

# THE WRIT OF EXECUTION IN THE LIGHT OF THE NEW ROMANIAN CIVIL PROCEDURE CODE, THE OLD CODE AND INTERNATIONAL REGULATIONS

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## ABSTRACT:

*The civil trial has two major aspects: the judgment and the enforcement. Within the enforcement procedure, the only way the interested or injured parties can obtain the abolition of the illegal measures is the appeal against enforcement. One of the most important grounds of filing an appeal against enforcement is the lack of or the illegality of the writ of execution.*

*The purpose of the research is to identify the common legislative elements of the writ of execution in the new Romanian Civil Procedure Code, the old Code and international regulations, as well as the differences between them, to find legal lacunae, if there are any, as well as proposing solutions where the relevant legislation is not clear enough.*

*In our opinion, the new regulation comprises provisions clearly superior to the previous one, but it does not cover all the situations that may occur in practice.*

**KEYWORDS:** *writ of execution, decision, enforceable title, Regulation*

## 1. INTRODUCTION:

The civil trial has two major aspects: the judgment and the enforcement. The judgment is about establishing the parties' rights and obligations and the enforcement implies the actual fulfillment of the parties' rights stipulated in the decisions and other enforceable titles. The right to request the enforcement is part of the right to a fair hearing established by art. 6 par. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup>.

Within the enforcement procedure, the only way the interested or injured parties can obtain the abolition of the illegal measures is the appeal against enforcement.

One of the most important grounds of filing an appeal against enforcement is the lack of or the illegality of the writ of execution. We note that, following the enforcement request the authorization to effectively begin the enforcement is needed. This authorization procedure is called *writ of execution*.

Concerning this procedure, the 1865 Civil Procedure Code (the ancient code) and the New Civil Procedure Code (entered into force February, 15, 2013) contain different provisions.

The purpose of this research is to identify the common legislative elements of the two Codes, as well as the differences between them, to find legal lacunae, if there are any, as well as proposing solutions where the relevant legislation is not clear enough.

## 2. JURISDICTION AND SOLUTION OF THE REQUEST FOR A WRIT OF EXECUTION:

The ancient code stipulated that the request for a writ of execution is analyzed by court in a "non-contentious" (Lucaciuc, 2014: 177) procedure (according to art. 373<sup>1</sup> CPC, the bailiff had to, within the 5 days following the registration of the enforcement request, ask the court for a writ of execution, sending them a copy of the enforceable title), in opposition, the new civil procedure code gives this authority to the bailiff, the legislator giving them "jurisdictional authority" (Leş, 2015: 540) (thus, according to art. 666 NCPC, within 3 days following the registration of the enforcement request, the bailiff passes a writ of execution, without summoning the parties, and they will motivate their decision within 7 days since their decision). The provisions of the ancient code stipulated that the court passed the writ of execution, in closed session, without summoning the parties, within 7 days the registration of the request. The delays set by the new civil procedure code are short, with the purpose to rapidly fulfill the procedure. The non compliance of these delays by the bailiff is not sanctioned with the annulment nor the forfeiture, but it will be reason to appeal the enforcement (in the situation of the 3 day term for settling the request for a writ of execution), being equal to an "unjustified refusal to comply an enforcement act" (Leş, 2015: 540), or it may have as consequences disciplinary sanctions (if the motivation of the decision is not made within 7 days since its passing).

Unlike the ancient code, the new code also regulates the content of the writ of execution. According to the current provisions, the document should contain, besides the stipulations of art. 657 par. 1, the following: the enforceable title, the amount – when it is determined or determinable, with all the accessories for which the execution is authorized, when the execution of the debtor's assets has been authorized and the specific way of execution when it has been expressly asked for. In order to comply with their obligations, the bailiff will use all enforcement methods, simultaneously or successively. The writ also includes all enforceable titles that will be issued by the bailiff within this procedure and they will be effective throughout the country (Hurubă, 2011: 271).

The two civil procedure codes also present similarities as far as the overruling of the request for a writ of execution is concerned. Thus, there is an identity of reasons for overruling such a request in the following situations:

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<sup>1</sup> ECHR, decision of 19.03.1997 in Hornsby vs. Greece case, par.40

- *The solution of the enforcement request must be done by another bailiff than the one who received it;*
- *The formalities for rendering a title an enforceable one, if needed, have not been done;*
- *The debt is not certain, liquid and due;*
- *The title also has other provisions that cannot be carried out in this procedure;*
- *There are other impediments stipulated by law.*

The current civil procedure code has two more situations. Thus, according to art. 666 NCPC, the request for a writ of execution will be overruled if:

- *The debtor benefits from an execution immunity ;*
- *The decision or, if the case, the document, is not an enforceable title, according to law.*(New Romanian Civil Procedure Code, 2015: 167)

According to the provisions of the ancient code, the writ of execution could not make the object of an appeal, and the decision to overrule a request for a writ of execution could only be appealed by the creditor, within 5 days since its receipt.

The current civil procedure code stipulates that the writ of execution will be verified within the appeal against enforcement (any other ordinary or extraordinary way of appeal being excluded) and the decision to overrule a request for a writ of execution can only be appealed within 15 days since its receipt.

The writ of execution illegally passed can be appealed only using the appeal against enforcement procedure.

The jurisprudence under the ancient regulation saw problems appear, problems concerning the beginning of the execution if the writ had been issued only for a certain execution form. In this case, "it has been stated" (Tudurache, 2009: 196) that the bailiff could start the execution only for the way which had been decided upon in the writ of execution and not to use all execution forms. We agree with this opinion on the following grounds: if an all forms execution would begin the party disposition principle would be infringed (the creditor being the only one entitled to chose the execution forms); the effects of the writ concerning one execution form cannot expand to other execution forms. We believe that, on the contrary, an appeal against enforcement could have every chance to be admissible.

Art. XII of Law no. 138/2014 states that (1) every time a normative act stipulates that the court must issue the writ of execution for the courts' decisions' the latter will be enforced only after the competent bailiff issues the writ of execution. (2) Every time a normative act stipulates that the court must issue the writ of execution for enforceable titles other than courts' decisions, those will be enforced after the court's decision to render the title enforceable and after the bailiff's writ of execution, according to law. Art. XIII The stipulations concerning the enforceability of decisions, also arbitral and foreign decisions, remain applicable.

### **3. FOREIGN JUDGMENTS' WRIT OF EXECUTION:**

Unlike the ancient Civil procedure code, which had no provisions on foreign judgments enforcement, the current Civil procedure code expressly states upon this type of enforceable titles.

Thus, we find this kind of regulations at art. 1104 that stipulates the conditions (found in art. 1096) to be met for issuing a writ of execution (the judgment must be final under the law of the State where it was rendered; the court that ruled it must be competent to rule on that question, the existence of reciprocity in relation to the effects of foreign judgments between Romania and the State of the court that delivered the judgment), plus an additional condition - that judgment is enforceable. Reasons for rejecting a declaration of enforceability of the foreign judgment are similar to those for recognition and under art. 1097 NCPC:

- *The judgment is manifestly contrary to public policy Romanian private international law,*

- *The judgment has been rendered in a matter where people do not freely use their rights, has been obtained with the sole purpose of evading the applicable law according to Romanian private international law,*
- *The trial has been settled between the same parties by a judgment, even not final, of the Romanian courts or is being tried at the moment the foreign court receives the request,*
- *It is irreconcilable with an earlier judgment given abroad and likely to be recognized in Romania,*
- *Romanian courts had exclusive jurisdiction for proceedings,*
- *There has been a violation of the right to defense,*
- *The decision may be subject to appeal in the state where it was issued.* (New Romanian Civil Procedure Code, 2015: 280)

Unlike the writ of execution of Romanian enforceable titles, the foreign judgments' writ of executions will be pronounced by court, that will give their solution after summoning the parties.

According to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, a judgment given in a Member State shall be recognized in the other Member States without any special procedure being required. For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court. A judgment shall not be recognized: if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought; where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

As far as the writ of execution of a decision issued in any Member State is concerned, according to the EC Regulation 44/2001, the competent authority is the Courthouse.

According to art. 43 par. 1 and 2 of the above mentioned Regulation, any of the parties can appeal the writ of execution. The appeal will be tried, according to Annex III by the Court of Appeal. The question to be asked in this case is which is the judicial nature of the appeal stipulated by the Regulation? As long as the Annex III does not mention the name of the appeal (of the appeal mentioned in art. 43) and the internal legislation does not mention one either, we can only use the terminology of art. 43. Before the entry into force of the New civil procedure code, Government Emergency Ordinance no. 119/2006 set, in art. I<sup>2</sup>, the rules of applying the EC Regulation 44/2001. Art. 1 par. 2 stipulated that the judgment on writ of execution can only be subject to second appeals. This provision however has been repealed by Law no. 76/2012 title VI art. 63, without an express mention of the internal means of appeal according to art. 43 of EU Regulation no. 44/2001. In lack of such explicit mention within internal law, we can only make reference to the name indicated in the Regulation.

We believe that it is a sui generis, direct action, a special means of appeal.

Another problem left unsolved by the EC Regulation is the organization of the panel that is to decide upon the appeal against the writ of execution of the foreign judgment.

It is our opinion that it should be decided upon by a panel of two judges since we are talking about a means of appeal against a solution given by the first instance court and only in this way would the objectivity and control of the judgment analyzed be insured.

#### **4. CONCLUSIONS:**

In our opinion, the new regulation comprises provisions clearly superior to the previous one, but it does not cover all the situations that may occur in practice.

A positive and innovative aspect is that of giving authority to the bailiffs to decide upon the request for a writ of execution, which led to unburdening the courts. Also, establishing short delays for deciding upon the writ of execution is in favour of the creditor who will rapidly benefit from fulfilling their right.

All irregularities appearing during this procedure will be subject to appeals against enforcement.

Legal lacunae still remain concerning the foreign judgments' writ of execution procedure, and the legislator's intervention would be opportune in this respect. It is the only way the contradictory jurisprudence and appeals against enforcement will be avoided.

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