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THE SCOPE OF THE ORDER FOR PAYMENT IN SPECIAL PROCEDURE FROM THE NEW CIVIL PROCEDURE CODE

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Abstract

Through a modern and more comprehensive approach, the New Civil Procedure Code defines the scope of the order for payment, the terms and the course to be followed in advance and the processual specific details.

Keyword: debs, certain, ready, eligible, evidence

JEL Classification: K40, K41

I. Introduction

The order for payment represents a recovery procedure mechanism of certain ready exigible debs, regulated in art. 1013-1024 of the New Civil Procedure Code.

Prior to the new regulations, the issue of the recovery of such claims found its solution through two normative acts, namely G.O. no.5/2001, regarding the order for payment procedure, modified and completed, and G.O. no. 119/2007, on measures to combat late execution of the payment obligations, resulting from the commercial contracts.

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At the level of the European legislation in the matter of cross-border disputes in which at least one of the parties has its domicile or habitual residence in a member state, other than the member state of the court seised, is applicable the EC Regulation no. 1986/2006 of the European Parliament and of the Council on European procedure for summons of payment. Claims subject to a court refferal on this topic are the ready and exigible ones, their certainty not being required by the European norm.

II. Discution and results

The subjects of law able to access on court the order for payment are the parties of a civil contract, including those contracts between a professional and a contracting authority.

The aforementioned provision expends the scope of this procedure, towards the administrative contracts, closely linked to the material component, because it can't be conceived a public service without the set of agents and material resources, assigned to accomplish specific interests [Bilouseac, (2012)].

The form of the claim in question must be established by a statute, regulation or other document appropriated by the parties by signature or other way accepted by the law (art. 1013, para.1 of the New Civil Procedure Code).

It thus remain to discuss the situation of bills sent by mail or courier for which the debtor signs the receipt, before knowing the content of the delivered document, beig questionable to what extent the signature for the receipt of the correspondence may be assimilated to the acquiring of a document through signature. In our view, the court is asked to examine whether the bill on which the creditor's claim is acquired by the debtor, or by recognizing the signature on the cargo document or other documents that can be legally valued on this regard.

The court decisions must be both legal and thorough, the judge must be sure that only the taking of evidence in the file reaches the truth [Alexe, (2008)]. In fact, in art. 237 para. 4 of the New Civil Procedure Code it is expressly provided the judge's obligation to ascertain which claims related to the case are recognized and which ones are challenged.

The result of corroborating the mentioned texts is that the legislature provided enough processual provisions to clarify the way in which a document can be acquired by signature.

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The expresis verbis hypotetical application of the legal provision cannot lead to solving the case while respecting the principle of fairness laid down in art. 6, para. 1 of the New Civil Procedure Code. It is natural that the absence of a signature on the cargo document might be complemented by signing documents related to its issuance.

Clear and unambiguous situations are those in which the value of the debt results from a civil contract between professionals or between professionals and other individuals or legal entities, or is confirmed through a goods receipt, its equivalent value being reflected in the bill. The value of confirmed bills through signing the Consignment Note are also subsumed to the category of claims acquired by signature.

Another problem occurs while judging cases that concern the order for payment is the documentary evidence review on computer or electronic formats(art. 266, 267 of the New Civil Procedure Code). Thus courts face new forms through which creditors can prove the acquiring of the debt instrument by signature.

According to art. 282 of the New Civil Procedure Code, if the data of a legal document are presented on computer support – respectively CDs, floppy disks, USB sticks, hard drives etc. – the document that reproduces these data represents the evidence of that act, whether is understandable and provides serious guarantees for its content and the identity of the issuing person. For this type of document law establishes a presumption of validity of registration if the registration is made in a systematic way, without gaps, and the entered data are protected against alterations and counterfeiting.

As we have shown, the order for payment cannot be promoted in the absence of a document showing the amount of the debt. Since the new regulation includes in the category of documentary evidence the documents on electronic formats for which the legislature establishes, in certain circumstances, the presumption of validity, we think the judge invested with such a request must accept as evidence of the debt a document on informatics support.

In the same category of documentary evidence, the legislature includes the electronic format, without specifying its legal value. The latest doctrine starting from the regulation of this new legal institution, within Law 455/2001 on electronic signature states that "the electronic document represents a collection of data in electronic form that have logical and functional relations and reproduce letters, numbers or other characters with intelligible meaning, intented to be read by a software programme or other similar process" [Bleoancă, Bîrsan, (2010)].

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In the case of informatics support the electronic signature occurs, due to the need for establishing the presumption of validity, given to electronic documents. The specificity of electronic formats that allow copying, scanning and distributing the documents forced the legislature to impose strict conditions for the use of digital signature, the provision of this type of signature being monitored by the Ministry of Communication and Information Society, in which there is a Media Directorate whose activity includes in the chapter of informatics services the electronic signature.

Securing and monitoring the electronic signature is based on the presumption of validity of the document in an electronic form.

Regarding the order for payment, it must be held that the acquired of a document by signature is not limited to the standard document, each of its forms being defined by the New Civil Procedure Code. We believe that in the matter of documents on informatics support and those on electronic formats, the debtor can manage, if necessary, evidence showing that the signatures in question do not belong to him. Moreover, in this case of special procedure, the legislature seeks to limit its application only to uncontested debts that are certain, ready and demandable.

The scope of this juridical institution excludes expressly (art. 1013, Para. 2 of the New Civil Procedure Code), two types of debts: those included in the list of creditors within insolvency procedure under a special law, namely Law 85/2006 on insolvency proceedings and those from contracts between entrepreneurs and consumers.

For the second category of excluded claims is required to clarify the way in which the legislature uses the term “entrepreneur” rather the ubiquitous term “professional”. The definition used in the legal text is “authorized person or legal entity that assumes the risk to organize, conduct and develop a business, a profitable activity” [Legal dictionary].

The term “professional” was introduced after the emergence of the New Civil Procedure Code and replaced the term trader. In our opinion there are no key differences between these expressions and the legislature did not consider conceptual delimitations.

On the other hand, a consumer means a person that purchases, uses or consumes goods or he benefits from the provision of services, outside of his professional, industrial or productive activity, craft or liberal, according to the G.O. no.21/1992 on consumer protection and Law no. 193/2000 on unfair terms in contracts concluded between professionals and consumers.

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III. Conclusion

In conclusion we ca state that the exception from this special procedure of claims concluded between these parties concerns the legislature's intention to regulate through a special norm legal specific relations.

To specify with maximum accuracy the subjects of law that meet as the contracting authorities, the legal text analyzed lists in a limitative way the legal institutions subsumed under the term. The contracting authority means:

"a) any public authority of the Romanian state or of a member state of the European Union acting at central, regional or local level;

b) any public law entity other than those reffered to point a), with legal personality, which was established to meet the needs of general interest, non-profit, found in at least one of the following situations:

(i) is funded mostly by a contracting authority, as defined in point a);

(ii)is subordinated to or supervised by a contracting authority, as defined in point a);

(iii) within the board of directors or, where appropriate, within the supervisory board and directorate, more than half of the members are appointed by a contracting authority, as defined in point a);

c) any association formed by one or more contracting authorities of those referred to point a) or point b)."(art. 1013, para. of the New Civil Procedure Code)

Once the scope being delimited it clarifies in a detailed way the coordinates of the special procedure of the order for payment. The express provisions of the specific terms simplify the approach of this widely comprehensive litigation.

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