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# THE INVESTMENT OF THE PAYMENT INSTRUMENTS WITH EXECUTORY FORMULA

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***Abstract:*** *The judge-made-law is not unitary regarding the necessity to invest with executory formula the cheque and the bills payable to order, and the same courts interpreted the dispositions from the civil procedure code excluding the special laws which established the juridical conditions for the cheque and bill payable to order. At the same time, other courts grant priority to the special laws which established the regime of writ of execution for this payment instruments. Because of this disparity the attorney general has filed an appeal in the interest of law and the solution of the Highest Court of Cassation and Justice was to admit the appeal and to dispose to invest them with executory formula.*

***Key words:*** *cheque, bill payable to order, writ of execution, appeal, executory formula.*

We have been writing before about this subject [1] regarding the necessity of an unitary application and interpretation of the article 374^1 from the Civil Procedure Code relative to the article 61 from the Law no.58/1934 [2] and article 53 from the Law no.59/1934 [3], and at that moment the Highest Court of Cassation and Justice did not pronounce the sentence. We agree then to the second opinion that sustained that it is not necessary and compulsory to invest with executory clause the promissory note ,bill payable to order and cheque because article 374^1 from the Civil Procedure Code represents the special rule in the domain of the execution without the executory clause based only on the law which recognized the character of the writ of execution.

Our juridical argument at the moment of appeal in the interest of law was that Law no. 58/1934 and no. 59/1934 haven't been amended in essence until today, and the actual amendments brought to the Civil Procedure Code through Law no. 459/2006 [4] have priority as special rules when they concluded that "the judgment or other titles execute themselves only if they are invested with the executory clause mentioned in article 269 paragraph 1, except for the enforceable judgment, the provisional enforceable judgment and other judgments or documents mentioned by law which execute themselves without the executory clause".

In accordance with article 61 paragraph 1 from the Law no. 58/1934, "the promissory note has value of a writ of execution for

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the capital and premises, settled in accordance with article 53, 54 and 57".

At the same time, the identical law confers equally through article 106 the same character to the bill payable to order. The bill payable to order has the same juridical regime as the promissory note. The character of writ of execution is also recognized to the cheque, and so article 53 paragraph 1 from the Law no. 59/1934 settled :"the cheque has value of a writ of execution for the capital and premises, settled in accordance with article 48 and 49".

We have taken into account all these arguments when we sustained our point of view about the priority as special rules of the amendments brought to the Civil Procedure Code through the law no. 459/2006, especially the provisions of article 374 ^1 from the civil procedure code.

The opinion of not investing with executory formula the payment instruments was also sustained by the General Prosecutor of Romania in the appeal filed in the interest of law.

The first opinion that sustained the necessity of investment with executory formula for the cheque, promissory note and bill payable to order, also mentioned in the appeal filed in the interest of law by the General Prosecutor of Romania, was based exactly on the dispositions of article 374 paragraph 1 from the Civil Procedure Code, as it was changed through Law no.459/2006 :"the judgment or other title execute themse;ves only if they are invested with the executory clause mentioned in article 269 paragraph 1 (…)". Starting from the character of special act for Law no.58/1934 and Law no.59/1934, documents which settled expressly to invest with executory clause the promissory note, bill payable to order and cheque notwithstanding the legal provisions from the article 374^1 from the civil procedure code, some courts sustain that the investment with the executory clause of the commercial titles is necessary and is imposed expressly by the legislator.

The divergent opinions of the judge-made-law are argued each against the normative texts mentioned above, in accordance with the legal dispositions which are considered to represent the special law, respectively the laws about promissory note, bill payable to order and cheque;and on the other hand with the dispositions of article 374^1 from the civil procedure code against the amendments brought in 2006 through the Law nr.459/2006.

On 19th January 2009, the Highest Court of Cassation and Justice pronounced the appeal in the

interest of law in the file no.24/2008, and the judgment was to admit the appeal within the meaning of the dispositions of article 374 ^1 from the civil procedure code, referred to article 61 from the Law no.58/1934 and article 53 from the Law no.59/1934.It must be interpreted in the way that the promissory note, bill payable to order and cheque must be invested with executory formula in the application of forced execution. At the time of writing this article, the Decision no.4 from 19th January 2009 of the Highest Court of Cassation and Justice is not motivated and not published into the Official Gazette of Romania, but the solution is imperative for all the courts, in accordance with article 329 from the Civil Procedure Code.

Opposite to the opinion sustained by the General Prosecutor of Romania, the

solution of the appeal in the interest of law is in accordance with the special laws, which are law no. 58/1934 and law no.59/1934, and it isn't in "the spirit" of the general law, which is the Civil Procedure Code.

Analyzing the arguments sustained by the courts who ask for the executory formula in case of promissory note, bill payable to order and cheque before the solution of appeal in the interest of law, it results without doubt that the solutions were based on the text from the special laws (article 61 paragraph 2 from the Law no.58/1934, respectively article 53 paragraph 2 from the Law no.59/1934) which speak about the investment with executory formula of the payment instruments.

The only required condition asked by the special laws for the forced execution procedure of the payment instruments is to invest with executory formula the promissory note, bill payable to order and cheque, and for that the legislator, from the beginning, settled expressly that the competence to invest with executory formula belongs to the courts, respectively to the Court of Justice or to the High Court of Justice [5].

It is true that at the moment of the adoption of special laws no.58/1934 and no.59/1934, the disposition from the Civil Procedure Code article 374 was in the way that "no other judgment can be executed if it is not invested with executory formula, the only exception being the provisional enforceable judgment and the preparatory judgment". With that condition, the formality of investment with executory formula has the effect to confirm that the title is susceptible to be applied in forced execution, and that there is no temporary suspension from the forced execution procedure.

Even if some courts and authors consider that laws no.58/1934 and no.59/1934 aren't the special law, because they have taken into account the rapport between the general and the special precept, reproduced „specialia generalibus derogant", we can agree with this only under the directive of the former procedural civil law.

Starting from the above mentioned principle , even if „*actus interpretandus est potius ut valeat quam ut pereat*" (the law must be interpreted in the way to produce its juridical effects, and not in the way of its non application) , and even if "*Ubi lex non distinguit, nec nos distinguere debemus*"(Where the law is not distinguished, neither can we distinguish it), we cannot interpret that Laws no.58/1934 and no.59/1934 are the special law.

Also, after the modifications brought to the Civil Procedure Code through the law no.459/2006, if we take into account the dispositions from the article 374^1, we can still consider hereinafter that the dispositions from article 61 paragraph 3 from the law no.58/1934 and article 53 paragraph 3 from the law no.59/1934 are still not out of date, because we are in the position to apply with priority a special disposition'of the law towards the general disposition of the law, which are the Civil Procedure Code.

The lapse intervenes only in case when our legislation lacks dispositions about the necessity to invest with executory formula, and that's because a general precept can not modify a special precept.

It is true that regarding the investment with executory formula the civil procedure code (the general precept) settled the cases

in which the investment with executory formula is necessary, and in the new view of the settlement the Civil Procedure Code's dispositions exclude expressly from the investment with executory formula the documents which recognized

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