

## DISCUSSIONS ON THE LEGAL NATURE OF CIVIL ENFORCEMENT AND BAILIFF'S INSTITUTION

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**ABSTRACT:** *The study proposes an analysis of the legal nature of the civil enforcement procedures and of the judicial bailiff institution, through the legal rules governing them, respectively: Law no. 188/2000 on bailiffs, with subsequent amendments, the Code of Civil Procedure and the New Code of Civil Procedure.*

**KEY WORDS:** *legal nature, enforcement, judicial bailiff, jurisdiction, administrative body.*  
**JEL CLASSIFICATION:** *K 49*

In general, to determine the legal nature of a procedure or of a judicial institution, a thorough analysis of all legal rules governing them needs to be made. The main regulation of enforcement proceedings regarding the obligations included by civil enforcement orders is provided in Book V – about enforcement procedure included in the new Civil Procedure Code<sup>1</sup>, and it contains a more comprehensive content in terms of the number of articles compared to the old regulation.<sup>2</sup>

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<sup>1</sup> Adopted by Law no. 134/1.06.2010, published in the Official Gazette part I, no. 485/15.07.2010. The New Civil Procedure Code will enter into force on the date established by law regarding its application. (n.n. – see art. 1119 para. (1) NCPC).

<sup>2</sup> The old regulation was included in Book 5 – About enforcement procedure included in the 1864 Civil procedure Code, enacted on September 9, 1865, promulgated on September 11, 1865 and implemented starting with 1 December 1865. The Civil Procedure Code has undergone many changes, the latest being made through: O.U.G. (Government Emergency Ordinance) 138/14 September 2000, - Official Gazette, part I, no. 479/2.10.2000; O.U.G. 290/29 December 2000 - Official Gazette, part I, no. 706/29.12.2000; Law no. 32/5 March 2001 – Official Gazette, part I, no. 116/7.03.2001; O.U.G. 59/25 April 2001 - Official Gazette, part I, no. 217/27.04.2001; O.U.G. 58/25 June 2003 - Official Gazette., part I, no. 460/28.06.2003; Law no. 195/25 May 2004 - Official Gazette part I, no. 470/26.05.2004; O.U.G. 65/9 September 2004 - Official Gazette, part I, no. 840/14.09.2004; Law no. 493/10 November 2004 - Official Gazette, part I, no. 1071/18.11.2004; Law no. 219/6.06.2005 - Official Gazette, part I, no. 609/14.06.2005; L. 459/6.12.2006 - Official Gazette, part I, no. 994/13.12.2006; O.U.G. 51/21.04.2008 - Official Gazette, part I, no. 327/25.04.2008; O.U.G. 42/6.05.2009 - Official Gazette, part I, no. 324/15.05.2009; L. 177/28.09.2010 - Official Gazette, part I, no. 672/4.10.2010 and Law no. 202/25.10.2010 - Official Gazette, part I, no. 717/26.10.2010.

Rules relating to enforcement proceedings we find in a number of special national laws such as: Law no. 36/1995 on public notaries and notary activities<sup>3</sup>, O.U.G. (Government Emergency Ordinance) no. 99/2006 on credit institutions and capital adequacy<sup>4</sup>, Law no. 93/2009 on non-banking financial institutions<sup>5</sup>, Law no. 190/1999 on mortgage loans for real estate investments<sup>6</sup>, Law no. 99/1999 regarding some measures to accelerate economic reform<sup>7</sup>, Law no. 540/2002 on pensioners' mutual aid funds<sup>8</sup>, OG No. 2/2001 on the legal regime of contraventions<sup>9</sup>, Law no. 58/1934<sup>10</sup> and no. 59/1934<sup>11</sup>, O.G. No. 51/1997 on leases and leasing companies<sup>12</sup>, Law no. 51/1995 on the organization and performance of the profession of lawyer, republished<sup>13</sup>, OG No. 5/2001 on order for payment procedure<sup>14</sup>, GEO no. 119/2007 on measures to combat late payment obligations resulting from the execution of commercial contracts<sup>15</sup>, etc. Also, the European<sup>16</sup> and international<sup>17</sup> law was concerned with the regulation of rules regarding enforcement procedures.

<sup>3</sup> Published in the Official Gazette, part I, no. 92/16.05.1995.

<sup>4</sup> Published in the Official Gazette, part I, no. 1027/27.12.2006 and amended by Law no. 270/2009 published in the Official Gazette, part I, no. 483/13.07.2009.

<sup>5</sup> Published in the Official Gazette, part I, no. 259/21.04.2009.

<sup>6</sup> Published in the Official Gazette, part I, no. 611/14.12.1999 and amended by O.U.G. no. 201/18.12.2002, by Law no. 34/2006, published in the Official Gazette, part I, no. 200/03.03.2006 and by Law no. 174/2008 published in the Official Gazette, part I, no. 795/27.11.2008.

<sup>7</sup> Published in the Official Gazette, part I, no. 236/27.05.1999 and modified by O.G. no. 89/2000, published in the Official Gazette, part I, no. 423/01.09.2000 and by Law no. 161/2003, published in the Official Gazette, part I, no. 279/21.04.2003.

<sup>8</sup> Published in the Official Gazette, part I, no. 723/03.10.2002.

<sup>9</sup> Published in the Official Gazette, part I, no. 410/2001 and amended by Law no. 293/2009 published in the Official Gazette, part I, no. 645/01.10.2009.

<sup>10</sup> Published in the Official Gazette, part I, no. 100/01.05.1934 and amended by O.G. no. 11/04.08.1993, by Law no. 83/06.10.1994, by O.U.G. no. 38/2008 published in the Official Gazette, part I, no. 284/11.04.2008 and by Law no. 163/2009 published in the Official Gazette, part I, no. 322/14.05.2009.

<sup>11</sup> Published in the Official Gazette, part I, no. 100/01.05.1934 and amended by O.G. no. 11/04.08.1993, by Law no. 83/06.10.1994, by O.U.G. no. 38/2008 published in the Official Gazette, part I, no. 284/11.04.2008 and by Law no. 127/2009 published in the Official Gazette, part I, no. 294/06.05.2009.

<sup>12</sup> Republished in the Official Gazette, part I, no. 9/12.01.2000 and amended by Law no. 571/22.12.2003, Law no. 533/25.11.2004, published in the Official Gazette, part I, no. 1135/01.12.2004, by Law no. 287/2006, published in the Official Gazette, part I, no. 606/13.07.2006, by Law no. 241/2007, published in the Official Gazette, part I, no. 496/24.07.2007 and by Law no. 93/2009 published in the Official Gazette, part I, no. 259/21.04.2009.

<sup>13</sup> Republished in the Official Gazette, part I, no. 113/06.03.2001 and amended by Law no. 489/2002, by O.U.G. no. 77/2003, by Law no. 201/2004, by Law no. 255/2004, by Law no. 280/2004, by O.G. no. 94/2004, by O.U.G. no. 190/2005 and by O.U.G. no. 159/2008.

<sup>14</sup> Published in the Official Gazette, part I, no. 422/30.07.2001 and amended by Law no. 295/15.05.2002 published in the Official Gazette, part I, no. 380/05.06.2002.; O.U.G. no. 142/24.10.2002 published in the Official Gazette, part I, no. 804/05.11.2002; Law no. 195/25.05.2004 published in the Official Gazette, part I, no. 470/26.05.2004.

<sup>15</sup> Published in the Official Gazette, part I, no. 738/31.10.2007 and approved with amendments by Law no. 118/2008, published in the Official Gazette, part I, no. 410/02.06.2008.

<sup>16</sup> Following the accession of Romania to the European Union, on the internal level there are effects of the Secondary Community legislation in this area, namely Regulation (EC) no. 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters, Regulation (EC) no. 805/2004 establishing a European Legal Title for non-disputed claims, Regulation (EC) no. 1896/2006 establishing a European demand for payment, Regulation (EC) no. 861/2007 establishing a European procedure on small claims, Regulation (EC) no. 2201/2003 concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters and

In addition to the Civil Procedure Code, the most important national legislation in relation to enforcement proceedings of the civil obligations from the writ of execution is Law. 188/2000 on bailiffs<sup>18</sup>, which contains both rules regarding the procedure for enforcement and regulation of the bailiff's institution.

The bailiff's institution<sup>19</sup> was created by art. 47 of Law no. 5 of 19 June 1952 on the judiciary organization, functioning within the courts under the guidance and direction of the head of the court, and with the task to carry out enforcement of judgments given in civil lawsuits, as well as the enforcement on the parties of the judgments setting patrimonial obligations in criminal lawsuits. Besides judgments, the bailiff was required to enforce the notary writs of execution, the decisions of the state arbitration bodies, as well as other writs of execution.

The bailiff, being an auxiliary body of justice, carries out his duties by order of the court, which becomes and enforcement court by means of creditor's notification and being subject to its control. The enforcement court also intervened in the bailiff activity either forced when it had to carry out a procedural act under its competence<sup>20</sup>, or voluntarily when having to give resolutions to challenges on enforcement.

The doctrine of that time<sup>21</sup>, called the law enforcement proceedings a "process execution" phase of the civil trial, concluding that this is connected to the court's right to take jurisdiction and that it is not an administrative activity in the system of the Civil Procedure Code.<sup>22</sup>

The new regulations introduced by O.U.G. No. 128/2000, Law no. 188/2000 and the Statute of the National Union of Bailiffs and bailiff profession, have given a new meaning, both to the enforcement procedure and the bailiff's institution. The bailiff was thus removed from the administrative rule of the court, becoming an independent professional<sup>23</sup>, and the enforcement proceedings were substantially reformed. Enforcement activities performed by the bailiff in the enforcement proceedings are the

matters of parental responsibility and Regulation (EC) no. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

<sup>17</sup> The conditions for recognition and enforcement of "foreign judgments" is governed by Law no. 105/1992 on the regulation of private international law relations, in Art. 168-178, stating that these provisions also apply to legal transactions concluded abroad. This law is common law, in its meaning, the term "foreign judgments" referring both to the jurisdiction of the courts, and the notaries or any competent authority of another state, the only requirement being the jurisdictional nature of all these acts (Article 165 of the Law)

<sup>18</sup> Published in the Official Gazette, part I, no. 559/10.11.2000 and amended by: O.U.G. no. 18/1.02.2001 - Official Gazette, part I, no. 64/6.02.2001; O.U.G. no. 64/3.05.2001 - Official Gazette, part I, no. 233/9.05.2001; Ordinance no. 7/19.07.2001 - Official Gazette, part I, no. 435/3.08.2001; Law no. 540/11.10.2001 - Official Gazette, part I, no. 652/17.10.2001; Law no. 493/11.07.2002 - Official Gazette, part I, no. 543/25.07.2002; O.U.G. no. 190/21.11.2005 - Official Gazette, part I, no. 1179/28.12.2005; Law no. 332/17.07.2006 - Official Gazette, part I, no. 629/20.07.2006; Law no. 278/4.07.2006 - Official Gazette, part I, no. 601/12.07.2006; O.G. no. 144/19.12.2007 - Official Gazette, part I, no. 880/21.12.2007 and Law no. 202/25.10.2010 - Official Gazette, part I, no. 601/26.10.2010.

<sup>19</sup> Until the creation of the bailiff's institution, the enforcement body was called "portărel".

<sup>20</sup> Enforcement courts ordered the initiation of compulsory execution, set deadlines for auction sale, distributed among creditors amounts made by enforcement, confirmed the sale by the order of adjudication, acknowledged by writ of execution the completion of the last enforcement procedure, etc.

<sup>21</sup> See E. Heroveanu, *Teoria execuțiunii silite*, Ed. Cioflec, Bucharest, 1942, p. 7.

<sup>22</sup> See S. Zilberstein, V.M. Ciobanu, *Drept procesual civil. Executarea silită*, 2nd edition, Vol. I, Ed. Lumina Lex, Bucharest, 1998, p. 20.

<sup>23</sup> According to art. 12 of the Statute the bailiff's profession is liberal and independent."

minutes, which shall include the specific procedure elements and those expressly regulated by law. The court intervention in this procedure is possible only in two cases:

- to settle the claim for confirming enforcement made by the bailiff, when, by admitting the claim, the court of trial also becomes an enforcement instance;
- for the settlement of challenges on enforcement made under art. 400 of the Civil Procedure Code or of the complaints made under art. 53 of Law no. 188/2000. By this action the enforcement court may review and decide on the legality of a report prepared by the bailiff, and on the maintenance, modification or cancellation thereof.

Following these legislative changes, the legal nature of the enforcement procedure has been reconsidered. Admitting the idea that enforcement is a civil trial phase, but appreciating that enforcement documents, through their specific character, are closer to the nature of administrative acts<sup>24</sup>, all these have led to the conclusion that enforcement proceedings in civil matters has a mixed character<sup>25</sup>, where the administrative character is prevailing.

Regarding the legal nature of the bailiff's institution, the aforementioned legislative changes have produced some changes. The bailiff as an independent professional is no longer held by the court that issued the judgment, but by the district in which the enforcement is done, and where the enforcement court functions. The enforcement court does not have a preventive role or of permanent control over the activity of the bailiff but acts only after being notified by the claimant within the challenge on enforcement, by means of a sanctioning intervention meant to cancel the unlawful and/or harmful enforcement acts.

We will not focus on the details of the study of the legal nature of civil enforcement procedures and of the bailiff institution regulated by the Code of Civil Procedure of 1864, about which, as we mentioned, most doctrine<sup>26</sup> believes that it is mainly of a mixed character, predominantly administrative, but we will move our attention to the provisions of the new Civil Procedure Code.

The general rule, also maintained in the NCPC<sup>27</sup>, is that the obligations established by a judgment or other writ of execution are fulfilled voluntarily, without any intervention, neither from the creditor, nor from the court. Failure to carry out the obligation may trigger a legal dispute, within whose resolution, the creditor may require enforcement.

According to art. 623 of the NCPC, the enforcement of any writ of execution<sup>28</sup> shall be made only by the bailiff. This, in the exercise of his competencies as invested by law, drafts documents for enforcement, by rendering a resolution or by making reports or other

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<sup>24</sup> See I. Leș, *Tratat de drept procesual civil*, 5th edition, Ed. C.H. Beck, Bucharest, 2010, p. 1047.

<sup>25</sup> See I. Leș, *op. cit.* p.1046, S. Zilberstein, V.M. Ciobanu, *op. cit.* p. 21. For other enforcement procedures having a mixed character, also see T. Pop, *Considerații în legătură cu prescripția Dreptului de a cere executarea silită*, R.R.D. no. 5/1984, p. 12-13, apud I. Leș, *op. cit.* p. 1047.

<sup>26</sup> See for details I. Leș, *op. cit.* p. 1045 and the following authors, S. Zilberstein, V.M. Ciobanu, *Tratat de executare silită*, Ed. Lumina Lex, Bucharest, 2001, p. 29 and the following authors, I. Deleanu, *Tratat de procedură civilă*, 2nd edition, vol. II, Ed. C.H. Beck, Bucharest, 2007, p. 199 and the following authors, F. Măgureanu, *Drept procesual civil*, 9th edition, Ed. Universul Juridic, Bucharest, 2007, p. 583 and the following authors.

<sup>27</sup> See art. 622 NCPC.

<sup>28</sup> Except those dealing with the revenues from the general consolidated budget, or the budget of the European Union and the European Atomic Energy Community budget

and other procedural acts.<sup>29</sup> It should be noted that in the most important moments of the enforcement procedure, the bailiff renders resolutions. Thus, according to art. 656 of the NCPC, "postponement, suspension and termination of enforcement, release or distribution of the proceeds from enforcement, as well as other measures specifically provided by law, shall have the bailiff's resolution." The resolutions given by the bailiff are made without summoning the parties, are enforceable by law and can be challenged only by appeal to enforcement

Regardless of documents issued by the bailiff, enforcement proceedings governed by NCPC preserves the same mixed character, involving the issue of jurisdictional acts, as well as of a series of acts that are closer to the administrative ones. Regarding the proportion of the administrative as reported to the jurisdictional, we were unable to express an opinion, so we will concentrate on the mixed nature of this procedure.

Another important regulation in our analysis is that of art. 650 of NCPC, according to which "the enforcement court is the court in whose jurisdiction the bailiff's office is placed." Therefore, contrary to current regulations, where the territorial competence is given by the jurisdiction of the court where the bailiff works, the court being also the enforcement instance, according to the new regulation, the bailiff's office determines the enforcement court selection.

Under the new regulations, can we state that the bailiff becomes a body with jurisdictional activity? Let's review:

- the enforcement activity is carried out by the bailiff, a free and independent profession which is not part of the organization of courts;
- by their work the bailiffs only carry out the procedures for the enforcement of the civil decisions contained in court judgments or in other writs of execution;
- the bailiffs provisions contained in resolutions can be attacked only by challenge on enforcement addressed to the court.

The previous review was considered in the doctrine as the characterization of special jurisdiction, which has been defined as a settlement activity carried out by some government or private bodies, other than courts, following a certain procedure, a settlement of the legal conflicts that by law, expressly fall under their jurisdiction.<sup>30</sup> So we can state that in the new regulation, the bailiff is a special body with a special jurisdictional activity, an executive jurisdiction, which often combines with the jurisdiction activity of the enforcement court.

To conclude, we consider that the legal nature of enforcement regulated by the New Code of Civil Procedure is a mixed one, made by a body with a special jurisdictional activity.

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<sup>29</sup> See art. 655 NCPC

<sup>30</sup> See M.N. Costin, I Leș, M.Ș. Minea, C.M. Costin, S. Spinei, *Dicționar de procedură civilă*, 2nd edition, Ed. Hamangiu, Bucharest, 2007, p. 546