CONSIDERATION REGARDING THE LEGAL CAPACITY OF THE ASSIGNEES OF THE BANK CREDIT AGREEMENT

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Abstract:
Any proffesional lending activity, outside the special legal authorization, is prohibited, in this category af activities being also included the acquisition of loan porfolios. Credit granted to a person keeps the legal frame and features only if a bank or nonbanking financial institution is part of the credit agreement, facing, from this perspective, a legal monopoly, the need to regulate lending itself being obvious for stability financial system. To circumvent prudential regulations, banks practice the assignment of debts, assignee being a company established as having the majority shareholder (or sole) shareholder the bank-assignor. This situation, in the absence of the express authorization of the National Bank of Romania, makes the assignment contract violate the conditions of specialized use ability. In these conditions, the operation itself, done by fraud law, is void. The aims of the presented study bring to the conclusion that only the companies which are authorized by the National Bank to run credit operation have the judicial capacity to take over, by assignment, banking credits, any other solution being equivalent to recognize the right of each entity (why not of any individual) to develop credit operations specific to banks, in any conditions, by establishing any kind of accessories.

Key words: assignment contract, bank credit agreement, ability to use, credit institutions, non-banking financial institution, fraud law

JEL classification: K12, K22

INTRODUCTION

Conditions of access to banking and of its holding in Romania are subject to prudential supervision exercised by the Romanian National Bank, lending activity being legally conducted by credit institutions or by non-bank financial institutions (NFI).

The legal framework of the credit institutions consist of GEO nr. 99/2006 regarding the credit institution and the adequation of capital, approved by the Law no. 227/2007, modified and completed ba the GEO no. 215/2008, GEO no. 25/2009, GEO no. 26/2010, Law no. 71/2011, GEO no. 13/2011, Law no. 287/2011 and GEO no. 1/2012.

Also, the legal framework of the non-banking financial institutions consist of Law no. 93/2009 regarding the non-banking financial institution, completed by GEO no. 42/2011 and Law no. 287/2011.

The credit institutions, Romanian legal entities, are able to be registered according to the general provisions aplicable and also to the specific requirements provided by the Second Part of the GEO no. 99/2006, their organization being as banks, cooperative loan organization, savings and loan banks for housing and mortgage banks (purely banking activity).

The non-bank financial institutions are other legal entities, incorporated according to the general provisions of the Law no. 31/1990 of the commercial companies, which are authorized by the National Bank of Romania to develop professional loan activities, consisting of consumer credits, mortgages credits, microcredits, financing of the commercial transactions, factoring, forfaiting, financial leasing, pledges or any other forms of finacing similarly to credit activity.

Any proffesional lending activity (such as the proffesional activities being regulated by the article 8 of the Law no. 71/2011), outside the special legal authorization, is prohibited, in this category af activities being also included the acquisition of loan porfolios.

In this legal framework, it is revealed that the subjects of banking law are specialized institutions, which are prior authorized by the National Bank of Romania, which impose special requirements in order to get the full capacity of use by the legal entities which act as a creditor.

Thus, corroborating the above mentioned legal provisions and the provisions of art. 207 New Civil Code, the consequense is that the operations and contracts fulfilled in the absence of the legal authorization are void.

According to the Law no. 216/2011, art. 3, lending money with interest, being professionaly, by an unauthorized person, is an offence punished by jail up to 5 years, the ammounts of money which are coming from this offence being confiscated, the offence being also regulated by the New Criminal Code project.

SPECIAL CONDITIONS FOR AQUIRING THE ABILITY TO USE BY THE ASSIGNEES

According to the GEO no. 50/2010 on credit agreements for consumers, credit agreement is defined as the contract by which a lender (legal person, including branches of credit institutions and foreign non-bank financial institutions, which operate in Romania and gives or agrees to grant credit in the business activity or professional) gives, promises or provides the possibility to grant a consumer credit in the form of deferred payment, loan or other similar financial accommodation.

Thus, a credit to a person keeps the name and features only if a bank or NBFI is part of the credit contract - in this regard, it can be stated that we are facing a legal monopoly, the need to regulate the credit activity being obvious for the stability of the financial system itself.

Bank credit agreement establishes the obligation borne by the debtor to pay, at maturity, related rates, as the contract being concluded with successive execution.

In the absence of contrary stipulation in the contract, the creditor-bank has only the possibility, in case of non-compliance, to ask for termination of the contract on judicial terms, or, if the contract provides, has the option to request enforcement of outstanding rates.

To avoid reference to the provisions of the enactment, but also due to the reaction of debtors, who have left unpaid rates on loans contracted by the end of addenda modifying credit agreements, which, especially towards the financial year end, would have led the charge balance sheets of the banks with bad loans that would attract the attention of the National Bank, the solution adopted was to transfer the chose in action originated from the credit contract - procedure that fas an obvious illegal character.

One of the most commonly used methods of circumvention current banking on risk provisions, but also bypass the GEO no. 50/2010, is the practice where the banks debt assignment contract covering overruns due loans.

Typically, the assignee are constituted as companies with majority (or sole) shareholder the assignor-bank, which would qualify the assignee company as apparent, a false person, as it operates a confusion between the patrimonies of those two legal entities.

From this point of view, due to the fact that the company is apparent, because of its illegal aim (to circumvent prudential norms of the National Bank of Romania), it can be questioned the very commercial company nullity, under art. 56 lett. a) the first sentence („the instrument of incorporation was not executed", Romanian incorporated legal provision of the former Directive 68/151/EEC "no instrument of constitution was executed", disposition held by the Directive 2009/101/EC), in conjunction with the lett. e) of the Law no. 31/1990, republished ("missing authorize administrative legal incorporation of the company").

The assignment agreement (civilian regulated by art. 1566 et seq. NCC) is the contract which aims to transfer a chose in action, achieving, by paying the purchase price, a substitution of the active subject of legal relationship with another topic active.

Under the civilian law, the assignment of certain choses in action may be free or against payment, to fulfill the general conditions of validity of legal documents. For opposability, the law requires notification of the debtor or authentic statement of accepting by him.

Principally, any certain chose in action can make the object of an assignment, with the exception of cases in which the assignment is forbidden by law, or if, through its nature, the chose in action is linked to the person of the creditor (art. 1.573 NCC), becoming *intuitu personae*.

In the latter case it is required, *ad validitatem*, the debtor's consent.

Articles 70 and 71 GEO no. 50/2010 established the general conditions that can operate the credit assignment, the al. 5 of art. 71 setting but that "notification shall state the creditor that will charge the consumer for repayment amounts by assignment, and the name and office address and the endpoint of the legal representative in Romania".

Text of law, linked with the definition of "creditor" made by art. 7 Section 5 of the law ("creditor" - the legal person, including branches of credit institutions and foreign non-bank financial institutions, which operate in Romania and gives or agrees to lend the course of his trade or business") basically reinforces the specialized ability to use analysis in credit activity.

As for the assignment of banking chose in action, there are imposed, in this context, some comments, that make, in our opinion, the assignment derived form banking credit contracts (where the position of assignor is held by debtor's bank and the position of assignee is held by a limited liability company which is not authorised by the National Bank of Romania), to be illegal.

From this perspective, the credit contract aquires an *intuitu personae* character for the bank, the assignement resulting from the conclusion of such contract may be made only in special circumstances.

Thus, through the assignment of chose in action originated from the credit contract to a commercial company, the late practically subrogates the rights and obligations of the assignor creditor.

From this point of view, the commercial company, without authorization according to financial norms, even if acquires the obligations of the banks, eludes the authorization procedure, practically breaking the legal monopoly – in this context, it can be appreciated that the operation itself, concluded by breaking the law, is void.

Simultaneously, the personal subrogation that is the effect of the cession puts into discussion the change of the judicial nature of the very credit contract, since only banking institutions or NFI have the judicial capacity to sign banking credit contracts.

Thus, this subrogation has as effect the modification of the judicial nature of the contract, which can exist, legally, only with the agreement of all partners – from this perspective, the judicial operation practically trespasses the limits of receivable cession, becoming, actually, an unilateral modification of the contract.

Also, it is emphasized even the break of the limits of the specialized use capacity of the assignee commercial company, the judicial act thus signed becomes absolutely null.

But, in the measure in which they prevail on the credit contract, the assignee of the receivable derived from the banking credit contract acquires for himself the quality of "creditor" as GEO no. 50/2010 provides – "judicial person, including the subsidiaries of credit institutions and non-banking financial institutions from abroad, that run on Romanian territory and that grant or engage themselves to grant credits within their commercial or professional activity" – sense in which it could be appreciated that the grantee commercial company acquires, *ope legis*, the obligation to adapt the contracts, in compliance with GEO no. 50/2010!

If the assignee company has common shareholder with the bank, the problem of the simulation can be raised – in the measure in which is proven that the operation has as purpose the break of imperative norms related to the obligation to form risk provisions and to keep the minimum level of solvability of the assignor bank.

Furthermore, according to the credit contract signed between the debtor and the bank, the latter would have the possibility to enforce only the eventually-matured rates (in the measure in which, through contract, the possibility of anticipate maturity is not treated or such operation did not took place).

In these conditions, each eventual „cession" of a chose in action to a third party can have as exclusive object matured debts, but the notification addressed to debtors cover sums much greater

than the credit itself – from this point of view, the sum not being exigible, the enforcement cannot start.

According to general legal provisions, through the effect of the assignment, the chose in action is transferred for the nominal value of the receivable, regardless the context in which the cession was made at a smaller price or even charge-free (the last variant, in our opinion, strengthening the illegal character of the operation, since the very judicial nature of the commercial company assumes the intention to obtain a profit).

In the case of banking credit contracts, and even more pregnant in the context of existence of some debt accessories reported to a variable reference indicator, the problem of the certain character of the transmitted chose in action comes forward.

Practically, the assignor creditor cannot oppose to the debtor the existence of a true, liquid and exigible chose in action towards the debtor, even if, usually, through the assignment contract, the assignor guarantees to the assignee the fact that „the receivable is real, liquid and exigible".

It is observed the refuse of the partners in the assignment contract to communicate also the contents of the contract.

The explanation is easy, because if the assignment is charge-free, the illegal character of the operation is granted, and in the extent that the contract is onerous, the assignor guarantees to the assignee the existence and validity of the receivable, but not the solvability of the debtor – the solvability guarantee intervenes only in the context of express assumption of this obligation, in every situation, only to the level of the really paid price. Generally, the law affords to guarantee including the future solvability of the assigned debtor.

Considering the exemplary case of a decision, made in 2008, High Court of Cassation and Justice ruled that banks can perform any other activities or operations necessary to achieve the authorized object of activity, without requiring their inclusion in the authorization, which includes debt recovery operations, which may result in assignment contracts, seeking collection or recovery of nonperforming credits.

The banks' right to conclude assignment contracts is expressly stated and regulated in normatives peculiar to the banking domain, respectively in the Law no. 190/1999 regarding the mortgage credit and Law no. 289/2004 regarding the judicial regime of the consumption credit contracts, and these are base don the general provisions of Banking Law no. 58/1998 (repealed by the GEO no. 99/2006).

Thus, the first court ascertained the absolute null character of the assignment contract signed by the assignor bank and assignee commercial company, taking into consideration that through the assignment, the chose in action of the assignor for its given debtor were onerously transmitted, receivables resulted form the credit contracts determined. The two credit contracts were guaranteed through two mortgages of rank I and II, according to the real mortgage contracts.

On the context, the first court noted that the action is founded, taking into view that assignment contract was signed by a subsidiary, without judicial status, so it signed the convention without contracting capacity, according to art. 3 pt. 4, Law no. 58/1998.

On the other hand, it has been appreciated the cause of the assignment contract as illegal, because banking law at the date of contract, namely Law no. 58/1998 expressly stated at art. 11 – 13 the activities allowed for banks, the assignments not being among these.

Besides, the banking debts cannot be transmitted, the recovery of banking debts could be made only through banks' own executioners or judicial executioners, especially knowing that the assignee commercial company does not have stated in its object the recovery of debts.

The appeal declared by the bank was admitted, irrevocably, motivated by the fact that the initial court made a wrong interpretation of the articles 11, 12 and 13 of the Law no. 58/1998, in effect at the contract signing date.

Thus, only art. 12 states, in a limitative manner, the activities that cannot be run by banks, the assignment is not mentioned. But art. 11 and art. 13 rule the activities that can be run by banks for the fulfillment of their object of activity and such activity is undoubtedly the recuperation of granted credits, through any legal mean.

Accordingly, the activity of transfering of a chose in action obtained through credit granting, and the transferring of the related guarantees, is accessory to the credit activity and is not forbidden by art. 12 of the Law no. 58/1998.

This argument strengthens the contrary opinion, that only an entity authorized to run banking activities has the judicial capacity to run credit activities – capacity which is not given to the assignee company without a special authorization given by the National Bank of Romania.

According to the provisions of the Law no. 190/1999 on the mortgage credit for real estate investments, the assignment of mortgage debt is the financial investment operation that could claim the transfer of individual mortgages or mortgage receivables portfolios.

Besides, the discussion could take place only in the measure in which this commercial company only had a mandate from the bank to recover the matured debts – but in the case of an assignment contract, after the notification, the valid payment can be done only to the assignee, the payment made to the assignor does not clear the debtor.

In this context, the decision of the High Court is objectionable, as the assignment contract has an illicit purpose.

It can not be held the argue according to which the debts are incorporeal movables which may be of legal translation, that can be transmitted to specific contracts, such as the contract of assignment of debt (but not only).

Art. 11 align. 3 of Law no. 58/1998 states that banks can perform any other activities or operations necessary for the realization of their authorized activity object, without including them in the issued authorization, so inclusively receivable recovery operation, that can become effective as contracts and asignment of certain chose in action, through which the encashment and recovery of non-performant receivables is pursued.

But GEO no. 99/2006 content no reference to such activities, art. 20 showing that credit institutions may also perform other activities permitted under the authorization granted by the National Bank of Romania, as follows: non-financial mandate or commission operations, especially on behalf of other entities within the group to which the credit institution belongs, managing a property consisting of movable and / or property owned by them, which are not carrying out for the financial activities, their customer services which, although not related to the main activity, is an extension of banking operations.

Also it is shown that these provided activities should be consistent with the requirements of banking activity, particularly those relating to maintaining the good reputation of the credit institution and protect the interests of depositors, the total amount of revenues from these activities can not exceed 10% of revenues obtained by the credit institution through classical banking activities.

The National Bank of Romania, through the Rule and Authorization Department, has stated, in 2007, that „transmission (through assignment) of a chose in action resulted from a credit facility granted by the credit institution to a person or legal entity, represents for the respective credit institution an accessory aspect of the credit activity and does not require a distinct authorization, on the provisions of art. 18, GEO no. 99/2006. We appreciate that the same reasoning is applicable to the provisions of Law no. 58/1998 regarding banking activity, re-published".

But, this is an *a fortiori* argument in the reasoning regarding to which only the companies which are authorized by the National Bank to run credit operation have the judicial capacity to take over, by assignment, banking credits – to admit the contrary would be equivalent to recognize the right of each entity (why not of any individual) to develop credit operations specific to banks, in any conditions, by establishing any kind of accessories.

CONCLUSIONS

As a practical matter of topical interest, bank credit assignments must be understood as representing a legal act in which the validity of the convention itself depends on the full capacity to

use of the asignee, acquired through the special authorization procedure of the National Bank of Romania .

Also, facing the *intuitu personae* character of the bank credit agreement, the asignment requires, as a mandatory fund condition, obtaining prior consent of the assigned debtor, which, only in the context of direct participation in negotiating the contract of assignment, may supervise the exigible conditions of the bank debts.

In these circumstances, the assignee's claims against the assigned debtor, derivated from the assignment, loose the certain and exigible character, as long as, lacking the ability to use required by law, the assignee can not opose the debtor a bank credit and derived banking accessories.

Therefore, enforcement started by the assignee must be preceded by the acquisition of enforceable in common law procedure, the following procedure may be pursued to determine the quota of the claims and the certainty of it, as provided by art. 372 and following of the Procedural Civil Code.

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