THE PRINCIPLES AND THE ESSENCE OF THE PROCEDURE FOR CONTESTATION IN ENFORCED CIVIL EXECUTION

PRINCIPIILE ȘI ESENȚA PROCEDURII DE CONTESTARE A EXECUTĂRII SILITE CIVILE

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Sumar. *Executarea silită, ca și finalitate a procesului civil este supusă rigorilor formalismului procedural, reglementate prin edificarea principiile executării silite civile. În acest sens, Codul de Executare al Republicii Moldova reglementează principii comune cu procedura civilă ca și reguli de conduită, precum și principii distincte specifice procedurii de executare silită și contestației la executarea silită civilă. Aceste principii trebuie respectate atât în procesul civil, cât și la faza punerii în executare silită a unui act judecătoresc, ca reguli de conduită fundamentale. În prezentul studiu vom identifica și analiza esența principiilor procedurii de executare silită în materie civilă.*

Drept parte a procedurii de executare silită civilă, capitolul privind contestarea executării silite civile cuprinde reguli specifice și diferite de cele prevăzute în procedura civilă. Această lucrare se va axa inter alia și pe proiectarea și analiza principalelor repere ale proceduri de contestație la executarea silită civilă. De asemenea, va fi analizat cadrul normativ intern în raport cu standardele Curții Europene a Drepturilor Omului și cu bazele gândirii juridice moderne.

Cuvinte-cheie: *principiile executării silite civile; procedura civilă; executor judecătoresc; contestația executării silite civile.*

Guaranteeing the right to a fair trial does not end with the adoption of a court decision. In this sense, the ECHR has repeatedly stated that the observance within the meaning of art. 6 of the ECHR of the right to a fair trial is essentially aimed at the partial transposition of the court order. Thus, the ECtHR has always reminded that the execution of a final court decision issued by any court must be considered as an integral part of the process within the meaning of Article 6 of the ECHR.Because, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 paragraph 1 should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States un-

dertook to respect when they ratified the Convention (see, mutatis mutandis, the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, pp. 16-18, paras. 34-36). Execution of a judgment given by any court must therefore be regarded as an integral part of the „trial" for the purposes of Article 6; moreover, the Court has already accepted this principle in cases concerning the length of proceedings (see, most recently, the Di Pede v. Italy and Zappia v. Italy judgments of 26 September 1996, Reports of Judgments and Decisions 1996-IV, pp. 1383-1384, paras. 20-24, and pp. 1410-1411, paras. 16-20 respectively). [1, paragraph 40]

That is why the European Commission for the Efficiency of Justice (CEPEJ) adopted at its 14th plenary meeting in Strasbourg on 9-10 December 2009 Guidelines for a better implementation of the existing Council of Europe's recommendation on enforcement, highlighting the importance of execution of court decisions, pointing: for the rule of law to be maintained and for court users to have confidence in the court system, there needs to be effective but fair enforcement processes. [2, paragraph 6]

Based on the above, it is undeniable the importance of the execution of civil court hearings as an integral part of the guarantees offered by a rule of law and a system of democratic justice. Reason why it is necessary to determine the place in the system of that stage in the process of doing justice.

Thus, according to the provisions of par. 4 art. 12 C. proc. of the Republic of Moldova: *"Civil procedural legislation establishes the manner of judging cases in civil actions resulting from civil, family, labor, housing, land, ecological and other legal relations, cases with special procedure and procedure in the ordinance (simplified),* ***as well as those that appear in connection with the execution of the acts of the court and the acts of other authorities."*** Provision from which we can deduce the subsidiary character of the legislation in the field of forced execution of final civil court decisions compared to civil procedural law.

But with the adoption of the Enforcement Code of the Republic of Moldova by the Law of the Republic of Moldova no. 443 of 24.12.2004, published in the Official Gazette of the Republic of Moldova dated 05.11.2010 no.214-220 art. 704 has started the procedure of the codification of the legislation in the field of forced execution of final civil court decisions and practically laid the foundation of an independent branch in our legal system. Notwithstanding the natural evolutionary tendency to become an independent branch of law, we consider that: civil procedural law and enforcement of final civil judgments, both as legal institutions and as mechanisms in the administration of justice, are inextricably linked from each other and are continuously determined by each other: from an organizational point of view, as well as functionally.

Thus, with the adoption of the Law of the Republic of Moldova no. 113 of 17. 06. 2010 on bailiffs, published in the Official Gazette of the Republic of Moldova on 23. 07.2 010 no. 126-128 art. 406, our legal system has opted for a private enforcement mechanism. Thus, according to the provisions of art. 2 of the cited law, ***the Bailiff is a private individual invested by the state with the competence to carry out activities of***

public interest provided by this law and other laws. In the exercise of his duties, the bailiff is the exponent of state power. Only the bailiff licensed and invested under the conditions of this law may carry out the forced execution. This delegation of powers did not exonerate the state of responsibility in order to guarantee the proper execution of final civil judgments, as the state remains to provide and guarantee those domestic remedies that guarantee the proper execution of final civil judgments in the light of the right to a fair trial guaranteed through the light of art. 6 ECHR.

If we analyze the provisions of the Enforcement Code of the Republic of Moldova, we notice that the enforcement procedure is governed by the following principles: legality (art. 2); equality (art.3); disposability (art. 4); humanism (art. 5); the language of the execution procedure (art. 6); independence of the bailiff (art. 7); the binding nature of the bailiff's requirements (art. 8); attacking the acts of the bailiff (art. 9). All these principles set out above form the basis of the system of enforcement of final civil judgments in an efficient and equitable manner, for all participants in the enforcement procedure, as well as in order to achieve the purpose and tasks of public interest.

The principle of legality – implies the establishment of those rigors and procedural guarantees against the activity of the bailiff in order to ensure the forced execution of the executory documents in strict accordance with the provisions of the normative acts in force. The arbitrariness and the whim of the bailiff being excluded, notwithstanding the fact that Republic of Moldova has chose for a private system of forced execution of final civil decisions. However, the so-called liberalization of the system of forced execution of final civil decisions did not abolish the need to maintain compliance in the field of guaranteeing in order to guarantee a *happy ending* through the prism of art. 6 ECHR.

The principle of equality – regulates the manner and conditions of enforcement of enforcement documents regardless of the state of the participants in the procedure of enforcement of civil judgments whether we are talking about persons in charge, individuals, also regardless of race, nationality, origin ethnicity, language, religion, sex, opinion, political affiliation, wealth or social origin, and on legal persons, regardless of the type of property and the legal form of organization.

The principle of disposability – extends the volitional nature of the procedural acts of the participants in the enforcement procedure. And it can be seen both through the prism of the active subject – the creditor, and through the prism of the debtor. Thus, the creditor has the right to request the forced execution of the executory documents, as well as to give up the started execution or to postpone its start, within the limits of the prescription of the established right. In turn, the debtor can voluntarily execute the executory document. And the parties in the enforcement procedure (creditor and debtor) can execute the enforcement document by concluding a transaction under the law.

The principle of humanism – the manner and conditions of execution of enforcement documents are established on the principle of respect for human rights and may not be intended to cause physical and moral suffering or material damage.

Principle of the language of the proceedings – it is vital that the participants in the enforcement proceedings know the extent of their procedural rights and obligations, which is why everyone is presumed to know the official language of the state entity of which they are residents, which is why the legislator established the rule execution is conducted in the state language. As a guarantee, in order not to violate the rights of other persons who do not know the language of the proceedings, the participants in the enforcement proceedings have the right to be acquainted with the documents of the enforcement proceedings and to speak through the interpreter.

The principle of independence of the bailiff – the essence of the promoted reform was not intended to move the field of enforcement of final civil judgments from the responsibility of public authorities in the private sphere, without regulating a practical and effective mechanism. Or, the simple passing of the attributions in the field to some individuals, without offering some guarantees, would have been doomed to failure. Which is why, as a primary guarantee, bailiffs were guaranteed independence in the execution of enforcement documents, as they were subject only to the law. Any interference in the activity of execution of the executory documents is inadmissible and attracts the liability provided by law.

The principle of the obligatory character of the bailiff's requirements – another no less important guarantee of the exercise of the bailiff's tasks and attributions at the execution of the final civil court decisions is the obligatory character of his requirements. The only limitation is that the requirements of the bailiff must be submitted in the established manner the normative acts in force. In this respect, the requirements of the bailiff are mandatory for all public authorities, legal persons, persons in charge and individuals. Moreover, persons who do not comply with the requirements of the bailiff or who impede their execution bear legal responsibility.

The principle of challenging the acts of the bailiff – this rule establishes the questionable character of the acts and actions of the bailiff. Contrary to the appearance of the transfer on the acts and actions of the bailiff of the indisputable character of the irrevocable court act, which is the object of the enforcement procedure, they cannot benefit from such immunity, for the simple reason that they go beyond the scope of *res judicata* on another new subject: the bailiff and finally cannot restrict the right to defense and free access to justice of defense participants in case of abuse or error by the new plaintiff in the enforcement of the judicial act invested with enforceable force. Because we cannot deny that the activity of administering justice as well as that of fulfilling the attributions and duties related to the execution of the executory document, is exercised by a subjective factor. And if the judge, who is the main character of the process of carrying out the act of justice, does not benefit from an infallible immunity from possible judicial errors, by implementing different forms of implementation of judicial control. Then, all the more, the bailiff – as a key subject in the process of transposing into life the result of the judge's activity, is not exempt from the possibility of making mistakes, as in fact any sphere of human activity. Reason for which it is natural to create a legal mechanism

to correct these mistakes – by establishing in Title IV of the Enforcement Code of the Republic of Moldova the institution: *Contesting the acts of the bailiff.*

The contestation of the bailiff's acts – is carried out by means of the ***enforcement appeal.*** The request regarding the contestation of the execution acts or of the actions or inaction of the bailiff is submitted ***directly*** to the court in whose territorial area the bailiff's office is located – not being necessary to observe a preliminary procedure *(the only exception is the case provided in art. 65 par. 3 Enforcement Code of the Republic of Moldova – when we speak of the correction of material or formal errors committed in the preparation of acts related to the performance of duties and duties of execution of enforcement documents, in this case according to Article 163 paragraph 3[1] Enforcement Code of the Republic of Moldova, this will serve as a basis for removing the application from the list in accordance with the provisions of art. 267 letter a) of the Code of Civil Procedure).*

The acts of the bailiff may be challenged not only by the parties to the enforcement proceedings, but also by other participants in the enforcement proceedings, as well as by third parties who consider that the enforcement acts or actions or inaction of the bailiff have been violated. recognized by law.

Requests regarding the contestation of the enforcement acts or of the actions or inaction of the bailiff are not imposed with state fee.

The enforcement act drawn up by the bailiff may be challenged by the participants in the enforcement process, according to the general rule, within 15 days from the date on which they found out or should have found out about these documents. For certain categories of documents drawn up by the bailiff, the law also provides special terms *(for example: according to art. 118 para. 5 of the Enforcement Code of the Republic of Moldova within 7 days from the date of its preparation or communication).* And third parties who did not participate in the enforcement process may challenge the enforcement documents, drawn up by the bailiff, within 15 days from the date on which they found out or must find out about these documents. And in case the interested person missed for some reason the term for contesting the bailiff's act, it can be reinstated within the term for contesting under the conditions of art. 116 of the Code of Civil Procedure of the Republic of Moldova.

Although in the initial wording of the Enforcement Code of the Republic of Moldova was provided *a deadline for contesting the acts of the bailiff of no more than 6 months from the time of their commission*, by the Decision of the Constitutional Court of the Republic of Moldova no. 8 from 05.04.2019, published in the Official Gazette of the Republic of Moldova dated 26.04.2019 no. 148-158 art. 77, the mentioned regulation was rightly declared unconstitutional.

According to art. 163 of the Code of Execution of the Republic of Moldova, the request for contesting the enforcement acts is judged under the conditions of the Code of Civil Procedure - *ie* according to the rules of examination of a request for summons. The bailiff attracts himself *ex officio* as an accessory intervener and is obliged to present to the

court a certified copy of the enforcement procedure and to give written explanations regarding the contested acts. **Thus, establishing the written character of the procedure for examining the request for contesting the enforcement acts.** In case of unjustified non-execution of the court's requirement to present the certified copy of the enforcement procedure or the presentation of written explanations, the bailiff is sanctioned by the court with a fine of up to 50 conventional units *(equivalent to approximately 140$ USA).* And the conclusion of the court regarding the application of the sanction is enforceable from the moment of issuance and can be appealed together with the conclusion by which the request regarding the contestation of the execution acts is solved.

In case of contesting the act drawn up by the bailiff, the *burden of proof* is placed on the *plaintiff.*

Enforcement documents drawn up by the bailiff, which are legal in substance, cannot be annulled on formal grounds.

Complaints from the application for contesting enforcement acts drawn up by the bailiff or his / her actions / inaction are filed against the creditor or debtor. If the amount of the bailiff's fee is contested, the complaint is filed against him.

The decision of the court of first instance can be appealed.

In the case of defending the rights of other persons who are not parties to the enforcement procedure, they may defend their legitimate rights and interests by bringing an action in the contentious (general) procedure.

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