

COMPARATIVE ASPECTS CONCERNING THE WAYS OF ENFORCEMENT IN FISCAL PROCEDURE AND CIVIL PROCEDURE

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The enforcement is the final solution for the creditor to reclaim his debts if the debtor refuses to pay them willingly.

Although the fiscal procedure and the civil procedure are similar concerning the enforcement, there are several differences between these two procedures. The most important is that the fiscal procedure is started and is being deployed by the administrative- tax and financial control bodies of state without asking permission from any other body of state, on the grounds that the tax debt instruments are enforcements by themselves.

Enforcement, widely regarded, is the procedure through the instrumentality of which creditor, holder of the right acknowledged by a judgement or by another writ of execution, with help from the qualified bodies of state, enforce the debtor to accomplish his obligations.

Enforcement bodies can use, either successive or simultaneous, any of the ways of enforcement shown by Code of Fiscal Procedure and Code of Civil Procedure, namely: enforcement by attachment, execution of movable property, execution of real property, enforcement of gathered fruits and root crops caught, execution of a set of goods.

We proposed that this article refer only to the comparative aspects of enforcement procedures in the two branches of law: fiscal procedure and civil procedure.

Enforcement by attachment. The specific of attachment in civil procedure is determined, as in fiscal procedure, by the triangular character, which in principle requires the participation of three essential parts: the creditor (which in this case is not anymore the State as in the fiscal procedure), the debtor and the garnished third party. This operation also involves the existence of two legal relationships, from creditor to debtor and from debtor to garnished third party. Both legal relationships precede the establishing of an enforcement. In ground of the attachment also arises a third legal relationship between creditor and garnished third party, the legal relationship contents including the differentiated obligations of third party.

A form of attachment, which isn't met in fiscal procedure, is *the attachment in creditor's own hands*, that means there are only two topics: the creditor and the debtor, that two sides being mutually creditor and debtor. Whereas their claims are not accomplishing the conditions for legal compensation, provided by art. 1144-1145 Civil Code, (not being both liquid and exigible) and a party has the interest to ensure for future the accomplishment of his claim against his own debtor (which is also creditor), this party will resort to an attachment in his own hands, hereby reassembling, in the same time, the quality of creditor and also of garnished third party. Such attachment has been identified as

"an antechamber of compensation", as it prepares the compensation, winning the time needed for the conditions required to be satisfied. It suppresses (in case of competition with an assignee or a creditor later follower) or (otherwise) mitigates the risk of insolvency of the debtor.

Compared to the Code of Civil Procedure, which expressly and repeatedly provides the need for the three subjects in the attachment procedure, it was difficult to recognize the achievement of attachment in the own hands of the creditor. However, the solution was required, precisely because it was necessary. Using this procedure, a money lender-debtor or the debtor himself can get the right to retain in his own hands the amount that he owes to the debtor.

The attachment in the creditor's own hands is an attachment procedure in every sense of the word. There must be a writ of execution to justify the application of attachment and, what is essentially, an attachment address from the competent distrainer.

As in the case of fiscal procedure, the attachment is set up without any notice, by an address together with a certified copy of the writ of execution, at the same time informing the debtor of the action taken. (Art. 454 CCP).

In January 2007 by amending the Code of Civil Procedure were exempt from attachment: payments which are intended for special affectations provided by law, on which the debtor has no right of disposal; the amounts of not reimbursable loans or grants received from institutions or international organizations to conduct programs or projects; the amounts required for payment of wages, but not more than 6 months after the establishment of attachment. (paragraph 2, art.452 CCP).

These amounts were already exempt from execution by attachment in fiscal procedure.

The content of establishment address of attachment is similar in both procedures, with some specific elements of each procedure separately.

Article 460 CCP establishes a penalty if the garnished third party no longer meets the obligations incumbent for making the attachment, including when, instead of recording the lawsuitable amount, he handed out to the garnished debtor. In this case, the creditor, debtor or enforcement body within 3 months from the date when the garnished third party should record or pay the lawsuitable amount, can apply to the enforcement court, in order to validate the attachment. The garnished third party, which in bad faith, refused to fulfil his obligations regarding the accomplishment of attachment, will be fined with an amount between 200 lei and 1,000 lei.

So in the fiscal procedure and in civil procedure, the performance of attachment is the same, but taking into account the specifics of each procedure.

Enforcement of movable property. As in the fiscal procedure, lawsuiting movable property in civil procedure begins with the communication of the notice. However, the time that the debtor has to pay the amount due is different. Thus, if in the fiscal procedure the time is 15 days from notification of the summons in civil procedure deadline is one day.

Article 412 CCP establishes the presence necessity of a police officer or his aid, and in their absence, the mayor or his aid: if the doors are closed and the debtor doesn't want to open them; if the debtor doesn't want to open rooms or furniture; if the debtor is missing and there is no relative living with him, to represent him.

In these cases, once the homes or furnitures were opened by the debtor, or if he doesn't want to or in his absence, by the distrainer, police officer's or the mayor's presence, will be replaced by two major witnesses. (Art. 413 CCP).

The steps for enforcement of movable property are the same for civil procedure and fiscal procedure: identification and property valuation, application of the distraint and exploitation of movables.

In case of application of the distraint in civil procedure it will also conclude a report of distraint which comprises the same elements as in fiscal procedure.

Capitalization of movables can be made through auction, direct sales and through other means permitted by law (Art. 431, para. 1 CCP). Unlike civil procedure, the Code of Fiscal Procedure lists also the private sale and consignment sale.

Concerning the methods for capitalization of movable property, there are slight differences between the two procedures regarding the sale at auction.

Thus, before deploying the auction, the sales publication is settled for at least 3 days before in civil procedure and at least 10 days before in the fiscal procedure.

Concerning the fiscal procedure, those interested in participating in the auction must file certain documents with at least one day before the auction. But the Code of Civil Procedure is silent on this.

If those interested to participate in the auction are required in fiscal procedure to submit a participation fee of 10% of the auction starting price, in civil proceedings that tax is not provided, the successful tenderer is obliged to give full price after auction sale.

The Code of Civil Procedure does not provide the time until the next auction neither the decrease of starting price as the fiscal procedure.

In both procedures the auction closes with a report on the conduct and result of it.

The Code of Civil Procedure provides in art. 448, par. 3 that the distrained property that could not be capitalized remain unavailable at most 6 months from the date of distraint. During this period, the distrainer can proceed again to the capitalization of those movables. If any goods after this period expires can not be capitalized, they returned to the debtor.

The Code of Fiscal Procedure uses for this period of time that goods remain unavailable, the term of prescription of right to make enforcement.

As we observed, in general, movable enforcement procedures are similar.

Enforcement of immovable property. Immovable property enforcement procedure is very similar to movable property enforcement procedure, both for civil procedure and fiscal procedure.

Immovable property enforcement procedure in civil matters do not differ from the fiscal procedure, excepting some regulations concerning the civil procedure.

The Code of Civil Procedure does not show all the immovables that are excepted from enforcement, as it shows the Code of Fiscal Procedure. Only art. 491 of C.C.P. establishes an exception that applies also to the fiscal proceedings, which consists of a minor or a person placed under interdiction fixture.

The Code of Civil Procedure regulates in art. 492 the possibility for the mortgagee to follow in the same time also the unmortgaged imovables of his debtor. This regulation isn't included in the Code of Fiscal Procedure, but we must keep in mind that the dispositions of the Code of Civil Procedure are common law provisions and they are valid unless it is otherwise provided by special laws.

The stages of enforcement of immovable property in civil matters are the same as those in the field of fiscal procedure. Differences between the two procedures are for sale at auction, but they are not essentialy.

If the debtor is granted a period of 15 days from the notification of the report of distraint to request full payment of claims or payment of incomes of the followed building during 6 months, the debtor in civil matters is given a period of 10 days from the date of the notification.

Also, the Code of Civil Procedure provides the situation in which the debtor has no other means of livelihood, than incomes of pursued building (art.503C.C.P.). In this case he may, by report, to be set at a rate not exceeding 20% of such incomes for his and his family livelihood.

Regarding the time of publication of auction notice it differs in the two procedures, in fiscal procedure being 10 days before the auction, and in civil procedure only 5 days.

The offers of purchase must be submitted to the fiscal authority of performance (fiscal procedure) or the State Treasury, Home Savings Bank CEC SA or to any other banking institution (civil procedure) (Art. 506, para. 1, amended by Law of January 2007).

The auction follows the same course as in fiscal procedure, but to the provisions of the Code of Fiscal Procedure which provides a term not exceeding 30 days for the holding of the second auction, the Code of Civil Procedure provides in art. 509 paragraph 5, a period not exceeding 60 days.

The Code of Civil Procedure provides special dispositions regarding the applications for eviction on the property awarded, which are prescribed within 3 years from the date of registration of adjudication act in the land register (Article 520 CCP).

As we have seen, there are no essentially differences between the two procedures, common law provisions contained in the Code of Civil Procedure being applied when the fiscal procedure doesn't provide otherwise.

Enforcement of an assembly of assets is the way of enforcement which falls on movable and immovable property of the debtor and which allows the enforcement in a single procedure of the assembly that they compose.

The decision on forcible pursuit of movable and immovable property belongs to the enforcement body and it is based on the possibility of capitalize the assembly in more favorable conditions than if the movables were separately pursued from the immovables.

All the legal dispositions regarding the enforcement procedure of movable and immovable property applies accordingly on this way of enforcement.

Enforcement of unharvest fruits and attached to roots crops is that way of enforcement that allows the application of legal dispositions concerning to the immovable enforcement.

If the enforcement is on collected crops and fruits, become applicable the dispositions relating to moveable enforcement.