

CONSIDERATIONS REGARDING THE DECLARATION OF ENFORCEMENT

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Abstract: *This article analyses some theoretical and practical issues concerning the procedure of the declaration of enforcement according to the Romanian Civil procedure Code and Law no. 138/2014. Also, some considerations are made regarding the difference between this procedure and the procedure applicable to European Enforcement Orders, i.e. the certification regulated by Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.*

Keywords: *enforcement, declaration of enforcement, enforcement order, judgement, European Enforcement Order*

Acknowledgement: *This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.*

ENFORCEMENT ORDER SUBJECT TO THE PROCEDURE OF THE DECLARATION OF ENFORCEMENT. THE DIFFERENCE BETWEEN JUDGEMENT AND OTHER TITLES. THE EUROPEAN ENFORCEMENT ORDERS

With reference to the provisions of art.632-643 Civil Procedure Code, and from an exclusive formal perspective, enforceable orders can be divided into two broad categories: judgments and other documents or orders that the law gives enforceable character, the essential difference from a procedural point of view between them being that the first are not subject to declaration of enforcement, while the others are (art.641 Civil Procedure Code, respectively, in case of arbitral judgments, art.615 Civil Procedure Code). As a separate category, the notion of European Enforcement Orders is individualized, in their regard being unnecessary to perform any other prior formalities (art. 636 Civil Procedure Code).

The distinction between judgments and other documents to which the law grants this character arises from several legal texts: art.622 para.1 Civil Procedure Code, which states that the obligation established throughout a judgment or another enforceable order is executed willingly, art.626 Civil Procedure Code which provides that the state is obliged to ensure, through its agents, the promptly and effectively enforcement of judgments and other enforceable orders.

As noted above, the relevance of this distinction lies in the formal conditions that must be fulfilled by the enforcement order: in case of judgments, given that they are rendered in judicial contentious proceedings before the Court, it is not necessary to

perform any other formalities in order to start the enforcement procedure, in other words, the declaration of enforcement is not necessary; in case of other documents that the law grants enforceable character, as they are not the result of a trial, it is necessary to deploy a non-contentious procedure of verifying their enforceable character, which is achieved through the declaration of enforcement (art.641 Civil Procedure Code).

Also, there is no need of any other formalities prior to enforcement in case of European enforcement orders (art.636 Civil Procedure Code), including in this category the European enforcement orders for uncontested claims (Regulation 805/2004), the European payment procedure (Regulation 1896/2006), orders emitted in the European procedure on small claims (Regulation 861/2007). Also, due to the application from January 10, 2015 of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast of Regulation 44/2001), the possibility of certificating as a European enforcement orders extended over all the decisions adopted in a Member State, no longer being needed their recognition in the Member State wherein the enforcement is to be performed. The free movement of enforcement orders in the entire European Union`s space is guaranteed by the inclusion in national legislation of some legal texts, as it is the case of art. 636 Regulation 1896/2006, according to which the enforcement of European enforcement orders on the territory of a specific state is not subject to any prior formality that is to be accomplished before the court or administrative bodies of the State. This applies only if that decision is accompanied by the certificate of the European Enforcement order issued according to art.42 para.1 letter b) and Art.53 of Regulation 1215/2012 (Boroi, Stancu, p.950).

The provisions concerning the enforcement character of the European judgments extend to authentic documents and court settlements, according to art.58 and 59 of the same Regulation. In what concerns judgments, the European enforcement character is conferred by issuing the certificate contained in Annex 1 of the Regulation, and in case of authentic documents and court settlements, in Annex II. Therefore, given that both judgments and authentic instruments and court settlements become European enforcement orders only after issuing the certificate, means that they must meet a formal condition prior enforcement, but it is not subject to regulation by national law but results directly from the Union`s legislation; the national law may not impose additional formal requirements to the Regulation, as it cannot provide a different procedural legal regime for the enforcement of European orders to the national ones. Therefore, it guarantees the freedom of movement of European enforcement orders, which contributes to the development of the procedural law and, in particular, to uniform enforcement procedures.

THE DECLARATION OF ENFORCEMENT IN THE CIVIL PROCEDURE CODE, AS IT HAS BEEN MODIFIED BY LAW NO.138/2014

As a general rule, enforcement orders, other than judgments can be enforced only if they are declared enforceable (art.641 par.1 Civil Procedure Code). In the original version of the Civil Procedure Code, the declaration of enforcement was not needed for any enforcement orders prior to seizing the enforcement body. The enforcement declaration was contained in the final part of the enforcement court`s judgement on

admitting the application of enforcement. By Law no. 138/2014, the jurisdiction of settling the application of enforcement was transferred from the enforcement court to the judicial bailiff and the declaration of enforcement has been regulated as a preliminary procedure to the enforcement itself required only if the enforceable order is not a judgment. The aim was to decongest the courts of the deadlock created due to the large number of applications on enforcement, in parallel with the creation of a jurisdictional control prior to the enforcement, regarding the enforceable character of the order, if it has not been issued by a court (Oprina, Gârbuleț, p. 69-70).

The declaration is not required for a European Enforcement Orders, as it is accompanied by a certificate of the European Enforcement (art. 636 Civil Procedure Code provides that they are enforceable by law without prior formality). The certificate is a European „passport” allowing the title to be recognized and enforced in all Member States without the need for a prior recognition from national courts. Therefore, the title will be enforced like a national judgement or writ, without the need for any other declaration of enforceability or other formality in front of the authorities of that Member state.

The declaration of enforcement, as a condition stipulated by law so that the enforcement orders may be enforced, may not be purged by the will of the parties. Thus, even if, for example, in the contents of an authentic document issued by a notary would be mentioned the clause according to which it is enforceable without fulfilling any formality, it does not produces effects to the imperative legal nature of art.641 para.1 Civil Procedure Code.

The procedure regarding declaration of enforcement is a non-contentious one, which not aims to establish a averse right to another person, but obtaining a court`s authorization regarding an enforcement order. The enforceable character of the order is granted by law, the court seized with the declaration of enforcement doing nothing else but verifying if, in that specific case, the conditions laid down by the law for that document submitted by the creditor constitute, in particular, an enforceable order that can be enforced. The court shall not consider the merits of the claim of the creditor, not even if the claim is certain, liquid and payable, but only the formality of the presented document with reference to the legal requirements for it to be enforceable. For example, in accordance with art.1798 Civil Code which states that the tenancy agreements concluded by document under private signature which have been registered with the tax authorities are considered enforcement orders for the payment of rent to the dates and in the manner specified in the contract or, if they are missing, by law. The court will verify only whether the document submitted by the creditor meets the requirement of registration with the tax authorities, without regard to any issues related to substance of the legal relationship between the creditor and the debtor (for example, the execution of the debtor`s obligation by payment or by legal compensation). Any substantial defence may be subject to opposition on enforcement under art.713 para.2 Civil Procedure Code and the opposition throughout which the debtor asserts factual or legal reasons relating the substance of the right contained in the enforcement order, other than a judgment, insofar as the law does not envisage its abolition by a specific legal procedure.

As a general rule, the application regarding the declaration of enforcement is submitted to the lowest ranking court in whose circumscription is located the residence or the headquarters of the creditor or of the debtor, as applicable. If the domicile or, where appropriate, the headquarters of the creditor is abroad, the creditor may apply for declaration also at the lowest-ranking court in whose jurisdiction is located his chosen residence (art.641 par.2). The law, therefore, establishes an alternative territorial jurisdiction regarding settling the declaration of enforcement, being the creditor`s right to seize one of the courts indicated as being competent by art.641 para.2 Civil Procedure Code. If neither the creditor, nor the debtor does not live in the country and the creditor does not have a chosen address in Romania, and the Romanian courts are competent to settle his application regarding the declaration of enforcement of a specific order, it is competent in this matter, according to art.1072 par.2 Civil Procedure code, the District 1 of Bucharest lowest-ranking court.

It is noteworthy that the application of declaration of enforcement is not rendered to the court of enforcement, because before seizing the enforcement body, we cannot talk about an instance of enforcement (Oprina, Gârbuleț, p.73). Furthermore, the territorial jurisdiction of the enforcement court takes into consideration, as a general rule, the debtor`s domicile or, where appropriate, the headquarters at the time of the judicial bailiff`s notification. Or, the application of declaration of enforcement is formulated before the demand for enforcement; the creditor can seize the judicial bailiff only after his order is declared enforceable, if it is another order than a judgment. From this perspective, we note an inconsistency of the legislator, which, in art. XII par. 2 of Law no. 138/2014 provided that "Whenever an normative act provides that the approbation of the court of enforcement orders, other than judicial decisions, they will be enforced after declaring it enforceable by the enforcement court and after the approval of the application for enforcement by the judicial bailiff competent by law". Or, as mentioned above, the declaration of enforcement cannot be done by the enforcement court since at the time of the application; the court of enforcement does not exist, as the enforcement procedure has not begun.

The law provides some exceptions to the general rule laid down in art.641 para.2 Civil Procedure Code, both in terms of substantive competence and the territorial jurisdiction.

According to art.615 para.2 first sentence of Civil Procedure Code, the application of declaration of enforcement of an arbitral decision is to be settled by the tribunal in which jurisdiction the arbitration took place. In case of ad-hoc arbitration, we are interested in where occurred the juridical procedure before the arbitral tribunal, respectively the place chosen by the parties in this regard, and in the absence of agreement, the place chosen by the arbitral tribunal (art.569 Civil Procedure Code). In what concerns the institutionalized arbitration, the court which will declare the order enforceable shall be determined by reference to the place of the institutionalized arbitral tribunal, to the extent that the juridical procedure took place there. The court`s competence of declaring enforceable arbitral decisions is covered by art.95 pt.4 Civil Procedure Code (any other applications are given by law to the tribunal).

Also as an exception to the rule laid down in art.641 para.2 Civil Procedure Code, according to art.31 para.5, second sentence of Law no.51/1995 on the organization and the exercise of the profession of attorney at law, the declaration of enforcement of a legal assistance contract is in the competence of the lowest-ranking court in whose jurisdiction the registered the attorney at law's professional headquarters.

According to art.181¹ par.1 of Law no.71/2011, as it has been amended by art.VI of Law no.138/2014, the declaration of enforcement of a mortgage contract in order to enforce the movable mortgage by selling the mortgaged property under art.2445 of the Civil Code is to be issued by the lowest-ranking court in whose jurisdiction the creditor has his domicile or, as applicable, his headquarters, and according to art.21 of Law no.190/1999 on mortgage loans for real estate investment, the jurisdiction to settle the application for declaration of enforcement of the contract on mortgage loans for real estate investment, and also the real and personal guarantees subsequent, belongs to the court where the property is situated. In the absence of any express mentions regarding the material competent court, it is applicable the general rule from art.641 para.2 Civil Procedure Code, according to which the lowest-ranking court is always the competent court, and not the court determined by the value criteria laid down in art.94 pt. 1 lit. k) Civil Procedure Code.

The court seized with settling the application of declaration of enforcement will verify its jurisdiction *ex officio*, even if it is of private nature, according to the rules regarding the non-contentious procedure (art.529 par.1 Civil Procedure Code). The court may require the parties any explanation necessary to verify, according to the law, its jurisdiction, for example the court may ask the creditor to submit evidence of his residence or, where applicable, headquarters or of the debtor's. The verification of jurisdiction is performed on the rules laid down in art.131-132 Civil Procedure Code. If the court considers that it is not competent, it will automatically invoke the exception of lack of jurisdiction and, if it is admitted, it will decline, *ex officio*, its jurisdiction and send the file to the competent court (art.529 par.2 Civil Procedure Code). The dismissal through which the court declares itself not competent is not subject to appeal, the file being sent immediately to the competent court (art.132 par.3 Civil Procedure Code).

The application of declaration of enforcement is settled in closed session without summoning the parties. Being a non-contentious proceeding, the application is resolve without debate. However, the court may, *ex officio*, order any measures useful to the case (art.532 par. 2 first sentence of Civil Procedure Code). Related to the provisions of art.12¹ of Law no.76/2012, introduced by art.VII pt.1 of Law no.138/2014 (according to which "Unless the law provides otherwise, the provisions of art.200 of the Code of Civil Procedure on the verification of the application and its regulation does not apply to procedural incidents and to any special procedures that are not compatible with those provisions"), the application of declaration of enforcement is not subject to the regularization procedure. The juridical tax of the application is 20 lei for each enforceable order, according to art.10 para.1 letter a) of Government Urgency Ordinance no.80/2013 on judicial stamp taxes, as amended by art.IX pt.1 of Law no.138/2014.

In case the declaration of enforcement regards arbitral decisions, art.615 para.2 Civil Procedure Code refers only to par.3-6 of art.641, excluding, therefore, par.2, which

provides, *inter alia* that "the application of declaration of enforcement is settled ... in closed session without summoning the parties". Without these provisions, the application of declaration of enforcement of arbitral decisions will be settled by the ordinary court non-contentious procedure. This states that the application is examined in closed session, summoning the petitioner and the persons shown in the application, only if the law requires, otherwise the proceedings will be carried out with or without summoning the parties, at the discretion of the court. In other words, the rule in non-contentious matters is that summoning the parties is voluntary, not compulsory unless the law expressly provides it. In the case in art.615 para.2 Civil Procedure Code, respectively in the declaration of enforcement procedure of arbitral decisions, even if there is no reference made to the provisions of art.641 para.2 CPC, though the law does not require summons, therefore it is voluntary, being up to the court to decide whether to summon the creditor and the debtor. It is noted, therefore, an essential difference between the declaration of enforcement procedure of other orders except judgments, which is always without summoning the parties, and the procedure of declaration of enforcement of arbitral decisions, which, follows the rules of the common law on non-contentious procedure, with the optional summoning of parties, or, more specifically, the parties will not be summoned, but the court may consider necessary to do so.

In settling the application of the declaration of enforcement, the court will verify whether the document meets all the formal requirements demanded by law in order to be an enforceable order, as well as other requirements in cases specifically provided by law (art. 641 par. 3 Civil Procedure Code). As noted above, the court will be limited to a formal verification of the enforceable order, taking into consideration exclusively the legal provisions in this regard, without examining the substantive conditions relating to the claim (Răileanu, p. 74). The judge analyses only the external regularity of the document, which creates a presumption of internal regularity. Therefore, any substantive defences raised in this procedure are inadmissible, even if they regard the validity of the act, perceived as *negotium*. For example, the court cannot reject the application of declaration of enforcement because the document is void, but it can reject it when it does not fulfil the formal requirements of the law which gives it enforceable character. For example, according to art.96 para.1 and 2 of Law no. 36/1995 on notaries and notarial activity, "those who, because of their infirmity, sickness or any other cause, cannot sign, the notary, fulfilling the document, will only take their consent in the presence of two assistant - witnesses, this formality supplying the lack of the party's signature. The assistant - witnesses will be identified and will sign the document and in the dismissal of authentication shall be mentioned that they were present at the reading of document by the parties or, where appropriate, by the notary and at the taking of consent". If in the contents of the notarial document are not mentioned the aspects required by the law regarding the assistant – witnesses, the application of enforceable shall be rejected because, due to its vices resulting from the authentication procedure, the document has not authentic character and cannot, therefore, be an enforceable order.

In what concerns the court's verification, in proceedings regarding the application of declaration of enforcement, of other requirements of the law, these may refer to checking certain extrinsic requirements on the legal operation registered through that

document, without checking the substance of the legal relationship between the parties. For example, in case of declaration of enforcement of arbitral decisions which relate to a dispute concerning the transfer of ownership and / or the establishment of another real right on immovable property, during the proceedings of declaration, the court will verify the compliance of legal provisions regarding the transfer or the establishment of ownership or other real right and the payment of taxes on the transfer of property by the interested party (art. 603 par. 3 Civil Procedure Code).

In regard to this verification, the question whether it is necessary to submit to the court the original enforcement order has been raised. To the extent that which it would be necessary to verify the compliance with the legal requirements relating to the enforceable character, the creditor will be obliged to submit the original document, if it is possible, and otherwise, he will submit a duplicate or a certified copy. For example, in case of credit orders, given that they have a literal and autonomous character, encompassing virtually the claim, their submission in original is an essential prerequisite to the declaration of enforcement; in what authentic documents emitted by the notary are concerned, relating also to the provisions of art.639 para.1 second sentence Civil Procedure Code. (if the original order is missing, the enforcement order may be represented by the duplicate or certified copy of exemplary from the notary`s archive), as well as those of art.97 para.1 and 4 of Law no.36/1995 on notaries and notarial activity (according to which the notarial authentic documents shall be drawn up into a single original exemplary, which is kept in the archives of the notary and the parties shall be provided with a duplicate of the original document), as the original document`s submission would be impossible, the only original exemplary of the document being at the notary, so the declaration of enforcement will be based on the duplicate or on the certified copy. If the court orders the submission of the original exemplary and the creditor does not comply with the request, the settling of the application shall be suspended, according to art. 242 Civil Procedure Code, and it shall be resumed, at the creditor`s request, if he brings out the obligation to submit the original order, by paying half the juridical stamp tax prescribed by law for the original application (art. 9 letter g) of Government Urgency Ordinance 80/2013 on judicial stamp taxes).

In case the court rejects the application of declaration of enforcement, the dismissal can only be challenged by appeal to the creditor, within 5 days from communication. The appeal is settled in closed session, according to art.534 para.5 Civil Procedure Code. Unless the law provides otherwise, applying the general rules on non-contentious procedure, the appeal against the dismissal of rejecting an application for declaration of enforcement is settled with summoning the parties.

Regarding the situation in which the application of declaration of enforcement is admitted, the dismissal is not subject to appeal, but its legality can be subject to the opposition to enforcement (art.641 par.5 Civil Procedure Code). In this respect, art.713 para.3 Civil Procedure Code provides that after the commencement of the enforcement, those interested or harmed may request, through opposition to enforcement also the avoidance of the court dismissal of declaration of enforcement if it was given without fulfilling legal requirements. A request of avoidance of a court`s dismissal submitted before the commencement of enforcement proceedings will be rejected as inadmissible.

The deadline for submitting the enforcement contestation provided by art.713 para.3 Civil Procedure Code is that from art.715 para.1 pt.3 Civil Procedure Code, respectively 15 days from the day in which the debtor has received the court's dismissal of admitting the enforcement or the notification or the date when he became aware of the first act of enforcement in cases in which he has not received the court's dismissal of admitting the enforcement or the enforcement is made without notice.

The declaration of enforcement is the following (art. 641 par. 6 Civil Procedure Code): "We, the President of Romania, empower and order the judicial bailiffs to enforce the order (Here follows the enforceable order identification information) for which has been issued this dismissal of declaration of enforcement. We order the agents of the public force to support the prompt and effective fulfillment of all acts of enforcement and the prosecutors to insist on the fulfillment of the order of enforcement, according to the law. (Follows the signature of the panel's president and the court's clerk.)". The enforcement declaration will be included in the court's dismissal of admitting the application, which will be attached to the enforcement order. Some authors consider that the declaration of enforcement must also be stamped on the original title (Boroi, Stancu, p. 943; Răileanu, p. 76). In our opinion, this practice is not advisable, mainly because the wording of article 641 par. 6 Civil Procedure Code, which is that the formula is contained by the court order and not stamped on the document provided by the creditor. With the European Enforcement Order, the certificate is not a part of the title itself, but a different document, accompanying the writ that is to be enforced (art.42, Regulation 1215/2012). In the case of a document that is subject to the enforcement after the declaration regulated by art. 641 Civil Procedure Code, the title will be accompanied by the minutes of the court containing the enforcement formula provided by art.641 par.6 Civil Procedure Code (Țiț, p. 319; Dinu, Stancu, p. 45).

If the application for enforcement is submitted on the basis of an order which has not been declared enforceable, although, according to the law, this formality is required, the judicial bailiff will reject it, according to art.666 para.5 pt.3 Civil Procedure Code. If, however, unlawfully, the enforcement is accepted and it has begun, the absence of the declaration of enforcement voids the entire enforcement procedure, as the requirement of the declaration of enforcement is one of public order. The nullity may not be covered by obtaining a declaration after the commencement of the enforcement procedure, but the creditor may submit a new application for enforcement, provided that in the meantime it has not been reached the statute of limitations for the right to obtain enforcement. In this context, it should be noted that the application of enforcement, even if it is admitted, does not interrupt statute of limitations.

CONCLUSIONS

According to the Civil Procedure Code, as it has been amended by Law no. 138/2014, the difference between judgements and other enforcement orders is made by a formal procedure, aimed to verify the conditions provided by law for the enforcement of a document or writ, other than a judgement. This procedure is not applicable for European Enforcement Orders, because the certificate issued in accordance to the

European regulations regarding this instrument makes it recognizable and enforceable in all member states without the need for a recognition or declaration of enforcement in front of foreign courts. However, in all cases, for the enforcement of a judgement, writ, document or European Enforcement Order in Romania, the bailiff invested with the application for enforcement will verify if the conditions to commence the procedure are met and will issue a minute in this regard. Thus, the declaration of enforcement, which is a procedure in front of a court aimed at checking the enforceability of the title, must be distinguished from the declaration of the bailiff regarding the commencement of the enforcement procedure, based on the application of the creditor.

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