CONSIDERATIONS REGARDING THE WILL OF THE PARTIES IN ENFORCEMENT PROCEDURES

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***Abstract**: This article analyses some theoretical and practical issues concerning the principles applicable to enforcement procedures, in the context of the modifications on the Civil Procedure Code and the implementation of European regulations on enforceable titles. The importance of parties will is observed in enforcement proceedings, starting with the enforcement application, choosing the competent enforcement executor, carrying out the procedure and finalizing it.*
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1. THE AVAILABILITY PRINCIPLE IN CIVIL TRIAL

The entire civil procedural activity is governed by the availability principle. This important rule of the civil trial has three main components: initiating the procedure, establishing its boundaries and finishing it (Durac, 2014, p.47-56.)

For the judgement phase of the trial, the three components are regulated by art.9 CPC, with the title „Disposal right of the parties". The first component, the initiation of procedure, is about triggering the trial by the right owner (the interested party) or by other parties or authorities, stipulated by the law. The second, establishing the boundaries of the procedure and the configuration of procedural frame, is about establishing the claims, defences and facts to be solved by the competent court (Jeuland, 2014, p. 306). For this end, art.196 CPC provides that the fundamental elements of the application are the name of the parties, the claims, the facts and the signature. The court is prohibited, unless otherwise provided by law, to change the procedural frame from a subjective point of view (regarding the parties), an objective one (regarding claims) or factual (regarding the facts to be discovered or analysed). As a general rule, the judge has to solve the case in the subjective, objective and factual boundaries established by the parties, according to art.22 par.6 CPC. The three elements of procedural frame will be found in the substance of the judgement, both in the solution and in reasons, and will constitute the basis of res judicata. The judge cannot, except otherwise provided by law, change the coordinates established in the statements of the parties, but can only establish the reality of facts and

give them the correct legal interpretation. For this reason, in order to find out the truth, the judge has certain of powers, like the ones provided by art.22 par.2 CPC, but they do not alter or diminish the availability principle. On the contrary, the imperative of find out the truth start with the claimant triggering the application and giving the court the exact coordinates of his judicial investigation. The judge will establish the facts and apply the law in the boundaries determined by the parties in their statements (Durac, 2014, p.36-38).

The third component of the availability principle in the judicial phase of the trial is given by the procedural acts by which the parties finalize the trial without an actual solution given by the judge, resulting from the appreciation of facts and the application of law. These acts, enumerated by art.9 par.3 CPC are the discard of the application, disclaim of the subjective rights, acknowledgement of claims or of judgements, the transaction, discard of the appeal, discard of enforcement. Beside these, art.9 par.3, final thesis provides that the parties can dispose of the civil trial in any other form, provided by the law, which can be considered to be the fourth dimension of the availability principle, subordinated and in close relation with the legality principle.

There are no legal provisions regarding the availability principle in the enforcement procedure, but its application is evident, even if art.9 CPC does not include a specific paragraph, like art.6 CPC does with regard the right to a fair trial. Structuring the elements of the principle under the same model like the one applicable to the judicial trial, we can refer to the right of the creditor to initiate the procedure, establishing the boundaries and frame of the enforcement, both for the obligations to be enforced and ways of enforcing them, procedural acts to end or finalize the enforcement and other ways provided by law.

2. TRIGERRING THE ENFORCEMENT

The first component of the availability principle is the one referring to the commencement of enforcement proceedings. The creditor is the only one able to decide upon the opportunity of initiating the enforcement, namely to decide when to start it and to choose the enforcement officer who will carry out the procedure. The creditor can initiate the procedure as soon as he holds an enforcement title or order (Perrot, Thery, 2013, p.130), more precisely as soon as the debt is due, or can decide to wait for the debtor to voluntary fulfil his obligation, in order to avoid paying the expenses. Triggering the enforcement has therefore two components related to the availability principle: choosing the enforcement officer and applying to the enforcement officer.

Regarding the first issue, art.651 par.1CPC provides for a rather wide range of territorial competence of the enforcement officer, related to the competence area of a Court of Appeal where his office is situated, the same rules being found in art.8 of Law no.188/2008 concerning the enforcement officers. The creditor has therefore the option between all the enforcement officers in the area of a Court of Appeal, as the Constitutional Court recently has established (Constitutional Court Decision no.348/2014 regarding the unconstitutionality of articles 650 (1) and 713 (1) CPC, par.15). Once the creditor has chosen one of the enforcement officers he cannot simply decide on another.

The replacement of the enforcement officer can be decided only by the enforcement court, at the creditor's request, according to art.652 par.4 CPC (Oprina, Gârbuleț, p.175-176).

Regarding the second component of the principle of availability related to initiating the enforcement procedure, namely the application for enforcement, according to art.663 par.1 CPC, the enforcement can be initiated only by the creditor, unless otherwise provided by law. The text makes reference to two different categories of exceptions: situations when the enforcement can be started ex officio, without a statement from the creditor; situations when the application for enforcement can be formulated by another person or entity.

On the first issue, it is to be noted that the new Civil Procedure Code does no longer provides for situations like the one in the former Procedure Code art.453 par.2, situations in which the enforcement was decided by the first court. In other words, the new Civil Procedure Code provides a wide application of the availability rule in relation to triggering the enforcement, which can be commenced only if an application is launched by the creditor or another person. This rule can be observed as well in article 622 par.2, on the moment of commencing the procedure: the moment when the enforcement officer is invested with the enforcement application.

On the second issue, of the person who can apply for the enforcement, the rule is that only the creditor can initiate the proceedings. As an exception, the law provides for cases when the application can be formulated by other persons, such as the public prosecutor, in cases provided by article 92 par.5 CPC, according to art.657 CPC.

2. THE ENFORCEMENT FRAME: OBJECT AND WAYS OF ENFORCEMENT

The second component of the availability principle in the enforcement proceedings is the one related to the enforcement frame, namely the object of the enforcement and the ways of enforcing the obligation provided by the title.

On the first issue, the right of the creditor to choose is restrained, because the obligations to be enforced are stipulated by the title. If the obligation is pecuniary, if the title does not provide for interest, penalties or other means of updating the amount, the creditor can ask the enforcement officer to update the debt according to the criteria provided by the enforcement title and, in the absence of such a criteria, according to the inflation rate, from the date when the judgement became definitive or, if the title is not a judgement, when the debt was due, to the date of the payment. In both cases, the calculation made by the enforcement officer is also enforceable.

If the obligations provided by the title are alternative, the creditor does not have the right to choose between them, in the first stage. According to article 675 CPC, the right to choose between alternative debts belongs to the debtor, in 10 days after being notified by the enforcement officer, under the sanction of losing that right. If the debtor does not make the choice in writing in the stipulated time, the right is passed to the creditor and the debtor will be summoned to fulfil the obligation chosen by the creditor.

On the second issue, a distinction must be made between pecuniary debts and other enforceable obligations. The creditor right to choose is predominant in cases when the debt is pecuniary, because in these situations the enforcement has an indirect character and can be made in various forms, such as movable or immovable seizure, garnishment etc. All the ways of enforcing a pecuniary obligation can be simultaneously or separately be exercised, at the creditor's choice (art.622 par.3 CPC), except when the immovable asset is seized (art.799 par.3 CPC).

This component of the availability principle is also contained in art.663 par.3 let.c) CPC, according to which the application for enforcement has to include the identification by the creditor of the ways of enforcement. The creditor's decision on this regard can be influenced by the assets owned or the debtor or his incomes and their enforceability. Also, the creditor has the possibility of not including in his application for enforcement any reference to the ways of enforcement to be followed, if, at the moment of initiating the procedure he does not hold any information on the assets or income of the debtor or other components of his patrimony. This possibility is clearly stated in art.665 par.3 CPC, regulating the elements in the decision of the enforcement officer to commence the execution. This decision has to include the identification of the ways of enforcement, when they were expressly indicated by the creditor in the application for the enforcement. In other words, the creditor can opt, according to the availability principle, to include in his application for enforcement the indication of the ways of enforcement, by doing that framing the enforcement into those ways, or make no reference to those ways, case in which they will be determined along the procedure, depending on the assets or income owned by the debtor.

Tightly linked to this issue is the one regarding the possibility of the creditor to choose to seize one or more of the debtor's assets. The creditor can choose to start the execution over all assets or incomes of the debtor or over a part of those assets or incomes. The final thesis of art.629 par.1 CPC provides that all incomes or assets owned by the debtor can be garnished or seized, according to the law, only in a proportion necessary to fulfil the obligations stated in the enforcement title. These provisions must not be interpreted in a way that will lead to the conclusion that the creditor cannot start the enforcement over all assets and incomes. The rule does not restrain that possibility. On the contrary, according to art.2324 par.1 CPC, the debtor is responsible for the fulfilment of his obligation and the guarantee awarded by law to all his creditors is his entire patrimony, all his assets and incomes. This is the general warranty of all obligations are for all creditors, awarded by law as a way of securing the civil circuit of rights and obligations. Therefore, as a holder of this warranty, the creditor can start the execution over all goods or incomes, but the proceedings will end as soon as all obligations are fulfilled, voluntarily or forced (Cayrol, p.202-203).

This conclusion can be also drawn from art.701 CPC, regarding the limitation of enforcement. This can be asked by the debtor when the creditor seizes simultaneouslymore than one assets of the debtor and their value is obviously disproportionate with the value of the debt. In such a case, the debtor can ask the enforcement court to limit the execution in some of the assets, thus suspending the execution on others. The premises that this regulation is based on is that the creditor has

started the proceedings by seizing all assets of the debtor or a vast proportion of these assets, based on his right described above as a part of the availability principle. This right exists even if the creditor has a warranty over some of the assets, because he is not obliged to start the execution over these assets, but can chose to seize other assets owned by the debtor, except the situation when his warranty is a mortgage. In this case, the creditor cannot ask for the sale of other goods, unless the goods under mortgage are insufficient to cover the debt (art.816 par.4 CPC). If the debtor has a guarantor, the creditor can chose to start the proceedings over the assets of the debtor and guarantor, who can ask that the execution to be carried out first over the assets of the debtor (art.2294 C. civ.) or divided between guarantors (art.2298 C. civ.), unless otherwise agreed.

If the enforcement is carried out over movable assets, even if the creditor specifies the assets that he wants to be seized, the enforcement officer can also seize other goods, if he considers that the one indicated by the creditor are not sufficient for the debt recovery (art.730 CPC).

3. THE ROLE OF THE PARTIES WILL ON THE COMPLITION OF ENFORCEMENT

The third component of the availability principle is about the ways the debts are recovered, via enforcement procedure or in another manner, and also about the suspension and termination of the enforcement procedure. Regarding this issue, art.630 CPC provides that during the procedure, under the supervision of the enforcement officer, the parties can agree that the enforcement procedures will be carried out only over a part of the debtors assets or only overs his income, that the sales will be voluntarily and not forced or that the debts will be recovered in any other way not prohibited by law. The prerogative given to the parties according to this article is a strong and important component of the availability principle. Most of the time, this agreement of the parties takes the form of a transaction, defined by art.2267 of the Civil Code as a contract by which the parties prevent or finish a litigation, including the enforcement procedure, by concessions and reciprocal discard of rights or by transferring rights one to another. This transaction might not be closed in writing, because according to art.2272 Civil Code the written form for this contract is not a validity condition, but only one provided for evidence. In these situations, the debt is recovered following an enforcement procedure, under the supervision of the enforcement officer or enforcement court. The parties can decide upon which goods will be sold, if the sale is voluntary or not, under the condition that law is respected. The availability principle is subordinated to the legality principle therefore the parties cannot decide to enforcement ways that are contrary to the law or are in fact an abuse of law.

This last component must be observed in particular: if the parties, by their agreement, are trying to obtain an illicit result, than the operation is an abuse prohibited by art.12 par.1 CPC, according to which all procedural rights must be carried out in conformity with good faith according to the scope they were provided by law and without violating the procedural rights of another person. This is way the law provides that even

if the enforcement procedure is carried out based on an agreement of the parties; the procedure must be supervised by the enforcement office, which has the role of looking over the legality of that procedure and preventing abuse of rights. This role is exercised, for instance, in case the sale of immovable assets by the debtor, with the agreement pf the creditor (art.753 CPC) or of a direct sale (art.754 CPC).

The will of the creditor is predominant when talking about the suspension or the termination of enforcement procedure. According to art.700 par.2 CPC, the enforcement procedure will be suspended by the enforcement officer if the creditor asks that, meaning that the will of the creditor is sufficient to trigger that end, without other conditions necessary. The creditor does not have to give reasons to his decision regarding the suspension and in such a case; the enforcement officer cannot continue the procedure. This voluntary suspension of the enforcement will take place without the intervention of the enforcement court, so no judgement or court order is necessary to this end. After the enforcement procedure was suspended voluntarily, the creditor can decide to restart it, if the enforcement did not expire according to art.696 CPC, the expiration time being of 6 months.

The creditor can decide to finish the enforcement procedure, by voluntarily discarding it, according to art.702 par.1 point 3 CPC. Discarding the enforcement is an important act based on the will of the creditor with a procedural and not substantial consequence. In other words, it does not lead to extinction of the subjective right, but only to the ending of the enforcement procedure. This conclusion can be drawn from art.708 par.3 CPC relating to the statute of limitations regarding the right to enforce a title. Is the creditor decides to end the procedure, this will not influence the statute of limitations, but if it is not expired, the creditor will be able to start a new enforcement procedure, based on the same title, because his substantive right is not extinct. Unlike the procedure in front of the court, during which the creditor can give up the trial or the substantive rights, during enforcement procedure, the creditor can only give up the procedure and in this case the enforcement officer will give him back the title. After that, it is the creditors choice to start new enforcement procedure, is the statute of limitations did not expire meanwhile. Giving up the procedure can mean that the creditor does no longer want to recover the debts, but can also have a different reason. For instance, according to art.845 par.9 CPC, with the creditors consent, the enforcement officer will try to sell the immovable goods for the third time, starting the bidding at 50% of the value established by expert evaluation. In this case, the goods can be sold at the highest price offered, if there are at least two bidders, even if that price does not cover the debt. Such a result can be disastrous to the creditor. He might prefer to give up the procedure at this point that agreeing for the goods to be sold at very low prices and start a new procedure in the future, when there will be better chances for a good price, sufficient for the recovery of the debt.

As noted above, the waiver of enforcement provided by art.702 para.1 pt.3 CPC has strictly a procedural effect, leading to the cessation of enforcement, and not a substantial one, the loss of the right to obtain the enforcement. This effect may occur indirectly through rules on limitation, which it is no longer interrupted when executing cancellation. But we do not exclude any possibility of a waiver to substantial enforcement

or provision of an act similar to that covered by art.408-410 CPC. This can be done by a remission of debt (art.1629 of the Civil Code.). When executing creditor waives not only the enforcement procedure, but its manifestation has the purpose of releasing the debtor from its obligation, he will not be able to subsequently submit a new application for enforcement; the obligation is extinguished organically, substantially. Remission of debt may be expressed or implied (art.1630 par.1 Civil Code) and may result in certain acts or deeds of the creditor. Thus, according to art.1503 par.1 Civil Code, voluntary submission of original document confirming the claim made by the creditor to the debtor, one of the co-debtors or fidejusor, will trigger the presumption that the obligation is extinguished by payment. The burden of proof is allocated to the party who claims that the remission was made for another purpose. If the original document voluntarily submitted is authentic, the creditor is entitled to prove that the delivery was made on a ground other than the settle of the obligation. As shown above, in the case remission of the enforcement by the creditor made under art.702 para.1 pt.3 CPC, enforcement shall cease and the executor will deliver to the creditor, personally or through a representative, the enforcement title. If the delivery of the enforcement title to the creditor is followed by remission of the title by the creditor to the debtor, this has the effect of a remission of debt, which presumes the settlement the obligation of payment.

The creditor will not be able to make a new application for execution later, only to the extent that the enforcement order was an authentic one and he can prove that the remission was made for a reason other than settle the obligation. In all cases, it is presumed, until proven otherwise, that the entry of the debtor, a co-debtor or guarantor of the original document in the possession of the title was made by a voluntary delivery of the creditor (art.1503 par.3 Civil Code). For example, if after giving up the enforcement procedure the creditor makes a new application for enforcement, the debtor may oppose to it by the way of the contest of enforcement, claiming that the obligation was settled, if he is in possession of the original enforcement order (the situation may be encountered when in the second application for execution has attached a certified copy of the enforceable title under Art.663 para.4 CPC). In such cases, the creditor can prove either that the title came into the possession of the debtor in another way than by voluntary remission (i.e., was stolen) or, if the title is an authentic one, it was handed over to the debtor for another purpose than settle the obligation.

4. CONCLUSIONS

The will of the parties plays an important role in enforcement proceedings. Triggering enforcement proceedings can be done only at the request of the creditor, who also establishes the frame of the execution, the parties may close transactions during the execution and completion of the procedure can also be caused by unilateral will of the creditor or by the common will the parties. The principle of availability is still subordinate to that of legality, because any manifestation of will may be made only in accordance with the procedural rules enacted in Book VI of the Code of Civil Procedure, and rights should be exercised with respect for economic and social purpose which was enacted by the legislature.

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