the C.C.R.[8] stated that "*in respect of the immovable property awarded before the entry into force of the law, a hypothesis forming the subject-matter of the case-law of the a quo court, the Court determined that the ordinary legislator had recourse to a legal fiction in the sense that the debts resulting from the credit agreement considered to be extinguished, even if the good on the collateral was sold at a price lower than the amount of the debtor's debt to the credit institution. As a matter of fact, the legislator considered in the context of the unpredictability that the amounts of money paid voluntarily in performance of the contract, those obtained from the adjudication of the property, regardless of the date on which it took place, as well as, where appropriate, the amounts resulting from the forced pursuit of other assets of the debtor up to the date of the notification shall cover the amount of the debts of the credit agreement. Such a legal fiction, far from being arbitrary, uses an ancillary element of the credit contract, the mortgage, defined in the present case as a real right to immovable property affected by the refund of the amount of money borrowed, and is likely to ensure the contractual balance between the parties within the limits of the risk inherent in a credit agreement, removing the added risk from the sphere of relationships between the debtor and the creditor ...* "

In regards to the need for a notification by the debtor in order to benefit from the effects of Law no. 77/2016 the C.C.R.[9] indicated that "*the procedural mechanism regulated by the legislator for the application of art. 8 par. (5) of the Law, as in Art. 8 par. (1) of the same law, state two stages of particular significance in its economy. Thus, a first compulsory stage is the part of a direct negotiation between the parties and concerns the notification procedure regulated by art. 5 par. (1) of the Act, the parties being able to agree to the extinction of the debts arising from the credit contract by paying with the immovable asset. This stage applies to and must be pursued irrespective of whether or not the mortgaged property was sold under an enforcement procedure at the date when the law entered into force. The second, judicial, optional, by its nature, concerns the intervention of the courts at the request of the debtors, in order to apply Law no. 77/2016, respectively, ascertaining the settlement of the debt arising from the credit agreement. Thus, the debtor of the obligations to pay the sums of money under a credit agreement must necessarily go through the first procedural step in order to reach consensus with the creditor and to avoid as much as possible the intervention in the contractual relations of the court. The legislator regulated this two-stage procedural mechanism to allow the termination of the contract as a result of the parties' agreement, without the intervention of the courts, the use of the state's coercive force is obviously only when the parties I reach a consensus. 45. Therefore, to appeal directly to the court, in disregard of the first stage, that of the notification, is equivalent to the inadmissibility of such an action promoted under Art. 8 par. (5) of the Law no. 77/2016, the courts having the right in this case to reject as such the debtor's action*".

3. The case law and doctrine

The Romanian courts made the first application of the theory of imprevision in a case solved in 1920, the case of Lascăr Catargiu against Bercovici Bank[10]. Although under the auspices of the Old Civil Code the legal institution was not expressly regulated, it should be noted that the solution has been repeatedly seen throughout its history for nearly 100 years, in which contractual relations have been adapted in order to restore the balance of obligations between the parties.

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[8] Decision no. 29 of 23 January 2018 regarding the non-constitutionality exception of the provisions of art. 1 par. (3), Art. 3, art. 4, art. 5 par. (3), Art. 6, art. 7, art. 8 and art. 11 of Law no. 77/2016 regarding the payment of real estate in order to settle the obligations assumed by credits.

[9] Decision no. 95/2017 regarding the rejection of the unconstitutionality exception of the provisions of art. 3, art. 4 par. (1), art. 5 par. (1) and (3), art. 7, art. 8 par. (1) and (5), art. 10 and art. 11 of Law no. 77/2016 regarding the payment of real estate in order to settle the obligations assumed by credits.

[10] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod Civil - Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2012, p. 1028.

The same author carried out a thorough analysis of the conditions for applying this institution: "*From a strictly formal point of view, the wording of the text would mean that we are in the presence of a premise (excessively onerous execution), a single condition (exceptional change of circumstances) which, in turn, must meet several sub-conditions as to: the time of the change of circumstances, the unforeseeable unpredictability of the change in circumstances, and the failure of the injured party not to take the risk; also, the prior negotiation of the contract becomes a condition for the court to be summoned with a claim for legal action, and not a distinct effect of the unpredictability. The specification of the exceptional attribute of change is not to be qualified as a genuine additional requirement: the term "exceptional" is a legal metaphor, announcing all the attributes-conditions of change of circumstances, as set forth in par. (3) lit. a) and b). The issue of imprudence must not be reduced to the question of inflation, since unpredictability is an effective means of resolving a legal situation of contractual origin caused by the unforeseeable change of circumstances, regardless of their nature, (3) of art. 1271 does not distinguish in this regard, ubi lex non distinguit nec nos distinguere debemus*"[11].

It is inevitable that after the conclusion of the contract, its execution may attract more efforts than the ones initially foreseen by the parties.

The contract, once concluded and considered *ab initio* to meet the requirements on the equivalence of benefits, is inevitably exposed to the relationship of an external context with economic and social determinants, consequent to the evolutionary dynamics of society.[12] One can even admit the idea that all contracts that run for a longer period of time tend to entail a slightly random character.

However, in order to be in the realm of unpredictability, it is necessary that certain specific conditions be met, such as the cause of the imbalance.

The cause of the imbalance is an external event to the person and the will of the debtor, which does not imply an impossibility to carry out the obligation, but only makes it more onerous, but it is not certain that it is necessary to be unpredictable or that it is not foreseen.[13]

This significant imbalance must lead to the ruin of the debtor of the obligation.[14]

In analyzing our national jurisprudence, certain cases can be identified in which the court, in application of these provisions and principles, has determined that: "*the property right of the mortgaged property under the mortgage contract concluded between the parties ..., located in Bucharest, sector 5, under the forced execution procedure, as evidenced by the claims of both parties. Although the defendants invoke the provisions of art. 8 par. 5 of the Law no. 77/2015 in support of the plea, the court finds that the law governed by that article permits consumers who have been forced to enforce the mortgaged property to bring an action for a declaration requesting the court to establish the settlement of the debts arising from the credit agreements. However, no legal provision allows consumers in the abovementioned situation to make the notification regulated by art. 5 of the Law no. 77/2015, this possibility being provided solely for the benefit of persons* ***who continue to be the property owners of the buildings***"[15].

The examples are numerous, in which it was considered that unpredictability cannot operate because the property was sold at auction before the debtor notified the creditor: "*In view of the above, the court notes that the debtor still in the process of forced execution cannot claim the settlement of debts under Law no. 77/2016 regarding the surrender of the immovable asset in order to settle the assumed obligations, since, as stated in the Constitutional Court Decision no. 639/2016 published in the Official Gazette no. 35 of January 12, 2017, the law extinguishes all debts of consumers who voluntarily transfer the property to the patrimony of the professionals. At the same time, it was mentioned in the same decision that this effect results not only from the very name of Law no. 77/2016 - The Law on the Payment of Real Estate in order to Extinguish the Obligations assumed by Credits*

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[11] *Idem*, p.1028.
[12] Mona-Maria Pivniceru, *Efectele juridice ale contractelor aleatorii*, Hamangiu Publishing House, Bucharest, 2009, p. 71.
[13] G. Anton, *Teoria impreviziunii în dreptul român și dreptul comparat*, „Dreptul", no. 7/2000, p. 25.
[14] E. Chelaru, *Forța obligatorie a contractului. Teoria impreviziunii și competența în amterie a instanțelor judecătorești*, „Dreptul", no. 9/2003, p. 48.
[15] Civil Sentence no. 6939/2016, 5th District Court of Bucharest, http://www.rolii.ro/hotarari/598bc08be4900924160008b, accessed on 07.11.2018.

- but also from Art. 3, according to which the consumer has the right to extinguish the debts arising from the credit agreements with all accessories without additional costs, by surrendering the immovable asset in favour of the creditor, if within the term stipulated in art. 5 par. (3) the parties to the contract do not reach another agreement. The law invoked by the applicant would therefore have become applicable if the mortgaged property was still in its ownership so that it could be "paid" to the creditor, a hypothesis not found in the present case, given that the real estate was redeemed on auction on 24.07.2015, ***ie prior to the filing of the present petition, as a result of the failure of the debtor to fulfill the main contractual obligations assumed to pay the rates under the contractual terms initially agreed.*** *The sale of the building prior to the issuance of the notification by the debtor was recognized by the applicant and is apparent from the conclusion no. xxxxx / 09.10.2015 issued by OCPI, as well as in the land book extract, so that the condition of voluntary transfer of the property right from the patrimony of the consumer to that of the professional, in order to attain the applicability of Law no. 77/2016 is not met in the present case,* ***since the mortgaged property is not currently owned by the applicant****."*[16]

In the latter case, Decision C.C.R. no. 639/2016, although later, as it emerges from the earlier decisions of the above-mentioned Constitutional Court, the legal text has been reconsidered.

4. The author's analysis

As we have seen before, our national jurisprudence has applied the provisions on unpredictability for over 100 years in an attempt to ensure a reasonable division of obligations between the parties and to prevent the ruin of the debtor.

By referring to the condition of not understanding the risk of changing the circumstances originally envisaged in the contract, it should be noted that usually the loan contracts include in the contents the fact that the debtor expressly assumes that risk.

At the same time, in view of the fact that the evolution of the exchange rate can be relatively easily verified by the prospective contractor of a loan agreement, it should be noted that it is equally difficult to prove that he could reasonably have failed to assume the risks of a significant increase in the value of the foreign currency in which to repay the loan.

This condition is very difficult to prove because, by simply analyzing the historical course of foreign currencies such as the Euro or, in particular, the Swiss franc, it is clear that they have risen to an extremely high level prior to the conclusion of the contracts in the 2007 -2009 time frame, which are most often claimed to be abusive than after this time.

Thus, a large number of courts have held that the debtor could have reasonably foreseen that for the extended period of time for which the loan was contracted, the value of the foreign currency could increase at least as much as in the years preceding the contract.

Therefore, such a defence should not, as a rule, constitute an impediment to the opposition to enforcement claims by the creditor in disputes in which the contractual terms relating to foreign exchange risk are invoked, and in actions in which the debtor is to be executed, as his obligation has become more onerous than originally envisaged.

Unpredictability, as a prerequisite for admitting such a claim, can be retained only in extremely rare cases.

However, despite these issues, the role of the article is to examine whether, in those cases when the other conditions laid down in Law no. 77/2016 are fulfilled, the fact that the property was sold prior to the entry into force of these provisions may constitute an impediment to the fact that the court finds that the debtor's obligations have been extinguished by the payment of the immovable property.

Starting from Article 1 of Law 77/2016, it can be recounted that the legislator has understood not to limit the effects of the legal act to contracts concluded after its publication in the Official Gazette, but also in the cases of those that have already been concluded and whose effects are in some

[16] Civil Sentence no. 3963/2017, 1st District Court of Bucharest, http://www.rolii.ro/hotarari/598153e3e490094c1d000385, accessed on 07.11.2018.

cases extremely damaging for borrowers. By corroborating article no. 1 with article no. Article 8 (5), it should be noted that he intention of the legislative branch was to allow the consumer already subject to enforcement, irrespective of the state of his status, to take advantage of those provisions, including when the moment of forced sale of immovable property mortgaged which guaranteed the loan is prior to the claim.

Indeed, in Decision no. 623/2016, the C.C.R. talks about the need for a notification so as the debtor to be able to benefit from the legal provisions.

There have been numerous cases in which an action for failure to fulfil obligations was made, without this condition being met, since the asset had already been sold and the content of the notification would no longer have any purpose since the creditor had already taken possession of the asset or it had been awarded in an auction to an acquirer. Such actions have been rejected either for lack of notification, which is a solution in full compliance with both the legal provisions and the decisions of C.C.R. in this matter, or in other cases for the fact that a surrender of the asset cannot be withheld, since the good was sold prior to the entry into force of the provisions of Law no. 77/2016.

This latter solution is subject to criticism and is to be analyzed in more detail.

First of all, the provisions of paragraph 5 of Article 8 of Law 77/2016 speak of a forced execution of the mortgaged property, regardless of its status, which implies at least two hypotheses: hypothesis number 1, when the forced execution of the mortgaged property began, but the asset was not yet sold and hypothesis number 2, in which at the time of the entry into force of the law the asset had already been awarded to a third party or to the creditor.

The latter hypothesis has been quite common in practice and implies a legal relationship whose consequences are particularly pronounced on the debtor. It would be unfair for the legal provisions mentioned above to be interpreted differently by the courts because, in the cases when the court does not allow the party to invoke these provisions, the debtor will be left in a very precarious economic state.

However, the argument of the difficult economic situation must not justify the applicability of this legal text, but rather the fact that the legislator did not **understand to limit the prevalence of these extremely important provisions to debtors whose assets have already been executed**.

The formality of the creditor's notification of surrender by the debtor, even if the building has already been sold, is necessary because it allows for dialogue between the parties, the dialogue referred to in Article 5 (1) of Law 77/2016. In the context of this dialogue, the creditor is fully entitled to raise questions about the fulfilment of the conditions of admissibility necessary for the debtor to be able to invoke these extremely important provisions.

The court's practice of admitting the claim without the condition being fulfilled is incorrect because the creditor lacks the right provided by the law and the possibility prior to the litigation to mount a defence, to engage in that dialogue in order to apply the law in its spirit. The spirit of the law consists in avoiding to resort to the court in order to rearrange the legal relationship, and the duty incumbent on the court is to ensure that the formality of the notification is fulfilled, thus ensuring its application in accordance with the will of the legislator.

Returning to the central issue of the study, the Constitutional Court of Romania in Decision no. 623/2016, rightly considered that the surrender of the asset could also be performed during the forced execution phase, and in the decision no. 29/2018 it maintained that reasoning, referring in turn to the assumption that the proceeds of the sale of the asset did not cover the value of the debt.

The Court further considered that this direct negotiation between the parties should take place prior to any court proceedings, so that the debt be extinguished by means of surrendering the immobile asset.

However, the Constitutional Court of Romania did not consider in its case-law that the debtor is forbidden from exercising that right whose mortgaged property had already been sold at the time of entry into force of the legal provisions laid down in Article 8 (5) of the Law no. 77/2016.

Since neither the legislator nor the Constitutional Court of Romania has made any distinction, by establishing any additional condition for its exercise or by suppressing this right, the practice of

the courts of rejecting the claim based on the provisions of Law no. 77/2016 since it would not be applicable in this situation is a very damaging and lacking legal basis.

5. Conclusions

The courts are required to verify that the conditions for admissibility laid down in the legal text have been met. Among these are those expressly provided by Law no. 77/2016, which must be interpreted in full accordance with Decision no. 623/2016.

Certainly, the condition for prior notification before the application must be fulfilled, subject to the rejection of the application as inadmissible.

However, there is no need to verify an additional condition, namely that the asset has not previously been auctioned in order to establish that a surrender has occurred. This condition has not been established by any legal text and has not been stated by the C.C.R. in its case-law, in interpreting Law no. 77/2016.

Rejecting the action for failure to fulfil this condition is a profoundly erroneous solution and capable of generating serious inequities, given that the legislator sought to establish those provisions to support those more vulnerable debtors who, due to their precarious economic situation, were executed prior to the moment when Law no. 77/2016 entered into force.

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