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NOTARY PUBLIC AS THE PUBLIC AUCTION CLERK IN GREEK LAW – NOTARY-RELATED NULLITIES IN PUBLIC AUCTIONS OF IMMOVABLE PROPERTY

According to Greek law, notaries public are unsalaried public functionaries (not civil servants) and their function is governed by the Code of Notaries currently in force (Law 2830/2000; before that, it was governed by the provisions of Laws 670/1977, 1333/1973, and even earlier, by the Law on Courts and Notary Public Offices of 1835). As a result of the above characteristic (unsalaried public functionaries), notaries public are not subject to hierarchical official dependence but only to inspection by the locally competent Prosecution Authority at First Instance (Art. 41 Code of Notaries; nevertheless, prosecutors are not vested with the authority to give binding instructions to notaries public, while their written opinions are only of a consultative character).

Notaries public are appointed by decree of the Minister of Justice, published in the Government Gazette (art. 26 Code of Notaries), after having succeeded in the relevant panhellenic competition for the filling of vacant notary public posts, that is conducted annually at the district of local Courts of Appeal during March (Art. 25 Code of Notaries). To become a notary public, one must meet the following eligibility criteria: a) has attained at least the age of twenty eight years and has not exceeded the age of forty two (art. 21 § 1 Code of Notaries), b) is a Greek national, c) holds a Degree in Law by a Faculty of Law of a domestic university (or of foreign university, after equivalence of degree having been recognised), d) has been or was a lawyer or a judicial functionary (of any branch or degree) or an unsalaried registrar of mortgages or a notary public that resigned from office (art. 20 Code of Notaries).

Notaries public hold a permanent position and must retire from office upon attainment of the age of seventy years (art. 33 Code of Notaries). They enjoy personal guarantees equivalent to those provided to judicial functionaries by the Greek Constitution (art. 92 §4 Constitution). Their disciplinary law is governed by articles 42–95 of the Code of Notaries, whereas their civil liability is sought by the remedy of the action for mistrial (art. 73 § 1 of the Law introducing the Civil Code). Finally, notaries public are compulsorily organised in Notaries' Associations formed according to the districts of local Courts of Appeal (art. 97 § 1 Code of Notaries); these

associations are legal entities governed by public law and are supervised by the Ministry of Justice (art. 98 Code of Notaries).

Key words: *Notary public.– Public auction.– Nullities.– The element of harm.– Enforcement acts in stages.*

1. INTRODUCTION

In a lecture at the Law Faculty of the Hebrew University of Jerusalem on a legal-comparative study of enforcement organs, Professor *Konstantinos Kerameus* stressed that “in any country in Europe that *ius commune* preceded the era of great codifications of the 19th century, the doctrine of non-separation of judicial assessment from judicial coercion perceived enforcement to be a natural extension of judicial cognizance. This is why enforcement was mainly assigned to the court that adjudicated the dispute”.¹ Nevertheless, this close interdependence between assessment and enforcement enfeebled in continental Europe, following the entry into force of the French Code of Civil Procedure of 1806². It is nevertheless a fact that ever since that time European systems waver between the judicial and administrative classification of enforcement,³ A typical example of that is German law, where the former classification still prevails, but modern tendencies are in favour of the administrative approach.⁴

While comparative review indicates that there is a variety of systems of enforcement⁵, escalating between quasi judicial perceptions⁶ and true administrative methods⁷, most systems follow the median

¹ K. Kerameus, *Organs of execution and executory titles in a comparative perspective*, *Harmonopoulos* (Arm.), Monthly law review edited by the Bar Association of Thessaloniki, 50/1996, pp. 5 et seq. (in Greek).

² See closer K. Kerameus, previous fn., Arm 50/1996, pp. 7/8, with references to fn. 18–20; additionally also P. Yessiou-Faltsi, *Law of Execution I. General Part*, Sakkoulas, Athens-Thessaloniki 1998, § 4 III p. 59 (in Greek).

³ K. Kerameus, *supra*, fn. 1, Arm 50/1996, pp. 7 et seq.; P. Yessiou-Faltsi, *supra*, fn. 2, § 12 I p. 208.

⁴ K. Kerameus, *supra*, fn. 1, Arm 50/1996, p. 8, with explanatory notes in fn. 21 et seq.

⁵ See K. Kerameus, *supra*, fn. 1, Arm 50/1996, pp. 7 et seq.; P. Yessiou-Faltsi, *supra*, fn. 2, § 12 I p. 208.

⁶ A typical example is that of Austrian law, where the institution of the court of execution (*Exekutionsgericht*) exists; this court is the competent central institution that directs the entire enforcement process; see P. Yessiou-Faltsi, *supra*, fn. 2, § 12 I p. 208, with references.

⁷ The system adopted by Swiss law is indicative, whereby, in contrast to the regulation of cognizance proceedings, which is a matter of the individual cantons, at the level of enforcement there is a single, federal enforcement procedure for the satisfaction of pecuniary claims. In the frame of this system there are specially organised enforcement

way⁸. In other way, enforcement is vested in functionaries of the law, who, even though they do not exercise judicial powers, they are not members of the public administration either⁹. In contrast to foreign jurisdictions, where the court of execution¹⁰ is vested with the conduct of an auction, the Greek legislator decided, both in the Civil Procedure of 1834 (CP/1834) and in the Code of Civil Procedure of 1968 (CCP/1968), that the competent organ for the conduct of the auction shall be the notary public. Thus, the notary public that will carry out the compulsory auction is appointed by the petitioning creditor in the order of enforcement given to the bailiff (art. 927, 1st sentence in f. CCP)¹¹. In fact, it has been decided that “in case that there is a public auction on the basis of a procedurally inexistent order given by the petitioning creditor [: revoked order], then this auction is procedurally null and void, without requiring the incurrence of harm (Art. 159 nr. 3 of the CCP), as there is a breach of a fundamental rule of the system (requiring ... an order to enforce Art. 927 CCP)”¹².

services (Betreibungsämter), assisted by administrative institutions, that have a very loose relation to courts; see more closely P. Yessiou-Faltsi, *supra*, fn. 2, § 12 I p. 208. A clearly broader adoption of administration models is observed in Swedish law, for which see K. Kerameus, *supra*, fn. 1, Arm 50/1996, p. 8.

⁸ K. Kerameus, *supra*, fn. 1, Arm 50/1996, p. 8.

⁹ In English law, where the competent organ of enforcement of High Court judgments is the High Court Enforcement Officer (HEO), as well as his bailiffs and employees, see esp. A. Zuckerman, *Zuckerman on Civil Procedure. Principles of Practice*, Sweet & Maxwell, London 2006², p. 829 (no. 22.128), who points out: “The HEO (previously known as a Sheriff) is independent of the court and charges fees calculated by reference to the amounts involved; as Sir Jack Jacob explained the HEO, operates “a form of private enterprise in the business of enforcement of judicial processes and is highly productive”; for the most recent amendments to the law of enforcement in English law see J. Kruse, “Enforcement Law Reform and Common Law”, *Civil Justice Quarterly* 27/2008 pp. 494 et seq.

¹⁰ See e.g. for French law P. Yessiou Faltsi, *supra*, fn. 2, § 4 III p. 59, with references to fn. 71; for Italian law see P. Yessiou-Faltsi, *supra*, fn. 2, § 4 III p. 61 and § 12 I p. 209, with references to fn. 19; for Austrian law see P. Yessiou-Faltsi, *supra*, fn. 2, § 12 I p. 208.

¹¹ J. Brinias, *Compulsory Enforcement II*², Sakkoulas, Athens 1982, § 312 p. 813 (in Greek); Court of Appeal of Athens 7396/2004, *Nomiko Vima* (NoV), Monthly law review edited by the Bar Association of Athens 53/2005, pp. 1614 et seq. (1616 II). In fact it is accepted also in cases of voluntary partition of immovable property that it is the petitioning creditor – co-owner who pursues the auction (and not the court) that appoints the clerk of the auction, as long as there is no regulation in the CCP that corresponds to that of article 1092(2) CP: Three-member District Court of Thessaloniki 7583/2008, Arm 52/2008, pp. 1381 et seq. (p. 1382 I), with further references.

¹² “But also because it will constitute a violation of a procedural provision, which establishes grounds for cassation in cognizance proceedings, according to arts. 559 nos. 9 and 14 CCP (CCP 159 no. 2)”: Court of Appeal of Crete 90/1995, *Helliniki Dikaiosyni* (EllDni), Monthly law review edited by the Judges’ and Public Prosecutors’ Association 36/1995, pp. 1297 et seq. (p. 1298 I).

Nullities of public auctions that are related to notaries public or to their actions are crucial in the evaluation of the relevant selection. In particular:

2. NULLITIES OF ENFORCEMENT THAT ARE RELATED TO NOTARIES PUBLIC IN THEIR CAPACITY AS CLERKS CONDUCTING PUBLIC AUCTIONS

2.1. Notary – related nullities

Pursuant to article 998(1) CCP, the immovable property attached is auctioned publicly before a notary public in the area where the immovable property is situated¹³. It may as well be defined in article 4(1) of the Notaries' Code (Law 2830/2000) that “notaries public exercise their duties in the districts of Magistrate Courts that they are appointed in, as Magistrate Court districts are defined each time¹⁴”, but, the law recognizes a broad exception for notaries public of the Greek capital. In particular, pursuant to article 4 (2) of the Notaries' Code, by way of exception to the provisions in previous paragraphs, notaries appointed in municipalities that are included in the judicial districts of the Athens, Piraeus, Nikea, Kallithea, Nea Ionia, Peristeri, Halandri, Maroussi, Salamina, Acharnes, Kropia, Elefsina, Megara, Marathon, Lavrion (Kea Island excluded), Nea Liosia and Aghia Paraskevi Magistrate Courts may exercise their duties in the other districts of the above Magistrate Courts, as long as an auction is assigned to them¹⁵ and therefore there can be no nullity of the auction on those grounds. For example, the 1st Chamber of the Supreme Court has ruled that an auction carried out by the replacement of an Athens notary public (also a notary public in Athens) for immovable property situated in the district of the Acharnes Magistrate Court is not null and void¹⁶. Earlier, the Greek Court of Cassation (the Supreme Court)

¹³ About the fact that the place of conduct of an auction of immovable property may not differ from the seat of the notary public where the property is situated, see under the law previously in force the opinion of the Larissa Prosecutor of First Instance 485/1961, NoV 10/1962, pp. 331/332.

¹⁴ Court of Appeal of Athens 7396/2004, NoV 53/2005, pp. 1614 et seq. (1616 II); One-member District Court of Lamia 228/1998, *Archeion Nomologias* (ArchN), Archive of Court Rulings 50/1999, pp. 393 et seq. (394 II).

¹⁵ Or, if they are called to draft the notarial deeds in the residence, store or office of the contracting parties or in hospital/clinic, if hospitalized, or in prison, if detained, or in the branch of a bank or of a credit institution or organization, as well as when they act together with another notary public, according to the renumbered second paragraph of article 4 of the Notaries' Code, as it applies after the amendments of law 2915/2001, as the said paragraph bore the number 3 until then.

¹⁶ Supreme Court 145/1997, EllDni 39/1998, pp. 103 et seq. (104/105); similarly in the cassated judgment of the appellate judgment of the Court of Appeal of Athens

had correctly ruled that there can be no invalidity in an auction that was carried out by an Athens notary public, because at the time of its conduct no notary public had been appointed, nor was there a Magistrate Judge acting as a notary public in the district where the immovable property was situated (Zografos Community at the time)¹⁷. In any event, when the seat of the municipality or of the community where the auction is conducted belongs to the district of another Magistrate Court (and therefore, of another notary public), the exercise of notarial duties is not contrary to the provision of article of the Notaries' Code. In particular, according to article 998(1) CCP, auctions are carried out before a notary public of the district where the immovable property is situated; in case the notary public should travel to the seat of the municipality or of the community, which lies within the district of another Magistrate Court (and notary public) to carry out the auction, it was correctly accepted that there can be no nullity of the auction, as this is imposed by law and not by the will of the notary public¹⁸.

Notaries public that are absent or impeded in the exercise of their duties are replaced by another notary public of the same district, who is appointed by the president of the Council or the judge presiding at the Court of First Instance, upon a proposal by the party requesting the replacement, or even without it¹⁹. In the absence of another notary public in the district of the Magistrate Court, another notary public is appointed as a replacement originating from the same or from another district of a

6648/1994, EllDni 1996, pp. 1126 et seq. (1128): both under the similar regime of the previous Notaries' Code (law 670/1977); additionally also One-member District Court of Athens 11822/1971, NoV 19/1971, p. 1466; One-member District Court of Athens 141/1971, NoV 19/1971, p. 494 (they all rejected the grounds of opposition put forward that the auction was conducted by an incompetent clerk of the auction); opinion of the Athens Prosecutor of First Instance 14/1971, D (Diki; monthly law review edited by Professor C. Beys) 2/1971, pp. 461/462, with opposing remarks J. Psomas.

¹⁷ Supreme Court 310/1956, NoV 4/1956, p. 918: it was the case of Zografos community, which had recently been detached from the municipality of Athens (13.1.1929) and the auction was held on 27.4.1930.

¹⁸ Opinion of the Prosecutor at the Supreme Court 5/1997, EllDni 38/1997, p. 1939 (under the previous Code of Notaries: law 670/1977).

¹⁹ Court of Appeal of Thessaloniki 2692/1992, Arm 36/1992, pp. 749 et seq. (750 I): on the occasion of an auction of movable property, the Court accepted that "the opposing debtor was lawfully granted a copy of the auction report by the notary public I.M [who was replaced] and not its replacement, as the notarial deed of the auction report belongs to the archive of the first notary public". –In any case, it was ruled that "No provision of this (law 670/1977) or any other law prohibits the exercise of the notary's duties during the time of his leave; for the same reason the deposit of documents related with the auction to his hands and the drafting of the relevant auction report does not lead to the nullity of these acts and of the subsequent auction": One-member District Court of Larissa 623/1988, NoV 36/1988, p. 1673 II down; of the same opinion are J. Hamilothoris, C. Kloukinas, T. Kloukinas, *Law of Execution*, Nomiki Vivliothiki, Athens 2005, no. 41 p. 29 (in Greek).

Magistrate Court of the same Court of First Instance, appointed as described above, and in his absence, the Magistrate Judge of the seat [art. 3(1) of the Notaries' Code]²⁰. However, when replacement is effected without an act of the president of the Council or of the judge that is presiding at the Court of First Instance, the auction is not ipso jure null and void, but, according to the case-law of Greek courts, it is contingent upon the requisite of procedural or patrimonial harm sustained^{21, 22}. Moreover, in the event of death or retirement of a notary public before the conduct of the auction and as long as his archive has been reassigned²³ to another notary public (newly appointed or not)²⁴, according to the provisions of article 128 of the Notaries' Code, i.e. following an order of the First Instance Prosecutor (following an opinion of the board of the Notaries' Association), the latter is the lawful clerk of the auction²⁵.

²⁰ The same was foreseen under the previous law (see art. 168 of organization and decree 21/3/1836); see on the issue of lawful conduct of an auction by a magistrate judge the opinion of the Arta Prosecutor of First Instance 7681/1935, *Themis* (Th.), Monthly law review, no more edited 37/1926, p. 46.

²¹ Supreme Court 1454/1998, EllDni 40/1999, pp. 789 et seq. (790) = D 30/1999, p. 348 (summ.); Court of Appeal of Athens 9955/1998, ArchN 51/2000, pp. 640 et seq. (648 I); Court of Appeal of Athens 5242/1993, EllDni 35/1994, p. 462; Court of Appeal of Athens 7396/2004, NoV 53/2005 pp. 1614 et seq. (1616 II).

²² In view of the fact that the initial second paragraph of article 4 of the Notaries' Code, in which it was stipulated that "each notarial act performed beyond the district of the previous paragraph is null and void and the violator is liable to indemnify the injured party, while at the same time he is subject to disciplinary indictment", was abolished by article 32(1) of law 2915/2001, the nullity of the auction that is conducted by an incompetent notary public is correctly linked to the concurrence of the element of harm, as the penalty of nullity is no longer imminent [see before the abolishment of the regulation P. Yessiou-Faltsi, *Law of execution II. Specific part*, Sakkoulas, Athens-Thessaloniki 2001, § 59 IV pp. 408/409 (in Greek)].

²³ Under the Civil Procedure of Maurer it was adjudicated that the lack of notification about the person of the new notary public, after the death of the initially appointed, results into nullity of the auction; so according to Court of Appeal of Patras 157/1906, Th. 19/1908–1909, pp. 148 et seq. (149 I).

²⁴ That the person appointed as the temporary holder of the archive of a retired notary public could under Civil Procedure of 1834 issue a summary of the schedule "of the auction of 28.1.68 before the aforementioned deceased notary public as a clerk of the auction under the condition that the notary public to be appointed as a replacement of the deceased will not have settled" see opinion of the Patras Deputy Public Prosecutor 1/1968, NoV 16/1968, p. 349.

²⁵ Supreme Court 1156/1980, EEN (: Ephimeris Hellinon Nomikon; Newspaper of Greek Jurists; edited in Athens) 48/1981, p. 267 (while the legislative decree 1333/1973 on the Code of Notaries was still in force), dismissing the grounds of opposition against the auction based on the opposite. –Due to the lack of a corresponding regulation (art. 128 of the Notaries' Code) in the law previously in force, it was accepted that in case of passing of a notary public, the auction was conducted not by the notary public who took over his archive, but his replacement instead; so according to the opinion of the Athens Pros-

Provisions on disqualification of judges²⁶ may not apply to notaries as clerks of the auction; however, in order to ensure the guarantees of impartiality and sound judgement during the conduct of an auction, the law prohibits outbidding in the particular auction to the notary public himself²⁷, as well as to his servants/employees [art. 965 (1) 2nd sentence CCP; see also art. 533 Civil Code]²⁸, and also to his relatives by consanguinity or affinity up to the third degree [art. 7 of the Notaries' Code (law 2830/2000)]²⁹. In any event, also in this case, the nullity of the auction, which is not to be considered as *ipso jure*³⁰, is pronounced only when the element of harm³¹ (procedural or patrimonial)³² is present. As the dearly departed *Ioannis Brinias* noted, “it may be taught that the effect of the prohibition of article 533 [CC] is the nullity of the auction according to article 174 CC, the nature of which nullity as absolute or relevant is fur-

ecutor 73760/1954 *K. Fafoutis*, NoV 3/1955, p. 89, who claimed (90 I up) that: “this perception is founded on articles 203–210 of the Organisation of Courts, from the conjunction of which appears that, when a notary public is for any reason unable to perform the duties assigned to him with regard to his archive, care is taken in order to replace him (Opinion of the Supreme Court Prosecutor 37/1929, Th. 40/1929, p. 772)”.

²⁶ Comp. *K. Kerameus*, *Notarial impediment due to relationship with a contracting party* (in Greek), D 1/1970.341 et seq. (346); additionally also *J. Brinias*, *Law of execution*, Vol. I², Sakkoulas, Athens 1978, § 131 VIII p. 335/336 (in Greek).

²⁷ In fact *Emmanuel Mihelakis*, during the preparatory works of the CCP (session of 10.7.1957), insisted “in favour of the non – quotation except for the debtor of other persons as unable to bid, as it is self-evident that the notary public may not bid” (Draft of Civil Procedure VIII p. 166).

²⁸ That the auction is invalid according to art. 533 CC, because the long-standing assistant of the notary public that conducted the auction bidden in it, see *Lasithi Court of First Instance* 18/1960, *Arm* 14/1960, pp. 867 et seq. (868) = NoV 8/1960, p. 1143.

²⁹ It was nevertheless adjudicated under the previous law in force that an auction is not null and void due to the fact that the sister of the notary public that conducted the auction was a bidder: *Court of Appeal of Athens* 754/1939, Th. 50/1939, p. 713.

³⁰ See the distinction adopted in *Supreme Court* 1352/1998, *EllDni* 40/1999, p. 634, i.e. that “the violation of the provision of art. 533 CC may result into the nullity of the bidding according to the provision of art. 174, in which bidding the highest bidders were the aforementioned persons, which annuls the auction procedure and leads at the same time to the nullity of the adjudication, as well as of the adjudication report, whereas the prohibition of 965 (1) 2nd sent. CCP ..., refers to each bidding (and not to the last one) extending to the employees of the notary public of the auction and leads to nullity with the concurrence of the conditions in article 159 (3) CCP”; similarly *J. Schinas*, *Civil Code*, *Commentary by A. Georgiades – M. Stathopoulos*, Vol. III, Sakkoulas, Athens 1980; reprinted 2004, art. 533 no. 40.

³¹ As accepted by the Drafting Committee of the CCP by majority (dissenting opinions by *J. Sakketas* and *E. Mihelakis*), who supported that the participation of these persons should be prohibited under penalty of nullity, in the session of 10.7.1957 (Draft of Civil Procedure VIII p. 166).

³² This interpretative approach is considered to be dubious by *P. Yessiou-Faltsi*, *supra*, fn. 22, § 59 IV p. 419 with fn. 185.

ther contested”, however, “the application of the principles of substantial law should be restricted to the cases of other auctions that are foreseen and regulated by substantial law (compare art. 199 CC) and not to public auctions that are regulated by the CCP; according to current perceptions, auctions do not constitute an act of sale but an act of public authority, regulated solely by procedural law”³³.

2.2. Nullities related to notaries’ acts or omissions

The most frequently encountered grounds of opposition to enforcement due to actions of the auction clerk is obstruction of free competition and deterrence of potential bidders, which is condemned in the Greek jurisdiction³⁴. The issue arose in the past, before the entry into force of Article 4 (13) of law 2298/1998, especially by reason of the guarantee imposed on bidders according to articles 1003(1) and 965(1) CCP. The compulsory deposit of guarantee, as well as the kind or the amount of guarantee relied on the reasonable judgement of the auction clerk, whose criteria were the costs of repeat auction and the potential difference between the proceeds of auction and repeat auction, as well as the avoidance of inconsiderate participation in the bidding of insolvent persons or persons of suspicious intentions, that merely aim at the protraction of the procedure³⁵. It thus remains at the discretion of the notary public to accept the participation of a prospective bidder, even without the deposit of guarantee, if he/she decided that the bidder was solvent³⁶, to set unequal guarantee or guarantee of different kind for each bidder³⁷ or even to increase and/or reduce the amount of guarantee during the auction³⁸. Ac-

³³ J. Brinias, *supra*, fn. 11, § 345 IV p. 884.

³⁴ See recently L. Pipsou, “Malicious deterrence of bidders as grounds for annulment of the compulsory auction”, *Commemorative volume for J. Manoledakis*, Vol. III, Sakkoulas, Athens-Thessaloniki 2007, p. 927 et seq. (in Greek).

³⁵ See instead of others Supreme Court 347/1995, EllDni 37/1996, pp. 1333 et seq. (1334/1335); Supreme Court 1277/1994, EEN 62/1995, p. 738 = EllDni 37/1996, pp. 588 et seq. (589), with notes *G. Diamantopoulou*; Supreme Court 129/1994, NoV 42/1994, pp. 1167 et seq. (1168); Supreme Court 425/1988, EEN 56/1989, p. 221; Supreme Court 795/1988, EllDni 30/1989, pp. 571 et seq. (572 I). —Nevertheless, through an addition to article 965 (1) CCP, by virtue of article 3 of law 1653/1986, guarantee could not be higher than one third or lower than one eighth of the upset price.

³⁶ Supreme Court 405/2000, EllDni 41/2000, p. 1328.

³⁷ See the facts of the case in Supreme Court 347/1995, EllDni 37/1996, pp. 1333 et seq. (1335): the clerk of the auction, who had set guarantee at 4.000.000 drachmas, “for the agents of the two cassationees it accepted letters of guarantee as guarantee, for others he demanded cash and for one (A.M.) he was satisfied with a personal cheque from him, and at the same time he excluded at least another two interested bidders from participation, who offered the same guarantee as A.M., i.e. personal cheques”.

³⁸ Supreme Court 1654/1988, EEN 55/1989, p. 764.

cording to the established case-law of the Greek Supreme Court, “any misuse or abuse by the clerk of the auction (acting as a State instrumentality, exercising authority of the public service and not representing the petitioning creditor, the debtor or the successful bidder) of the discretionary power to render the highest bidding contingent upon the deposit of guarantee does not constitute grounds of nullity of the auction as such, so that it can form the basis of the respective remedy of opposition against the petitioning creditor and the creditor. Any eventual subsequent unjustified obstruction of a bidder’s participation in the auction, resulting from misuse or abuse of this power, may establish grounds of nullity of the auction, due to obstruction of free competition between potential bidders, under the additional condition that the above obstruction was effected following an understanding of the auction clerk with the highest bidder, thus leading to the debtor’s loss”³⁹. In fact, in order for the opposition to the auction to be successful, the element of malicious conduct should be described with clarity in the legal brief, i.e. the understanding of the auction clerk with the highest bidder, so as to exclude or obstruct the participation of solvent bidders and bring about the adjudication at a price lower than the actual value of the thing, to the detriment of the debtor and his/her lenders⁴⁰. Nevertheless, according to the prevalent opinion in case-law, there constitutes no grounds of nullity of the auction and the adjudication,

³⁹ Supreme Court 190/1992, EEN 60/1993, pp. 271 et seq. (272 I); similarly among many others also Supreme Court 405/2000, EllDni 41/2000, pp. 1328/1329; Supreme Court 347/1995, EllDni 37/1996, pp. 1333 et seq. (1334/1335); Supreme Court 1277/1994, EEN 62/1995, p. 738 = EllDni 37/1996, pp. 588 et seq. (589), with notes *G. Diamantopoulos*; Supreme Court 1962/1990, EllDni 33/1992, pp. 542 et seq. (544 II); Supreme Court 1654/1988, EEN 56/1989, pp. 764 et seq. (765 I); Supreme Court 795/1988, EllDni 30/1989, pp. 571 et seq. (572); Supreme Court 425/1988, EEN 56/1989, p. 221; Supreme Court 67/1985, EEN 52/1985, p. 843 = NoV 34/1986, p. 54; Supreme Court 533/1984, NoV 33/1985, pp. 757 et seq. (758); Supreme Court 141/1979, EEN 46/1979, pp. 245 et seq. (246 II) = NoV 27/1979, pp. 1098 et seq. (1099 II); Supreme Court 672/1974, ArchN 26/1975, pp. 131 et seq. (133) = EEN 42/1975, pp. 305 et seq. (306 II) = NoV 23/1975, pp. 282 et seq. (284 I).

⁴⁰ See indicatively from case-law Supreme Court 425/1988, EEN 56/1989, p. 221; Supreme Court 795/1988, EllDni 30/1989, pp. 571 et seq. (572), and from theory *L. Pipsou*, *supra*, fn. 34, III pp. 944/945, with numerous references in fn. 96. Nevertheless, the Greek Supreme Court has ruled that “a specific mention of the way, the aim and generally of the circumstances under which the clerk of the auction came to an understanding with the cassationnees was unnecessary, in order to evaluate that in the disputed case the conditions of the provisions applied indeed concurred. Also, it was unnecessary to further investigate whether the guarantee set by the clerk of the auction was proportional to its aims, the upset price and the degree of solvency of the potential bidders, as well as whether these were indeed solvent, and finally, whether they had the intent and capacity to bid beyond the sale proceeds achieved. It is sufficient that the aim of the understanding in question is presented, as well as the method of its realisation”: Supreme Court 1277/1994, EEN 62/1995, pp. 738 et seq. (740 I) = EllDni 37/1996, pp. 588 et seq. (560/561), with notes *G. Diamantopoulos*.

when the agreement of the notary public with the bidder is not proved and it is merely the notary public's initiative⁴¹.

Following the amendment of article 4 (13) of law 2298/1995, the aforementioned discretionary power of the notary public with regard to the deposit, the kind and the amount of guarantee was modified, and the relevant issue was rendered obsolete⁴². In article 965 (1) 3rd sentence CCP is it now stipulated that "highest bidders have to deposit in cash or by letter of guarantee or by cheque issued by a bank or by another credit institution a guarantee equal to one third of the upset price"⁴³. In fact, the relevant regulation covers also the auction of immovable property, pursuant to an express statutory reference [1003(1) CCP]. The deposit of guarantee is now a requirement for the validity of the highest bidding, whereas the violation of the above provision on payable guarantee amounts –except for the criminal liability of the notary public⁴⁴– leads to the nullity of auction and adjudication, under the condition however, of existing harm [art. 159 (3) CCP]⁴⁵. Nevertheless, the jurisprudential position towards malicious agreements between the auction clerk and the successful bidder with regard to guarantee, which is a sub-category of "malicious deterrence of bidders"⁴⁶, has been a leading guide for Greek courts when evaluating the conduct of the auction clerk, in cases that it hinders the

⁴¹ See instead of others Supreme Court 67/1985, EEN 52/1985, pp. 843/844 = NoV 34/1986, pp. 54/55, which did not quash the ruling of the appellate court that dismissed the opposition at hand, exactly because "such an act by the clerk of the auction, by which the said bidder of the above auction was excluded, was performed on his own initiative and not after guidance or understanding with the cassation – highest bidder"; already in this direction Supreme Court 672/1974, ArchN 26/1975, pp. 131 et seq. (133 I) = NoV 23/1975, pp. 282 et seq. (284 II) = EEN 42/1975, pp. 305 et seq. (306 II).

⁴² P. Yessiou– Faltsi, *supra*, fn. 22, § 59 VI p. 425 fn. 206; L. Pipsou, *supra*, fn. 34, 946.

⁴³ On the ratio iuris of the provision, which consists on the one hand of limiting the risk of participation in bidding of insolvent persons or false bidders and on the other hand of avoiding unwanted surprises to potential bidders, see Explanatory Report of law 2298/1995, in P. Yessiou–Faltsi, N. Nikas, A. Kaissis, *Code of Civil Procedure*, Sakkoulas, Thessaloniki 1998, p. 764 et seq. (770).

⁴⁴ See characteristically Supreme Court (in Council) 452/2000, NoV 48/2000, pp. 1032 et seq. (1033 II): acceptance of bank cheque issued by the highest bidder and adjudication of industrial unit of 3 bn. drachmas to the sole bidder for 166.000.000 drachmas.

⁴⁵ As such is understood not only procedural but also patrimonial harm; see Supreme Court 268/2004, EllDni 46/2005, p. 433, with further references; additionally also Supreme Court (in Council) 452/2000, NoV 248/2000, pp. 1032 et seq. (1034 I).

⁴⁶ This term was constituted by case-law see *J. Brinias*, *Compulsory Execution V*² (Sakkoulas, Athens 1982), § 646 II pp. 2123/2124 (in Greek); One-member District Court of Athens 5619/1992, EllDni 34/1993, p. 660; One-member District Court of Athens 4618/1993, D 25/1994, pp. 752 et seq. (757) and suggests the "hindrance of bidders and the obstruction of free competition pursued and often achieved by malicious, insidious

attendance of potential bidders. Therefore, according to the case-law of the Greek Supreme Court, the obstruction of free competition through the notary public's conduct is not sufficient to render the auction and the adjudication null; the malicious cooperation of the notary public with the successful bidder is also required. For example, even though the notary public "stated to the highest bidders that she would henceforth not accept any new bids that have only a slight difference from the previous ones, but only bids that are considerably increased, with the effect that the existing bidders were hindered from the continuation of the procedure"⁴⁷, the Greek Supreme Court accepted –despite the obvious obstruction of free competition through deterrence of potential highest bidders– that the auction was not defective, as the opposing debtor did not invoke before the court "in the brief of opposition malicious acts by the clerk of the auction"⁴⁸. Similarly, the Supreme Court demanded a mention "in the brief of opposition of the exact malicious act of the said notary public, serving her own interest or the interest of another person participating in the bidding, thus obstructing the participation of the opposing debtor in the bidding"⁴⁹, in order to determine whether the false information given over the phone by the notary public affected the validity of the auction.

As it is aptly noted, the requirement by case-law of concurrence not only of more requisites than those required for the specification of the vague legal notion of "contrast to bonos mores" (or to good faith), but also of invocation and evidence of fact or inner state, which are by nature difficult –if not impossible– to prove, results into the validation of biddings achieved under circumstances that are disapproved by law⁵⁰. The reasonable fear of annulment of auctions without conclusive facts is certainly not overseen, with regard to facts that specify the vague legal notion of bonos mores (or of good faith). This risk is however neutralized by the court stating the impossibility to form its own view. Proving critical facts is one thing; excessive exaggeration in data (facts or inner state) required each time to specify the crucial vague legal notion (good faith or bonos mores) is another⁵¹. Using the criterion of "obvious transgression"

and misleading means" see One-member District Court of Athens 5619/1992, *supra*; One-member District Court of Athens 4618/1993, *supra*.

⁴⁷ Supreme Court 1128/1992, EllDni 35/1994, pp. 394/395 = EEN 60/1993, pp. 738 et seq. (739 I).

⁴⁸ Supreme Court 1128/1992, EllDni 35/1994, pp. 394 et seq. (395 I up) = EEN 60/1993, pp. 738 et seq. (739 I).

⁴⁹ Supreme Court 364/1997, NoV 46/1998, pp. 1416 et seq. (1417 I), with commentary by *F. Doris*.

⁵⁰ See *C. Beys*, Notes under Supreme Court 1454/1998, D 30/1999, p. 348.

⁵¹ *C. Beys*, Notes under Supreme Court 1454/1998, D 30/1999, pp. 348 et seq. (349); see similarly *F. Doris*, Notes under Supreme Court 364/1997, NoV 46/1998, pp. 1417 et seq. (1418/1419), regarding the requirement of the element of malice.

of the limits imposed by good faith would be useful and compatible with the regulation of article 116 CCP; this criterion is also well-suited in the exercise of procedural rights or options; besides, it is a criterion used also by the makers of substantial law.⁵² Thus, the non-nomination of malice as an individual subjective requirement in the pronouncement of nullity would contribute more effectively to ensuring the aim of the auction. Obstruction of free competition by deterring potential bidders from participation in the bidding for any reason, i.e. even when there is no malice involved, may lead to the nullity of the auction⁵³.

Nullities in the auction procedure may arise also with regard to temporal selections of the notary public. In particular, art. 3(2) of law 1653/1986 abolished the statutory rule that designated Sunday to be the auction day for immovable property, following a long-standing tradition⁵⁴. The rationale of selecting the last day of the week was an effort to ensure the attendance of numerous bidders⁵⁵. However, the modern way of living, at least in big cities, seemed to overturn this logic⁵⁶, and thus resulting into auctions being held “always on Wednesdays from 12 noon to 2 in the afternoon” [article 998(2) in. f.]. Certainly the Supreme Court did not exclude the possibility of auctions being held on Wednesdays, even on bank holidays. In particular, the Supreme Court in judgement No. 183/1999 of the 1st Chamber

⁵² F. Doris, previous fn.; L. Pipsou, supra, fn. 34, Commemorative Volume Manoledakis (in Greek) III p. 949.

⁵³ J. Brinias, supra, fn. 46, § 646 VII p. 2133 et seq.; *id.*, Notes under Court of Appeal of Athens 543/1985, NoV 33/1985, pp. 1034/1035; F. Doris, supra, fn. 51; L. Pipsou, supra, fn. 34, Commemorative Volume Manoledakis (in Greek) III pp. 948/949; *id.*, Remarks under Court of Appeal of Thessaloniki 889/1987, Arm 42/1987, pp. 1054 et seq. (1062); I. Iliakopoulos, Notes under the opposing One-member District Court of Athens 6267/1984, D 18/1987, pp. 447 et seq. (450); compare also P. Yessiou-Faltsi, supra, fn. 22, § 59 IV p. 424/425; additionally also Court of Appeal of Thessaloniki 726/1995, EllDni 37/1996, pp. 185 et seq. (187 I); Court of Appeal of Athens 543/1985, NoV 33/1985, p. 1033; One-member District Court of Kavala 2245/2002, Arm 58/2004, pp. 1318 et seq. (1319 II).

⁵⁴ Minutes of Revision Board (Athens 1967) p. 609; J. Brinias, supra, fn. 11, § 315 p. 817 with fn. 20; opinion of Messolongi Prosecutor of First Instance 2/1975, EllDni 17/1976, pp. 62 et seq. (63 II). – It is true that law 1653/1986 had left by obvious oversight intact the provisions of articles 960 (2) 4th sent., 973 (1) and 999 (3) 2nd sent. CCP, in which Sunday was still mentioned. This legislative inconsistency was replaced by article 10 (10), (12) and (13) of law 2145/1993. In the meantime, theory and case-law [*P. Mazis*, Amendments to the law of enforcement through laws 1653/1986 and 1682/1987 (in Greek), NoV 35/1987, pp. 1155 et seq. (1156); Supreme Court 1446/1997, EllDni 39/1998, pp. 349 et seq., p. 350 I] proceeded with corrective (logical) interpretation and were of the opinion that in the above provisions Wednesday was meant instead of Sunday.

⁵⁵ P. Yessiou-Faltsi, supra, fn. 22, § 59 IV p. 414; opinion of Messolongi Prosecutor of First Instance 2/1975, EllDni 17/1976, pp. 62 et seq. (63 II).

⁵⁶ J. Brinias, supra, fn. 11, § 315 p. 817 fn. 20; P. Yessiou-Faltsi, supra, fn. 22, § 59 IV p. 414.

ruled: “the fact that an auction was conducted on the day of the funeral of the ex-Prime Minister (Andreas Papandreou) in the Rozena Community Offices in the Prefecture of Korinthia, while the funeral was taking place in Athens, does not by itself render the auction null and void, given the fact that there is no provision stipulating that auctions are not to be held on days that for some reasons are bank holidays”⁵⁷.

While the day of conducting auctions (now on Wednesdays) is imposed by law under penalty of nullity (“always”), irrespective of the harm caused⁵⁸, the inexact observance of the time period from 12 noon to 2 in the afternoon is not considered to bring about nullity without the element of harm⁵⁹. The same solution (the concurrence of harm) is preferred also in case of late commencement of auctions of immovable property⁶⁰ or in

⁵⁷ Supreme Court 183/1999, EllDni 40/1999, p. 1051, noting that “it is well known that until the year 1986 ... auctions were conducted always on Sundays, which is a day of rest, without any hindrance caused to interested bidders”. –In contrast to that, about the impossibility of holding an auction on election Sunday see opinion of Mesolongi Prosecutor of First Instance 2/1975, EllDni 17/1976, pp. 62 et seq. (63 II); under the regime applicable before the entry into force of law 1653/1986 (auctions on Wednesdays).

⁵⁸ J. Brinias, *supra*, fn. 11, § 315 p. 817; J. Brinias, P. Mazis, “Compulsory auctions according to the provisions of the Code for the Collection of Public Revenues of legislative decree 17.7/13.8.1923 “about special provisions on public limited companies”. Application or not to those provisions of the amendments to the CCP that were enforced by article 3 (1–7) of law 1653/1986, opinion, NoV 35/1987, p. 707; P. Mazis, *supra*, fn. 54, NoV 35/1987, pp. 1155/1156; P. Yessiou-Faltsi, *supra*, fn. 22, § 59 IV p. 414; opinion of Messolongi Prosecutor of First Instance 2/1975, EllDni 17/1976, pp. 62 et seq. (63 II); J. Hamilothoris, C. Kloukinas, T. Kloukinas, *supra*, fn. 19, no. 52 p. 33; Supreme Court 183/1999, EllDni 40/1999, p. 1051; but of the opposite position Supreme Court 1460/1995, EllDni 38/1997, p. 1548, according to which an auction may be declared null only with the concurrence of harm, which can not be rectified in any other way.

⁵⁹ Supreme Court 53/2004, D 33/2004, pp. 968 et seq. (970), with remarks C. Beys; Supreme Court 347/1995, D 24/1995, pp. 765 et seq. (770) = EllDni 37/1996, pp. 1333 et seq. (1337 I); Supreme Court 1460/1995, EllDni 38/1997, p. 1548; Court of Appeal of Athens 307/2003, D 32/2003, pp. 473 et seq. (477); Court of Appeal of Athens 1142/1995, D 25/1996, p. 331; Court of Appeal of Athens 1391/1997, EllDni 40/1999, pp. 174 et seq. (175 II) = NoV 46/1998, pp. 352 et seq. (354 I); Court of Appeal of Athens 2393/2002, EllDni 43/2002, pp. 1462 et seq. (1463 I); P. Yessiou-Faltsi, *supra*, fn. 22, § 59 IV p. 414; K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), *Code of Civil Procedure II*, Sakkoulas, Athens-Thessaloniki 2000, art. 998 no. 4 (in Greek); J. Hamilothoris, C. Kloukinas, T. Kloukinas, *supra*, fn. 19, no. 52 p. 34. Nevertheless, C. Beys supports in “Single auctioning of more immovables that were seized in the same attachment report”, D 26/1995, pp. 747 et seq. (761), the opinion that even if the incurrance of harm is fully proved, the grounds of opposition are unfounded in law, because harm can be restituted by an action for mistrial (art. 73 of Explanatory Report of the Code of Civil Procedure) against the clerk of the auction.

⁶⁰ K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), *supra*, fn. 59, art. 998 no. 4; Supreme Court 347/1995, D 26/1995, pp. 765 et seq. (770) = EllDni 37/1996, pp. 1333 et seq. (1337 I); Court of Appeal Athens 1142/1995, D 27/1996, p. 331; Court of Appeal Athens 307/2003, D 35/2004, pp. 474 et seq. (477).

case of interruption and resumption of the auction during the aforementioned period of time for the auction⁶¹. As a rule, harm will amount to non-achievement of higher auction proceeds; therefore, the brief of opposition should name all persons wishing to but not being able to make a bid, by reason of a temporally defective procedure⁶². The same should be accepted under the new regulation of law 3714/2008, as the respective timeframe of 12–2 p.m. was moved to 4–5 p.m., pursuant to article 3(2) of the above law, which applies the new wording of article 959 (2) CCP (auction of movables) also to the auction of immovable property [art. 998(2) following its amendment by law 3714/2008].

Finally, the adjudication is effected by the lapse of a reasonable period of time since the last of the three calls for bidding and the cease of bids [arts. 1003 (1) and 965 (1) (2) CCP], since there is no temporal limitation under the CCP, in contrast to the previous law, where it was stipulated that adjudication was effected “to the highest bidder only three minutes after the last offer, following a signal given by a scepter or a bell” (art. 974 CP/1834). The intervening time between consecutive calls and the waiting time between third call and adjudication is not set out by law, since the last rests upon the sober judgement of the auction clerk. The latter ought to determine the relevant time periods, based on the criterion of achieving the highest sale proceeds⁶³ to the benefit of the lenders and the debtor⁶⁴. Nullity due to violation of the above rules is not immi-

⁶¹ One-member District Court of Athens 4618/1993, D 25/1994, pp. 753 et seq. (756), with concurring remarks by *N. Katiforis*, p. 757 et seq. (759), as it is noted in the judgement: “the uninterrupted conduct of the auction and the public announcement by the auctioneer or his employee of the interruption or resumption of auction (in the event of such interruption) is not foreseen under penalty of nullity in the provision of article 998(2) Civil Procedure, which refers to the time and place of conduct of auctions of immovable property, or in any other provision”; in the same direction already One-member District Court of Syros 131/1982, EllDni 23/1982, pp. 249 et seq. (250).

⁶² Supreme Court 53/2004, D 35/2004, pp. 968 et seq. (970), with critical remarks *C. Beys*, id. p. 970 et seq. (972); Court of Appeal of Thessaloniki 726/1995, EllDni 37/1996, pp. 184 et seq. (187 I); Court of Appeal of Pireaus 597/1979, EllDni 23/1982, p. 175; *K. Kerameus*, *D. Kondylis*, *N. Nikas* (G.-Nikolopoulos), *supra*, fn. 59, art. 998 no. 5; *J. Hamilothoris*, *C. Kloukinas*, *T. Kloukinas*, *supra*, fn. 19, no. 53 p. 34.

⁶³ *J. Brinias*, *supra*, fn. 11, § 347 p. 886/887, aptly noting that the periods of time need not be equal in duration, but it results from their purpose that between each call for bidding and from the time between the last bid until the adjudication such time should intervene, so that a new bid may be submitted to the clerk of the auction and generally that competition is facilitated and adjudication is not coerced; see also additionally *F. Mitsopoulos*, “Issues of the preliminary stages of auction and adjudication”, *D* 13/1982, pp. 305 et seq. (312); *K. Kerameus*, *D. Kondylis*, *N. Nikas* (G.-Nikolopoulos), *supra*, fn. 59, art. 965 no. 7.

⁶⁴ Court of Appeal of Athens 8512/1985, EEN 53/1986, pp. 64 et seq. (65 I) = *NoV* 34/1986, pp. 235 et seq. (236 II) = *D* 17/1986, pp. 762 et seq. (763); Court of Appeal of Thessaloniki 4095/1990, *Arm* 45/1991, pp. 801 et seq. (802 I); Court of Appeal of Pi-

nent upon penalty of nullity, but is contingent upon the existence of harm incurred to the opposing debtor⁶⁵. The Supreme Court has overturned a decision of the Larissa Court of Appeals, because it did not annul an auction in which “there were no three calls to the public for a higher bid before the adjudication, but there were merely hand gestures by the auctioneer, indicating the adjudication, i.e. actions that do not correspond to the factual prerequisites of article 965(2) CCP”⁶⁶. It is nevertheless self-evident that the auction procedure continues after 2 p.m. until the time of adjudication, as long as there is a new bid within reasonable time from the last call for a higher bid⁶⁷. In fact, the Greek Supreme Court has ruled that, if the auction continues after 2 in the afternoon with a sole offer (that however takes place after that time⁶⁸) or with a new bidder, who appears after 2 p.m.⁶⁹, the auction may only be null and void only when it is

reaus 229/1990, EllDni 35/1994, pp. 163 et seq. (164 I); Court of Appeal of Athens 10219/1989, EllDni 33/1992, pp. 596 et seq. (599).

⁶⁵ See indicatively K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), *supra*, fn. 59, art. 965 no. 7; Supreme Court 147/1994, EEN 62/1995, pp. 70 et seq. (71 I); Court of Appeal of Athens 8512/1985, EEN 53/1986, pp. 64 et seq. (65 I) = NoV 34/1986, pp. 235 et seq. (236 II) = D 17/1986, pp. 762 et seq. (763); Court of Appeal of Pireaus 229/1990, EllDni 35/1994, pp. 163 et seq. (164); Court of Appeal of Athens 10219/1989, EllDni 33/1992, pp. 596 et seq. (599 II).—Besides, under the previous law in force, where adjudication took place by the time of completion of exactly three minutes after the last bid (art. 974 CP), the Supreme Court had ruled that “there is no nullity if a short period of time (8’) follows instead of three minutes, as in that way there is no violation of the provisions that refer to the time of the auction”: Supreme Court 6/1967, NoV 15/1967, p. 635; the court of first instance had ruled differently in the same case, which accepted the nullity of the auction regardless of harm; *idem* President of District Court of Athens 4356/1965, NoV 13/1965, pp. 192 et seq. (193 I), stressing that “[the] acceptance of the opposite opinion ... would lead to abnormalities in the application of articles 906 and 979 Civ.Proc., for example by which it is stipulated that until adjudication the debtor is entitled to purchase the immovable property that is being auctioned”.

⁶⁶ Supreme Court 147/1994, EEN 62/1995, pp. 70 et seq. (71 I).

⁶⁷ Supreme Court 1196/1993, EllDni 35/1995, p. 345; K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), *supra*, fn. 59, art. 998 no. 5; similarly before the reform of law 1653/1986 and Supreme Court 545/1971, NoV 19/1971, pp. 1417 et seq. (1418); Court of Appeal of Pireaus 597/1979, EllDni 23/1982, p. 175: “[c]onsequently, a statement of the notary public that after 12 o’ clock noon [corresponding to 2 pm nowadays] he/ she shall not accept any new offers but bidding will be limited only between those persons who submitted their bids until 12 o’ clock noon, is unlawful, if since that time interested parties were hindered in participating in the bidding, the auction should be annulled, if there was no intent on behalf of the notary public, as long as through this unlawful statement free competition and the achievement of higher sale proceeds were hindered”.

⁶⁸ Supreme Court 1460/1995, EllDni 38/1997, p. 1548 (: only bid by the petitioning creditor, which was submitted at 14:03, while adjudication was effected at 14:08).

⁶⁹ Supreme Court 1196/1993, EllDni 36/1995, p. 345: “during the period of time that intervenes between 2 pm and the adjudication, a new bidder is entitled to appear and participate in the bidding for the first time, after depositing the guarantee set by the clerk

proved that procedural harm was incurred⁷⁰. There is no differentiation of the above under the new regulation through law 3714/2008, as, in the event of two bids, the adjudication is effected to the bidder offering the highest price, following a triple call for higher oral bids [art. 998(2), as amended by law 3714/2008, in conjunction with article 965 (2) sent. 8, as it applies after the adoption of law 3714/2008].

Nevertheless, it should be stressed that the above defects ought to be included in the auction report drafted by the notary public, as, according to art. 438 CCP, it constitutes full and conclusive evidence of everything certified in it towards all parties, as a public document; counterevidence is only allowed by challenging the validity of the document for falsification⁷¹.

3. EVALUATION OF THE AUCTIONS' ASSIGNMENT CONDUCT TO GREEK NOTARIES. PARAMETERS OF IN STAGES ENFORCEMENT ACTS CHALLENGE AND THE ELEMENT OF HARM

According to Greek law, notaries public are unsalaried public functionaries [art.1(1) of the Notaries' Code]⁷², an ancillary instrument in the award of justice, with two main duties: on the one hand, the drafting and keeping of notarial deeds [art.1(1) of the Code of Notaries] and on the other hand, the performance of enforcement acts, mainly of auctions [arts. 959 (1) and 998 (1) CCP on movable and immovable property

of the auction"; Court of Appeal of Athens 2393/2002, EllDni 43/2002, pp. 1462 et seq. (1463 I).

⁷⁰ Supreme Court 695/1983, VN (: Vasiki Nomologia; Supreme Court's decisions) complementary I 376; Court of Appeal of Thessaloniki 726/1995, EllDni 37/1996, pp. 184 et seq. (187 I); K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), *supra*, fn. 59, art. 998 no. 5.

⁷¹ Of the rich case-law see indicatively Supreme Court 1394/1980, NoV 29/1981, p. 689; Court of Appeal of Athens 1391/1997, EllDni 40/1999, pp. 174 et seq. (175 II); Court of Appeal of Athens 499/1997, EllDni 38/1997, p. 1627; Court of Appeal of Athens 1142/1995, D 27/1996, pp. 331 et seq. (333); Court of Appeal of Thessaloniki 726/1995, EllDni 37/1996, pp. 184 et seq. (186 II); Court of Appeal of Athens 229/1990, EllDni 35/1994, p. 163; Court of Appeal of Athens 5795/1982, Arm 37/1983, pp. 791 et seq. (792/793).

⁷² The previous Code of Notaries (law 670/1977; art. 1) concurs. Under the regime of legislative decree 1333/1973 he was named as a "judicial functionary", while during the validity of the Organisation of Judicial Councils of 1835 a "civil servant". – A consequence of notaries public named "judicial functionaries" (and not civil servants) is that they are not hierarchically dependent, but are only subject to inspection by the locally competent prosecutor of first instance, according to art. 41 of the Code of Notaries; see *N. Nikas*, *Civil Procedure I* (Sakkoulas, Athens-Thessaloniki 2003) § 6 IV p. 70 (in Greek).

respectively]⁷³, as well as the drafting of classification table, by which the insufficient sale proceeds are distributed according to specific legal rules (arts. 974–978 CCP)⁷⁴.

The fact that the actions of notaries public as clerks of the auction are subject to judicial control via the remedy of opposition to the auction (933 or 979 CCP for opposition to the table of classification) does not negate the correctness of the choice made by the Greek legislator to entrust notaries with the conduct of auctions (compulsory or voluntary; for the latter, see art. 1021 sent. 3 CCP) of immovable (and movable) property. As *Loukas Yidopoulos* characteristically underlined, under the previous law “the drafter of our code of procedure did not copy the French provisions on enforcement, but in certain parts it deviated from it, for reasons of simplification of the enforcement procedure. Nor did he omit the futile involvement of the court in the conduct of the auction of immovable property, assigning this to the clerk of the auction, either a magistrate judge or a notary public”⁷⁵. However, the parameters of both the challenge of enforcement acts in stages and of the necessity of the element of harm appear to be crucial for the nullity of critical actions. In particular:

The challenge of enforcement acts in stages was enacted in the provision of article 934 CCP, the criterion for differentiated time frames being the act challenged by the remedy of opposition each time⁷⁶. The rationale for the enactment of this provision –in fact the relevant regulation was the result of lengthy deliberations in the Revision Committee of

⁷³ See also opinion of the Supreme Court Prosecutor 18/1972, in A. Thanopoulos, *The Code of Notaries*, Athens 1973, p. 44 fn. 8 (in Greek).

⁷⁴ K. Kerameus, *Law of Civil Procedure I*, Athens 1983², p. 118 (in Greek); J. Brinias, *supra*, fn. 26, § 131a p. 333 fn. 16.

⁷⁵ L. Yidopoulos, *Law of compulsory enforcement*, Vol. A, Athens 1933, § 5 p. 8/9 (in Greek).

⁷⁶ J. Brinias, *supra*, fn. 26, § 164 p. 457 et seq.; K. Kerameus, “Opposition against an auction that took place on the last day of voluntary suspension” *Arm.* 42/1988, p. 630; K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), *supra*, fn. 59, art. 934 no. 1; C. Beys, *Civil Procedure*, Vol. 22, Sakkoulas, Athens 2004, art. 934 no. 1; N. Nikolopoulos, *Compulsory enforcement*, Sakkoulas, Athens 2002, p. 122 (in Greek); V. Vathrakoulis, *Code of Civil Procedure. Interpretative – jurisprudential analysis* vol. V, Athens 1997, art. 934 no. 55, with references to case-law, in which additionally Supreme Court 340/2006, D 37/2006, p. 1310; Supreme Court 916/2004, EEN 72/2005, p. 30 = EllDni 47/2006, p. 1645; Supreme Court 279/2004, NoV 53/2005, p. 277; Supreme Court 69/2001, EllDni 42/2001, p. 914; Supreme Court (plenary assembly) 108/1981, NoV 29/1981, p. 1275, the latter points out that: “by the general wording of the above provision but also due to the aim hereby pursued, establishing the challenge of the compulsory enforcement in stages in order to avoid the absurdity of its challenge after a long time due to nullities that could be challenged much earlier”; Court of Appeal of Athens 2755/1998, EllDni 40/1999, p. 1125 (no. 31); Court of Appeal of Thessaloniki 1606/1998, Arm 52/1998, p. 978; Court of Appeal of Athens 459/1993, NoV 42/1994, pp. 206 et seq. (214 I).

the CCP⁷⁷– stems from need for a speedy realisation of the law-enforcement function of the law⁷⁸. Therefore, in article 934 (1) case c CCP it is provided that the grounds of opposition that are related to the validity of the final act of enforcement, i.e. the drafting of the auction and adjudication reports, are subject to the third stage of time limits [art. 934 (2) CCP]. Violations that refer to the validity of the auction of immovable property and are related to the person of the notary public justify the remedy of opposition against the auction, while the timely character of the grounds of opposition that is related to the person performing the main act of the auction is self-evidently governed by the provision of article 934 (1) sent. c CCP⁷⁹. In other words, the validity of the auction will be decided swiftly, something that does not prevent potential successful bidders from bidding.

Furthermore, the validity of the conducted auction and of the adjudication act, as presented above, is normally contingent in the cases at hand upon the element of harm (procedural or patrimonial). The latter will consist of the non-achievement of a higher proceed of sale; for this reason, all persons that wished to, but could not submit a bid due to a misconduct of the notary public of the procedure, should be specified by name in the brief of opposition. It has been proved by case-law that the necessity of concurrence of this element limits drastically the possibility of annulment of the auction and of the adjudication.

Besides, the comparison of the grounds of opposition generally with notary public-related grounds of nullity proves that the latter are limited and, in the majority of cases, they can be attributed to the difficulty in interpretation of legal provisions. Similarly, it has been proved that during the drafting of the classification table by the notary public, the latter –in most cases– acts correctly, whereas the opposition against the classification table is mostly to be attributed to the great difficulty in the interpretation of applicable provisions.

4. ADDENDUM

Enforcement is neither a functional extension of principal litigation, nor a method of judicial self-confirmation, but a balanced mixture of violence, threat and persuasion, designed to transform the executory title into reality. Legal comparative research has proved that, even such a tech-

⁷⁷ See Minutes of Revision Board, *supra*, fn. 54, pp. 424–427.

⁷⁸ G. Mitsopoulos, *Civil Procedure*, Vol. I, Athens 1972, pp. 49 and 55 (in Greek); Court of Appeal of Athens 6743/1985, D 15/1986, p. 337.

⁷⁹ Court of Appeal of Athens 9955/1998, ArchN 51/2000, pp. 640 et seq. (648 I); J. Hamilothoris, C. Kloukinas, T. Kloukinas, *supra*, fn. 19, no. 40 p. 29.

nical field like enforcement of civil claims seems to be open to productive comparison⁸⁰. Especially when evaluated from the viewpoint of challenge of enforcement acts in stages and of the necessity of the element of harm, the choice of the Greek legislator to assign the conduct of auctions to notaries was successful. Besides, the almost bicentennial trial of Greek notaries in their role as clerks of auction has proved that the relevant choice was acceptable by Greek society as well.

⁸⁰ *K. Kerameus*, *supra*, fn. 1, Arm 50/1996, p. 14.