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## National Case Law in Setting Bail Suspending Credit Enforcement in Disputes between Consumers and Professionals from the Perspective of Art.1 of Additional Protocol no.1 of the Convention

Mircea Grozavu<sup>a\*</sup>

\* Corresponding author: Mircea Grozavu, , grozavumircea@gmail.com

<sup>a</sup>*Ștefan cel Mare University, Suceava, Romania, Lawyer - member of Suceava Bar Association, grozavumircea@gmail.com*

### Abstract

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The enforcement of a bank loan credit presents is often imagined as a major abuse of professional's dominant contractual position. This is why the opposition to enforcement is seen by a significant part of the civil society as a judicial way that must be less restrictive for the costumer to use, especially by means of bail suppression. This state of affairs brings up the selected subject as one with a significant potential for scientific research. The present article replies with a summarized study on the main court rulings that created the existing contradiction at the Romanian and European Union level of case-law concerning the protection of the consumer's rights. The analysis of the mentioned rulings will be realized from the standpoint of the existing normative regulations and also form the standpoints of the law and economics doctrine, with the main purpose to bring clarity in a field that is mainly speculative in the present time.

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## **1. Introduction**

According to Art.14 of Law 193/2000 on unfair terms in consumer contract, the consumers prejudiced by contracts signed in violation of this law have the right to address judicial organs in accordance with the Civil Code and the Code of Civil Procedure.

As the law text does not mention a limitative period within which the consumer can file a lawsuit against the bank institution, pursuing the goal to eliminate the unfair terms in the consumer contract signed with a bank even during the period of contract enforcement procedures.

The judicial denunciation of abusive terms will lead to the refund of the money paid by the consumer on their grounds, and usually will lower the debt that has to be collected by means of compulsory executions.

On the other hand, the vast majority of bank loan contracts are guaranteed by mortgages in favour of the bank, and usually mortgage is established on a property used as home by the consumer and his family, the suspension of compulsory execution procedures represent a major interest for the insolvent debtor.

According to the dispositions of art. 719 of the civil procedure Code, the suspension of the enforcement procedure represents a procedural incident which consists of temporary cessation of enforcement and it is aimed at protecting the debtor's interests in relation to possible irregularities as regarding the performance of the procedure, by temporary ceasing the performance of any enforcement deeds.

The measure regarding the suspension of the enforcement procedure may be ordered by the court of law only upon the request of the interested party, based on solid grounds which must be evidenced by the applicant and further to paying certain surety bond (the amount of which is established by the lawmaker).

According to section 2 of art. 719 of the civil procedure Code, the setting of the bail must be proportional with the value of the debt which is being collected by means of compulsory execution and cannot be set at a lower value than the rule of law.

Also, section 3 of art. 719 of the civil procedure Code, establishes three exceptional situations which exclude the execution debtor's obligation to pay a surety bond, but none of them is part of the scientific hypothesis this study approaches, thus we will not pay attention to them.

## **2. Public judicial aid in setting bail for suspension of compulsory execution**

The bail setting procedure is mandatory in any appeal against enforcement in which the appellant solicited the suspension of the enforcement procedure, otherwise the levy of execution will not be ceased temporarily, until the appeal against execution has been ruled by a final decision of the court.

Because in the vast majority of the cases the mandatory enforcement of a credit loan contract is a legal matter triggered by the insolvency of the debtor, the judicial fee and the security bond that have to be paid in order to obtain the privilege of suspending the compulsory execution process may turn to be unaffordable.

If for the judicial fees that have to be paid for filing the appeal against enforcement can be paid from the funds of the Ministry of Justice, under the form of a public judicial aid, under the regulation of art. 6 of the Government Emergency Ordinance no. 51/2008, the sum of money ruled to be paid as a security bond is not eligible to be paid as public judicial aid.

The reasons behind this conclusion is based on art. 6, point d) from the Government Emergency Ordinance no. 51/2008, that statutes the fact that public judicial aid can be offered by the court by means of exemptions, reductions, rescheduling or delays in payment of court fees stipulated by law.

At an attentive lecture of this paragraph it is easy to find out that the letter of law does not mention the appliance to the institution of safety bonds required to be paid in mandatory order before a court can rule the suspension of the compulsory execution.

But even if the content of the legal norm appears to be clear, the rulings of the national courts are divergent on this common matter.

In the opinion of the most national court rulings, applications for exemption from bail was rejected as inadmissible. The courts that proceed in this way mean that the Government Emergency Ordinance no. 51/2008, on legal aid in civil matters contains no reference to such a situation, did not provide, in other words, the possibility of courts to rule on the application in question.

As for Directive nr.2003/8/EC invoked by the petitioners, the court held that it does not directly produce consequences in the legal order of the Roman state than in the manner in which it is enforced through national legal act, namely the Emergency Ordinance Government no. 51/ 2008.

However, according to Article 6 of the Government Emergency Ordinance no. 51/2008, forms for granting legal aid are expressly stipulated, and the bail payment is not included among these forms.

For those reasons, the court dismissed the application for legal aid made by the complainant as inadmissible (Ploiești County Court Decision from 19.06.2014).

According to art. 6 of the same law, "legal aid may be granted in the following forms: ... d) exemptions, rebates, deferrals or rescheduling of court fees prescribed by law, including those due to phase enforcement.

However, according to art.8, paragraph 3 of Government Emergency Ordinance no. 51/2008 "Take advantage of legal aid in the forms provided for in art. 6 persons whose net monthly income per family member in the last two months before the application is below the level of 300 lei. In this case amounts constituting legal aid is progressing entirely by the state.

(2) If the average net monthly income per family member in the last two months before the application is below the level of 600 lei, the amounts of money constituting legal aid by the state is advancing at a rate of 50%.

(3) legal aid may be granted under other circumstances, in proportion to the needs of the applicant, if known or estimated costs of the process are liable to restrict the effective access to justice ”

If according to the text of the law court fees do not involve discussion is expressly provided for the possibility of exemption from court fees, as regards exemption from bail, art. 6 not expressly provide. However, some courts considers that it is possible to grant legal aid in this form as the order form Annex and this possibility is expressly stated, that "due to any security enforcement phase" (pt. 7, C3, letter e ).

Therefore, through this legal text was established opportunity for courts to consider the application for legal aid and in situations other than those listed in art.6 of GEO 51/2008, following the courts to make an analysis of the facts in each case (Deva County Court Decision no.2083/2014 from 24.06.2014).

In the objection of unconstitutionality of the provisions of Government Emergency Ordinance no. 51/2008 on legal aid in civil matters, as a whole, it must be rejected as unfounded. The Court finds that the Decision. 264 of 24 February 2009, published in the Official Gazette of Romania, Part I, no. 198 of 30 March 2009, the Constitutional Court has examined allegations of unconstitutionality similar to those made in this case, finding, for arguments exposed there, that Government Emergency Ordinance no. 51/2008 does not contain provisions contrary to the principle of equal rights, access to justice, the parties' right to a fair trial or the right to petition (Constitutional Court of Romania Decision no. 264 from 24 .02.2009).

### **3. Conclusion**

Under the prospect that the public judicial aid offered by limiting the security bond paid by the appellant, the solution appears to be questionable because it misleads the main purpose of the security bond – the guarantee that a in case of appeal rejection, the creditor will have the right to take the money subscribed as security bond in order to fulfil his debt.

In this particular case, creditor's property right is unlawfully restricted, with no regard for national law, by means of suspending the right of the creditor to pursue the debtor in order to regain the debt. Minding that the credit loan credit is guaranteed with a mortgage on a building like a flat or a house, it is most likely that suspending the compulsory execution for a long period of time, between 1 to 3 years usually, the postponing will be able to inflict value loses and will negatively affect creditor's interests.

On the grounds of article 1 part 1 of the first Protocol to the European Convention of Human Rights, every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Otherwise, any bail setting procedure that will lead to the suspension of a compulsory execution with no regard to the formal conditions of offering the judicial public aid shall be considered as an unlawful of the property rights of the creditor, regardless if the creditor is a bank or the debtor is a consumer, as the article 16 of the Constitution of Romania statutes that all persons, (natural or legal), are equal in front of the law without any discriminations.

### **References**

Ploiești County Court Decision from 19.06.2014 in case no 19604/281/2014  
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