RISKS IN THE ENFORCEMENT OF ASSIGNMENT OF CLAIM ARISING FROM A BANK LOAN AGREEMENT

Lawyer **Călin Viorel IUGA**[1]

Abstract

Identifying the risks generated in the matter of by the assignment of claim arising from a bank loan agreement following the review the of the court judgments delivered by courts within the Cluj Court of Appeal. The result of the study is practical, topical, with implications on the banking market in Romania of the practitioners identified deem that the bank loan agreement loses its enforceability following the assignment of claim, and the novation of the assignee creditor during the enforcement did not occur.

Keywords: *bank loan agreement, lack of execution order, lack of creditor capacity, cancellation of enforcement*

JEL Classification: K12, K41, K42

I. In Romania, the effect of the economic crisis that began in 2007 determined the banks to seek financial and fiscal solutions to limit their losses. These solutions included the assignment of claims resulting from bank loan agreements where the banks declared the loans outstanding due to the borrowers' financial inability to repay these loans.

By assignment of such claims, the banks mainly pursued the payment of lower taxes and fees for the recoveries and the release of risk provisions[2]. With a view of fiscal sustainability, the assignment was mostly performed to legal entities based in countries where income taxes are lower than in Romania, such as Luxembourg.

In judicial practice, in the matter of enforcement, the assignment of claims arising from bank loan agreements raised the issue of justification of the *creditor capacity* of the assignee creditors represented by the collection agencies, and the issue of the credit agreement *losing its enforceability*. Given the lack of uniform practices on the issues identified and a superficial approach of the literature, this paper aims to answer these problems by interpreting the jurisprudence of the Cluj Court of Appeal against the decisions of the High Court of Cassation and Justice and the Constitutional Court of Romania, but also in comparison with the new legislation in the matter.

The study is timely given that 35% of the collecting agents' clients are banks[3] and aims the legal status of the assignments of claims in force until the adoption of the Emergency Ordinance no. 52 of 14 September 2016 on loan agreements granted to consumers for immovable property, amending and supplementing the Government Emergency Ordinance no. 50/2010 on credit agreements for consumers.

II. The *capacity of creditor* of the collection agencies is challenged during the enforcement, usually due to lack of proof in the court enforcement file of the notification of debtors under the terms of Art. 1578 of the new Civil Code (Art. 1393 of the old Civil Code) and the claim assignment agreement.

But a peculiarity in ascertaining the lack of this capacity is the situation where the assigned debtor is a company against which the insolvency proceedings have been opened, and the guarantor enforced acts as debtor under the endorsement of the promissory note or check, and not as a result of the guarantee as it did not sign the bank loan agreement.

---

[1] Călin Viorel Iuga - Cluj Bar Attorney-at-Law, office@avocatiugacluj.ro

[2] National Bank of Romania Regulation no. 5 of 22 July 2002 concerning the classification of loans and investments, as well as the establishment, regulation and use of specific provisions for credit risk, currently repealed by the National Bank of Romania Regulation no. 6 of 4 June 2010 on the abolition of laws issued by the National Bank of Romania

[3] The document is available online at http://www.zf.ro/banci-si-asigurari/bancile-aduc-35-din-clientii-recuperatorilor-de-creante-fiind-urmate-de-operatorii-de-telefonie-pentru-2016-jucatorii-vor-cresterea-businessului-15110145, last accessed on 14 November 2016

In such a situation, Jibou Court[4] concluded that the enforcement is void starting the assignment of claim due to the infringement of Art. 13 para. (1) of Law 58/1934 on the Bills of Exchange and Promissory Notes and Art. 64 para. (1) and (3) of the same law, that governs a particular method for the transmission of the claim.

It was deemed that since the transmission of the creditor capacity occurred by an ordinary assignment, the creditor capacity was transmitted in breach of the law, i.e. Art. 13 para. (1) of Law 58/1934 on Bills of Exchange and Promissory Notes, according to which: "*The Bill of Exchange, even if not expressly drawn to order, is transferable by endorsement*" (provisions which are applicable to promissory notes as well under Art. 106 of the same law). The bill of exchange did not include the annotation "*not to order*" or an equivalent expression so as to fall under the regulated exception of Art. 13 para. (2) of Law 58/1934, therefore the only manner of a valid transmission in this case was the endorsement.

Furthermore, it was deemed that the transmission of the claim occurred in violation Art. 64 para. (1) and para. (3) of Law 58/1934 (applicable to promissory notes under Art. 106 of the same law), according to which, should a causal action derive from the relationship that gave rise to the bill of exchange, "*it remains in being with the issuing or transmission of the bill, unless novation is proved*". The holder of the bill may not exercise the causal action unless it repays the bill to the debtor, submitting it at the Registry of the competent Court and only upon justification of the formalities necessary for preserving the recourse actions against the debtor to which it is entitled. The reason for such regulations is to prohibit the creditor, as of the lodging of the causal action, the right to be able to capitalize its claims twice under two enforcement orders with the same subject matter (court judgment obtained in the causal action and the promissory note). Since the assignor creditor, the bank, elected to pursue its claims by registering in the list of creditors with the amount for which the guarantor debtor is pursued, the legal obligation incumbent upon the assigned debtor is to repay the promissory note, as provided by the above mentioned text. Since the bank had a legal obligation to repay the promissory note to the assigned debtor, it could not to assign it to the assignee creditor, so it was deemed that the enforcement continued unlawfully against the guarantor debtor, this being a legal impediment to enforcement.

III. The *loss of enforceability* of the credit agreement poses major issues in practice for the assignments of claim performed by banks to persons other than credit institutions under credit agreements concluded until 30 September 2016, the effective date of the G.E.O. no. 52/2016. Thereafter, the legislature dealt with the issue in Art. 58 para. (5) G.E.O. no. 52/2016, which states that all credit agreements, mortgage agreements and any other deeds serving as instruments to secure those loans, concluded at the request of creditors, are not enforceable instruments where the assignee is an entity conducting its business as collection agency.

Clarifying this issue is of particular interest at this time for the simple reason that nowadays all enforcements where the collection agencies have the capacity of creditor are substantiated on claims arising from the credit agreements concluded before the entry into force of the G.E.O. no. 52/2016.

Although the assignment of an agreement, with all the rights and obligations resulting therefrom, was not possible until the entry into force of the new Civil Code[5], all assignments of claim performed by banks under the new Civil Code included the claims arising from bank loan agreements and not from the agreements themselves. The explanation resides in that the bank always assigns only those agreements which do not generate profit or are not ongoing anymore due to the anticipated maturity.

[4] Civil judgement no. 523 dated 22 August 2016, delivered by Jibou Court in the civil case file no. 1420/1752/2015, and the not yet final and unpublished

[5] Under Art.1391 and following of the old Civil Code, the subject matter of an assignment of claim is represented by a claim, a right or an action, and not by an agreement, as the jurisprudence construes that the assignment of debt is prohibited.

This legal issue was settled by the Cluj Commercial Court [6] in that the enforcement lacks the enforcement order when the creditor seeking enforcement of a credit agreement is the non-banking institution assignee creditor following the conclusion of an assignment of claim with the credit institution, considering that the enforceable order of the credit agreement was granted solely *on account of the person of the* banking institution and the of the borrowed debtor. The enforceability is not accessory to the subjective right assigned but it is a matter of *procedural law* so that the assignment cannot be vested with the value of collateral agreement[7].

In their defence, the collection agencies claim that the enforceability of the credit agreement arising from the nature of the credit convention and not in consideration of the person, and the recitals of Decision no. 3/2014 issued by the High Court of Justice on Cassation concerning a prior ruling to settle the interpretation and application of Art. 120 of Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, endorsed with amendments by Law 227/2007, as subsequently amended and supplemented, in conjunction with Art. 1396 of the Civil Code of 1864, namely whether the consent for the enforcement of a credit agreement can be ordered at the request of the assignee creditor of the claim.

I reckon that, amongst the two views, the opinion of the Cluj Commercial Court is the correct one.

Under para. (1) Art. 632 of the new Code of Civil Procedure (Art. 372 of the old Code of Civil Procedure) the grounds for enforcement is the enforcement order: "*Enforcement may only be carried out pursuant to an enforcement order*".

The bank loan agreement, enforceable under the provisions of Art. 120 of G.E.O. no. 99/2006 ceased its legal effects with the assignment of claims, as the bank *waived* the right to enforce the debtor. The explanation stems from the effects generated by the assignment of claims, which gave rise to two distinctive legal relationships between the parties: one between the bank and the assigned debtor, and one between the assignee creditor and the assigned debtor. The assignee is third party in relation to the credit agreement, and obtains a right of claim against the assigned debtor under the assignment of claim agreement and not under the credit agreement concluded between the bank and the assigned debtor.

Assignment of claim by the bank to a person who does not have the capacity of bank does not transmits the enforceability of the credit agreement, as this privilege is recognised by law *intuitu personae* only to the bank. The "*acquiring*" of the claim by the assignee who lacks the capacity of credit institution with main activity the lending is not accompanied by the transfer of the "*intuitu personae*" nature of the credit agreement, and the old and new Civil Code do not qualify the assignment of claim agreement as enforcement order. Under these circumstances, the assignee must achieve the right acquired through this purchase of non-performing bank claims through a new procedural approach, in the common law, against the assigned debtor, given that the assignor bank has waived all the attributes of the claim resulting from the credit agreement, including the right to enforce the debt in question.

The right to enforcement granted to credit institutions by Art. 120 of G.E.O. no. 99/2006 has an "*intuitu personae*" nature, as shown by the Cluj Commercial Court in the aforementioned judgments, granted in consideration of the banking institution, based on the particularities of this type of activity, and cannot be transferred to a person who is not a credit institution. Given the derogation of the common law provisions of G.E.O. no. 99/2006, these provisions only apply to banking activities. The credit agreement is enforceable order exclusively as regards the legal relationship between the lender and the borrower.

In addition, the credit agreement is also characterised by the "*intuitu personae*" nature, as the bank concluded the agreement only with the person who fulfils certain capacities related to solvency.

[6] Civil judgement no. 96 of 2014 final, delivered in the civil case file no. 29507/211/2012 and Civil judgement no. 874 / A / 2014 final, delivered in the civil case file no. 6028/211/2014 of the Commercial Court Cluj, unpublished.

[7] Cluj Commercial Court opinion contained in the notification of the High Court of Cassation and Justice for a prior ruling to settle a matter of law, completed by judgement no 3/2014.

Since the assignment agreement is not an enforcement order, the assignee creditor's right of claim bears no such character, being necessary to obtain an enforcement order against the assigned debtor in the common law, to satisfy that claim. Therefore, the assignee creditor shall have at its disposal only the contractual liability action, and the enforcement cannot be initiated or discontinued upon the assignment of claim due to lack of enforceable order in the hands of the assignee creditor who is not a credit institution.

1. The defence of the collection agencies according to which Art. 120 of G.E.O. no. 99/2006 conferred enforceable order nature to the bank loan agreements due to the nature of conventions and not on the basis of the persons signing these conventions is unfounded for the following reasons:
On a preliminary basis, under this reasoning, the credit agreement would preserve its enforceable power, including in the event of assignment of a claim to an individual or an unincorporated entity, who could still charge bank interest, which is contrary to law governing the credit institutions.
Art. 120 of G.E.O. no. 90/2006 confers enforceable nature only to the credit agreements concluded by credit institutions. The reason for granting an enforceable nature to credit agreements stems from the professional character of credit institutions, acting in compliance with strict rules imposed by the legislation on banking, the National Bank of Romania, as supervisor of the banking sector and self-imposed to prevent fraud. Another reason is the need for relatively rapid means to recover the claims for the benefit of the creditor. The opinion according to which the assignment of claims is accompanied by a transfer of the enforceability of the credit agreement would be tantamount to ignoring the *intuitu personae* nature considered by the legislature to grant enforceable nature to a bank loan agreement.

Another argument is that all bank loan agreements are the result of investigation by the lending bank of the clients' creditworthiness and collaterals provided, and the analysis by the client the cost of the loan, which differs from one bank to another. The conclusion of the bank loan agreement takes place therefore in mutual consideration of the persons.

a) The *intuitu personae* nature results primarily from the *grammatical, literal interpretation* of the credit agreement. If we remove the word "*bank*", the credit agreement remains, which shall be enforceable as long as neither party is a credit institution.
It should be noted that according to Art. 6 of G.E.O. no. 99/2006 the term "*bank*" means "*banking activity*" and vice versa, and it is forbidden to use the name of bank or banking activities by persons who are not credit institutions.

b) In the recitals of Decision no. XIII of 20 March 2006 on the appeal on points of law, declared by the General Prosecutor of the High Court of Cassation and Justice, on the application of Art. 79 para. 2 of Law 58/1998 on banking activity, republished, the High Court of Cassation stated the following on the matter of bank loan agreements concluded before the entry into force of this law: *"Instituting unitary, simplified enforceable system, meant to ensure the prompt recovery of bank claims without resorting to complicated procedure, specific to contractual liability, represents an answer to an obvious public interest, of loan guarantee,* ***which removes the risk to depositors and shareholders to reach the situation of being deprived of savings or investments they have made.***
In this regard it is noted that the ***banking activity****, even if performed by private legal persons, has an undeniable public interest.*

The attainment of that public interest requires the ***guarantee of the loan granted by banks*** *by a provision of the law, meaning that the legal deed by which the loan was agreed must have an enforcement nature, to be used as such in flexible, simplified procedures for the recovery of amounts borrowed from bad-faith debtors who refuse to repay them upon maturities."*

The Court merely confirms that the legislature has conferred enforceability to credit agreements in consideration of the lender's bank capacity.

It results, from the explanation given by the Court, that the reasoning for granting such powers to credit agreements entered into by banks is to avoid the risk of losing banks' deposits from population as a result of non-reimbursement by the bad-faith borrowers of loans granted by the bank from these deposits. Given that the bank has assigned the claim resulting from such an agreement, we naturally question whether such a risk exists for bank depositors or shareholders, and if the

reasoning for preserving the enforceability of the bank loan agreement still persists. Clearly, collection agencies do not hold deposits from the population to justify such a risk cover.

In order to motivate the need to guarantee the loan granted by the banks and not by the collection agencies, the Court referred to the Art. 52 of Law 34/1991 (currently Art. 50 para. (1) of Law 312/2004 on the National Bank of Romania), showing by analogy that loan documents signed by the *National Bank of Romania* are enforceable orders. Furthermore, it referred to the provisions of Art. 5 of Government Emergency Ordinance no. 43/1997, according to which credit agreements concluded by the *Agricultural Bank* until 31 December 1996 had enforceable nature. The Court explained in this additional reasoning and equated the banking activity and banks, the enforceability of the credit agreement awarded in consideration of the credit institution entity, the only one authorised to conclude contracts of bank credit, whether it is called N.B.R. or the Agricultural Bank. The same reasoning was used by the Constitutional Court in the Decision no. 181 of 17 December 1998 regarding the exception of unconstitutionality of Art. 5 of the Government Emergency Ordinance no. 43/1997 for drawing up the special balance sheet and the reconciliation of loans and interest in the "loss" category at the Agricultural Bank - S.A., showing that the provisions of Art. 5 of Government Emergency Ordinance no. 43/1997 did not create a privileged situation for the Agricultural Bank - S.A. given that subsequently the capacity of enforceable orders of the contracts of bank loan and real and personal guarantees, established to guarantee the bank loan was granted generally, under the Banking Law 58/1998, to all banks, therefore not only for Agricultural Bank - S.A..

c) If the legislature had in mind the nature of the convention and not the entity of the creditor, i.e. the bank, how do the collection agencies explain that according to Art. 120 of G.E.O. no. 99/2006, only banks can grant bank loans and cash bank fees and interests? Assuming that the enforceability of the credit agreement would be preserved, the assignment of claim would constitute a circumvention of Art. 18 para. (1) section b) of the G.E.O. no. 99/2006, according to which only credit institutions may grant loans, including *inter alia*: consumer loans, mortgage agreements, factoring with or without recourse, financing of commercial transactions, including forfeiting.

Collection agencies impose bank interests and fees upon enforcement under "*the nature of the convention*", and there is no difference between them and a credit institution. It is not fair that a person other than a credit institution benefit from the privileges of such an institution in the event of assignments of claims, given that this person is forbidden to carry out, on usual basis, the activities provided by the G.E.O. no. 99/2006. A contrary interpretation is likely to allow persons other than credit institutions to carry out *incognito* the activities listed BY THE G.E.O. no. 99/2006 through assignment of claims, without complying with the minimum guarantees provided by law in favour of the debtors.

2. The decision no. 3/2014 of the High Court of Cassation and Justice does not settle the legal issue pursued, leaving unresolved the issue by rejecting as *inadmissible* the demand to rule on the settlement of this matter. The preamble explains both views, and neither is selected through a solution for the admission of the appeal. The solution of the Court could have been invoked only if the High Court of Cassation and Justice had granted the request and had ruled in favour of one opinion. Therefore, the judgment cannot be taken into consideration *under any procedural aspect,* as according to Art. 517 par. (4) of the Code of Civil Procedure *only the rulings given* for legal questions under trial is mandatory for Courts starting with the publication of the judgement in the Official Gazette of Romania, Part I. The Decision no. 3/2014 the issue deferred was not solved, the demand was overruled as inadmissible. Basically, the Supreme Court did not wish to settle the issue, contrary to the allegations in defence of the collection agencies.

In support for overruling the claim as inadmissible, the Court held that Art. 120 of the Government Emergency Ordinance no. 99/2006, approved with amendments by Law 227/2007, as subsequently amended and supplemented, did not confer the enforceable order nature to the credit agreements in consideration of the persons signing the contracts, but the nature of the those conventions, and that the amendment of the initial parties of the legal act which constitutes enforceable order does not affect the substance of the enforcement order, the assignee holds the

position of a genuine successor by particular title, which takes all the rights held by the assignor in relation to the claim.

In Art. 58 para. (5) of the G.E.O. no. 52/2016 the legislature interpreted to the contrary the findings adopted by the Court, providing that all credit agreements, mortgage agreements and any other deeds serving as guarantee instruments to secure those loans, concluded at the request of the creditors, do not constitute enforceable orders if the assignee is an entity engaged in activities of claim recovery. It is not the first time when the legislature provided a solution contrary to the solutions delivered by the High Court in appeals on points of law or in settling issues of law.

Upon the exclusive review of the Court arguments, one is bound to observe that it makes a confusion between the civil subjective law and the procedural law, as the rights transmitted by the assignment of claims does not include the enforceability of the credit agreement. The notion of claim, guarantees and accessories only concern the materiality of the right submitted for trial, and not the attribute of enforceability, the latter being an aspect of procedural law.

The enforceability attribute is not transmitted with the assignment of claim, such an attribute can be determined solely by the legislature, which, when so desiring, it expressly regulated this matter, as for example the matter of collateral and personal contracts for the credit agreement. The transmission of the enforceable nature under the procedural aspect has not been provided regarding the assignment of claims, and *where the law makes no distinction, neither should we*.

In the doctrine [8], the recitals of the High Court have not escaped criticism, pointing out that one cannot conclude that the law confers enforceable order nature in consideration of the nature of the convention, irrespective of the signatory parties of the deed, because both elements merge, forming an integrated whole. The banking nature of the conventions resides in the fact that one party is a bank. A contrary interpretation would lead to the conclusion that all loan / credit agreements should be recognized by the legislature as enforceable orders. However, the author believes that the credit agreement retains its enforceability following the assignment of claim.

The author's position is contradictory, most likely due to the confusion between the nature of the convention and the signatory parties.

Furthermore, the opinion of the High Court according to which the assignment of claim is accompanied by the transfer by the assignee of the enforcement order nature was criticized, showing that the nature of the enforcement order is not the amount borrowed (the claim), but the credit agreement as *formal deed* concluded between specific people in a specific context, the nature of enforcement order belongs to the credit agreement concluded by a credit institution[9].

While I agree that the enforceability attribute of the credit agreement derives from the capacity of the signatory persons and from the context in which the contract was signed, I disagree with the author's belief according to which the enforceability should be seen exclusively in terms of the deed. The enforceable order represents primarily a method to "*achieve*" the claim it ascertains, i.e. a form of "*materialization*" of the creditor's right[10] without which this right is an illusion. From this point of view, the enforceability is granted by law to the credit agreement to protect this claim right of the bank, and not simply because the bank has signed a credit agreement; the public interest pursued consists of protecting this right of claim. The deed represents the means, material support which protects the right of claim and not the legal basis of the right to require enforcement. The enforceability resides with the claim ascertained through a bank loan agreement but which is not transmitted through the effect of assignment of claim to a non-bank institution, but is lost upon the assignment, as the bank waives through the privilege provided by law in its favour through the assignment.

---

[8] Emod Veress, *Probleme controversate privind executarea silită a unor titluri executorii, altele decât hotărârile judecătoreşti,* „Revista Romana de Executare Silita" no. 3 of 2015, p.3 and p. 5.

[9] Lucian Bernd Săuleanu, *Încuviinţarea executării silite a unui contract de credit când cererea este formulată de cesionarul creanţei. Caracterul de titlu executoriu,* „Revista Universul Juridic", no. 2, February 2015, p. 6.

[10] Ion Deleanu, *Consideraţii cu privire la titlurile executorii,* „Revista Romana de Drept Privat" no. 3 of 2008, p. 5.

IV. The solution to this problem was resolved *ex nunc* by the legislator by Art. 58 para. (5) G.E.O. no. 52/2016, for the purposes of the opinion previously expressed by Cluj Commercial Court through judgments which I have referred to.

For the same reasons and in order to avoid creating discriminatory situations between the assignee debtors before the entry into force of G.E.O. no. 52/2016 and the assignee debtors for claims arising from bank loan agreement entered into after that date, I believe that the solution for the assignment of claims arising from bank loan agreement concluded before the entry into force of the G.E.O. no. 52/2016 is the cancellation of all enforcements started or continued under these acts of assignment of claim by persons not qualifying as credit institution, due to the lack of enforcement order.

The defence of the assigned debtors can be performed on a procedural basis by way of appeal of the actual enforcement or appeal of the order, the second method is subsidiary to the first. Thus, if the assigned debtor loses the 15-day term provided by Art. 715 para. (1) of the new Code of Civil Procedure (Art. 401 para. (1) of the old Code of Civil Procedure) to lodge the appeal to the actual enforcement, it may use the appeal of order to clarify the *application* of the enforcement order and to clarify whether the contract of bank loan can still be applied following the assignment of the claim by the bank due to the loss of its enforceable power.

Bibliography

1. Emod Veress, *Probleme controversate privind executarea silită a unor titluri executorii, altele decât hotărârile judecătoreşti*, „Revista Romana de Executare Silita" no. 3/2015.

2. Lucian Bernd Săuleanu, *Încuviinţarea executării silite a unui contract de credit când cererea este formulată de cesionarul creanţei. Caracterul de titlu executoriu*, „Revista Universul Juridic", no. 2, February 2015.

3. Ion Deleanu, *Consideraţii cu privire la titlurile executorii*, „Revista Romana de Drept Privat" no. 3/2008.