

CONSIDERATIONS REGARDING WHETHER ATTESTATION OF THE DATE OF A DOCUMENT BY A LAWYER REPRESENTS CERTIFIED DATE

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Abstract

Present article focuses on dealing with the aspect of preliminary ruling of the HCCJ of Romania regarding documents certified by a lawyer provided that the register of legal acts certified by a lawyer was according to the law a public register or not and if the institution of attestation/certification of the date of a document by the lawyer is equivalent to the institution of the certified date, respectively if the lawyer can give a certain date to a document.

Article follows also the aspect of the exception of unconstitutionality of the text of art. 3, para. (1), letter c) of Law no. 51/1995 in the sense that the lawyer can give certain data to the documents would constitute a lack of predictability of the legal provision, insofar as it is interpreted in the sense that the lawyer gives a certain date to the documents, considering that such an interpretation violates the provisions of art. 1, para. (5) of the Constitution and of art. 21, para. (3) of the Constitution, respectively of the security of legal relations and of the right to a fair trial.

Keywords: *certified date, attestation, lawyer, unconstitutional, preliminary ruling.*

1. Introduction

By the request for summons submitted to the Court of Appel, the plaintiff requested the admission, as it was formulated, of one main head of application, regarding the annulment of the sentence from 2017, pronounced by the Lower Court, by which the forced execution of the Loan Agreement no. 17/13.12.2012 attested by a certain Lawyer, under no. x/13.12.2012, now subject to the forced execution file, at the public executor, as the document does not constitute an enforceable title.

This brings into discussion two possible questions for the party. The first one is regarding referring the matter to the HCCJ for a preliminary ruling on the following questions of law:

a) if previously dated 29.05.2018 according to the Decision of the Romanian National Barr Association Council no. 325/17.02.2018 for the commissioning of the National Register of documents certified by a lawyer provided by art. 3 para. (3) of Law no. 51/1995 on the organization and exercise of the profession of lawyer, The register of legal acts certified by a lawyer was according to the law a public register¹;

b) if the institution of attestation/certification of the date of a document by the lawyer [art. 3 para. (1) letter c) of Law no. 51/1995], is equivalent to the institution of the certified date that falls within the competence of notaries public [art. 12, letter f) of Law

no. 36/1995]², respectively if the lawyer can give a certain date to a document.

The second aspect in question is regarding the unconstitutionality of the provisions of art. 3, para. (1), letter c) of Law no. 51/1995, in the form in force on 13.12.2012, insofar as it is interpreted in the sense that the lawyer gives a certain date to the documents, considering that such an interpretation violates the provisions of art. 1, para. (5) of the Constitution and of art. 21, para. (3) of the Constitution, respectively of the security of legal relations and of the right to a fair trial.

Having these two aspects in mind, the party went forward to ask the HCCJ, in one preliminary question and separately the Constitutional Court of Romania, on the aspect of unconstitutionality. We will present the arguments, considered by this author as relevant, on both aspects, as follows.

2. Content

1. With regard to the notification for a preliminary question, that should give birth to a preliminary ruling of the HCCJ, the procedural conditions for the acceptance of such claims shall not be the subject of the present article, but instead we shall refer to the reasons for admissibility retained by the holder of the notification.

1.1. The party notification is admissible in accordance with the provisions of art. 519 Code of Civil Procedure of Romania, motivated by the fact that:

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¹ Law no. 51/1995 for the organization and exercise of the legal profession of lawyers, effective from June 9, 1995, republishing in the Official Gazette of Romania, Part I no. 440 of May 24, 2018.

² Law no. 36 of May 12, 1995 regarding public notaries and notarial activity, republished in the Official Gazette of Romania no. 237 of March 19, 2018.

a) the litigation, in connection with which the notification was formulated, is being sued before a fully invested legal Court;

b) the Court invested with the settlement of the appeal is to settle the case in the last instance;

c) the solution that will be pronounced on the merits of the case depends directly on the legal issues whose clarification is required, in the sense that the settlement of the challenge and, implicitly, of the appeal is inextricably linked to (i) the interpretation of the notion of public registry of legal acts attested by the lawyer (ii) the interpretation of the notions of attestation of the date by the lawyers and of granting certified date by the notaries;

d) the issue of law stated is new, because, in consultation with the jurisprudence, the undersigned did not identify that the HCCJ had ruled on them, either by a case decision or by a decision in the interest of the law;

e) the party did not identify that the legal issues would be the subject of an appeal in the interest of the law being resolved, according to the records of the HCCJ, moreover, the given release may prevent the appearance of a non-unitary practice, caused by the amendments brought to Law no. 51/1995.

1.2. The point of view of the undersigned regarding the settlement of legal issues, are as follows.

With regard to the "public register", according to art. 641 Code of Civil Procedure of Romania, we quote "*documents under private signature are enforceable titles only if they are registered in the public registers in the cases and conditions provided by law. Any clause or agreement to the contrary shall be null and void.*". An emphasis is needed to be pointed out, that through art. 4 of Law no. 17/2017 the text has undergone an amendment³, in the previous wording it only stipulates that "*documents under private signature are enforceable titles only in the cases and conditions provided by law.*" The change is essential, as we will show in hereinafter.

The only public register provided by Law no. 51/1995, prior to the amendments brought by Law no. 25/2017, art. I.2. and art. I.3.⁴, was the Register of legal aid [art. 80 para. (2) of Law no. 51/1995], while the Register of registration of legal acts certified by a lawyer was not a public register.

For the purpose of explanations, it must be reminded that the electronic register of the documents drawn up by the lawyers and the electronic register of the evidence of the patrimony of affectation of the lawyers were established by the Decision of the Permanent Commission of the Romanian National Barr

Association no. 212/30.03.2017 for the implementation of the provisions of art. I.2 and art. I.3 of Law no. 25/2017 on amending and supplementing Law no. 51/1995 for the organization and exercise of the legal profession, republished, with subsequent amendments and completions, in order to urgently finalize the material and electronic support necessary for carrying out the activities of registration, evidence and information on the documents prepared by lawyers, according to Law no. 51/1995, as completed, in accordance with the provisions of art. 68 para. (3) of Law no. 51/1995, for the fulfilment of the Decision of the Romanian National Barr Association Council no. 852/2013, observing the provisions of art. I.2 and art. I.3 of Law no. 25/2017, published in the Official Gazette of Romania, Part I, no. 210/28.III.2017.

Also, by the Decision of the Romanian National Barr Association Council no. 271/26.08.2017, the National Registers of Romanian Lawyers were approved, being approved by annex the Regulation on the organization and functioning of the National Registers provided by art. 3 para. (3) and art. 5 para. (10) of Law no. 51/1995, art. 26 of the Annex stipulating that on the date on which, by the Decision of the Standing Committee of the Romanian National Barr Association, it is found that the Registers have become functional, Decision no. 212/30 March 2017 of the Permanent Commission of Romanian National Barr Association.

Non the less, by the Decision of the Romanian National Barr Association Council no. 271/26.08.2017, the rules of procedure and their annexes were approved, related to the Regulation on the organization and functioning of the National Registers of Romanian Lawyers and it was established that the National Registers of Romanian Lawyers are put into operation after 90 days from the date of publication of the judgment and will operate in parallel with those held, in paper format, by each form of exercising the legal profession. Thus, only on 05/29/2018, according to the Romanian National Barr Association Council Decision no. 325/17 February 2018, the National Register of documents certified by a lawyer provided by art. 3 para. (3) of Law no. 51/1995 on the organization and exercise of the legal profession.

1.3. In addition to the express provisions indicated above, from which we consider that expressly that the National Register of attested attorneys' acts was not a public register before 29.05.2018, this results from several rules of interpretation of normative acts:

a) by using literal interpretation - art. 92 para. (2) of the Statute of the legal profession of lawyers shows

³ Law no. 17 of March 17, 2017 on the approval of the GEO no. 1/2016 for the amendment of Law no. 134/2010 on the Code of Civil Procedure, as well as related normative acts, published in the Official Gazette of Romania no. 196 of March 21, 2017.

⁴ Law no. 25 of March 24, 2017 on amending and supplementing Law no. 51/1995 for the organization and exercise of the legal profession of lawyers, published in the Official Gazette of Romania no. 210 of March 28, 2017.

that “the lawyer is obliged to keep records of the documents drawn up according to art. 3 para. (1) lit. c) of the Law [s.n. 51/1995] and to keep them in his professional archive”. As we have shown above, the only public register of lawyers, before the amendments, was the Register of Legal Aid [art. 80 para. (2) of Law no. 51/1995]. The article continues with the specification that “under the sanction of inapplicability towards third parties, the lawyer is obliged to register the operation in the Electronic Register of the documents drawn up by the lawyers according to art. 3 para. (1) letter c) of the Law in accordance with the procedure provided in the Regulation on the organization and functioning of the register, approved by the Romanian National Barr Association.”, but as we showed above, the operation regulation was approved by the Decision of the Romanian National Barr Association Council no. 271/26.08.2017, and the commissioning of the National Register of documents certified by a lawyer was carried out by Romanian National Barr Association Council Decision no. 271/26.08.2017 with effect from 29.05.2018;

b) by using systematic interpretation - analysing the provisions of Law no. 51/1995 in comparison with those of Law no. 36/1995 we will observe that while the lawyer performs activities in the interest of natural and legal persons, the notarial activity is the one that has a public service character;

c) by using historical-teleological interpretation - as we showed above, the amendment brought by Law no. 17/2017, art. 641 of the Code of Civil Procedure of Romania is essential and clarified the issue of the enforceability of documents concluded under private signature.

1.4. Regarding the 'certified date', some interpretation is needed to understand that not all dates on documents are as such attested or certified.

a) art. 3 para. (1) letter c) of Law no. 51/1995 lists among the activities of the lawyer also “*the attestation of the identity of the parties, of the content and of the date of the documents presented for authentication.*” In addition, art. 92 para. (1) letter c) of the Statute of Lawyers (2011) states that “*a legal act signed before the lawyer, which carries a conclusion, a resolution, a stamp or another verifiable means of attesting the identity of the parties, the consent and the date of the act, may be presented notary for authentication.*”;

b) art. 12 of Law no. 36/1995 lists among the notarial deeds and procedures the giving of a certified date of the documents [art. 12 lit. f)], which is made by a conclusion issued by the notary public in accordance with the law [art. 83 letter f), art. 147 et seq. of Law no. 36/1995];

c) Law no. 51/1995 stipulates in a single situation in which a document drafted by a lawyer acquires a certified date, respectively the situation of the

registration of the legal aid contract in the official register of records [art. 29 para. (1) [art. 31 para. (3) of Law no. 51/1995].

1.5. Similar to the above statement, we show that the lawyer, in his activity does not give a "certified date" to the documents, by reference to several rules of interpretation:

a) by using literal interpretation - we show that where the legislator wanted to talk about the "certified date" that a lawyer's document acquires, he did so expressly [for example see art. 29 para. (1) of Law no. 51/1995]. Analysing the terms literary, it is contrary to this rule of interpretation, as well as to the provisions of art. 37 para. (1) of Law no. 24/2000 [which indicates: “*In the normative language the same notions are expressed only by the same terms*”], that in the content of the same law, the legislator should use two different notions, if it were about the same notion - art. 3 para. (1) letter c) of Law no. 51/1995 "attestation given" vs. art. 29 para. (1) of Law no. 51/1995 "certified date";

b) by using grammatical interpretation - art. 3 para. (1) letter c) of Law no. 51/1995 lists among the activities of the lawyer “*attestation of the date of the documents*”, while art. 29 para. (1) of Law no. 51/1995 specifies that a legal aid contract “acquires” a certain date by entering it in the official register of records. Analysing the texts morphologically and syntactically, it is observed that the acquisition of the certified date is not a result of an activity performed by the lawyer, but is a unique situation expressly provided by the legislator for a single document, namely the legal aid contract, standardized document issued by the bar exercise of the profession, which have a series and a unique number, which the lawyer only completes, does not issue. Moreover, this provision is corroborated with the provisions of art. 31 para. (3) of Law no. 51/1995 which gives character of executory title to the legal aid contract;

c) by using systematic interpretation and method of analogy - according to the provisions of Law no. 36/1995, we consider that if the legislator established the procedure of granting a certified date (i) both by a distinct enumeration within the attributions of the notary [art. 12 letter f)], (ii) as well as by establishing an express procedure in this respect [art. 147 et seq.]. Similarly, should have done the same in the case of lawyers;

d) by using logical interpretation - as we showed above, art. 92 para. (1) letter c) of the Statute of Lawyers (2011) states that “*a legal act signed before the lawyer, bearing a conclusion, a resolution, a stamp or another verifiable means of attesting the identity of the parties, the consent and the date of the act, may be presented notary for authentication.*” Or, related to the effects of the authentication procedure [art. 89 et seq. of Law no. 36/1995], it would not have any logic that

in the situation in which the document to which the lawyer drafted the content and attested the identity, the content and the date to be sent, once again to the notary to perform exactly the same operations.

It is for this reasons that the HCCJ shall issue a preliminary decision on these aspects. As shown above, it is this author's opinion that the notion of "certified date" is not subject to a lawyer's attributions, nor does it find application in the powers granted by law, with limited exceptions, and such power is by interpretation of the law, solely a public notary competence.

2. With regard to the same matter, the party decided to submit to the Romanian Constitutional Courts the judgment for the exception of unconstitutionality of the provisions of art. 3, para. (1), letter c) of Law no. 51/1995, in the form in force on 13.12.2012, to be interpreted in the sense that the lawyer gives a certain date to the documents, considering that such an interpretation violates the provisions of art. 1, para. (5) of the Constitution and of art. 21, para. (3) of the Constitution, respectively of the security of legal relations and of the right to a fair trial.

2.1. It is not subject to the present article whether the procedural conditions of presentation to the Constitutional Court of such a question, but the analysis of the main articles of law and why they must be rendered unconstitutionally. However, in short, such a claim is admissible on a procedural point of view, because it is in correspondence with art. 146 letter d) of the Constitution of Romania and art. 29-33 of Law no. 47/1992⁵ motivated by the fact that:

a) the object of the exception concerns a law or government ordinance or a provision of a law or an ordinance - in this case, art. 3, para. (1), letter c) of Law no. 51/1995, in the form in force on 12/13/2012. We specify that by Decision no. 349/19.12.2001 and Decision no. 536/08.04.2011 of the Constitutional Court it was found that certain interpretations that may be given to a text of law may be subject to constitutional review;

b) the law or the government ordinance or the criticized disposition to be in force - by Decision no. 766/2011 of the Constitutional Court, it was found that the phrase "in force" is constitutional insofar as it is interpreted in the sense that it is subject to constitutional review and laws or ordinances or provisions of laws or ordinances whose legal effects continue to occur even after their coming out of force;

c) the criticized law or ordinance or provision must be related to the settlement of the case at any stage

of the dispute and whatever its object - in this case, the settlement of the exception is directly related to the settlement of the dispute, in the sense that the settlement of the appeal and, implicitly, the appeal it is inextricably linked to the interpretation of the notions of attestation of the date by the lawyers;

d) the criticized disposition has not been found to be unconstitutional by a previous decision of the Constitutional Court - the criticized disposition has not been the subject of any other notification of the Constitutional Court.

2.2. Keeping in mind the legal texts and their interpretations, using various forms of interpretation, all mentioned at part 1 of the content of this article, we now speak on the violation of art. 1, para. (5) of the Constitution and of art. 21, para. (3) of the Constitution. The constitutional principle that guarantees and protects the supremacy of the Constitution and the laws in the Romanian legal system is based in the provisions of art. 1, para. (5) of the Constitution. The obligation of the legislature is to legislate within the limits and in accordance with the Constitution and to ensure the quality of the legislation. In order to obey the law, it must be known and understood, and in order to be understood it must be sufficiently precise and predictable. The jurisprudence thus outlined the principle of legal certainty.

The Court of Justice of the European Communities has ruled that the principle of legal certainty is part of the Community legal order and must be respected by both the Community institutions and the Member States when exercising their prerogatives under Community directives. [Case C-381/97, *Belgocodex*]⁶.

Likewise, the ECtHR pointed out in its jurisprudence [ex. *Marckx v. Belgium*, 1979]⁷ the importance of respecting the principle of legal certainty, which is considered to be necessarily inherent in both Convention law and Community law.

The accessibility and predictability of the law presupposes that the legal norm is clear, intelligible, so that those to whom it is addressed are not only informed in advance about the consequences of their acts and deeds, but also understand their legal consequences.

Non the less, the same ECtHR, in a rich jurisprudence, has emphasized the importance of ensuring the accessibility and predictability of the law, establishing also a series of benchmarks that the legislator must take into account to ensure these requirements. Thus, in cases such as the *Sunday Times*

⁵ Law no. 47 of May 18, 1992 on the organization and functioning of the Constitutional Court, republished in the Official Gazette of Romania no. 807 of December 3, 2010.

⁶ Judgment of the Court (Fifth Chamber) of 3 December 1998 - *Belgocodex SA v. Belgian State*. Case C-381/97, European Court Reports 1998 I-08153, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A61997CJ0381>.

⁷ *Marckx v. Belgium*, Application no. 6833/74, Council of Europe: European Court of Human Rights, 13 June 1979, available at: <https://www.refworld.org/cases,ECHR,3ae6b7014.html>.

v. The United Kingdom of Great Britain and Northern Ireland (1979)⁸, *Rekveny v. Hungary* (1999)⁹, *Rotaru v. Romania* (2000)¹⁰, *Damman v. Switzerland* (2005)¹¹, European Court of Human Rights he stressed that only a rule set out with sufficient precision to enable the individual to regulate his conduct can be considered law. The individual must be able to foresee the consequences that may arise from a given act; a rule is foreseeable when it offers a certain guarantee against arbitrary infringements. We also show that under art. 3 and 4 of the Code of Civil Procedure of Romania, the legislator expressly enshrined in the civil procedural legislation the obligation to apply with priority the provisions of European Union law and the obligation of the courts to interpret the legislation in accordance with them.

References

- Civil Code of Romania;
- Civil Procedure Code of Romania;
- Law no. 51/1995 for the organization and exercise of the legal profession of lawyers;
- Law no. 36 of May 12, 1995 regarding public notaries and notarial activity;
- Law no. 47 of May 18, 1992 on the organization and functioning of the Constitutional Court;
- *Belgocodex SA v. Belgian State*;
- *Marckx v. Belgium*;
- *Rekvényi v. Hungary*;
- *Dammann v. Switzerland*.

3. Conclusions

Consequently, taking into account the above, the interpretation of the text of art. art. 3, para. (1), letter c) of Law no. 51/1995 in the sense that the lawyer can give certain data to the documents would constitute a lack of predictability of the legal provision and would put the party in the impossibility to properly regulate his conduct and infringes the constitutional right to a fair trial provided in art. 21, para. (3) of the Constitution.

This idea is both backed and justified by the fact that, whit the exception of the Register of legal aid [art. 80 para. (2) of Law no. 51/1995], a lawyer may not issue certification power on a document, regarding the time period of the law cited in present article.

⁸ *Sunday Times v. The United Kingdom*, 6538/74, Council of Europe: ECtHR, 29 March 1979, available at: <https://www.refworld.org/cases/ECHR,3ae6b7240.html>.

⁹ *Rekvényi v. Hungary*, Merits, App no 25390/94, ECtHR 1999-III, [1999] ECtHR 31, (2000) 30 EHRR 519, IHRL 2879 (ECHR 1999), 20th May 1999, European Court of Human Rights [ECHR]; Grand Chamber [ECHR].

¹⁰ *Case of Rotaru v. Romania*, Application no. 28341/95, ECtHR Judgment Strasbourg, 4 May 2000.

¹¹ *Dammann v. Switzerland*, Application no. 77551/01, ECtHR, 25 April 2006, Summary: Human rights - Freedom of expression – art. 10 ECHR, available at: <https://www.5rb.com/case/dammann-v-switzerland/>.