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Articles Studia Iuridica Lublinensia vol. XXIX, 4, 2020
DOI: 10.17951/sil.2020.29.4.45-58

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Granting an Enforcement Clause against Partners

Nadawanie klauzuli wykonalności przeciwko wspólnikom spółek osobowych

SUMMARY

Pursuant to the Act of 9 November 2018 amending the Act – Code of Civil Procedure (Journal of Laws 2018, item 2385), there was a change in Article 778[1] of the Act of 17 November 1964 – Code of Civil Procedure (consolidated text Journal of Laws 2018, item 1360 as amended) regarding the granting of an enforcement clause against the partners who are liable without limitation for the obligations of partnerships. This amendment was a consequence of the judgement of the Constitutional Tribunal of 3 October 2017 (SK 31/15, Journal of Laws 2017, item 1883), which stated that this provision was incompatible with Article 45 (1) and Article 77 (2) of the Constitution of the Republic of Poland (Journal of Laws 1997, no. 78, item 483 as amended). The purpose of this article is to analyse the new Article 778[1] CCP in the context of the protection of creditors and partners.

Keywords: company law; partnerships; enforceability clause; civil liability; civil proceedings

INTRODUCTION

The partners in a general partnership are liable for the partnership's obligations with all their assets along without limitation, jointly and severally with the other partners and with the partnership[1]. The same rule applies to the partners of a professional partnership and the general partners in a limited partnership and a partnership limited by shares[2]. This is the liability for obligations of a separate

[1] Act of 15 September 2000 – Commercial Companies and Partnerships Code (consolidated text Journal of Laws 2019, item 505), hereinafter: CCPC.

[2] Article 22 § 2 CCPC in conjunction with Article 89 CCPC, Article 103 § 1 CCPC and Article 126 § 1 point 1 CCPC.

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legal entity, which arises *ex lege*[3]. It exists as long as the liability of the partnership itself exists (accessory liability)[4].

A characteristic feature of the liability of partners in partnerships is subsidiarity. It means that the creditor of the partnership may only conduct enforcement against the personal property of a partner if the enforcement against the partnership's assets proves ineffective (Article 31 § 1 CCPC). However, this does not prevent suing a partner before the enforcement from the partnership's assets proves ineffective (Article 31 § 2 CCPC). Therefore, the creditor is obliged first to conduct the enforcement against the assets of the partnership. Only when it is ineffective, the enforcement against the partner is possible[5]. This protects partners from claims made directly against their personal property.

At the stage of examination proceedings, the bringing of an action against a partner shall not be subject to any additional conditions regarding the liability of the partnership, in particular whether the partnership had been sued or the enforcement against its assets proved to be ineffective[6]. However, until the enforcement against the partnership's assets proves to be ineffective, the creditor will not be able to carry out enforcement against the partner.

WAYS OF OBTAINING AN ENFORCEABLE TITLE BY THE CREDITOR

The existence and scope of the performance by the debtor are confirmed by a final or immediately enforceable decision of the court (a court referendary), an amicable settlement made before the court, other decisions, settlements and acts which, by virtue of the statute, are enforceable through judicial enforcement, and

[3] Subsidiary liability only covers so-called external obligations, i.e. towards third parties and towards partners who act with the partnership in external relationships; it does not concern so-called internal obligations, i.e. towards the partners under the contract of partnership. See K. Kopaczyńska-Pieczniak, [in:] *Kodeks spółek handlowych*, vol. 1: *Komentarz do art. 1–150*, ed. A. Kidyba, Warszawa 2017, p. 226. Cf. judgement of 8 September 2015 (VI ACa 1591/14, LEX no. 1817537), in which the Court of Appeal in Warsaw stated that "The partnership's obligations for which the partners are liable include those that may be assumed by the partnership within the capacity vested in it (Article 8 CCPC), which covers external relations of the partnership with its contracting parties, i.e. creditors who are not partners, and towards creditors who are partners where the obligations do not result from the partnership contract".

[4] "There is no civil-law relationship between the plaintiff and the partners-defendants. The partners-defendants act here only as entities liable for third-party debt under a statutory delegation set out in the provisions referred to above" (A. Żuk, *Pozywanie spółki jawnej i jej wspólników a właściwość funkcjonalna sądu*, „Prawo Spółek" 2010, no. 7–8, pp. 68–71). Cf. judgement of the Voivodeship Administrative Court in Poznań of 27 February 2019, I SA/Po 704/18, LEX no. 2633435.

[5] Judgement of the Supreme Court of 8 May 2008, V CSK 573/07, LEX no. 408478.

[6] K. Kopaczyńska-Pieczniak, *Pozycja prawna wspólnika spółki jawnej*, Warszawa 2013, p. 502.

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notarial deeds listed in Article 777 § 1 of the Code of Civil Procedure[7]. However, the basis for enforcement is the enforceable title, i.e. the enforcement order with an enforceability clause appended, unless the statute provides for otherwise (Article 776 CCP).

Since the partner's liability is joint and several with the other partners and the partnership itself, and the ineffectiveness of the enforcement is not a condition for suing the partner, the creditor may choose to obtain the enforceable either against the partnership and the partner, or only against the partner, or only against the partnership.

Where the partner is sued concurrently with the partnership, the creditor may obtain an enforceability clause against the partner under a court ruling in a case to which the partner was a party, in accordance with the general principle that an enforceability clause is issued against the person named in the enforcement order[8]. However, the condition for appending it will be to show that enforcement against the partnership's assets proved to be ineffective.

Another way to obtain the enforceable title is making a claim by the creditor only against the partner, without first suing the partnership. This procedure will apply particularly when the creditor makes a claim once the partnership has been deleted from the register.

The third possible way to pursue a claim is where the creditor holds an enforcement order exclusively against the partnership as the directly obligated entity[9]. In such a case he or she does not have to sue the partner, it is sufficient that he or she applies for an enforceability clause to be appended to the enforcement order issued against the partnership under the simplified procedure, pursuant to Article 778^1 first sentence of the CCP. According to this provision, the court appends an enforceability clause to an enforcement order issued against a general partnership, professional partnership, limited partnership or partnership limited by shares against the partner who is liable without limitation with all his assets for the partnership's obligations if the enforcement against the partnership proved to be ineffective, as well as where it is clear that the enforcement will be ineffective. This provision does not constitute a substantive legal basis for the liability of the partner but is a kind of procedural tool which can be used by the creditor[10]. It applies only if the enforcement order is issued against the partnership. If the partner is also mentioned in the order, it is not allowed to obtain an enforceability clause against him on that basis.

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[7] Act of 17 November 1964 – Code of Civil Procedure (consolidated text Journal of Laws 2018, item 1360 as amended), hereinafter: CCP.

[8] K. Kopaczyńska-Pieczniak, *Pozycja prawna…*, p. 504.

[9] This regards primary liability. See A. Kidyba, *Prawo handlowe*, Warszawa 2018, p. 284.

[10] Cf. judgement of the Constitutional Tribunal of 3 October 2017, SK 31/15, Journal of Laws 2017, item 1883, III.7.1.

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CLAUSE-APPENDING PROCEEDINGS

The possibility of using a simplified procedure for appending an enforceability clause (i.e. Article 778[1] CCP) does not apply to shareholders of a partnership limited by shares, because they are not liable for its obligations (Article 126 § 1 (2) in conjunction with Article 301 § 5 CCPC). Nor does it apply to a limited partner, because his or her liability is, in contrast to the liability of a partner in a general partnership, partner in a professional partnership and general partner, limited to the commendam sum (Article 111 CCPC). A creditor may carry out enforcement against a limited partner's personal assets only if the value of the partner's contribution to the partnership is less than the amount of the commendam sum and the enforcement of the partnership's assets has been ineffective. When a limited partner has made a contribution of at least the commendam sum, he or she is not liable for the partnership's obligations at all (Article 112 § 1 CCPC)[11]. However, to determine this circumstance, an evidence-taking proceeding must be conducted, that goes beyond the limited scope of court jurisdiction in the clause-appending procedure.

For the same reason, it is not possible to append the enforceability clause to an enforcement order issued for a limited company against members of its management board who are jointly and severally liable for its obligations. Article 299 CCPC lists a closed catalogue of circumstances, the demonstration of which by members of the management board waives their liability. Proving these circumstances in the clause-appending proceedings would go beyond its scope[12].

The basic functions of the clause-appending proceedings involve "finding whether a given act meets the requirements contained in statutory provisions for a specific type of enforcement order, and finding whether the provisions of the act are suitable for enforcement by means of judicial enforcement"[13]. In the proceedings for appending an enforceability clause under Article 778[1] CCP, the creditor should

[11] Judgement of the Supreme Court of 12 March 2008, I CSK 447/07, LEX no. 494140.

[12] Cf. M. Muliński, *Tytuł egzekucyjny przeciwko spółce osobowej podstawą uzyskania klauzuli wykonalności przeciwko jej wspólnikom*, „Przegląd Prawa Handlowego" 2003, no. 6, p. 32.

[13] Resolution of the Supreme Court of 28 October 2010, III CZP 65/10, LEX no. 610125. Enforceability clause is "a judicial act by which the court states that the enforcement order presented by the creditor is enforceable and that it is admissible to conduct the enforcement against the debtor, and orders offices and stakeholders to execute the enforcement order" (K. Flaga-Gieruszyńska, [in:] *Kodeks postępowania cywilnego. Komentarz*, ed. A. Zieliński, Warszawa 2017, p. 1376; see also E. Wengerek, *Sądowe postępowanie egzekucyjne w sprawach cywilnych*, Warszawa 1970, p. 142). "Enforceability clause is a declarative judicial decision stating that the legal act presented by the creditor meets the statutory criteria for the enforcement order and that it is admissible to initiate an appropriate enforcement proceeding to enforce the debtor's performance with the use of state coercion" (P. Telenga, [in:] *Kodeks postępowania cywilnego. Komentarz*, vol. 2: *Komentarz do art. 730–1217*, ed. A. Jakubecki, Warszawa 2017, p. 200).

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prove that the entity concerned was a partner in the partnership when there was an obligation he or she was liable for. Usually, it is sufficient to submit to the court the enforcement order and an extract from the business register. Nonetheless, it should be borne in mind that entries in the business register as regards partners in partnerships are of a declaratory nature and the data resulting from the register do not have to be actual, e.g. when the partner has disposed of all rights and obligations, and the new entry has not yet been made.

The creditor must also prove that the enforcement against the partnership's assets was ineffective. This condition is to be examined at the stage of the clause-appending procedure and not at the examination stage[14]. Thus, there is no need to reserve in the wording of the enforcement order that enforcement against a partner may be carried out if the enforcement against the partnership's assets has proved to be ineffective[15]. However, the court may not append an enforceability clause to an enforcement order issued against a partner until the creditor demonstrates that the enforcement against the partnership's assets has been ineffective.

In accordance with the wording of Article 786 § 1 first sentence of the CCP, if the execution of the enforcement order depends on an event to be proved by the creditor, the court shall append the enforceability clause upon presenting the proof of the event in the form of an official document or a private document with an officially certified signature. A document confirming the ineffectiveness of enforcement may be a decision to discontinue enforcement proceedings against the partnership. If the partnership has been struck off the register, the creditor should then submit to the court a certificate attesting this fact. Since it is not possible to obtain an enforcement order against the partnership, it is clear that the enforcement against the partnership's assets will prove ineffective[16]. This is because the partnership's assets from which its liability could be enforced do not exist any more[17]. The mere

[14] Judgement of the Court of Appeal in Gdańsk of 28 March 2014, I ACa 752/13, LEX no. 1483711. As P. Telenga noted, "This view is disputable as the clause-appending proceeding does not expressly provide for a legal basis for examination of the ineffectiveness of enforcement concerning an enforcement order issued against partners" (P. Telenga, [in:] *Kodeks postępowania cywilnego. Komentarz*, vol. 2, p. 187).

[15] K. Kopaczyńska-Pieczniak, [in:] *Kodeks spółek handlowych*, vol. 1, p. 337; judgement of the Court of Appeal in Bialystok of 26 October 2004, I ACa 327/04, LEX no. 143479. A different view: resolution of the Supreme Court of 28 February 2013, III CZP 108/12, LEX no. 1365849; judgement of the Court of Appeal in Gdańsk of 28 March 2014, I ACa 752/13, LEX no. 1483711; judgement of the Regional Court in Lodz of 8 November 2017, XIII Ga 526/17, LEX no. 2420298.

[16] K. Kopaczyńska-Pieczniak, [in:] *Kodeks spółek handlowych*, vol. 1, p. 226. Cf. A. Kidyba, *Sukcesja praw i obowiązków w związku z likwidacją spółki jawnej. Glosa do wyroku SN z dnia 28.10.2005 r., II CK 275/05 i postanowienia SN z dnia 10.11.2005 r., II CK 320/05*, „Glosa" 2006, no. 4, pp. 39–43.

[17] Cf. judgement of the Voivodeship Administrative Court in Warsaw of 6 April 2018, III SA/Wa 423/18, LEX no. 2547765.

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fact that the partnership does not exist decides not only about the lack of legal and actual possibility to initiate enforcement proceedings, but also that a dissolved partnership may not own any assets[18].

POSSIBILITY TO DEFEND PARTNER'S RIGHTS OF IN CLAUSE-APPENDING PROCEEDINGS

The possibility of appending an enforceability clause to an enforcement order issued against a partnership against the partner with unlimited liability for obligations is linked to the construct of partnerships. Partners in these statutory entities[19] should be aware of the existence of the partnership's obligations and the proceedings pursued against it. As persons entitled to represent the partnership, they may submit the partnership's objections in these proceedings. They may also, acting on their own behalf, join such proceedings as secondary interveners and present the objections they have personally with respect to the creditor as joint and several debtors.

The situation of a partner who is not entitled to run the partnership's affairs looks slightly different. Such a partner has limited ability to be informed that any proceedings against the partnership are under way. It merely boils down to exercise of the partner's right of supervision which cannot be restricted (Article 38 § 2 CCPC)[20].

However, if a partner withdraws from the partnership (e.g. as a result of the notice of termination or disposal of all rights and obligations), it loses its effect on its functioning. He or she is practically deprived of the possibility of being informed about the trial taking place against the partnership[21]. He or she cannot, therefore,

[18] *Ibidem*.

[19] I use the term "statutory entity" following A. Kidyba (*Prawo…*, p. 171). There are also other terms used in the literature on the topic, e.g. "statutory person" (J. Frąckowiak, *Instytucje prawa handlowego w kodeksie cywilnym*, „Rejent" 2003, no. 6, p. 29; idem, *Jednostka organizacyjna jako substrat osoby prawnej i ustawowej*, [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, eds. W. Popiołek, L. Ogiegło, M. Szpunar, Kraków 2005, pp. 899–890, 912–913; idem, *Trzecia kategoria osób w prawie spółek – zbędna mistyfikacja czy krok w dobrym kierunku*, [in:] *Instytucje prawa handlowego w przyszłym kodeksie cywilnym*, eds. M. Stec, T. Mróz, Warszawa 2012, pp. 519–521), "deficient legal person" (as used by W.J. Katner, *Podwójna czy potrójna podmiotowość w prawie cywilnym?*, [in:] *Rozprawy prawnicze…*, p. 1027, 1029), or "imperfect legal person" (as proposed by A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 2001, pp. 229–231).

[20] As provided for in Article 38 § 2 CCPC, a contractual limitation of the partner's right to personally seek information about the state of the partnership's assets and business and the contractual limitation of the right to personal viewing of the partnership's books and documents is invalid.

[21] In the case of termination of the partnership, Article 65 § 5 CCPC granting the partner the right to participate in the profit and loss from affairs that were not yet completed, clearly indicates that this partner has no influence on running these affairs. He or she may only demand explanations, accounts and distribution of profit and loss at the end of each financial year.

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intervene as a secondary intervener and present to the creditor the objections of the partnership or the objections which he or she has personally.

In this situation, the creditor will be granted an enforceable title against the partnership and then, without the participation of a former partner, an enforceability clause also against him or her under Article 778[1] CCP. It does not matter whether the partnership dealt with the trial incorrectly[22] (e.g. it did not receive mailings, submitted remedies too late), or the title is based on the acceptance of the legal action. Once the enforcement order is issued against the partnership by the court, the partner is no longer able to defend his or her rights.

The choice of how the creditor will pursue the claim is therefore important for the partners. A judgement issued against a partnership has an extended substantive legal validity *vis-à-vis* its partners, although it is not *res judicata* in respect of them[23]. The extended legal validity constitutes a significant departure from the principle governing debtors' joint and several liability, according to which a judgement issued against one of the co-debtors is not the basis for enforcement against another debtor[24]. If the creditor holds an enforceable against the partnership but would decide to sue the partner separately, that partner could then raise the objections of the partnership under Article 35 CCPC and his or her personal objections under Article 373 in conjunction with Article 2 CCPC.

The situation is quite different when the enforcement order issued against the partnership is a notarial deed in which the partnership voluntarily submitted to enforcement (Article 777 § 1 points 4 and 5 CCP). In this case, the debtor may, by means of an action brought before the court, seek deprive the enforceable title of enforceability in whole or in part or its limitation if he or she questions the existence of an obligation determined by an enforcement order which is not a judicial decision (cf. Article 840 § 1 point 1 CCP). However, the debtor cannot challenge, on that basis, the obligation which results from the enforcement order issued by the court.

[22] Cf. Article 82 CCP.

[23] The Supreme Court, in the grounds for the resolution of 12 May 2005 (III CZP 21/05, LEX no. 148648), stated that the extended legal validity means that the creditor, in the cases mentioned in the statute, may obtain an enforceable title against persons other than those mentioned in the enforcement order. Thus, another person appears apart from the substantive-law debtor referred to in the enforcement order against whom an enforceability clause may be appended to the title based on procedural rules. This way the person becomes a debtor under enforcement, since the creditor may demand enforcement against him or her.

[24] Resolution of the Supreme Court of 28 February 2013, III CZP 108/12, LEX no. 1365849.

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CONSEQUENCES OF THE EXTENDED LEGAL VALIDITY OF THE ENFORCEMENT ORDER

As the wording of the provision in some situations prevented debtors from defending their rights, the Constitutional Tribunal ruled in the judgement of 3 October 2017 that Article 778[1] CCP, to the extent that it allows the court to append an enforceability clause to an enforcement order issued against a former partner of that partnership, who is no longer a partner at the time when proceedings were initiated in the case in which an enforcement order was issued against a general partnership, is inconsistent with Article 45 (1) and Article 77 (2) of the Constitution of the Republic of Poland.

In the grounds for the judgement, the Constitutional Tribunal stated that:

> From the point of view of the right to court, it is unacceptable a situation in which a dispute between the creditor and the debtor exists in the substantive-law area, the creditor asks the court to settle the dispute, and the "subsidiary" debtor not only has no possibility to participate in the judicial proceedings, but does not know at all that such proceedings are under way[25].

The Tribunal also noted:

> […] the constitutional standard comprises the very institution of the extension of the enforceability clause to a former partner of a general partnership, provided that he or she was a partner of the partnership at the time of the initiation of the proceedings in which the enforcement order was issued against the general partnership, and thus the partner had the opportunity to defend his or her rights before the court[26].

As a result of the judgement of the Tribunal, the second sentence was added to Article 778[1] CCP by the Act of 9 November 2018 amending the Code of Civil Procedure, which became effective on 5 January 2019. Pursuant to it, the possibility to grant an enforceability clause does not apply to "a person who was no longer a partner in the partnership at the time the proceedings were initiated in the case in which the enforcement order was issued against the partnership".

First of all, I will discuss a number of doubts related to the new wording of Article 778[1] CCP. It refers to "the moment the proceedings are initiated". This moment is the date of submission of the statement of claim and on this date the effects of bringing in the action arise. A considerable time may pass between the initiation of proceedings in the case in which an enforcement order has been issued against the partnership and the moment when the partnership (the partners representing it) become aware of its initiation. This is due to activities related to the service of the statement of claim

[25] Judgement of the Constitutional Tribunal of 3 October 2017, SK 31/15, Journal of Laws 2017, item 1883, III.7.2.

[26] *Ibidem*, III.8.

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on the court, taking steps to make up for the case, filling in formal[27] or fiscal[28] deficiencies, including proceedings for exemption from court costs. A change of partner may occur during this time, the entry on which in the register is declaratory in nature.

The current wording of the provision allows the court to append the enforceability clause also against a partner who had withdrawn from the partnership before the partnership became aware of the action brought in court. On the other hand, if the changes in the composition of the partners had taken place before the action was brought, even if the withdrawing partner knew about the initiation of proceedings in the case, the creditor will have to obtain an enforcement order against him or her through a separate trial.

Attention should also be paid to the specific situation that may arise due to the accession of a new partner to the partnership[29]. As provided for in Article 32 CCPC, the person acceding the partnership is responsible for the partnership's obligations that had arisen before the accession. At the moment of initiation of the proceedings, the person is not yet a partner but upon acceding the partnership he or she assumes subsidiary liability for the obligation being disputed. Therefore, I believe that the moment of initiating the proceedings is not conclusive for defending the rights of a partner bearing subsidiary liability for the partnership's obligations.

The reason for finding non-compliance of Article 778^1 CCP with the Constitution was that the partner could not defend his or her rights, and not solely that he or she did not participate in the proceedings against the partnership[30]. In its judgement, the Constitutional Tribunal restricted the possibility of issuing an enforceable title against a partner who cannot defend himself or herself against enforcement because the law does not provide for such a possibility. The Tribunal mentioned the need to amend the provision by suggesting that the creditor, in order to obtain an enforceability clause against a former partner in the partnership, will have to hold a separate enforcement order issued against that partner, which in contentious situations will in practice entail the need to sue that partner (separately or together with the partnership)[31].

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[27] If the statement of claim does not meet the formal conditions, the date of filing the claim shall remain in force only if it is supplemented within the prescribed time limit of a week (Article 130 § 3 CCP). See P. Potejko, *Chwila wszczęcia procesu cywilnego*, „Monitor Prawniczy" 2009, no. 11, p. 627.

[28] The court will not take any action as a result of a letter on which the fee due has not been paid (Article 126^2 § 1 CCP).

[29] Cf. comments contained in the memorandum of the National Council of Bailiffs of 14 May 2018, KRK/V/520/18, p. 3. This memorandum was submitted in the course of the legislative process to the draft Act amending the Code of Civil Procedure, Senate Papers no. 750.

[30] Judgement of the Constitutional Tribunal of 3 October 2017, SK 31/15, Journal of Laws 2017, item 1883, III.6.1 and III.7.

[31] Cf. *ibidem*, III.7.2. The Constitutional Tribunal stated also that "The absolute requirement to carry out separate examination proceedings against the current partner liable for the partnership's obligations, especially where the possibilities of his defence against the creditor's claim are closely

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ASSESSMENT OF THE AMENDED PROVISION

The possibility of appending an enforceability clause to an enforcement order issued against the partnership under Article 778[1] CCP should be dependent not so much on whether the person was a partner at the time of instituting proceedings against the partnership, but on whether he or she knew about the pending proceedings, being able to undertake defending his or her rights. The current solution is a half-measure, not including the goal to be achieved. It seems that it would be a better solution if Article 778[1] second sentence of the CCP read: "This does not apply to a person who was no longer the partner at the time of service of the statement of claim to the partnership in a case in which an enforcement order was issued against the partnership, unless this person was notified of the case"[32].

The moment of delivery of the statement of claim to the partnership (the status of *lis pendens*[33]) is more trustworthy for assessing whether a partner could, with due diligence, find out about the proceedings pending against the partnership and undertake to defend his or her rights therein. From that moment, the partnership (its partners representing it) knows that proceedings against it are pending. It should be in the interest of the partner to supervise the partnership and learn about with the state of cases instituted against it[34]. In this way, problems associated with a situation where the partner withdrew from the partnership between the initiation of proceedings against it and the moment when the partnership and its partners learned about it, are also avoided.

The interests of creditors are also protected. In the current wording of the provision, it may appear that the creditor initiated proceedings against the partnership when the partner was still included in the register but had already withdrawn from the partnership. In that case, the creditor could not apply for appending the enforceability clause against the partner, even if that partner was aware that such

related to the procedural activity of the partnership itself (Article 35 CCPC), would be dysfunctional and too strict" (*ibidem*, III.7.1).

[32] In the course of the legislative works, the need for additional reservation was indicated by the State Attorney General in the document of 18 May 2018, KR-51-355/18/MSI. It proposes to supplement the provision with the reservation: "and was unaware before the issuance of the enforcement order of the initiation of the proceeding".

[33] P. Telenga, [in:] *Kodeks postępowania cywilnego. Komentarz*, vol. 1: *Komentarz do art. 1–729*, ed. A. Jakubecki, Warszawa 2017, pp. 364.

[34] "However, the potential lack of partner's knowledge about the trial running against him as a result of the lack of cooperation between the partners, and the inability to protect his rights (e.g. by depriving him of the possibility of subsidiary intervention) is not a relevant circumstance from the point of view of assessing the constitutionality of the provision. On the other hand, it may justify possible claims for damages against the partners who have breached Articles 38 § 2and Article 65 § 5 CCPC" (W.P. Matysiak, *Zasady dochodzenia roszczeń od wspólników handlowej spółki osobowej*, „Glosa" 2018, no. 4, p. 50).

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proceedings are pending. The creditor would then have to summon the partner to participate in the case pursuant to Article 194 § 3 CCP. However, the court may not admit such a request[35]. In that case, it would be necessary to sue the former partner separately, which entails additional difficulties for the creditor. The same observations concern the person who acceded the partnership after the dispute between the partnership and the creditor became a pending case.

An advantage of the proposed solution is that it will enable the creditor to obtain an enforceability clause without having to additionally sue the persons who have withdrawn from the partnership. It is sufficient that, in the clause-appending procedure the creditor proves, by producing an official document or a private document with an officially certified signature, that the person concerned was a partner at the time of service of the statement of claim to the partnership or was notified of such a case. It may do so both by submitting a notification to the court of the pending trial under Article 84 CCP, as well as a letter addressed to the partner informing him or her of such a trial[36]. This should not pose special difficulties for the creditor.

In doing so, the provision ensures the possibility of defending the rights of partners and those who have withdrawn from the partnership. Since they know that the case against the partnership is pending, they can join the case as secondary interveners (Article 76 CCP) and present both their personal and the partnership's objections. If they claim that they have not been effectively notified of the ongoing proceedings and therefore failed to participate in it, they will be able to demand to deprive the enforceable title of enforceability under Article 840 § 1 point 1 of the CCP. It is understood that the opposition legal action may be based on the debtor's denial of the occurrence of an event on which the execution of the enforcement order and appending an enforceability clause to it was made conditional[37]. That

[35] "It is presumed that the court may disregard such a request when deems it inappropriate in view of the current progress of the case (see Article 198 § 3) and the party is not at risk of its claims falling under statute of limitations" (P. Telenga, [in:] *Kodeks postępowania cywilnego. Komentarz*, vol. 1, p. 369).

[36] According to Article 88 of the Act of 14 February 1991 – Law on Notaries (consolidated text Journal of Laws 2019, item 540 as amended) signatures on notarial deeds and certified documents are made in the presence of a notary. If the signature on a certified document has not been made in the presence of a notary, the person who signed it should declare before a notary that the signature made is the person's own signature. This circumstance is noted by the notary in the prepared document. The Supreme Court stated that the official certification of the signature on a private document (Article 788 § 1 CCP) may also be made at a different time than the legal action on the basis of which the creditor's entitlement or the debtor's obligation has been transferred to another person after the enforcement order was created. See resolution of the Supreme Court of 13 May 2015, III CZP 15/15, LEX no. 1679824.

[37] As proposed by K. Golinowska, [in:] *Kodeks postępowania cywilnego*, vol. 2: *Komentarz do art. 730–1217*, ed. J. Jankowski, Warszawa 2019, p. 596.

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fact can be proved in those proceedings by all available evidence. However, it will not be possible to raise objections concerning the mere obligation established by the enforcement order issued against the partnership.

CONCLUSION

The observations presented suggest that Article 778[1] CCP neither does adequately protect the persons who have withdrawn from the partnership nor the interests of creditors. As in the factual state considered by the Constitutional Court in its judgement of 3 October 2017, it may occur *de lege lata* a specific situation where a partner, being not aware of the proceedings pending (e.g. when he or she has withdrawn from the partnership before the partnership became aware of the institution of proceedings), cannot undertake to defend its rights.

Therefore, it appears that the legislative work on the amendment were concluded too quickly, without paying due regard to the consequences of the adopted wording of Article 778[1] CCP. In my view, it is worth discussing this and determining the wording of the provision which takes into account both the interests of creditors, partners in partnerships and those who have withdrawn from the partnership.

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STRESZCZENIE

Na mocy ustawy z dnia 9 listopada 2018 r. o zmianie ustawy – Kodeks postępowania cywilnego (Dz.U. poz. 2385) znowelizowano art. 778^1 ustawy z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (t.j. Dz.U. 2018, poz. 1360 z późn. zm.) dotyczący nadawania klauzuli wykonalności przeciwko wspólnikom spółek osobowych ponoszących odpowiedzialność bez ograniczenia całym swoim majątkiem za zobowiązania tych spółek. Zmiana ta była konsekwencją wyroku Trybunału Konstytucyjnego z dnia 3 października 2017 r. (SK 31/15, Dz.U. 2017, poz. 1883), który stwierdził zakresową niezgodność tego przepisu z art. 45 ust. 1 i art. 77 ust. 2 Konstytucji Rzeczypospolitej Polskiej (Dz.U. 1997, nr 78, poz. 483 z późn. zm.). Celem niniejszego artykułu jest analiza nowego brzmienia art. 778^1 k.p.c. w kontekście ochrony wierzycieli oraz wspólników spółek osobowych.

Słowa kluczowe: prawo spółek; spółki osobowe; klauzula wykonalności; odpowiedzialność cywilna; postępowanie cywilne