The Promissory Note in the Wake of Interpretative Decision No. 4/2013 concerning Summary Judgments for Debt Recovery: More Questions than Answers

On 18 June 2014, the long awaited Interpretative Decision (ID) No. 4 of the General Assembly of the Civil and Commercial Colleges of the Supreme Court of Cassation (SCC) concerning summary judgments for debt recovery was issued under Interpretative Case No. 4 brought in 2013.

Part of the questions examined by the SCC in its Interpretative Decision refer to the promissory note as a document under Art. 417(1)(9) of the Civil Procedure Code (CPC) which gives grounds for the issuance of a summary judgment to be enforced forthwith pursuant to the provisions of Art. 418 CPC.

Uniformity has been introduced in the existing inconsistent case law in the field of summary judgments through the Interpretative Decision with its answers to the following two questions related to promissory notes: (i) Do the grounds for the issuance of a summary judgment under Art. 417(1)(9) CPC continue to exist, where the promissory note contains an addendum concerning the existence of a causal relationship (Question No. 4e of ID No. 4/2013); and (ii) What is the subject-matter of the case and how is the burden of proof distributed when a declaratory claim is filed under Art. 422 CPC, where a summary judgment is issued to be enforced forthwith on the basis of a promissory note (Question No. 17 of ID No. 4/2013).

Question No. 4e of the Interpretative Decision is directly related to the question on the content of the promissory note as a type of security, as well as on the legal effect of the promissory note addendum, specifying the existence of a causal relationship.

The Explanatory Memorandum of the Interpretative Decision reads that the promissory note addendum which specifies the existence of a causal relationship constitutes an obstacle to the issuance of a summary judgment ONLY IN CASE that the addendum negates the unconditional nature of the obligation to pay within the meaning of Art. 535(2) of the Commercial Code (CC) and Art. 455(2) CC.

In other words, the line of reasoning of the SCC is to examine the addendum on the causal relationship only from the perspective of one of its features, i.e. it invokes only the provisions of Art. 535(2) CC and Art. 455(2) CC and concludes that only if the addendum negates the unconditional nature of the obligation to pay a certain amount of money, there exists an obstacle to the issuance of a summary judgment for debt recovery under Art. 417(9) CPC.

Furthermore, paragraph 4e of the main body of the text of the Interpretative Decision reads as follows: "Where the addendum specifying a causal relationship does not affect the features of the instrument, this addendum shall be considered to be unwritten and shall not affect its form".

This illustrates that the SCC has rectified and adjusted the view laid down in the Explanatory Memorandum through the additional wording in the main body of the text to the effect that the addendum has to be considered to be unwritten provided that it does not affect the form (i.e. if it does not affect any of the features under Art. 535 CC and not just the feature under Art. 535(2) CC).

This wording of the SCC instruction to the courts raises new questions. If the addendum specifying the existence of a causal relationship is considered to be unwritten in litigation, then what should courts

and litigants do? Could they raise objections based on the addendum or, if it is "unwritten", would be addendum fail to serve as evidence of causal relationships in connection with which the debt has occurred.

There is yet another question in this respect. Which are the cases, where the addendum to the promissory note on the existence of a causal relationship does not affect the features under Art. 535 CC? The Supreme Court of Cassation is silent on this matter. Obviously, it is necessary to apply the provisions of paragraph 2 of ID No. 1/2005 of the SCC, which has lost its effect under the new Civil Procedure Code. In other words, the question should be answered in the following way: the wording of the addendum on the existence of a causal relationship should not contain any condition on the occurrence and the effect of the obligation to pay a certain amount of money under the promissory note.

The other question in paragraph 17 of the Interpretative Decision is directly related to the one in paragraph 4e and its points to the decline of the promissory note as an abstract transaction.

In paragraph 17 of ID No. 4/2013, the SCC examines the issue of the subject-matter of the case, when a claim is lodged under Art. 422 CPC, as well as the related distribution of the burden of proof, when a summary judgment is issued to be enforced forthwith on the basis of a promissory note.

The question arises due to the inconsistent case law under Art. 422 CPC from the perspective of the issue whether, in the case of a summary judgment to pay on the basis of a promissory note, the causal relationship is subject to examination and the burden of proof is subject to distribution pursuant to the provisions of Art. 154(1) CPC or the causal relationship is subject to examination only if the debtor challenges the debt to be recovered.

The promissory note is a type of security, which means that it materializes the unilateral obligation to pay, regardless of the cause which remains outside the remit of the transaction.

In ID No. 4/2013, the Supreme Court of Cassation gives the instruction to the courts that the subject-matter of the declaratory claim under Art. 422 CPC is the existence of the debt based on a promissory note and examines two possible cases. In the case when the defendant files a general challenge of the claim, the creditor who is the claimant is not under obligation to prove the existence of a causal relationship which generates his right to recover the debt because "the debt… is generated by an abstract transaction the grounds for which are beyond the contents of the document".

In the second case, the parties explicitly invoke the existence of a causal relationship and a promissory note arising out of or in connection with this relationship. Then it is the causal relationship that is also subject to examination, whereby each party is to prove the facts underlying its assertions of or objections to the existence or non-existence of the debt.

The text of ID No. 4/2013 reveals the need for the promissory note to be necessarily linked to causal relationships in a documentary way so that to ensure protection of the creditor's rights. If there are no documents signed, e.g. contracts, notices, agreements and others, the creditor's rights are jeopardized because the promissory note *per se* would not be sufficient to prove the existence of causal relationships and the claim to recover the debt only on the basis of the promissory note would not be proved.

All this comes to show the actual removal of the promissory note from business relations, which is a trend observed over the recent years.