

CONSIDERATIONS ON THE APPEAL AGAINST ENFORCEMENT REGULATED BY ART. 62-63 OF LAW NO. 58/1934 ON BILLS OF EXCHANGE AND PROMISSORY NOTES

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Abstract

In this article I have tried to present some aspects concerning the special means of challenging the enforcement procedure, provided by art. 62 – 63 of the Law no. 58/1938 on the bills of exchange and the promissory notes. These articles contain special rules on the object of the contestation/opposition, the term in which this means of challenging the enforcement procedure can be amended by the claimant and evidence which can be presented before the court.

Keywords: challenge on enforcement, opposition to the enforcement procedure, promissory note, enforcement procedure

1. SUBJECT OF THE APPEAL AGAINST ENFORCEMENT

Given that the doctrine¹ defined the subject of the action as being “what is required by the action in question, the applicant's claim” I will try to analyse in this chapter the subject of the action specified in Art. 62 of Law no. 58/1934 on bills of exchange and promissory notes (**Law no. 58/1934**), both before and after its amendment by Art. 16 of Title IV of Law no. 76/2012 for the implementation of Law no. 134/2010 on Civil Procedure Code (**Law no. 76/2012**).

Prior to the amendment of Art. 62 of Law no. 58/1934 by Law no. 134/2010, it was provided that: “Within 5 days of summons receipt, the debtor may object to enforcement.”

Also, in Art. 63 of Law no. 58/1934, the legislator provided that: "In the bill of exchange cases initiated either by action or by way of opposition to the summons of enforcement, the debtor will be able to object to holder only by exceptions of security nullity, according to the stipulations of art. 2², and those that are not held by art. 19”³.

¹ Florea Măgureanu, *Civil Procedural Law*, Vol. I, Universul Juridic Publishing House, Bucharest, 2013, p. 77.

² According to art. 2 of Law no. 58/1934: “Security lacking any of the conditions shown in the previous article does not have a bill of exchange value, except for the cases shown in the following paragraphs:

Bill of exchange with no maturity date indicated is deemed as payable at demand.

In the absence of special indication, the place indicated next to the name of the drawee is considered as place of payment and, at the same time, the place of drawee’s residence.

Bill of exchange not indicating where it was issued is deemed as signed in the place indicated next to the name of the drawer.

If the bill indicates several places of payment, the holder of the bill may submit it for acceptance or payment to any of these places.”

³ According to art. 19 of Law no. 58/1934: “Persons whom a bill case was initiated against, cannot object to owner by exceptions based on their personal relations with the drawer or with previous holders, unless the holder acquiring the bill has acted at the expense of the debtor, being aware of such act.”

Legal literature⁴ showed that, by opposition to enforcement, the validity of the enforcement order, the existence of bills relations are subject to court review, the debtor being able to claim bills exceptions "which protect him from the obligation to pay".

Similarly, in judicial practice⁵ it was decided that "the bill of exchange case initiated by opposition is not intended to cancel forms of enforcement, as it generally is the case of the appeals against enforcement, but through it (in relation to the interest of the debtor) the establishment of security invalidity or lack of bill of exchange relation per se (as in a bill of exchange case for that matter, with which the legislator assimilates it) are sought".

In relation to matters held in the judicial literature and practice mentioned above, I believe that through opposition to enforcement lodged under art. 62 of Law no. 58/1934, before this article be amended by Law no. 134/2010, the debtor could request:

- Abrogation of the enforcement order represented by a bill of exchange or promissory note, for violating the conditions of validity of legal instruments (capacity, consent, a determined and lawful subject and a determined and moral cause) and for breaching the formal conditions of the bills, provided by Art. 1 of Law no. 58/1934⁶, or promissory notes provided by Art. 104 of Law no. 58/1934⁷;

⁴ Stanciu D. Cărpenu, *Roman Commercial Law Treatise*, 2nd edition revised and enlarged, Universul Juridic Publishing House, Bucharest, 2011, p. 687; Ion Turcu, *Theoretical and Practical Treatise of Commercial Law*, vol. I, C.H. Beck Publishing House, Bucharest, 2008, p. 561.

⁵ The Court of Cassation – Decision no. 383/1939, in Cornelius Turianu, Vasile Pătulea, *Commercial Law – Collection of Judicial Practice*, C.H. Beck Publishing House, Bucharest, 2008, p. 146. See also Civil Sentence no. 7240 of 13.07.2005, issued by Bucharest District 1 Court, in Cristina Nica, *Enforcement. Judicial Practice*, Hamangiu Publishing House, Bucharest, 2008, p. 174: "To claim the invalidity or abrogation of trade securities for subsequent reasons, Law no. 58/1934, by art. 106, related to art. 62, provided for the ability of the debtor to lodge an opposition to enforcement, within which he may claim objective and subjective exceptions wherethrough he defend against the obligation to pay."

⁶ According to art. 1 of Law no. 58/1934: "The bill includes:

1. Name of the bill entered in the security text and expressed in the language used in the wording of this security.

2. Unconditional order to pay a specified amount.

3. Name of the person who has to pay (drawee), i.e. printed name of the individual or legal person or entity that undertakes to pay. If the drawee's name exceeds the space allocated on the security, the first letters of the name shall be entered on the bill, i.e. the name of the drawee, within specially allocated space, without making the bill be void thereby.

3¹. Code of the drawee or a sole identification number provided in the documents of identification or registration of the drawee.

4. Indication of maturity.

5. Indication of the place where payment must be made.

6. Name of the person to whom or at whose order the payment must be made.

7. Indication of the date and place of issue.

8. Signature of the person issuing the bill (drawer)."

⁷ According to art. 104 of Law no. 58/1934: "Promissory note includes:

1. Name of the promissory note entered in the security text and expressed in the language used in the wording of this security;

2. Unconditional promise to pay a specified amount;

3. Indication of maturity;

4. Indication of the place where payment must be made;

5. Name of the person to whom or at whose order the payment must be made;

6. Indication of the date and place of issue;

- Cancellation of enforcement by claiming bill exceptions, such as the limitation of the right to obtain enforcement, settlement of the bill obligation by payment etc.⁸

Thus, an appeal to enforcement per se, based on the settlement of the obligation embedded in a promissory note by payment made by the debtor prior to the commencement of enforcement, would be required to be dismissed as inadmissible.

However, the doctrine⁹ showed that the court must resolve the means of appeal chosen by the debtor according to the argument set by him. Thus, the debtor may appeal against the enforcement, but may not claim aspects of the validity of enforcement order, these defences can be raised only by opposition to enforcement.

With regard to enforcement appeal provided by art. 711 Civil Procedure Code, the subject of this action is clearly regulated and may consist of¹⁰:

- abrogation of enforcement per se,
- cancellation of any enforcement instrument,
- cancellation of rulings issued by the court enforcement officer,
- cancellation of rulings upholding request for enforcement permission,
- division of the joint property by interest or in condominium,
- meaning, scope or application of the enforcement order,
- court enforcement officer's refusal to proceed to enforcement or to implement any enforcement instrument.

Subsequent to amendment of art. 62 of Law no. 58/1934 by Law no. 134/2010, it is provided that “Within 5 days of the summons communication, the debtor may appeal against enforcement.”

Following this amendment to the article above, the doctrine¹¹ held that the legislator intended to suppress means of opposition to enforcement and replace the same with the procedural means of appeal, in which one may also claim defences aiming at fundamental legal relations matter between the parties. Thus, the appeal against enforcement became the only procedural tool for verifying the foundation of the litigious legal relations.

Therefore, similar to the opposition to enforcement by appeal against enforcement based on art. 62 of Law no. 58/1934, one may request the court:

7. Signature of the issuer, i.e. the handwritten signature of the individual acting as an issuer or, where applicable, of the legal representative or the authorized agent of the issuer, individual, legal person or entity using such instruments;

8. Issuer's name, i.e. the printed name of the individual or legal person or entity which undertakes to pay. If the issuer's name exceeds the space allocated on the security, the first letters of the name of the issuer shall be entered on the promissory note, within specially allocated space, without making the promissory note be void thereby;

9. Issuer's code or a sole identification number taken from the documents of identification or registration of the issuer.”

⁸ Stanciu D. Cărpenaru, *loc. cit.*, p. 688; Sorana Popa, *Commercial Law. Obligations. Contracts. Securities. Insolvency*, Universul Juridic Publishing House, Bucharest, 2014, p. 204.

⁹ Florin Mihăiță, *Considerations on the Admissibility of the Appeal against Enforcement for Securities. Distinction from opposition to enforcement*, in Revista Forumul Judecătorilor no. 2/2011.

¹⁰ Evelina Oprina, Ioan Gârbuleț, *Enforcement Theoretical and Practical Treatise*, vol. I, *General Theory and Enforcement Procedures*, Universul Juridic Publishing House, Bucharest, 2013, p. 585.

¹¹ Evelina Oprina, Ioan Gârbuleț, *loc. cit.*, p. 595.

– to abrogate enforcement order represented by a bill of exchange or promissory note,

– to cancel full enforcement.

Also, to submit certain enforcement instruments to court censorship, the debtor may appeal against enforcement within 15 days from the date on which he became aware of these measures, in accordance with art. 714 par. (1) section 1 Civil Procedure Code.

2. TIME LIMIT IN WHICH THE APPEAL AGAINST ENFORCEMENT MAY BE AMENDED/COMPLEMENTED

Regarding the trial procedure of the appeal against enforcement, art. 62 of Law no. 58/1934 refers explicitly to the provision of Civil Procedure Code: “The appeal shall be lodged with the court of enforcement which will try it according to the Civil Procedure Code, immediately and with priority before any other cases.”

According to art. 712 par. (3) Civil Procedure Code: “(...) the applicant may amend his initial application adding new grounds of appeal if, for the latter, the time limit for exercising the enforcement appeal is complied with.”

Thus, we might say that bill exceptions (which in reality are grounds for appeal against enforcement, which can be claimed to obtain abrogation of the enforcement order and of the enforcement *per se*) may be made only within the period in which the appeal may be advanced or within 5 days from the date of communication of the bill summons, provided by art. 61 of Law no. 58/1934.

As regards the time limit in which the appeal against enforcement may be filed, the starting point of the 5 days deadline is the enforcement summons. This instrument is distinct from the summons provided for by art. 667 Civil Procedure Code, it has a content specifically regulated by the provisions of Art. 61 of Law no. 58/1934 and is exclusively specific to enforcement procedures initiated pursuant to a bill of exchange or promissory note.

Being governed by special provisions (Art. 61 of Law no. 58/1934) derogating from the provisions of general law concerning enforcements, contained in the Civil Procedure Code, the issuance of the enforcement summons is compulsory even if the enforcement procedure chosen by the lender is the attachment.

For the purposes of the above, judicial practice¹² held that: “(...) transition to the establishment of the attachment was made without court enforcement officer’s prior communicating the summons of enforcement provided by Art. 61 of Law 58/1934; that, in fact, the communication of the enforcement summons by the enforcement officer within the deadline set by Law 58/1934 opens the debtor’s means to opposition to the bill enforcement. Enforcement by attachment was initiated before communicating the bill summons to the debtor, leading to its nullity which is drawn over the enforcement instruments also.”

However, in the art. 63 of Law no. 58/1934 the legislator has provided that “The bill exceptions must be proposed in the first hearing. The first hearing means the first term in the first instance, when, the procedure being fulfilled, the parties may draw conclusions on the merits even if the defendant or the opponent fails to appear.”

¹² Brăila Court – Civil Sentence no. 1100/18.02.2009.

Art. 63 of Law no. 58/1934 contains special rules in relation to those contained in Art. 712 par. (3) Civil Procedure Code. As stated in the literature¹³, special rules apply with priority over the general rules, regardless of the date of occurrence of the latter.

Therefore, subsequent to the advancement of the appeal against enforcement within 5 days of receipt of summons for enforcement, the debtor may modify/complement its appeal, with the possibility of bringing new grounds of appeal (bill exceptions) at first instance, at the first hearing, as defined in art. 63 of Law no. 58/1934.

In judicial practice¹⁴ it was decided that the legal provisions cited above are not public order provisions, the debtor may claim bill exceptions (reasons for appeal) even directly in the appeal redress, if the opposing party does not object incapacity to the debtor and accepts discussing them for the first time in the appeal.

3. EVIDENCE THAT MAY BE ADMINISTERED TO RESOLVE APPEAL AGAINST ENFORCEMENT

According to art. 63 of Law no. 58/1934 “Personal exceptions will have to be of prompt settlement and always based on written evidence.”

From the interpretation of the legal provisions cited above we might conclude that the debtor is required to prove its claims only with documents, no other evidence being admissible in an appeal against enforcement based on art. 62 of Law no. 58/1934.

In this regard, the oldest legal practice¹⁵ has noted that: “The aim of the legislator by enforcing the provisions on the bill of exchange was to create a debt security slightly negotiable and of urgent movement. To achieve this goal, the legislator has prescribed measures it thought necessary, ordering the removal of obstacles that could be raised and that would have delayed implementation of obligation incurred under such a security. (...) Therefore, the restrictions imposed by law which does not allow discussion of personal exceptions unless they are liquid and of urgent settlement, are general and apply to both formal exceptions, and personal exceptions. Therefore, the issue of plea based on lack of beneficiary’s name when issuing the bill has to be evidenced by a written document.”

I believe that art. 63 of Law no. 58/1934 provides for an exception of strict interpretation and application in terms of evidence, in the matter of bills and promissory notes. Thus, the restriction contained in this Article shall apply only if the debtor claims personal exceptions, concerning the holder of the bill or the fundamental relation, such as the lack of legitimacy of the bill holder, extinction of the fundamental legal relation, incapacity of bill holder to receive payment etc.¹⁶

For objective exceptions (exceptions aiming the bill security and bill obligation, for example, the bill does not contain all the information required by Art. 1 of Law no. 58/1934, the bill obligation was extinguished by payment etc.) the rules of admissibility of evidence provided in the Civil Procedure Code will apply and the literary nature of the

¹³ Florea Măgureanu, *loc. cit.*, p. 29.

¹⁴ The Court of Cassation – Decision no. 1812/1937 in Corneliu Turianu, Vasile Pătulea, *loc. cit.*, p. 149.

¹⁵ The Court of Cassation – Decision no. 2040/1938 in Corneliu Turianu, Vasile Pătulea, *loc. cit.*, p. 152.

¹⁶ Stanciu D. Cărpenaru, *loc. cit.*, p. 688.

debt securities shall be taken into account, in that the scope and nature of the right incorporated in the security are determined solely by mentions contained in the document¹⁷.

In recent judicial practice¹⁸, to prove a relative objective exception consisting of forging signatures on bills, a graphoscopic survey has been approved.

Also, in a case¹⁹, to prove absolute objective exception on the settlement of bill obligation by payment and unlawful cause of the endorsement of the promissory note, the court acquiesced the evidence with the interrogation of respondents and performance of an accounting expertise.

4. CONCLUSIONS

4.1. With regard to the subject of appeal against enforcement governed by art. 62-63 of Law no. 58/1934, it is similar to that of the opposition to enforcement and may consist of abrogation of the enforcement order or cancellation of the entire enforcement.

4.2. Appeal against enforcement regulated by art. 62-63 of Law no. 58/1934 may be complemented by the hearings to which the summoning procedure is legally fulfilled and the parties can draw conclusions on the merits.

4.3. Subjective exceptions (grounds of appeal) must be proven with documents. This rule does not apply to objective exceptions (grounds for appeal).

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¹⁷ Stanciu D. Cârpenaru, *loc. cit.*, p. 643.

¹⁸ Ruling of 04.04.2013 issued by Timișoara Court in case no. 24758/325/2012.

¹⁹ Ruling of 13.10.2014 issued by Bucharest District 4 Court in case no. 10902/4/2013.