

29 March 2017

Legal Bulletin



Banking Law

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Law No. 17 of 21 March 2017 approving the Government Emergency Ordinance No. 1/2016 on the amendment of Law No. 134/2010 on the Code of civil procedure, as well as other related legal acts (“**Law No. 17/2017**”) was published in the Official Journal of Romania No. 196/21 March 2017.

Law No. 17/2017 amends certain provisions of the Code of civil procedure, including the provisions of Article 641 (*Deeds under private signature*). Following this amendment, deeds under private signature (in Romanian, *înscrișuri sub semnătură privată*) are considered to be enforceable titles (in Romanian, *titlu executoriu*) only if such deeds are registered with public registries¹, in the cases and under the conditions specifically provided by law. Prior to the entry into force of these amendments, the Code of civil procedure did not require the registration with public registries of the deeds under private signature, as a condition for such deeds to be qualified as enforceable titles.

The legislative amendment raises certain interpretation issues relevant for the banking sector, particularly regarding deeds which are deemed to be enforceable titles based on specific legal provisions, such as the loan agreements.

¹ Although the Code of civil procedure does not provide a definition of public registries, we are referring to any registries which permit the registration and the public consulting of certain types of information, such as the Electronic Archive for Secured Transactions, certain registries held by public notary offices.

The relation between Law No. 17/2017 and provisions in special laws

According to Article 120 of the Government emergency ordinance on credit institutions and capital adequacy, the loan agreements, including the mortgage or personal guarantee agreements, concluded by a credit institution, represent enforceable titles.

As such, according to the banking legislation, the loan agreements represent enforceable titles. On the other hand, such agreements are not the subject of registration with public registries. Given that Law No. 17/2017 does not provide details regarding the relation between the provisions of the Code of civil procedure and the ones provided by special laws, two interpretations are possible:

1. Pursuant to the amendments introduced by Law No. 17/2017, it may be deemed that an additional registration requirement was introduced as a condition for a deed under private signature to be qualified as an enforceable title, irrespective if that deed was attributed with such a quality by a special law. Such an interpretation raises certain legal issues, mainly for deeds under private signature which are not subject to registration with public registries (and prior to the amendments, there was no legal requirement and no public registry in which such a registration could be made). The result could be: (i) either to render ineffective the provisions of special laws, such as Article 120 of the Government Emergency Ordinance No. 99/2006 (a case in which the legislative techniques rules would be breached, according to which (x) the repeal should be express² and (y) unless it is expressly provided, one cannot derogate from the special norms by way of general norms³); or (ii) to preserve such legal effects by complying with the registration requirement; or
2. The wording used in Article 641 „*only if such deeds are registered with public registries, in the cases and the conditions specifically provided by the law*” is interpreted in the sense that this newly introduced condition applies only with respect to deeds which were subject to registration requirements based on specific legislation, other than Article 641 (for example, the movable mortgage agreements, which must be registered with the Electronic Archive for Secured Transactions). Under such an interpretation, the deeds under private signature which are not subject to registration with public registries, should not be affected by the newly introduced provision of Article 641. The general norm included in Article 641 would

² Article 17 of Law No. 24/2000 on legislative technique rules for the drafting of legal acts (“Law No. 24/2000”) “*For the purpose of enhancing the active legislation, throughout the process of drafting the legal acts, the express repeal of the legal provisions which are obsolete or which register contradictory aspects with the envisaged regulation, will be sought.*”

³ Article 67 paragraph (3) of Law No. 24/2000 “*The implicit legislative events are not recognised in the case of special legal acts, the dispositions of which cannot be deemed as amended, supplemented or repealed by way of the general regulation of the matter, unless such fact is expressly provided for.*”

not affect the applicability of the provisions of special laws, such as Article 120 of Government Emergency Ordinance No. 99/2006 on credit institutions and capital adequacy. The arguments advanced by the High Court of Cassation and Justice in its Decision No. 3/2014 on the interpretation and application of the provisions of Article 120 of Government Emergency Ordinance No. 99/2006 are in favor of this interpretation: *“the enforceability is an attribute of the receivable, and not of the deed which ascertains the receivable”, therefore “the enforceability attribute is not a procedural matter (...) as it has become a quality of the receivable”*.

The way in which the courts of law will interpret the provision *“in the cases and the conditions specifically provided by the law”* will be determinant for loan agreements to continue being enforceable titles. In this respect, it must be clarified whether a deed under private signature, which is not the subject of registration with the public registries, will remain an enforceable title following the entry into force of the amendments.

Effects

Article 641 of the Code of civil procedure represents a procedural norm, applicable to any enforcement proceedings commenced after 24 March 2017, the date of the entry into force of the amendments. Nevertheless, if the courts will interpret the new provision along the lines mentioned in point 2 above, the loan agreements should continue to be enforceable titles for all enforcement proceedings commenced after the entry into force of the amendments to Article 641.

The new provision of the Code of civil procedure should not have any impact on movable mortgages, if the relevant publicity requirements (namely the registration with the Electronic Archive for Secured Transactions or the Land Book) have been fulfilled.

Moreover, the new provisions will not have an effect over (i) the immovable mortgage agreements, as such agreements are concluded in an authenticated form, and (ii) the promissory notes, as such deeds represent titles of credit. The Code of civil procedure contains express provisions with respect to the authenticated deeds and the titles of credit, granting to such deeds the enforceable title character, in accordance with the law.

Possible solutions

We believe that, in order to clarify the aspects signaled above, the High Court of Cassation and Justice may be requested to give an interpretation of a legal matter. Such a decision of the supreme court would provide clarity with respect to the interpretation of the provisions of Article 641, as such provisions were affected by the amendment introduced by Law No. 17/2017.

If the High Court of Cassation and Justice would state that the registration requirement with public registries is applicable to all privately signed deeds (including deeds which are enforceable titles under special laws but which are not subject to registration with public registries), a

registration system for such deeds should be considered. The lawmaker and the High Court of Cassation and Justice will determine whether a possible solution would be to register loan agreements with the Electronic Archive for Secured Transactions (from our perspective, such a solution would be unpractical and costly) or with another publicity registry which would be established for such purpose (for example, a public registry of loan agreements, managed by the National Bank of Romania).

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