

CONCEPTUAL DISTINCTIONS REGARDING THE NOTION OF ENFORCEMENT

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Abstract: *This article analyses some theoretical and practical issues concerning the notion of execution, in the context of the modifications on the Civil Procedure Code and the implementation of European regulations on enforceable titles. It can be noticed a certain autonomy of the execution phase and a crystallisation of a specific discipline, with particular rules.*

Keywords: *enforcement, litigation, enforcement order, autonomy, creditor, debtor*

1. THE AUTONOMY OF THE PROCEDURAL ACTIVITY OF ENFORCEMENT

According to the classical conception on the civil trial, the execution (*executio*) is considered to be the second phase of it, following the judgment phase (*cognitio*). This concept, however, is not valid in every situation: in certain cases, the trial stage phase is not to be followed by enforcement (for example, when the judgement can't be enforced, either because of the solution, either because it is not enforceable) (Durac, 2014); the reverse situation can also be encountered, when the execution phase is not preceded by a trial (when the enforcement title is not a judgement).

The new Civil Procedure Code governs the enforcement as a phase of the civil trial, giving it this way a quasi-independent character toward the judgment phase more significant than in the previous regulations. This is proved also by transitional provisions and the implementation ones included in Law No.76/2012. According to these, the provisions of the new Civil Procedure Code apply exclusively to enforcements that started after its entry into force. In this respect, it must be noticed the moment of investing the enforcement body. More exactly, if the application for enforcement is filed after the date of entry into force of the new Civil Procedure Code, the entire enforcement procedure, including the enforcement incidents, will be regulated by its provisions. On the other hand, if the enforcement application has been entered prior to the entry into force of the new Code, the whole enforcement procedure, starting with the approval of enforcement and including the incidents, shall be governed by the provisions of the

previous Code. It is so to be noticed a separation between the two phases of civil suit: even if the trial stage has been governed by the previous Civil Procedure Code, the enforcement will be subject to the regulations of the new Code, in so far as the application of enforcement measures has been introduced after the date of entry into force of this new regulation. (Oprina, Gârbuleț, 2013)

It can be noticed that this legislative perspective can be highlighted by the terminology used by art.3 of Law no.76/2012. In paragraph 1 of this article shall be used the term „trial” to designate the trial stage in front of a judge or court, and the term „enforcement” to designate the phase of enforcement. The same terminology is to be found in Articles 24 and 25 of Civil Procedure Code, referring to the time application of the procedure law: concerning the applicable law in new trials, art. 24 provides that the provisions of the new law of procedure applies only to trials and enforcements that begun after its entry into force; regarding the law applicable in ongoing trials, Article 25 (1) provides that trials in the process of judgements and enforcements started under previous law shall remain subject to that legislation. (Boroi *et al.*, 2013)

The wording is objectionable because it can lead to the conclusion that the enforcement is not part of the civil trial. We don't agree with this interpretation. It is important to notice that the concept of trial in such a context can be given two meanings: a broad one, including both trial in front of a court and enforcement, and a restricted one, relating exclusively the trial in front of the court. The wording of Article 3 (1) Law no 76/2012 and the transitional and implementation provisions which follows it, as well as Article 24 and 25 of Civil Procedure Code, highlights a certain autonomy of the enforcement towards the judgement phase of the trial, underlined especially by the applicable law, that can be different for the two phases. More accurate, if the application has been filed prior to the date of entry into force of the new Civil Procedure Code, the judgement will be governed by the provisions of the previous Code, but if the enforcement application is lodged with the enforcement body after the entry into force of the new Code, the phase of enforcement will be governed by it, including the incidents and contest of enforcement.

In the light of these considerations, we think that a definition of the enforcement phase must relate to it as an activity and not necessarily a phase of civil trial. Without doubt, the enforcement is a trial related activity, to which general rules regarding procedural documents, nullities, terms and conditions are applicable. However, considering the way the legislator is using the term „trial”, as it was shown above, the enforcement shall be particularized as a distinct procedural activity, with implications in both theory and practice of law. As well the enforcement phase has its autonomy towards the trial in front of the court; the discipline of civil enforcement law is going thru a process of individualization. We can think about a discipline separated from Civil Procedure, or at least a branch of it, with its own rules and principles, some similar to those applicable to Civil Procedure Law, some specific.

Having in mind the above mentioned considerations, the enforcement can be defined as being a procedural activity related to the trial, carried out by the enforcement bodies in accordance with the procedures laid down by law in order to accomplish the obligations stipulated by the enforcement order. The definition refers to the main

coordinates of the enforcement activity: the procedural character, the role of the enforcement body, the grounds and purpose of the enforcement, its legality.

2. LEGAL CHARACTERISTICS OF ENFORCEMENT PROCEDURE. THE CONNECTIONS WITH SUBSTANTIAL LAW

The enforcement, as a procedural activity meant to lead to the accomplishment of the obligations laid down in the title, has a subsidiary character to the voluntary fulfilment of those obligations. Even if the safety of the civil circuit would require that the obligations laid down in the enforcement title (judgement or another order) must be achieved in all situations, there may be cases in which this does not happen, either because the statute of limitations expires, either because the parties, namely the creditor and debtor, decide to resolve their judicial conflict in another manner, by negotiation or mediation, for instance. These situations, which are covered by the principle of availability, do not alter the mandatory nature of the enforcement title and the imperative that it must be carried out voluntarily. As in the case of the substantial legal report, the enforcement report requires, in the first place, the debtor's action: the obligation can be fulfilled without prior notice from the creditor. The enforcement title, as a basis of the enforcement procedure, can be respected and accomplished by the debtor at any time. More precisely, the obligation contained in the title does not need the creditor's confirmation; it is not possible for the creditor to choose whether or not the payment is received. If the debtor desires, he can fulfil his obligation and the creditor cannot refuse or postpone the voluntary achievement. The voluntary execution, by payment, constitutes the rule, in accordance art.662 (1) Civil Procedure Code. This provision gives procedural meaning to the substantive discipline laid down in Article 1469 (1) Civil Code, according to which „the obligation is fulfilled thru payment when it is voluntary accomplished”.

Speaking from a practical point of view, the interest for studying the enforcement procedure does not concern these situations of voluntary fulfilment the obligations, which are mainly subject to civil law. The enforcement law regulates those situations in which the creditor is forced to apply for enforcement to establish or, as the case may be, to restore the disrupted legal order, by the non-fulfilment of the obligation by the debtor, or the violation of the creditors' rights. The owner of the violated right must act, must apply for enforcement if the report does not work or fail due to the debtors passivity or improper fulfilment of the obligation. From this point of view, the enforcement is a part of the civil action manifestation, as defined in Art. 29 Civil Procedure Code – all procedural means lay down by law for the protection of the claimed right or for the defence (Durac, 2014).

The notion of enforcement is not specific to the procedural law. It is also used in the material law, regarding obligations, when it is referred to the fulfilment of obligations, either in nature, or by equivalent, being, along with the payment, a way of fulfilment of the obligation. Emphasis must be placed in a different manner: the rules provided by Article 1516 – 1548 Civil Code are substantial, referring to a metamorphosis of the legal report, determined by the non-fulfilment of the obligation. If the payment is not made, the creditor has, according to art.1516 (2) Civil Code, three alternatives: to

apply for enforcement; if the obligation is contractual, to obtain the resolution of the contract or, as the case may be, a reduction of its own obligation; to use, when appropriate, any other means provided by law, to achieve its rights. The creditor shall be entitled to the whole, exact and on time fulfilment of the obligation (Article 1516 (1) Civil Code), meaning that the right is automatically and legally doubly shielded: the creditor is the owner of the substantial right itself, but also of the right to enforce the obligation on the debtor because, according to Articles 1527 and 1530 Civil Code, the creditor may ask for the obligation as it is or for the equivalent. (Pop *et al.*, 2012)

As mentioned above, by analysing the rules provided by the Civil Code and Civil Procedure Code with regard to enforcement, emphasis must be placed in a different way: if the provisions of the Civil Code regulate the creditors ways to obtain an enforceable title, the ones contained in the Civil Procedure Code refer to the enforcement stage of the trial, after the creditor already obtained an enforcement order. If the title is an order other than a judgement, the creditor can directly apply for enforcement, according with the provisions of the Civil Procedure Code, no longer needed to prove its claim in front of the court. In this case, the creditor has, however, to ask for a declaration of enforcement, according to Article 640¹ Civil Procedure Code.

Within the meaning of the civil procedure law, the enforcement is, as is has been stated by the previous definition, a procedural activity based on the existence of an enforcement title, more exactly of an obligation contained in the enforcement title that must be carried out by the debtor. Therefore, the right is not only claimed (as in the definition of the civil action provided by Article 29 Civil Procedure Code), but confirmed by a judgement which has *res judicata* power. If the enforcement title is not a judgement, but another order, the debtor can, however, invoke substantial defence by contest against enforcement, if the law does not provide for a special procedural path for this purpose (Article 712 (2) Civil Procedure Code). Of course, there are similarities towards the functioning of the legal report before and after the enforcement title is obtained. The rule is, as mentioned above, the voluntary fulfilment of the obligation, by payment. To this end, the creditor must send a prior notice to the debtor or apply to the court (Article 1522 (1) Civil Code). Also, the law provides for situations when prior notice is not required (Article 1523 Civil Code).

As mentioned above, the enforcement can be started without prior notification, simply by applying to the enforcement officer (Article 622 (2) Civil Procedure Code). Even so, and as a general rule, the enforcement procedures can be enacted only after the debtor is served a notification, according to Article 666 and 667 Civil Procedure Code. The debtor can pay in the time stipulated by the notification and by doing so can obtain a reduction of the enforcement expenses (Article 669 (2) Civil Procedure Code). If the debtor does not pay before the enforcement is started, his payment cannot be however considered voluntary. We have to take into consideration as the starting point of the enforcement the application made by the creditor to a competent enforcement body. The creditor can do so as soon as the obligation is due or if the debtor has lost the right to pay in a certain time (Article 662 (4) Civil Procedure Code). In order to legally start the enforcement procedure, the application must comply with the legal requirement of article 663 Civil Procedure Code. Also, the original title or a certified copy must be filed along

with the application. The rule provided by Article 622 (3) Civil Procedure Code, according to which, if the debtor does not voluntarily fulfil his obligation, it can be enforced by applying to a enforcement office, must not be read in the sense that the creditor has to award the debtor a due time before enforcing the title, other than the situations when the law or the court established such a time. By contrary, as mentioned above, the creditor can start the enforcement, more precisely can apply for enforcement to a competent body, as soon as the obligation prescribed by the title is due.

A difference is however to be made between different types of enforcement orders. The judgements can be carried out without any declaration of enforcement, but other orders must be declared enforceable, according to Article 640¹ Civil Procedure Code. A special and distinct category is represented by the European Enforcement Orders, according to Article 636 Civil Procedure Code. These orders, even if are not issued by a Romanian court or according to Romanian law can be enforced in Romania without any other prior formality, such as a declaration of enforcement. In other words, they are considered enforceable by law. It belongs to this category the titles certified as European Enforceable Orders in accordance with Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims, Regulation (EC) No 861/2007 establishing a European small claims procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure. (Crifo, 2009) In their case, the certification of the title as European Enforcement Order in the Member State of origin leads to the elimination of both the recognition procedure, as well as the declaration of enforceability, if they are to be enforced in Romania. As of January 10th 2015, along with the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the rule will be extended to all judgments given in a Member State, which shall be enforceable in the Member State concerned without any declaration of enforceability being required (Art. 39).

3. PRACTICAL IMPLICATIONS OF TIME WHEN THE OBLIGATION IS FULFILED. THE DETERMINATION OF DIFFERENT STAGES OF THE EXECUTION

It is possible for the debtor to pay after the creditor has already applied for enforcement, but before the enforcement was approved or before the debtor has been served a notification regarding the enforcement, according to Art.666 Civil Procedure Code. The payment made by the debtor is in this case a voluntary one or not? In order to answer this question, it is necessary to divide the enforcement into three stages, considering the subjective position of the debtor and the subsidiary character of the enforcement.

In the first stage, if the payment is made between the moment of the application for enforcement and the notification of the debtor, it can be considered voluntary. Even so, the debtor has to also pay the expenses made after the registration of the enforcement application (Article 669 (2) second phrase Civil Procedure Code).

The second stage is placed between the moment when the debtor is served the notification and the expiration of the due time given to him in order to fulfil his

obligation, depending on the type of enforcement procedure (in some case, such as third party debt order, prior notification serviced to the debtor is not required, according to Article 782 Civil Procedure Code; prior notification is also not required in the situations provided by Article 668 Civil Procedure Code). The fulfilment of the obligation in this stage can no longer be considered voluntary, but the debtor can obtain a reduction of the expenses, such as the fees of the enforcement office fee or the creditor's lawyer, in relation with their activity (Article 669 (2) third phrase).

In the third stage of the enforcement, the enforcement procedure is carried out and even of the debtor makes a payment; it is not a voluntary one. Therefore, in order to end the enforcement, the debtor must also pay the expenses made so far by the creditor within the enforcement procedure.

It is to be noticed a difference between the situation when the debtor pays after the application to a court is filed, if he was not served a notification to pay prior to that or such a notification is not required, and the situation when the debtor pays after the application for enforcement is launched. In the first scenario, because an enforcement order is not yet issued, the debtor can pay, in a reasonable time, calculated from the date the application was filed. In this case, the debtor will not pay judicial expenses, which will be supported by the creditor (Article 1522 Civil Code). More than this, the debtor is exonerated from the payment of expenses if he agrees with the claims made by the creditor and accepts the debt as far as the first hearing, except the situations when a notified has been served to the debtor before claims were brought into court or the law provides that such a notification is not required (Article 453 Civil Procedure Code).

After the commencement of the enforcement procedure, by virtue of the application made by the creditor to the enforcement body, the debtor can no longer be exonerated from the payment of expenses, but can only obtain a reduction. The enforcement title makes the right to be double protected by a significant procedural component: the right is confirmed, acknowledged and therefore must be realized, enforced. The fulfilment of the obligation by the debtor after the commencement of the enforcement is therefore not entirely a payment, within the meaning of Article 1459 (1) Civil Code, even if it's made before the service of the notice according to Article 666-667 Civil Procedure Code.

The enforcement activity is therefore, in all cases, triggered by the launch of the enforcement application with the competent body, even if the enforcement is approved after that. The beginning of the enforcement is not necessarily the same as the beginning of enforcement acts, the most important consequences of this distinction being the one regarding enforcement expenses. The enforcement will last until the achievement of the rights established by the title, as well as the payment of interest, penalties or other royalties given by the title or by law, as well as enforcement expenses (Article 622 (3) Civil Procedure Code).

As mentioned above, the enforcement does not require the service of a notification prior to launching the enforcement application, by opposition with the provisions of the substantial law, which requires such a notification, as a general rule. The legislator seems to establish an exception to this rule, in the case of to do obligations, such as the registration or withdrawal of a right, act or fact in a public registry, the release

of a certificate, handing over a document or other such obligations. In accordance with Article 622 (4) first sentence Civil Procedure Code, the enforcement of such obligations can be made by a simple request of the entitled person, on the basis of the enforcement title, without the need to apply to an enforcement officer, unless the law provides otherwise, and in cases of non-fulfilment by the debtor, the creditor may apply for enforcement measures.

The distinction made by the legislator is however artificial. In fact, the fulfilment of any obligation, regardless of its nature, can be obtained thru a simple request by the creditor and without the support of an enforcement officer, especially when the obligation is provided by an enforcement order. The creditor may chose, prior to applying to an enforcement body, to serve a notification of payment to the debtor, who can be interested in making the payment in order to avoid additional expenses. The creditor, however, can also apply directly for enforcement, as long as his right has been confirmed by an enforcement order, even in case of obligations mentioned by Article 622 (4) Civil Procedure Code. The enforcement procedure of these obligations implies a time of 10 days for the debtor to achieve the obligation, starting from the service of the notice via executor. For instance, in cases in which the fulfilment of the obligation contained in the title is in relation with the registration of a right in the real estate registry, against the person registered as owner, the creditor is entitled to request the registration directly to the real estate registry office, or via an enforcement officer, according to article 908 (1) Civil procedure Code. It is therefore the creditor's choice to apply to the real estate registry office before enforcing the title or to apply to an enforcement body that will follow the enforcement procedure prescribed by Article 902 and the following Civil Procedure Code. Same rules apply in cases regarding the registration of rights in other public registers (Article 908 (3) Civil Procedure Code). Therefore, there is no case in which the creditor has to service a notification to the debtor for the fulfilment of the obligation laid down in the title, but the creditor can chose to do so. The enforcement order entitles the creditor to immediately and without delay, apply for enforcement.

4. CONCLUSIONS

The essential distinction between the concept of enforcement in a substantial meaning and a procedural one, is given by the existence of an enforcement title: the rules relating to enforcement in a substantial meaning, contained mainly in the Civil Code, apply to the creditor who is seeking to obtain an enforcement title; the ones regarding procedural enforcement, mainly contained in the Civil Procedure Code, apply to the creditor who already holds an enforcement title. Its existence empowers the right and involves its accomplishment. The enforcement activity has a procedural nature, the right is already recognized, confirmed and the creditors aim is no longer to prove it, but to attain it.

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