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Protection of Consumer Rights when Initiating Enforcement Proceedings under a Bank Enforcement Order

Abstract

The bank enforcement order was one of the most controversial banking privileges. The repeal of this institution due to its contradiction with the Constitution did not definitively end its use. The creditors were entitled to carry out enforcement proceedings under the transitional provisions which requires balancing the principle of protection of pending interests and the protection of the debtor-consumer. This paper addresses the key issues associated with initiating enforcement proceedings against consumers and clarifies any interpretative uncertainties.

KEYWORDS: bank enforcement order, consumer protection, banking privileges, enforcement against a consumer

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1 Introduction

The granting of special empowerments to banks, referred to as "banking privileges", resulted from the special position of these entities in the market economy and pressure from the banks.[1] One of the most important bank-

[1] See Rafał Sura, *Bankowy tytuł egzekucyjny* (Lublin: Wydawnictwo KUL, 2008), 235.

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ing privileges, and also the most controversial,[2] was the bank enforcement order.[3] The essence of this legal instrument was the entitlement of banks to simplified enforcement, since the bank's claim did not have to be established by a court judgment[4]. To be able to start enforcement against the debtor, all that was required was the granting of an enforceability clause on the b.e.o. Such a significant strengthening of the position of banks compared to other creditors was rightly considered by the Constitutional Tribunal to be incompatible with the constitutional principle of equality.[5] In view of the principle of protection of pending interests, the Tribunal postponed the expiration of the provisions on bank enforcement titles and emphasized the need for intertemporal provisions regulating the conduct of proceedings initiated before the repeal of the b.e.o. provisions.[6] In the end, it was decided to preserve the force of b.e.o.'s issued prior to the entry into force of the law repealing the b.e.o. provisions[7] and, consequently, the right of creditors to initiate and continue enforcement. Banks were therefore entitled to carry out execution on the basis of the b.e.o. if an order granting an enforceability clause to the b.e.o. had been issued before the Amendment Act came into effect (27 November, 2015).[8]

The rights of the debtor prior to the initiation of enforcement can only be protected in the procedure for granting an enforceability clause to the b.e.o. Therefore, it is necessary to examine whether and to what extent the procedural conditions and prerequisites for granting an enforceability clause to the b.e.o. protect the interest of the debtor-consumer. Also analyzed will be the rules for the issuance of the b.e.o. and their impact on the level of consumer protection.

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2 Among literature on this subject, see for example Ryszard Zelwiański, "Bankowe tytuły egzekucyjne (potrzeba nowelizacji)" *Państwo i Prawo*, No. 9 (2011): 99-104.

3 Hereinafter referred also to: "b.e.o.".

4 See Łukasz Hawrylak i Mirosław Pawełczyk, „Prowadzenie egzekucji na podstawie dalszego bankowego tytułu egzekucyjnego na mocy przepisów przejściowych" *Prawo i Więź*, nr 3 (2023): 300. https://doi.org/10.36128/PRIW.VI46.651.

5 The judgment of the Constitutional Tribunal of 14.04.2015, ref. P 45/12, LEX no. 1665900.

6 Ibidem, point 4.

7 Institution of the b.e.o. was regulated in Article 96-98 of the Banking Law of 29 August 1997 (Journal of Laws of 2015, item 128). These provisions were repealed on November 27, 2015, pursuant to the Act of September 25, 2015 amending the Banking Law and certain other laws (Journal of Laws, item 1854, hereinafter: "the Amendment Act").

8 Article 11(2) of the Amendment Act.

2 Consumer protection at the stage of issuance of b.e.o.

The bank enforcement order is issued *verba legis*: "on the basis of the bank's books or other documents related to the performance of banking operations."[9] The b.e.o. issued by the bank, on the other hand, constituted the bank's statement referred to in Article 95 (1) of the Banking Law[10], being a "formal emanation" of the bank's own documents,[11] as a result of which it had the legal force of an official document.[12] The bank's own documents also had a special status under the former Banking Law, as they also then had the force of official documents.[13] The authority of banks to issue b.e.o. was closely related to the granting of official document status to bank documents[14] and thus introducing evidentiary facilities for banks.[15] Therefore, the bank can only prove the existence and amount of the claim

9 Article 96(1) of the Banking Law.

10 The judgment of the Supreme Court of 07.10.2010, ref. IV CSK 187/10, LEX no. 667507.

11 See the judgment of the Appeal Court in Szczecin of 11.08.2016 r., ref. I ACa 234/16, LEX no. 2137103.

12 See the judgment of the Appeal Court in Bialystok of 15.03.2013, ref. I ACa 917/12, LEX no. 1294718. On the contrary: Tomasz Czech, "Wykonalność bankowych tytułów egzekucyjnych w Unii Europejskiej (cz. I)" *Prawo Bankowe*, No. 6 (2006): 100-106. See also Katarzyna Nowakowska, Paweł Ochmann, "Bankowy tytuł egzekucyjny jako instrument realizacji konstytucyjnie gwarantowanego prawa własności" *Przegląd Prawa Konstytucyjnego*, No. 1 (2016): 107.

13 According to Article 53 (1) of the Banking Law of 31 January, 1989 (Journal of Laws of 1992 no. 72, item 359): "The books of the banks referred to in Article 49, point 1, the abstracts from these books signed by these banks and bearing their seal, and any statements issued in the same manner containing obligations, release from obligations, waiver of rights or receipt of receivables, or stating the granting of credit, its amount and terms of repayment, shall have the legal force of official documents and shall be the basis for entries in the land and public registers."

14 Official documents within the meaning of the Code of Civil Procedure of 17 November 1964 (Journal of Laws of 2014, item 101).

15 It should be noted that according to Article 95 (1) of the Banking Law: "Bank accounts and statements prepared on their basis, as well as other statements signed by persons entitled to make declarations with respect to the property rights and obligations of banks and bearing the bank's seal, as well as receipts for the receipt of receivables prepared in this manner, have the legal force of official documents with respect to rights and obligations arising from banking operations and securing established in favor of the bank, and may form the basis for entries in the land and mortgage registers."

on the basis of its own documents. Such a significant strengthening of the bank's position in relation to consumers has resulted in the exclusion of the special evidentiary power of bank accounts in civil proceedings in civil proceedings in implementation of the judgment issued by the Constitutional Tribunal.[16]

However, the limitation of the evidentiary power of bank accounts in civil proceedings has not eliminated doubts about the legal nature and binding force of the b.e.o. Indeed, the essence of the b.e.o. is the bank's independent determination of the existence, amount and maturity of a debt. The concept of the legal nature of the b.e.o. as an official document is represented, among others, by Rafał Sura, who states that

> from the fact that the legislator grants a private law subject a right that, as a rule, should be enjoyed by public law subjects, it is impossible to conclude that the right itself changes its nature and essence.[17]

Sura thus recognizes that from the very essence and function of the b.e.o. that is an official document.

A court order granting an enforceability clause to the b.e.o. has the power of an official document, which is connected with the assumption of authenticity and truthfulness of what is officially certified therein, i.e. "the enforceability of the bank enforcement order with respect to the obligation indicated therein" arising from Article 244 of the Code of Civil Procedure.[18] A final order to grant an enforceability clause to a b.e.o. also has binding force to the extent referred to in Article 365 of the Code of Civil Procedure.[19] The order granting an enforceability clause to the b.e.o. also certifies that "the prerequisites of Articles 96 and 97 of the Banking Law, as in effect on the date of their issuance, have been met."[20] The b.e.o.,

16 The judgment of the Constitutional Tribunal of 15.03.2011, ref. P 7/09, LEX no. 785598.

17 Sura, *Bankowy tytuł egzekucyjny*, 180.

18 The judgment of the Supreme Court of 07.10.2010, ref. IV CSK 187/10, LEX no. 667507. See also the judgment of the Appeal Court in Bialystok of 09.08.2017, ref. I ACa 157/17, LEX no. 2663419 and the jurisprudence referenced therein.

19 See the judgment of the Appeal Court in Szczecin of 11.08.2016, ref. I ACa 234/16, LEX no. 2137103.

20 The judgment of the Appeal Court in Warsaw of 19.05.2016, ref. VI ACa 260/15, LEX no. 2075681.

on the other hand, when provided with an enforceability clause, states the existence of the obligation covered by the title and its amount.[21]

After the repeal of the provisions on the b.e.o. by the Amending Law, the jurisprudence expressed the view that the b.e.o. provided with an enforceability clause is not an official document and does not have the evidentiary power of an official document as referred to in Article 244 of the Code of Civil Procedure.[22] However, the Court pointed out that the issue in question should be considered through the prism of the provision of Article 365 of the Code of Civil Procedure, which regulates the power of court judgments.[23] The provision of Article 365 of the Code of Civil Procedure refers to validity in the positive sphere[24]. This means that in the case of a renewed case between the same parties, the court

> is obliged to assume that the legal issue in question is shaped as it results from the earlier final judgment. [...] The positive effect of *res iudicata* thus creates not only a prohibition on making findings contrary to the previously adjudicated issue, but also a prohibition on conducting evidentiary proceedings in this regard.[25]

The issue of the binding force of out-of-court enforcement orders has already been considered by the jurisprudence of the Supreme Court with regard to notarial deeds in which the debtor submitted to execution. The Supreme Court explained that the consequences of Article 365 of the Civil Procedure Code are "limited, as they are reduced to a preliminary ruling on the issues decided by the court in these proceedings."[26] Due to the very limited court's cognition in the proceedings for attaching

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21 The judgment of the Appeal Court in Gdansk of 27.04.2016, ref. V ACa 774/15, LEX no. 2112393.

22 The judgment of the Appeal Court in Szczecin of 11.08.2016, ref. I ACa 234/16, LEX no. 2137103.

23 According to Article 365 § 1 of the Code of Civil Procedure: "A final judgment is binding not only on the parties and the court that issued it, but also on other courts and other state bodies and public administration bodies, and in cases provided for by law, also on other persons."

24 Aleksandra Partyk, "Komentarz do art. 365," [in:] *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz*, ed. Olga Maria Piaskowska (Warszawa: Wolters Kluwer, 2020), 924.

25 Partyk, "Komentarz do art. 365," 925.

26 See the judgment of the Supreme Court of 10.08.2017, ref. I CSK 44/17, LEX no. 2365546 and the jurisprudence referenced therein.

an enforceability clause to the notarial deed and also primarily involves procedural issues, so that in these proceedings there is no "judgment of the case." Thus, it was already stated in the jurisprudence of the Second Republic of Poland that the legal consequences that the law attaches to the issuance of a final judgment are not created by "acts that do not have the character of judgments."[27] These acts in modern jurisprudence include out-of-court enforcement orders.[28]

Despite the fundamental structural differences between the notarial enforcement order and the b.e.o., it is possible to refer *per analogiam* the above view of the Supreme Court to the b.e.o., given the similarity in substance of these two out-of-court enforcement orders under consideration, expressed in the voluntary submission to execution by the debtor.[29] Moreover, the b.e.o. has been classified in the literature among out-of-court enforcement orders, which are "acts without the character of judgments," which do not have the value of substantive validity.[30] It should be added that the problem of substantive validity of court decisions is complex.[31] However, the prevailing view in the literature is that all court rulings have the value of binding force specified in Article 365 of the Civil Procedure Code,[32] In the jurisprudence of the Supreme Court, it has been stated that the order on the granting of a clause of enforceability does not have the character of *res iudicata*.[33] However, it should be supplemented that substantive validity and *res iudicata* are different legal institutions.[34]

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27 See ibidem and the jurisprudence referenced therein.

28 Ibidem.

29 M. Bączyk states that the institution of the b.e.o. refers by construction to the notarial enforcement order referred to in Article 777 § 1(5) of the Code of Civil Procedure – Mirosław Bączyk, "Umowy w zakresie czynności bankowych," [in:] *Prawo umów handlowych. System Prawa Handlowego*, Vol. V, ed. Stanisław Włodyka (Warszawa: C.H. Beck, 2017), 1100. On the similarity of the b.e.o. to a notarial enforcement order see also more: Patryk Ciok, „Notarialny a bankowy tytuł egzekucyjny. Rozważania na tle wyroku Trybunału Konstytucyjnego z dnia 14 kwietnia 2015 r., sygn. akt P 45/12" *Studia Iuridica Toruniensia*, Vol. XXI (2017): 103 et seq.

30 Paweł Grzegorczyk, "Komentarz do art. 365-366," [in:] *Kodeks postępowania cywilnego. Komentarz*, t. Vol II, *Postępowanie rozpoznawcze*, ed. Tadeusz Ereciński (Warszawa: Wolters Kluwer, 2016), 700.

31 Grzegorczyk, "Komentarz do art. 365-366," 698, 700.

32 Grzegorczyk, "Komentarz do art. 365-366," 698-699.

33 The resolution of the Supreme Court of 28.10.2010, ref. III CZP 65/10, LEX no. 610125; by: Grzegorczyk, "Komentarz do art. 365-366," 699.

34 Partyk, "Komentarz do art. 365," 924-925.

From the cited views of literature and jurisprudence, it follows that the b.e.o. can be considered an official document only on the grounds that it is a statement referred to in Article 95(1) of the Banking Law and the facts incorporated into this title were established by official documents. Thus, since the power of an official document has the power of an abstract from the bank's accounts, such a character must also be given to the b.e.o. issued on their basis.[35] In the current state of the law, although a court order granting an enforceability clause enjoys the power of an official document, which entails the presumption of the veracity of the enforceability of a bank enforcement order with respect to the obligation indicated therein,[36] the b.e.o. cannot be considered an official document. First of all, the bank's statements referred to in Article 95(1) of the Banking Law have been deprived of the power of official documents. Therefore, *a contrario* implies the deprivation of the power of an official document also for the b.e.o.[37] In addition, it follows from the nature of extrajudicial enforcement titles that they cover claims that have not been adjudicated. As a result, the status of an enforcement title does not automatically follow from the granting of b.e.o. status as an official document.[38]

Although a bank enforcement order is not an official document, but a private document, once it is made enforceable, it is the basis for initiating enforcement proceedings. Moreover, the bank did not have to inform the debtor about the issuance of the b.e.o. against him, as well as the application to the court for an enforcement clause.[39] Although a bank enforcement order does not authorize enforcement, it states the existence of the debtor's obligation and its amount, and the substantive legal basis of the claim is not subject to examination in the proceedings for granting an

35 Leszek Mazur, *Prawo bankowe. Komentarz* (Warszawa: C.H. Beck, 2008), 570.

36 The judgment of the Supreme Court of 7.10.2010, ref. IV CSK 187/10, LEX no. 667507.

37 See also the judgment of the Appeal Court in Szczecin of 11.08.2016, ref. I ACa 234/16, LEX no. 2137103.

38 The judgment of the Supreme Court of 18.10.2023, ref. II CSKP 1527/22, LEX no. 3616256; Krzysztof Knoppek, "Problemy z bankowym tytułem egzekucyjnym. Glosa do wyroku Sądu Najwyższego – Izba Cywilna z dnia 18 października 2023 r., II CSKP 1527/22" *Orzecznictwo Sądów Polskich*, Vol. 10 (2024): 14-16.

39 Z badania przeprowadzonego przez Urząd Ochrony Konkurencji i Konsumentów wynika, że 9 na 10 banków informowało dłużnika o wszczęciu egzekucji na podstawie b.e.o. – Urząd Ochrony Konkurencji i Konsumentów, *Raport z badania rynku usług bankowych pod kątem stosowania bankowego tytułu egzekucyjnego względem klientów indywidualnych* (Warszawa: 2012), 25.

enforcement clause. Thus, there is a risk of abuse of the bank's stronger contractual position and arbitrary determination of the amount of debt. Jurisprudence has recognized that the provision of the contractual template authorizing the bank to issue a b.e.o. to the extent that it covers court costs and any other costs and expenses necessary for the bank to purposefully pursue its rights is contrary to good morals.[40] The recovery of collection costs through the issuance of a b.e.o. takes advantage, in particular, of consumers ignorance and creates a disproportion of rights and obligations to the disadvantage of the consumer.

The debtor, however, cannot object to the issuance of a b.e.o. by the bank even if he became aware of it. Attempts by debtors to challenge the b.e.o. by bringing an action to establish the invalidity of the legal act of issuing an executive order by the bank have been contested in jurisprudence, as the b.e.o. is not a statement of intent[41]. In this regard, the only solution to protect the debtor at the stage of issuing the b.e.o. is the introduction of mandatory components of the title and a statement of submission to execution. However, the b.e.o. is issued unilaterally by the bank, which acts like a judge in its own case. Consequently, the only mechanism that realistically safeguards the debtor's rights to any extent is the control of the court in the proceedings for the issuance of an enforceability clause.

3 Consumer protection in the procedure for granting an enforceability clause to the b.e.o.

The importance of the court granting an enforceability clause to a bank enforcement order for the protection of consumer rights cannot be overstated. Although the debtor is a party to the clause proceedings,[42] the order

40 The judgment of the Appeal Court in Warsaw of 22.09.2010, ref. VI ACa 185/10, LEX no. 1130434; judgment of the District Court in Poznań of 14.07.2017, ref. I C 1572/16, LEX no. 2403485.

41 The judgment of the Appeal Court in Warsaw of 3.10.2018, ref. VI ACa 1761/16, LEX no. 2605246.

42 On the subject of parties to clause proceedings in the procedural and substantive sense, see more: substantiation of the resolution of the Supreme Court of 20.05.2003, ref. III CZP 19/03, LEX no. 78005.

is served only on the creditor. In the classic model of civil enforcement, in which the issuance of a clause of enforcement precedes full evidentiary proceedings and judgment of the case, the debtor was not surprised by the initiation of enforcement. Due to the adjudication of the claim in the adjudication proceedings, the clause proceedings were even considered a fragment of the enforcement proceedings.[43] The programmatic abandonment of the adjudicatory procedure in the case of the b.e.o., combined with the essence of the clause procedure, mean that the debtor can learn about the claim being asserted only from the notice of initiation of enforcement. Specifying the jurisdiction of the court in clause proceedings in a contractual template may be considered a prohibited clause,[44] but this solution does not protect the interests of the consumer, because even then the debtor is not notified of the pending proceedings. Therefore, for consumer protection, it is of fundamental importance that the court has jurisdiction in clause proceedings.

Proceedings for granting an enforceability clause to a bank enforcement order were conducted on the basis of Article 786^2 § 1 of the Code of Civil Procedure. This provision limits the scope of the court's cognition in clause proceedings: "In the proceedings for granting an enforceability clause to a bank enforcement order, the court shall examine whether the debtor has submitted to execution and whether the claim covered by the order arises from a banking operation performed directly with the bank or from securing for the bank's claim arising from that operation". It has been pointed out in the literature that the court will reject the application for an enforceability clause if the b.e.o. does not meet the formal requirements set out in Article 96 of the Banking Law[45], i.e. the b.e.o. does not contain at least one of the elements listed in Article 96(2) of the Banking Law.[46]

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43 This position was initiated on the jurisprudential ground in the resolution of the Supreme Court of 17.04.1985, ref. III CZP 14/85, LEX no 82431. In the current literature, the prevailing view is that clause proceedings are autonomous from enforcement proceedings – Marcin Drabik, *Postępowanie w przedmiocie nadania klauzuli wykonalności przeciwko małżonkowi dłużnika* (Warszawa: C.H. Beck, 2016), 8-13.

44 Article 385^3(23) of the Act of April 23, 1964 Civil Code (Journal of Laws of 2024, item 1061, as amended). See Marcin Uliasz, *Tytuł wykonawczy i klauzula wykonalności* in *Postępowanie zabezpieczające i egzekucyjne. System Postępowania Cywilnego*, Vol. VIII, ed. Kinga Flaga-Gieruszyńska (Warszawa: C.H. Beck, 2020), 487.

45 Beata Paxford, „Komentarz do art. 97," [in:] *Prawo bankowe. Komentarz*, ed. Hanna Gronkiewicz-Waltz (Warszawa: C.H. Beck, 2013), 341.

46 Artur Nowak, „Przedmiotowe elementy treści bankowego tytułu egzekucyjnego" *Prawo Bankowe*, No. 11 (2002): 85-86.

However, the court's cognition in the clause proceedings is very limited. Indeed, the proceedings for granting an enforceability clause for a bank enforcement order is formal and simplified, and the court does not examine substantive allegations.[47] In these proceedings, the court should limit itself to examining the application for an enforceability clause, the b.e.o. and the debtor's statement of submission to enforcement.[48] Thus, in the clause proceedings the court examines (i) whether the claim asserted by the bank arises directly from the banking operation referred to in Article 5(1) of the Banking Law or from the bank's security arising from that operation; (ii) whether the banking operation was carried out directly with the bank, and (iii) whether the debtor has made a written statement of submission to execution.[49] The biggest disputes arose over how to designate the date by which the bank could issue a b.e.o., as well as the content of the statement of submission to execution,[50] including the designation of the banking operation from which the bank's claim arose.[51]

Pointing to the limited court's cognition in the proceedings for granting an enforceability clause to the b.e.o., the Constitutional Tribunal even stated that the granting of an enforceability clause to the b.e.o. "is in fact a pure formality."[52] On the other hand, the granting of an enforceability clause by the court itself is declaratory in nature, since it does not create new rights, but merely states that order title issued by the bank is suitable for enforcement.[53] In addition, it should be pointed out that in the jurisprudence of the Supreme Court it is stated that the court's cognition

47 See Magdalena Olczyk, *Komentarz do art. 97* in *Prawo bankowe*, Vol. II, *Komentarz do art. 92a-194*, ed. Fryderyk Zoll (Kraków: Wolters Kluwer, 2005), 142 and the literature referenced therein.

48 Maciej Muliński, *Postępowanie o nadanie klauzuli wykonalności krajowemu tytułowi egzekucyjnemu* (Warszawa: C.H. Beck, 2005), 167.

49 Henryk Pietrzkowski, "Komentarz do art. 787," [in:] *Kodeks postępowania cywilnego. Komentarz*, Vol. V, *Postępowanie egzekucyjne*, ed. Tadeusz Ereciński (Warszawa: Wolters Kluwer, 2016): 191-192.

50 On intertemporal issues, see resolution of the Supreme Court of 9.02.2005, ref. III CZP 80/04, LEX no. 143105.

51 On the subject of the court's examination of whether a claim arises out of a banking operation, see the resolution resolution of the Supreme Court of 11.07.2010, ref. III CZP 22/00, LEX no. 40813.

52 The judgment of the Constitutional Tribunal of 14.04.2015, P 45/12, LEX no. 1665900.

53 Piotr Zapadka, "Przywileje bankowe," [in:] Agnieszka Mikos-Sitek, Piotr Zapadka, *Polskie prawo bankowe. Wybrane zagadnienia* (Warszawa: Wolters Kluwer, 2011), 205.

in the b.e.o. clause proceedings does not include the examination of the authenticity (truthfulness) of documents;[54] this allegation is subject to examination in proceedings for the revocation of the enforceable title.[55] In b.e.o. clause proceedings, the court is also not entitled to determine whether "the receivable claimed by the bank actually exists and whether it was indicated in the bank enforcement order in the correct amount."[56] In this regard, the literature emphasises the importance of the limited cognition of the court in clause proceedings and the need to strictly adhere to the limits of the court's cognition set forth in Article 786² of the Code of Civil Procedure, so that clause proceedings do not turn into examination proceedings.[57] This is due to the limited court cognition, which cannot eliminate all defects in the b.e.o.[58] Despite the fact that, according to the jurisprudence of the Supreme Court, in the proceedings for granting a clause of enforceability to the b.e.o., the court "should analyze the clause application, taking into account also the provisions of Article 96-98 of the

54 The judgment of the Supreme Court of 03.11.2009, ref. II CSK 207/09, LEX no. 551844. See also: Zbigniew Ofiarski, *Prawo bankowe. Komentarz* (Warszawa: Wolters Kluwer, 2013): 617-618; Arkadiusz Kawulski, *Prawo bankowe. Komentarz* (Warszawa: Lexis Nexis, 2013), 437; Tomasz Czech, "Wykonalność bankowych tytułów egzekucyjnych w UE (cz. II)" *Prawo Bankowe*, No.7/8 (2006): 120.

55 See jurisprudence cited in note no. 108 and Pietrzkowski, „Komentarz do art. 787", 193.

56 The judgment of the Appeal Court in Bialystok of 07.02.2014, ref. I ACa 687/13, LEX no. 1437877. See also: the judgment of the Constitutional Tribunal of 14.04.2015, ref. P 45/12, LEX no. 1665900.

57 See Sylwia Janas, "Bankowe tytuły egzekucyjne (wybrane zagadnienia procesowe)" *Polski Proces Cywilny*, No. 3 (2013): 375: "If the opposite view were taken, the proceedings for granting an enforceability clause would be transformed into examination proceedings. Therefore, it should be considered that the court should not demand from the bank the documents from which the benefit stated in the bank enforcement order is derived". As well Muliński, *Postępowanie o nadanie klauzuli wykonalności*, 167. It should also be noted that the procedure for granting an enforceability clause "is not an examination and evidentiary proceeding as to the existence and validity of the claim specified in the b.e.o." – Edward Kryński, "Bankowy tytuł egzekucyjny w orzecznictwie Trybunału Konstytucyjnego i Sądu Najwyższego" *Prawo Bankowe* No. 3 (2007): 100. Indeed, the literature points out that in the proceedings for granting an enforceability clause of the b.e.o. the court does not examine the substantive issues, so aptly states: Andrzej Rychter, "Oznaczenie odsetek w bankowym tytule egzekucyjnym" *Prawo Bankowe*, No. 5 (2002): 77; Andrzej Rychter, "Właściwość miejscowa sądu w postępowaniu klauzulowym" *Prawo Bankowe*, No.5 (2002): 79.

58 The judgment of the Supreme Court of 11.01.2006, ref. III CK 325/05, LEX no. 183597.

Banking Law and other requirements for each enforcement title." Arkadiusz Wróblewski states that this does not lead to a break in the principle of purely formal-legal verification of the title.[59] Approving the cited views of the literature and jurisprudence, it should be supplemented that it is not possible to expand by interpretation the cognition of the court in the proceedings for granting an enforceability clause of the b.e.o., as it contradicts the purpose of the institution of the b.e.o. itself and the essence of the normative construction constructed by the legislator, which is expressed in the assertion of a claim by the bank on the basis of the title issued by it without conducting examination proceedings.[60]

Due to the nature of the proceedings for granting an enforceability clause, the substantive defense of the debtor is an anti-enforcement action.[61] The debtor is entitled to a number of objections in these proceedings, including, in particular, the non-existence of the bank's claim, the lack of its maturity[62] or the inauthenticity of the documents forming the basis for the issuance of the b.e.o., such as the statement of submission to execution.[63] Although it is the debtor who must prove the basis of the anti-enforcement claim,[64] his position improves, because the defendant bank is charged with proving the existence and amount of the debt to prove in this way that the b.e.o. corresponds to the material and factual state of affairs, which was the basis for granting the enforcement clause.[65] Moreover, if the court

59 Arkadiusz Wróblewski, "Bankowy tytuł egzekucyjny – zarys instytucji na tle wyroku Trybunału Konstytucyjnego z dnia 14 kwietnia 2015 r." *Przegląd Prawa Egzekucyjnego*, No.12 (2015): 58. See also the order of the Supreme Court of 20.11.2009, ref. III CZP 90/09, LEX no. 553702.

60 See resolution of the Supreme Court of 11.10.2001, ref. III CZP 45/01, LEX no. 49098 and the judgment of the Supreme Court of 03.02.1999 r., ref. III CKN 155/98, LEX no. 36458

61 Judgment of the Supreme Court of 8.09.2016, ref. II CSK 750/15, LEX no. 2182659

62 Judgment of the Supreme Court of 8.09.2016, ref. II CSK 750/15, LEX no. 2182659.

63 Order of the Supreme Court of 3.11.2009, ref. II CSK 207/09, LEX no. 551844.

64 Judgment of the Supreme Court of 7.04.2016, ref. II CSK 522/15, LEX no. 2052524.

65 Judgment of the Supreme Court of 8.09.2016, ref. II CSK 750/15, LEX no. 2182659; See also: judgment of the Appeal Court in Warsaw of 23.10.2018, ref. V ACa 493/17, LEX no. 2592960; judgment of Appeal Court in Warsaw of 16.01.2019, ref. V ACa 814/17, LEX no. 2668855.

finds that the conversion clauses in a loan agreement indexed to a foreign currency are invalid, the bank must prove the actual amount owed.[66]

4 Conclusions

The repeal of the provisions on the bank enforcement order fully demonstrates the problems associated with the creation of transitional provisions. Interference with established legal relations is undoubtedly undesirable and should be an exceptional solution in a democratic state of law. However, the bank enforcement order was a privilege so contrary to the principle of equality and the right to a court that the repeal of this institution was necessary. The structural shortcomings of the bank enforcement order allowed banks to exploit their own contractual advantage and information asymmetry to the detriment of consumers.

Allowing enforcement to continue under the b.e.o., albeit to a limited extent and on the basis of transitional provisions, required the broadest possible consideration of the legitimate interests of consumers. In contrast, the legislature chose only to take into account the interests of creditors and at the same time did not introduce any instruments to strengthen the control of the courts over the conduct of enforcement during the transitional period. Information obligations cannot be considered an adequate instrument of protection, as they do not offset the weaker position of the consumer already after the issuance of the b.e.o. and the initiation of enforcement by the bank.

Therefore, it was necessary to balance all the values to be protected when introducing transitional provisions on the grounds of the unconstitutionality of the Articles 96-97 of the Banking Law – both the principle of protection of pending interests and the constitutional principle of protection of consumer interests. The content of Article 76 of the Constitution is the positive obligation to create mechanisms aimed at nullifying the contractual advantage of the professional (bank) and thus equalize its position toward the consumer.[67] Numerous court rulings made after the Constitutional

66 Ibidem.

67 See judgment of the Constitutional Tribunal of 21.04.2004, ref. K 33/03, LEX no. 107488, point III.17.

Tribunal's judgment, as well as serious interpretive doubts related to the application of the transitional provisions, prove that it would be axiologically more appropriate to equip the consumer with effective defenses against enforcement instead of full application of unconstitutional legal solutions. Considerations of consumer protection do not justify a complete remodeling of the essence of the b.e.o., which is associated with the abandonment of jurisdictional proceedings and the very limited scope of the court's cognizance in clause proceedings. For the same reasons, it is not permissible to challenge the binding force of bank enforcement orders provided with an enforcement clause before the entry into force of the Amendment Act.[68] The second way in which the courts to ensure the protection of consumer rights was to declare the declaration of submission to execution in its entirety as an illegal provision of the contractual model, which closed the way for the bank to carry out enforcement under the b.e.o.[69] However, a pro-constitutional interpretation cannot justify completely depriving banks of the possibility of continuing enforcement by completely negating the legal basis for using the b.e.o. It should be noted, however, that the b.e.o. regulation shifts the burden of litigation to the debtor-consumer, which is contrary to Council Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts.[70]

A systemic solution that takes into account the balancing of the interests of banks and consumers would be the introduction in the amendment provisions of the premise of a mandatory suspension of enforcement proceedings in the event of an anti-enforcement action. Its effectiveness could be safeguarded by imposing an obligation on the court enforcement officer to inform the debtor about the dissimilarities associated with enforcement conducted under the b.e.o. Unfortunately, the intertemporal provisions were enacted in haste without balancing the interests of debtors and creditors, which put banks in a privileged position even after the repeal of the b.e.o. institution.

68 Order of the Supreme Court of 9.09.2022, ref. I CSK 914/22, LEX no. 3485160.

69 Judgment of the District Court in Warsaw – Court of Competition and Consumer Protection of 26.06.2020, ref. XVII AmC 4/19, LEX no. 3439865.

70 OJ EU.L. 1993 No. 95, p. 29, as amended. Article 3(1) in conjunction with point 1.q of the Annex to the Directive.

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