

# FROM THE STRICTNESS OF THE REGULATION TO THE INCONSISTENCY OF THE IMPLEMENTATION; CASE LAW STUDY IN THE FIELD OF ATTACHMENT VALIDATION

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## Abstract

The case law study brought under analyze here was generated by the in concreto observation of the consequences induced by the misconduct of the participants in the validation of attachment procedure, in way that attenuated the consistency of the regulations in the field. From the examination of the case resulted two fundamental obligations that are incumbent on the participants in the enforcement proceedings, including by means of attachment, meant to ensure its efficiency: the obligation of information and the obligation of cooperation of the participants in the procedure, responsibilities that are considered as being components of a conduct centered on good-faith.

Keywords: *attachment validation, professional, third party garnishee, court of execution.*

## **1. The legal and circumstantial framework for the validation of attachment on the income of a debtor natural person; the situation of the professional third party garnishee.**

In the analysis of the following case we aim to highlight the consequences of misconduct of participants in the attachment validation procedure which brought a mitigation of the consistency of legal regulations and a faulty application thereof, with potentially severe consequences on the patrimony of the third party garnishee.

The pursuer creditor C.S.A. applied for enforcement of a judgement at the bailiff's office for a debt amounting to 69271.56 lei representing the amount outstanding under the bank credit contract for individuals concluded in 2008 by debtors V.A. and V.S.F. with the S.A. Bank.

Pursuer creditor C.S.A. legitimated its standing on the grounds that it is the assignee of the debt right resulting from the debt assignment contract concluded with S. SARL which, in turn, is the assignee of the debt right against the assignor A. S.A. Bank, under the debt transfer contract and the writ of execution consisting in the credit contract.<sup>1</sup>

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<sup>1</sup> According to Article 120 of Government Emergency Ordinance no. 99 of 2006 on credit institutions and capital adequacy, published in the Official Gazette no. 1027 from 27.12.2006, consolidated version of 14.12.2015, credit contracts, including real or personal collateral, are writs of execution. In the situation described in this case, it is noted that value has been given to the attribute of "enforceable" of the credit

It should be noted that the parties in enforcement proceedings are the creditor and debtor under Art.644 para. (1) of the Civil Procedure Code,<sup>2</sup> and the third party garnishee also participates in the execution by attachment. *Quality of creditor or debtor can be transmitted at any time during the enforcement*, by law, in which case the execution documents concluded until the transmission of the standing take effect, under the law, against successors in title of the creditor or the debtor, as the case may be.

In this case, the executing court held that the conditions for enforceability are met considering that the successive transfer of the debt right which operates the transfer of assignor rights to the assignee does not affect the attribute of enforceability of the credit contract, even if the assignee is not a banking company. In other words, the rightful successors of the original lender S.A. Bank may rely on the enforcement attribute of the credit contract and the enforcement provisions met by the date of transmission of the standing against them. The solution of the court has legal grounds given the *effects of the debt assignment* specified in Art.1568 of the Civil Code, consolidated version,<sup>3</sup> that the *assignment of receivables transfers to the assignee all rights that the assignor has in respect of the debt transferred*. One of these rights concerns the *prerogative of enforcement of the claim* under the law, based on the writ of execution.<sup>4</sup> An additional argument is derived from the provisions of Art.1574. (1) of the Civil Code, which establishes *the obligation of the assignor to remit to the assignee title of the claim* in its possession, and *any other documents proving the right assigned*.

Originally, enforcement was affirmed by the court of competent performance under Art.663 para. (2) and Art.665 of the Civil Procedure Code,<sup>5</sup> through the decision of November 1st, 2013.

On those grounds, the bailiff proceeded to the attachment of salary income that the debtor garnishee V.S.F. obtains from the company K.U. SRL third party garnishee. The attachment was established under *the same enforcement and for the same attachment same claim* by the same bailiff, at the Bank B. SA on the credit balance of

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contract transferred by the A S.A. Bank to another professional who is not a banking company, discussion which may present both a theoretical and practical interest.

<sup>2</sup> Civil Procedure Code, adopted by Law no. 134 of 2010 published in the Official Gazette 485 of 15.07.2010, republished [1] MO.Of.545 of 3.08.2012 and reprinted [2] Of., 247/10.04.2015, hereinafter referred to as the Civil Procedure Code. Namely, in the case analyzed, the creation and validation of the attachment were conducted under the new rules of the Civil Procedure Code.

<sup>3</sup> Romanian Civil Code, adopted by Law no.287 of 2009, published in Official Gazette 511 of 24.07.2009, republished (1) Of., no.505 of 15.07.2011, hereinafter referred to as the Civil Code.

<sup>4</sup> Enforcement can be made only pursuant to an **enforceable writ**, as provided by Art.632 para. (1) of the Civil Procedure Code. The category of enforceable writs includes court decisions with provisional enforcement, enforceable decisions, final decisions, according to distinctions enumerated by Art.632 para. (2), Art.633, and *the documents which, by law can be enforced*. This category thus encompasses other *enforceable writs*, such as those mentioned in Art.638 of the Code, namely: *minutes and reports drawn up by bailiffs, which, by law, are enforceable writs; authentic documents*, in the cases provided by law; notarial enforceable writs issued under the conditions provided by law; debt securities or *other documents that the law recognizes as enforceable*.

<sup>5</sup>According to Art.663 para. (2) "The claim is certain when its indisputable existence is made clear from the enforceable writ itself". Art.665 of the Code, having marginal title "Registering the enforcement request", states that "On receipt of the request for enforcement, the bailiff will register it".

the availability bank account<sup>6</sup> of the debtor V.S.F. and future receipts, bank account into which the third party garnishee K.U. S.R.L. transferred the salary rights of the debtor garnishee. *De facto*, the attachment was created by the same *bailiff's office for the same claim and creditor and under the same enforceable title* with an address for setting up the attachment, both at the B.S.A. Bank and the third party garnishee K.U. SRL.

In this context, the debtor garnishee V.S.F. asked the third party garnishee K.U. SRL not to proceed with the attachment, so as not to have the same salary income attached twice, respectively, the one which the third party garnishee K.U. S.R.L., as the employer, transferred to the personal availability account of V.S.F. opened at B. SA Bank, to be attached by the bank only.

Communication of the attachment address by the bailiff to K.U. SRL - third party garnishee, was held on 08.01.2014, but the debtor garnishee V.S.F. received salary income from third party garnishee only until 03.03.2014, as on this date he resigned. As a result, the employment contract under which he made a salary income ceased, in which case the third party garnishee no longer had to pay money to the debtor V.S.F. starting with 04.03.2014, amounts to be outstanding in the future, except unpaid wages until the end of the period worked.

Through the address of the third party garnishee K.U. SRL dated 01.04.2014, faxed on 10.04.2014, he told the bailiff that the debtor garnishee V.S.F. is no longer its employee, as a result of resignation, and attached to this address he submitted the resignation from 03.03.2014 and the decision to terminate the employment contract of V.S.F. from 04.03.2014.

On 02.04.2014, the bailiff informed the enforcement court with a request for validation of the attachment set up at K.U. SRL - third party garnishee, for the entire debt amounting to 69271.56 lei. In the request for the validation of the attachment the bailiff alleges that, in accordance with the address of 12.11.2013 issued by the Territorial Labour Inspectorate (ITM), the debtor V.S.F. is an employee of K.U. SRL third party garnishee. This, given that, resulting from the documents in the enforcement file, on file with the court to settle the claim for attachment validation, the debtor garnishee V.S.F., since 04.03.2014, no longer achieved income from wages, and to the extent that they would have become due they would have been attached in a share of 1/3, and such amount made unavailable would have been credited to the bailiff.

By the civil judgment delivered on 23.06.2014 the enforcement court accepts in part the request for validation of the attachment made by the bailiff, validates the attachment set in the enforceable file and obliges the third party garnishee K.U. SRL to pay the creditor assignee C. S.A. the amounts owed to the debtor V.S.F. up to the amount of 69,241.56 lei and rejects the request for amendment of third party garnishee.

The motivation of the sentence states that, according to Art.789 of the Civil Procedure Code, if the third party garnishee is not fulfilling its obligations regarding the establishment of the attachment, the creditor, the bailiff or debtor can inform the

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<sup>6</sup> On the contract of availability bank account see C.A.Gheorghe, Banking law, Publishing House CH Beck, Bucharest, 2014 p.214-215.

court for validation of the attachment, and that if the evidence provided shows that the third party garnishee owes money to the debtor, the court will compel the third party garnishee to pay the creditor, within the debt limit, the amount owed to the debtor and, otherwise, will decide the dissolution of such attachment.

The court found that in this case, the third party garnishee owed money to the debtor *at the time of attachment establishment* (s.n),<sup>7</sup> the debtor being an employee of the third party garnishee K.U. SRL at that time and, therefore, the claim for validation of attachment is reasonable and will be accepted.

Against the civil sentence dated 23.06.2014, ordering the attachment validation, the third party garnishee K.U. SRL appealed requesting to accept the appeal and rejudge the cause in order to dismiss the request for validation of the attachment as ungrounded and unlawful.

On appeal, the fact that payment of salary income paid by the third party garnishee K.U. SRL to the debtor garnishee V.S.F. was made by bank transfer and the salary was transferred from the third party's bank account to the bank account opened at B. SA Bank to feed the salary account whose owner was V.S.F., and that during the period 08.01.2014 - 03.03.2014 the third party garnishee made salary payments to V.S.F. and the amount of these payments, has been shown in the address issued by Bank B. SA on 25.07.2014, address accompanied by the bank account statement of V.S.F. submitted as evidence in the case file in the court of appeal.

Therefore, the evidence that the third party garnishee K.U. SRL invoked in the appeal and proved in part with the documents submitted, which is proven with documents submitted by Bank B. SA namely, that the attachment was established at the third party garnishee K.U. SRL, and the third party garnishee B. Bank SA, and the income from the salary paid by the third party garnishee K.U. SRL to the debtor garnishee V.S.F., by bank transfer, is subject to attachment by third party garnishee bank. Also, in probation, third party garnishee K.U. SRL filed a statement of V.S.F. debtor's bank account, account which highlights the amounts paid by transfer from the bank account of the third party garnishee K.U. SRL to the debtor garnishee V.S.F. in the period 08.01.2014 - 03.03.2014, the date of termination of the individual employment contract thereof.

This bank account records the amounts paid by bank transfer for wages, from the account of the third party garnishee K.U. SRL to the debtor's garnishee V.S.F. account in the period 08.01.2014 - date of communication of attachment address and 03.03.2014 - date of termination of the individual employment contract of the debtor garnishee V.S.F., the account collecting amounts solely from wages amounts paid by third party garnishee K.U. SRL.

The bank statement also highlights that attachments were made by Bank B. SA of the V.S.F. debtor's bank account, that amounts were seized and transferred to the record account of the bailiff's office. These documents prove that in the case of enforcement on the debtor V.S.F., enforcement started for 69,271.56 lei, the creditor being C. SA, Bank B. SA *was a third party subject to attachment in the same enforcement file, for the same debtor, same creditor, the same amounts and the same bailiff as the third party garnishee K.U. SRL.*

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<sup>7</sup> Moment that is offset compared to the time of validation of the attachment.

Consequently, the attachment was established both at the third party bank B SA - garnishee and the third party garnishee K.U. SRL - applicant, the latter continuing to transfer into the V.S.F. debtor's bank account amounts for wages until 03.03.2014 - date of termination of employment, amounts which - due to attachment established for third garnishee at Bank B. SA directly on the the bank account - were seized and transferred to the record account of the bailiff's office.

Moreover, the third party garnishee B. Bank SA gave a response to the bailiff, the address being submitted in the file sent to the substance court, confirming the attachment on the account of debtor V.S.F., which is the bank's client, script containing the statement "When receipts shall be registered, they will be seized for the availability of the enforcement body"; however, on 02.04.2014 the bailiff notifies the court to validate the attachment.

Consequently, the court's order to the applicant third party garnishee K.U. SRL to pay the amount of 69,271.56 lei, following the validation of the attachment, was considered ungrounded and unlawful by the court of appeal, bound to cause damage to the applicant and lead to unjust enrichment in favor of the creditor, provided that:

- in the period 08.01.2014 - date of communication of attachment address, until 03.03.2014 - date of termination of employment of the debtor garnishee V.S.F., the applicant third party garnishee K.U. SRL paid the amounts representing salaries paid by transfer to the bank account of the debtor garnishee V.S.F., and the third party garnishee *Bank B. SA attached the same account, in the same period, and amount were seized and transferred to the record account of the bailiff's office*, in the enforcement case;

- the applicant K.U. SRL no longer owed the debtor garnishee V.S.F., as of 03.03.2014 - the date of termination of employment thereof, money for wages.

Consequently, because the requirements of Art.789 para. (4) of the Civil Procedure Code are not met, the attachment established on 08.01.2014 in the bailiff's enforcement file is not warranted to be validated, more so as the applicant third party garnishee K.U. SRL no longer owes the debtor garnishee V.S.F. money for wages, as of 03.03.2014, the date of termination of the employment contract. For all these reasons, by the Civil Decision from 23.10.2014 the court allowed the appeal, entirely changed the contested judgment and dismissed the request for validation of attachment.

## **2. Legal regime of the attachment; regulatory rigors**

In the category of enforcement methods available to lenders to achieve their rights recognized by a court judgment or through another writ of execution, the attachment is a safe and rapid recovery means of the claim, being used with greater frequency because of the advantages it has. The diversity of earnings or remunerations that are likely to be the subject of enforcement this way, the facility that the creditor usually has to anticipate the purpose of the procedure, and the *judicial transfer of the debt right by which the third party garnishee becomes the debtor of the creditor garnishee, operating as a result of the judgment for validating*

*the attachment*, give reason to consider this means as appropriate and beneficial to the interests of creditors to obtain the claim as quickly as possible.<sup>8</sup>

The attachment is a *legal institution of civil procedural law* designating a *form of enforcement* by which sums of money, securities or other intangible assets are seized, owed to the debtor or held on their behalf by a third person, or which the third person will owe in the future, ordering the third party to pay them directly to the creditor follower.

The legal framework of the attachment is currently restricted by the rules of civil procedure law contained in the Civil Procedure Code, Book V "About enforcement" and Book VI "Special procedures", but there are special rules of law<sup>9</sup> for that matter.

The current regulation of the Civil Procedure Code shows elements of continuity with the previous legalization of the former code, as the latter was amended and supplemented by the Government Emergency Ordinance no.138 of 2000,<sup>10</sup> among which *separate systematization of attachment regulation for the enforceable attachment, and respectively, for the insurance attachment*. Thus, the Civil Procedure Code regulates the *enforceable attachment* under Book V "About enforcement", Title II "Forced pursue of the debtor's assets", Chapter I "Movable assets", Section 3 "Attachment", Art.781 - Art.794 and the *insurance attachment* - in Book VI "Special procedures", Title IV "Provisional and precautionary measures", Chapter II "The insurance attachment" Art.970 - Art.971.

Art.631 para. (2) of the Civil Procedure Code provides that the provisions of Book V on enforcement will constitute *common enforcement law, regardless of the source or nature of the obligations included in the enforcement writ or the legal status of the parties*.

In private law, rules of substantive law of the Civil Code declare *the attachment as a precautionary measure* along with the lien, *in the category of protection of creditor rights*, and refer, as is natural, to their application in accordance with the Civil Procedure Code.<sup>11</sup> Art.1558 of the Civil Code, consolidated version, mentions the *insurance attachment in the category of protection of creditor rights* stating that it will take all measures necessary or useful to preserve its rights, such as providing evidence, carrying out publicity and information formalities on the debtor's account, indirect exercise or taking precautionary measures. For the realization of precautionary measures, Art.1559 of the Code states that the main insurance measures are the lien and *insurance attachment*, which are applied under the Civil Procedure Code.

Finally, the transitional provisions of Law No. 71 of 2011 to implement the Civil Code clarify the application of those provisions, also applying to creditors whose

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<sup>8</sup> See S. Zilberstein, V.M. Ciobanu, *Civil Procedural Law. Enforcement*, volume II, Publishing House Lumina Lex, Bucharest, 1998, p.57.

<sup>9</sup>For example, the rules of the Tax Procedure Code. published in the Official Gazette 547 of 23.07.2015 which regulates in Art. 213 and the following the attachment as an enforcement measure to settle tax claims. Attachment in fiscal matters had been previously regulated in the Tax Code.

<sup>10</sup> The Civil Procedure Code, as amended by Gov. Emergency Ordinance no.138 / 2000, as amended and supplemented, regulated the *enforceable attachment* in Book V "About enforcement", Chapter II "Forced pursue of assets" section V "Attachment", and the *insurance attachment* was included in Book VI "Special procedures", Chapter IV "Precautionary measures", Section II "Insurance attachment".

<sup>11</sup> Civil Code, Book V "About obligations", Title V "Performance of obligations", Chapter III "Means the protection of creditor rights", Section 1, Art.1559 "Precautionary measures".

claims have been born before its entry into force, but depending on their maturity after the entry into force of the Code.

## **2.1. Proximity of attachment with other legal institutions regulated by the Civil Code**

Attachment applications are provided in the Civil Code, *in the matters of the current account contract and current bank account and other banking contracts*. Art.2181 of the Code states that only the credit balance which results at the termination of the current account may be subject to enforcement or attachment against one of the holders. By way of presidential injunction, the court orders - at the request of the creditors of either account holder - early termination of the current account in order to enforce or attach the resulting balance in favor of the debtor. The solution is based on the consecration *in terminis* of its nature as a liquid and outstanding debt of the credit balance of the account upon its termination.<sup>12</sup> Notwithstanding the general arrangements, and in the absence of a contrary provision, the contract between professionals, *in the account, includes exclusively receivables arising from the exercise of the professional activity of the account holders*.<sup>13</sup>

In the case of the current bank account, if any other bank operation, in addition to the bank deposit and credit to which the provisions of Art.2184 of the Code also refer, is performed by the current account, the current account holder may at any time dispose of the credit balance of the account, but observing the notice period if such dates have been agreed by the parties. In the case of an indivisible current bank account following the death of the account holder and considering heirs as co-holders of the account, until the date of partition, the personal creditor of any of the co-heirs cannot pursue by attachment the credit balance of the indivisible account, having only the power to request a division. The rule established in Art.2187 to regulate the indivisible current bank account is also applicable in other cases of indivisibility between current account holders, unless the law provides otherwise.

The attachment, changing the rank of the mortgage, and the pledge or the formation of another collateral on mortgage are subject to registration in the land register, according to Art.902 para. (2) Section 15 of the Civil Code. On the basis of a copy certified by the bailiff on the address to set up the attachment, the creditor may request the registration of the attachment in the land register where the claim attached is secured by a mortgage or other collateral. The abolition of the registration of the attachment in the land register is made possible by an address issued by the bailiff or, where appropriate, through a final conclusion of the enforcement court.

The rigors mentioned above in relation to rights, acts or other legal relations whose enforceability against third parties is recognized only by registration, as provided by Art.902 of the Civil Code, apply - in terms of the transitional provisions of Law No.71 of 2011 - *only to juridical acts and deeds concluded or performed or produced after the entry into force of the Code*.

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<sup>12</sup> Art.2171 para.(2) combined with Art.2179 para.(2) Civil Code.

<sup>13</sup> Art.2172 para.(2) Civil Code.

## 2.2. The object of attachment

The legal text establishing *the rule of principle in matters of enforcement of Art.629 of the Civil Procedure Code* provides that *the debtor's income and assets may be subject to enforcement if, by law, they can be pursued, and only to the extent necessary to achieve the rights of creditors*. In the case of goods subject to a special regime of movement, the benchmarks established by law must be complied with.

The object of the enforcement by attachment, established in Art.781 of the Civil Procedure Code, includes a variety of elements or components of the debtor's assets, which may be subject to the procedure in this way:

1. money, securities or other intangible assets are seized, owed to the debtor or held on their behalf by a third person, or which the third person will owe in the future, based on existing legal relations;
2. amounts of money from bank accounts, credit balance and future receipts alike, within the limits provided for by Art.729 of the Code;
3. tangible assets of the debtor held by a third party on its behalf;
4. money or intangible movable property which the creditor owes the debtor if both claims are reliable and liquid;
5. on term or conditional receivables, but the enforcement of the attachment on them can be assured after maturity or after the condition is met.

However, the following may not be subject to enforcement by attachment: amounts intended for a special destination prescribed by law and for which the debtor is deprived of the right of disposal;

- amounts representing nonrefundable loans or grants received from national and international institutions and organizations to develop programs or projects;
- amounts relating to future salary rights for a period of three months from the establishment of the attachment; if more than one attachment is set up on the same account the three months term in which payments can be made related to future salary rights is calculated only once after setting up the first attachment.

*The general boundaries of cash income pursue*, provided in Art.729 of the Code to be observed, for example, in the case of attachment of money from a debtor's bank accounts are fixed by *mandatory rules* whose violation is punishable by absolute nullity.

Thus, wages and other regular income, pensions granted under social security, other amounts periodically payable to the debtor designed to ensure its livelihood may be pursued:

- a) up to half of the net monthly income for the amounts due as obligation for maintenance or allowance for children;
- b) to one third of the net monthly income for any other debts.

In the case of *competing pursues on the same amount*, the pursue cannot exceed half of the net monthly income of the debtor, regardless of the nature of the claims, unless otherwise provided by law.

The current regulation evokes, as an element of continuity with the previous, rules which either exempt from enforcement some goods needed by the debtor and his family, or impose an order to be observed in the enforcement or limit the right of the creditor to pursue the debtor's assets at his discretion, expressing conditions or

limitations that have a component of social protection; the enforcement should not be a procedure which jeopardizes the existence of the debtor and his family.

If income from employment or other periodic amounts payable to the debtor, designed to ensure its livelihood, are less than the amount of net minimum wage per economy, they can be pursued only for the the part exceeding half of that amount.

The following categories of income can therefore be pursued, up to half of their amount and only for maintenance obligations and compensation for damage caused by death or bodily injury, unless the law provides otherwise: grants for temporary disability, compensation to employees in case of dissolution of the individual employment contract on any legal provisions and amounts for unemployed under the law.

Finally, *non-seizure of amounts or allowances with special destination* is absolute and concerns the amounts with special purpose, such as: state allowances and allowances for children, aid for sick child care, maternity aid, aid granted in case of death, scholarships granted by the state, allowances and any other indemnities with special purpose determined by law.<sup>14</sup>

### 2.3. The effects of the establishment and validation of attachment

The attachment shall be established at the request of the creditor by the bailiff in the jurisdiction of the court of appeal where the debtor or third party garnishee has residence.<sup>15</sup> The attachment is made *without warning*,<sup>16</sup> based on the conclusion of enforceability, by address communicated to the third party garnishee noting the attached writ and enforceability conclusion, as per Art.783 para. (1) of the Civil Procedure Code.

The debtor is informed about the measure taken by communication, in copy, of the address for setting up the attachment accompanied by the conclusion of enforceability and enforcement writ, in certified copy.

The main effect created by the attachment of amounts resides in *freezing all assets seized*, after *communication of the address establishing an attachment to the third party garnishee* who no longer is entitled to any payment or other transaction that could diminish the goods seized.<sup>17</sup>

The effect of freezing stretches also over the civil results of the claim seized, over any other accessories born just after the attachment was set up, and generates unenforceability against the creditor for the payment or assignment of a claim seized or acts of disposition made, subsequent to the establishment of the attachment, by the debtor garnishee on goods seized.

Other effects of attachment establishment regard its advertising in the public registers (land register or other registers) as required by law, or by the process.

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<sup>14</sup>Art.729 para. (7) of the Civil Procedure Code provides that amounts and allowances with special destination specified by the legal text cannot be pursued for any debt.

<sup>15</sup>Art.782 para. (1) of the Civil Procedure Code.

<sup>16</sup> Unlike the common law procedure in matters of tax procedures, according to Art.149 para. (11) of the Tax Procedure Code, as amended and supplemented by Ordinance No.8/2014 to settle *tax debts*, attachment of bank accounts of taxpayers "cannot be established before the end of a period of 30 days from the communication of summons".

<sup>17</sup>Art.784 para.(1) of the Civil Procedure Code.

Thus, *the attachment remains in existence when the debtor changes his workplace*, where the third party garnishee sends documents which set up the attachment for the unit which is the new workplace of the debtor or social insurance body responsible, which on the date of receipt of these documents becomes third party garnishee. If the debtor leaves the unit without him knowing the new job of the debtor, the unit in question will inform the creditor about this circumstance. After learning the new job of the debtor, the creditor shall notify the unit from which the debtor left in order to proceed to the enforcement of the attachment.<sup>18</sup>

The third party garnishee is forced, under Art.787 of the Civil Procedure Code, within 5 days from the notification of the attachment or maturity of amounts owed in the future, to record the amount of money if the receivable attached is due, to seize the movable assets attached and send evidence to the bailiff, and to pay directly to the creditor the amount due, in case of liability claims payable as maintenance, child support, compensation for any damage. In the event that *more than one attachment* is set up, third party garnishee proceeds in the manner indicated earlier and communicates to the bailiff or creditors the name and address of the other creditors and amounts seized by each.

Failure by third party garnishee to meet its obligations for carrying out the attachment, including failing to register the amounts released to the debtor garnishee contrary to the principle of freezing, entitle the *creditor pursuer, the debtor or the bailiff*, within one month from the date when third party garnishee should have registered or paid the amount pursued, to notify the enforcement court for *validation of the attachment*.<sup>19</sup>

Validation of attachment is an optional step in the proceedings, the decision being left to the creditor pursuer, the debtor or, where appropriate, the bailiff, subject to the non-enforcement of the attachment by third party garnishee, as is made clear by Art.790 para. (1) of the Code Civil Procedure.

Validation court may order, summoning the participants in the proceeding, any evidence that is admissible under the rules of the common law, relevant in this case. In the validation court, *third party garnishee may oppose the creditor pursuer all exceptions and defenses that he can oppose*, given that, according to procedural law [Art.787 para. (5) of the Code], the third party garnishee does not have the prerogative to appeal against attachment enforcement. The legal text of Art.787 para. (5) of the Civil Procedure Code, republished, stipulates that the third party garnishee "will defend himself before the validation court".

For amounts due periodically, the attachment of validated both for amounts at maturity and for those that will be due in the future, and for attachment of money from bank accounts, for future amounts, the court will maintain such attachment until the completion of the claim.

The validation decision of the final attachment has *the effect of an assignment of receivables and shall be enforceable against third party garnishee*, until the amounts

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<sup>18</sup> Art.786 of the Civil Procedure Code.

<sup>19</sup> Art.790 para.(1) of the Civil Procedure Code. According to Art.790 para. (5) of the Code, the third party seized who, in bad faith, refused to fulfill his obligations regarding the performance of the attachment may be fined by the judgment validating the attachment with an amount between 2,000 lei and 10,000 lei.

for which the attachment was validated are settled, as stated in Art.792 para. (1) of the Civil Procedure Code.

Therefore, the effects that the judgment for validation of the attachment generates can be summarized in the following aspects:

- the judicial transfer of the right of debt by which the third party garnishee becomes the debtor of the creditor;<sup>20</sup>
- enforcement of third party garnishee if he does not proceed, after validation of attachment, to deposit or pay the amounts determined by the validation decision to the bailiff or creditor pursuer.

### **3. The inconsistency in enforcing the regulations in the field of attachment validation, in this case**

The judicial institution of attachment is characterised, as previously referred, by a set of rules that describe a relatively simple, linear procedural framework conceived to *facilitate the predictable and speedy valorization of the attaching creditor' debt against his debtor.*

However, the enforcement in practice of these seemingly formal rules, in a way that would accentuate the lack of caution and procedural diligence of the participants in the procedure is capable of generating, at least for some of them, in this case the third party garnishee, serious consequences on the assets of the latter.

In what concerns the procedural conduct of the participants in the procedure, the analysis of the case reveals a series of deficiencies that lead to the nonfulfillment of certain rules and principles established by the legal framework for the purpose of ensuring the efficiency of the procedure and the compliance with the procedural rights of the participants in the procedure.

Therefore, in exercising the prerogatives conferred to him through the procedural law, the *bailiff* has the obligation to act in each stage of the procedure in compliance with the *active role* stipulated by the compulsory rule in art.627 of the Civil Procedure Code,<sup>21</sup> so as to demonstrate a professional conduct in compliance with the professional requirements.

Instituting the attachment by virtue of the *same title, for the same debt and on the same income representing salary*, transferred to the pursued debtor V.S.F. into his current account, from the account of the third party garnishee K.U. SRL by the Bank B S.A where the pursued debtor was the holder of the current account, was ordered *when the income from salary paid by the third party garnishee had already been attached at the Bank B S.A.,* and based on the letter of attachment communicated by the same bailiff the bank already directly withheld amounts. It results that there may coexist two attachments of a bank account, either for the same debt, or for different

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<sup>20</sup> Supra, S. Zilberstein, V. M. Ciobanu, op. cit., p.57.

<sup>21</sup> art.627 (1) of the Civil Procedure Code, stipulates that: "Throughout the enforcement, the bailiff is obliged to have an active role and to continue by all means permitted by law to achieve full and expeditious enforcement of the obligation under the enforceable title, in accordance with the legal provisions and act in the rights and interests of the parties".

debts. In this case the account was attached, in the situation where beside the salary, into the account of the pursued debtor V.S.F. weren't transferred any other incomes beside the salary. Considering that into the bank account is transferred only the salary. Therefore it resulted the unusual situation particular to this case, namely that the same salary was attached by the employer who practically transferred the salary into the respective account, and also by the bank that administered the account.

The bailiff submitted the application for validation of attachment and referred it to the validating court on 2 April 2014. Despite the communication received from the third party garnishee K.U. SRL in 10 April 2014, which informs on the termination of the labour relation between the third party and the pursued debtor V.S.F., he maintains the application for validation of attachment. Finally the validating court is notified by the bailiff through letter of 12 November 2013 issued by the Territorial Labour Inspectorate, *without previously checking whether the pursued debtor had or not at that date, the capacity of employee of the third party garnishee employer*, such as it would have been proper and also required in order to demonstrate a conduct in accordance with the strictness of the active role, and without rendering any effectiveness to the communication regarding the termination of the labour relation between the third party K.U. SRL and the pursued debtor V.S.F.

*The enforcement court* handling the application for validation of attachment issued the decision to validate the attachment, this way breaching the provisions of art. 790 (4) of the Civil Procedure Code in force at that time, by forcing the third party garnishee to pay to the creditor the amount owed by the pursued debtor, *even though from the evidence contained by the file handed by the validating court it would have resulted without a doubt that the third party garnishee did not owe any amount from the salary*, beginning from the date of the termination of the labour relation between the third party garnishee and the pursued debtor. In accordance with the text of the law referred above, the court shall issue a decision to validate the attachment, through which the third party garnishee will be forced to pay the creditor, in the limits of the debt, the amount owed to the debtor, *if from the submitted evidence it results that the third party garnishee owes amounts of money to the debtor*, as provided by art.790 (4) of the Civil Procedure Code.

Or in this case, as it resulted from the evidence contained by the file submitted to the court for judging the application for validation, to which it was attached the execution file, on the date of the court was addressed to validate the attachment, the pursued debtor V.S.F. no longer held the capacity of employer of employee K.U. SRL – third party garnishee, and therefore the latter practically did not owe any amount of money, namely salary, to the pursued debtor, and consequently, neither to the creditor. We mention that the third party garnishee being summoned, was absent from court and did not submit any document as evidence, only communicating to the bailiff the termination of the labour relation with the attached debtor V.S.F. under the provisions indicated in chapter 1.

The execution court ordered the validation of the attachment through the civil judgement delivered on 23 June 2014, establishing that *at the date the attachment was validated*, the third party garnishee owed the pursued debtor amounts of money, namely salaries, *but despite the evidence submitted in the validation file, the court*

*omitted to verify and establish that at the moment of validation of attachment the pursued debtor no longer was the employee of the third party garnishee and no longer earned attachable incomes from the third party garnishee, and on the other hand was unaware of the new job obtained by the ex employee and consequently there no longer were legal grounds for validating the attachment of the third party garnishee.*

It is true that where the *debtor changes the workplace, the attachment continues to produce effects*, situation in which according to the rule of principle established by art.786 (1) of the Civil Procedure Code, the third party garnishee has the responsibility to send the documents through which it was carried out the attachment of the debtor's new workplace or of the competent insurance body that becomes attached as third party, beginning with the date of receipt of the mentioned documents. However, if the debtor leaves the company *without the third party garnishee being aware of the new workplace* the legal text invoked established, in para. 2, the third party garnishee's obligation to inform the creditor regarding this circumstance.

The legal provision referred to previously institutes the *information obligation as part of a good-faith conduct of the participants in the procedure*, between the third party garnishee and the body that is the new employer of the pursued debtor, as far as this information is known, being correlated with the *third party garnishee's obligation to send the documents that order the attachment to the new employer of the debtor*. The obligation of mutual information also exists between the body that terminated the labour relation with the debtor without mentioning the new workplace, and the creditor; with respect to informing the bailiff on the newly arisen circumstances, also this obligation exists between creditor, who after knowing the new workplace of the debtor, has the obligation to bring this information to the attention of the debtor's ex employer, so that the latter be able to act in accordance with art.786 (1), namely send the documents that order the attachment of the new employer of the debtor.<sup>22</sup>

In the mentioned context, the absence of the grounds on which the attachment was validated by the court, at the bailiff's request, is obvious and was invoked by the third party garnishee by way of appeal as procedural remedy provided by art.791 of the of the Civil Procedure Code, in accordance with which the judgement delivered with regard to the validation of the attachment is subject to appeal only, a remedy that is exercised within 5 days from the communication of the judgement.

During the attachment procedure the conduct of the attachment third party K.U. SRL should have been subsumed to the requirements of good-faith, obligation of

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<sup>22</sup> The regulation on the roll-out of this procedural stage regarding the communications mentioned by the legal text of art.786 of the Civil Procedure Code, is however considered to be deficient because even if it provides the general obligation of information as key component of a good-faith conduct that the participants in the attachment procedure must show, in practice, the attached third party restraints to the exclusive communication to the bailiff of the information regarding the effective fulfillment of the attachment measure he/she set-up at the creditor's demand, or where the case, the impossibility to carry out this measure. Or the text of the law requires the attached third party to send him/herself the documents that establish the attachment of the debtor's new employer, even though we believe that in order to avoid discontinuity in the procedural undertaking, the mentioned obligation on the communication of the documents establishing the attachment to the debtor's new employer should exclusively be carried out by the bailiff (attributed with this prerogative through the procedural law), and not by the attached third party, a measure that should be accomplished based on the communication sent to the bailiff by the attached third party.

information and cooperation as default components of good-faith, but also subsumed to an active procedural position that places the third party garnishee in the role of participant in the procedure of attachment validation and whose rights and obligations, acknowledged by the procedural law, are meant to assure him the respect for his/her judicial status.

In the meaning indicated above, the fact that the *procedural law does not enable, for example, the third party garnishee to file appeal against the execution*<sup>23</sup> of the attachment does not represent a restrictive measure or a measure impairing or infringing the set of procedural rights and guarantees granted to the participants in the procedure. Art.787 (5) of the Civil Procedure Code, provides that the third party garnishee even though "shall not be able to file appeal against the attachment" will however submit "the statement of defence before the validation court". This means that within the validation court, the third party garnishee may oppose to the creditor "all exceptions and means of defence" that he/she might oppose the debtor "to the extent where their grounds arised previously to the attachment".<sup>24</sup> Only if from the submitted evidence it results that the third party garnishee owes money to the pursued debtor, the court delivers a judgement validating the attachment, otherwise it decides to annul the attachment.

As a result, the third party garnishee which, for various reasons, does not submit their own defence to the validation court, and has a passive behaviour, *is exposed to consequences in practice which may take serious forms such as the blocking of the bank account*, as an effect of the bank being communicated the judgement validating the definitive attachment, which may result in an inability of the third party to make payments, pay checkques, promissory notes or other trading operations.

Hence, for the third party garnishee it is essential to have an *active procedural behaviour* with the purpose of protecting the assets that are threatened by the possible unfounded validation of attachment and the measure of blocking the bank account and unavailability of the amounts placed in the account, as a consequence of the enforcement proceedings carried out by the bailif.

It is rather certain that not carrying out the defence of the third party garnishee within the validation court may lead to detrimental consequences for him/her, also having as possible effects the attraction of legal liability of its administrating and/or representing bodies based on the nonfulfillment of an essential duty that results from the mandate of the position of administrator, which is the *obligation to diligence*, as fundamental component of the mandate exercised by the administrators of a company.<sup>25</sup> The provisions of the special law in the field, in art.144<sup>1</sup> (1) of Company Law no.31 of 1990,<sup>26</sup> institute the administrators' obligation to act in the best interest

<sup>23</sup> The appeal against enforcement is provided by art.712 – art.720 of the Civil Procedure Code.

<sup>24</sup> Art.790 (3), final thesis, of the Civil Procedure Code.

<sup>25</sup> For further developments on the rights and obligations incumbent on the company administrators, including the obligation of diligence, see S. D. Cârpenaru, *Drept comercial român*, ed. a IV-a, revăzută și adăugită, All Beck Publishing House, București, 2002, p.241-242; St. D. Cârpenaru, Gh. Piperea, S. David, *Legea societăților. Comentariu pe articole*, ed. a 5-a, C.H. Beck Publishing House, București, 2014, p.531-532.

<sup>26</sup> published in Official Gazette.126 of 17.11.1990, republished (1) in Official Gazette 33 of 29.01.1998, 1066 of 17.11.2004, amended and supplemented, consolidated version of 16.07.2015, hereinafter called Company Law 31 of 1990.

of the company using the *caution and diligence that are proper to a good administrator*.<sup>27</sup>

A similar obligation to caution and diligence is provided by the common law rule, in art.213 of the Civil Code,<sup>28</sup> incumbent on the administrators of the legal person, in general, irrespective of the type or form of company/entity having legal personality. Specifically, the criterion based on which is evaluated the optimal fulfillment of the duty to act diligently is the *criterion of the good owner* ascertained by the common law rule that is generally applicable in evaluating the fulfillment of the obligations of the members of the administrative body of the legal person.<sup>29</sup>

Having in view the circumstances of this case, it should be pointed out the fact that the undertakings of the third party garnishee, as professional, company regulated under the Company Law, carried out up to the moment of the initiation of the appeal against the judgement validating the attachment, had been insufficient, as they were limited solely to the information sent to the bailiff regarding the termination of the labour relation of the pursued debtor, having the natural consequence of the impossibility to continue to withhold and transfer the salary of the pursued debtor into the account of the debt for which the attachment was set.

Thus it may be observed the deficitary exercise carried out by the managing, administrative and representing bodies of the third party garnishee, of the administrative and representing responsibilities specific to its position by *nonfulfilling the obligation to call on expert advice, (such as in this case), either economic or particular to other domains, which the manager or administrator of the company needs in order to be able to make a proper decision, this being an essential part of the obligation to diligence and caution that is incumbent on the administrators of a company and in a wider meaning, on the administrating body of a legal person.*

#### 4. Conclusive landmarks

From the embodiment of the legal regulations and from the analysis of the case emerge two *fundamental obligations that are incumbent on the participants in the enforcement proceedings, including by means of attachment*, being meant to ensure its efficiency in the context of exercise of the participants' procedural rights: *the information obligation* and the *collaboration obligation* of the participants in the procedure, responsibilities which are considered as being elements of the participants' good faith conduct within the attachment procedure.

The lack of diligence of some of the participants regarding the exercise of their procedural rights and obligations or the application of certain prescriptions contained by the legal texts in a way that could bring into discussion even the abusive exercise of acknowledged prerogatives of participants to the attachment procedure, may equally bring prejudice to the parties or participants in the procedure.

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<sup>27</sup> Art.144<sup>1</sup> of company law in para. (4) For further development regarding this article see I.Adam, C.N. Savu, *Legea societăților comerciale. Comentarii și explicații*, Ed. C.H Beck, București, 2010, 472-473.

<sup>28</sup> According to art.213 of the Civil Code, "the members of the administrative bodies of a legal person must act in its interest with caution and diligence proper to a good owner".

<sup>29</sup> An application of the principle is present in art.803 of the Civil Code.