What Is Not Well Started by the Creditor, Can End Nicely For the Debtor in the Enforcement Appeal

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Abstract: Capricious can prove to be the paths of the forced execution procedure especially when, from the premise situation of a creditor who starts a seemingly valid enforcement procedure, it quickly reaches an outcome opposed to the one he wanted, consisting in canceling the enforcement itself. The passage of time must keep alive the creditor's desire to see his right, recognized by the enforceable title, realised, and in some extreme situations, it must even impel him to act. Losing the notion of time, the creditor also loses the certainty that his wish will be fulfilled, and will assume, as a consequence, the risks supposed by such a procedural attitude.

Speaking of the element „time” and placing this element on the legal stage, we are actually talking about the statute of limitations of the creditor's right to obtain forced execution. The present study aims to make a brief presentation of some aspects of practical interest regarding this legal institution - sufficiently effervescent, but which has been and still remains an useful tool for vigilant debtors - by reference to court solutions too.

Keywords: *Forced execution procedure, enforcement appeal, credit agreements, statute of limitations.*

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1. Brief presentation of the legislative framework

The effervescence of the statute of limitations institution can be captured by the very legislative path that the statute of limitations has taken and which has created fertile ground for different doctrinal opinions.

The old Civil Procedure Code (Romanian Parliament, 1865), in terms of statute of limitations, has provided, in a summary way, at art. 404, that „a court decision that has not been executed within 30 years from its date will no longer be enforceable and will lose the power of the *res judicata*”.

Special attention was paid to the analyzed institution later on, by Decree no. 167/1958 regarding the statute of limitations (Romanian Parliament, 2011), which provided at art. 1 the fact that „the right to action, having a patrimonial object, is extinguished through statute of limitations, if it has not been exercised within the term established by the law” and at art. 6 the fact that „the right to request the forced execution on the basis of any enforceable title is prescribed by fulfilling a term of 3 years (...)”.

By Government Emergency Ordinance no. 138/2000 for the amendment and completion of the Civil Procedure Code (Romanian Parliament, 2000) was introduced, in the Civil Procedure Code, in Chapter I (with the marginal name „General Provisions”) of Book V (with the marginal name „About forced execution”), Section VI, with the marginal name „Statute of limitations of the right to request the forced execution” (art. 405-art. 4053). According to art. 405 para. (1) of this normative act, „the right to request the forced execution is prescribed within 3 years, unless the law provides otherwise (...)”.

The current Civil Procedure Code (Romanian Parliament, 2015) regulates in articles 706 - 711 „the statute of limitations of the right to obtain the forced execution” - as the marginal name of the chapter of which the six articles are part of. According to art. 706 para. (1) of this normative act, „the right to obtain the forced execution is prescribed within 3 years, unless the law provides otherwise (...)”.

At the same time, art. 711 of the current Civil Procedure Code, with the marginal name „Other applicable provisions”, establishes the completion of the provisions of the chapter dedicated to the statute of limitations of the

right to obtain the forced execution with „the provisions of the Civil Code regarding the statute of limitations”. This article must be read together with art. 2516 para. (2) of the Civil Code, according to which „the statute of limitations of the right to obtain the forced execution of a court or arbitral enforceable title or other enforceable title is subject to the provisions of the Civil Procedure Code, unless the latter would be insufficient”.

In other words, the Civil Code remains the main source of regulation of the institution of statute of limitations, „the common law in the matter of statute of limitations”, as indicated by para. (1) of art. 2516 of the Civil Code. The rules of the Civil Procedure Code have a special nature and will become applicable only regarding the statute of limitations of the right to obtain the forced execution. In case of situations in which the regulation of the Civil Procedure Code fails to fully include them (such as, for example, the waiver of statute of limitations), the reporting will be made to the regulation of the statute of limitations from the Civil Code (art. 2500 - 2544).

Regarding the regulation from the current Civil Procedure Code, it should be noted the replacement of the verb „to request” from the phrase „the right to request the forced execution” with the verb „to obtain”. Such a change was welcomed.

The right to request the forced execution has in view the creditor's prerogative to notify the bailiff, to submit to him the request for forced execution, followed by the formulation, by the notified bailiff, of the request for judicial authorisation of the enforcement proceedings, addressed to the enforcement court. Given the legal nature of the statute of limitations, that of a civil sanction (Ungureanu, 2013 p. 260), in order for the specific sanctioning effect to occur, it is necessary that the titular of the subjective civil right, from the moment he wishes to act, to be offered the real, effective possibility to act. In other words, the right to request the forced execution is equivalent to the exercise of the procedural right to action, as a form of manifestation of the right of free access to justice, and is therefore imprescriptible. As rightly stated in the doctrine (Țiț, 2016 p. 295), the prescriptibility of the right to obtain the forced execution is conditioned by the imprescriptibility of the right to request the forced execution.

2. Unity or duality?

The fact that, at the present moment, to the institution of statute of limitations is dedicated a regulation in both the Civil Code and the Civil Procedure Code could be interpreted as meaning that in discussion it is not a legal institution with an unitary character, but there are two distinct legal institutions: the statute of limitations of the material right to action- institution of substantial law, with the related regulation from the Civil Code- and, separately, the statute of limitations of the right to obtain the forced execution- institution of procedural law, with the related regulation from the Civil Procedure Code. Moreover, this issue is not a novelty, taking into account the fact that in the legal doctrine, prior to the new Civil Code and the new Code of Civil Procedure (Cotoi, 2009 pp. 187-191), has been launched in the form of two theories: the monistic one and the dualistic one.

Although a reference to the definition of this legal institution would be necessary, the current legislative framework does not provide it. However, although it does not enshrine a definition in terminis of the statute of limitations, the new Civil Code provides a definition of the right to action, through art. 2500 para. (2). According to this text of the law, „(...) the right to action means the right to compel a person, by means of public force, to perform a certain service, to respect a certain legal situation or to bear any other civil sanction, as the case”. But, by material right to action, as it is defined in art. 2500 para. (2) of the Civil Code, is it understood to be about exclusively the right to the condemnatory action- an action which seeks to obtain the defendant's condemnation and, consequently, an enforceable title- or the notion also includes the right to an executory action, which seeks to obtain the forced execution of the provisions of the enforceable title?

Starting from the definition given to the material right to action by the Civil Code, it is observed that the mechanism by which the right to the condemnatory action is activated is similar to that specific to the forced execution procedure- it is envisaged a form of coercion of a person, with the help of coercive force of the State, to perform a certain obligation. Thus, while the first mechanism presupposes the compulsion of the debtor in order to be obtained his obliging to fulfill the obligation, the right to obtain the forced execution presupposes a continuation of this constraint when the

debtor has not voluntarily fulfilled his obligation, being carried out through the enforcement body, that is, with the help of public force.

At the same time, if we were to separate the material right to action (Paziuc, 2018) from the right to obtain the forced execution, it would mean that the forced execution must be treated separately from the civil action, which would not be possible, starting from the very definition of the civil action. According to art. 29 of the Civil Procedure Code, „civil action is the set of procedural means provided by law for the protection of the subjective right claimed by one of the parties or of another legal situation (...)”. However, the forced execution is a form of manifestation of the civil action that can be included among the „procedural means provided by law for the protection of the subjective right claimed by one of the parties or of another legal situation”, as required by the definition cited above, not being two different legal institutions (Porumb, 1964). The civil action has in its composition two elements: the condemnatory action and the executory action.

Therefore, the right to obtain the forced execution is also only a special form of manifestation of the right to action, as defined in art. 2500 para. (1) of the Civil Code, the statute of limitations of the right to obtain the forced execution not distinguishing itself, under the aspect of its legal nature, from the statute of limitations of the material right to action. In other words, the material right to action brings together both the right to a condemnatory action and the right to an executory action (Hurubă, 2015). The fact that, at the present moment, both the Civil Code and the Civil Procedure Coderegulate the institution of statute of limitations does not take into account conceptual reasons, which would produce effects on the legal nature, on the unity of the legal institution of statute of limitations, but can be about at most only technical reasons (Oprina & Gârboleş, 2013, p. 522).

Also, if we take into account the jurisdictional enforceable titles- the court and arbitral decisions- in their case, the right to obtain the forced execution has the role of „dressing” in practical efficiency the material right to action, of offering the creditor a concretization of his desire to exercise the right granted to him as a result of the judicial procedure (Lazar, 2020). The two notions are not excluded, but are intertwined by virtue of a

common goal: the effective realization of the creditor's rights. That is why it appears natural and fair to include the right to obtain the forced execution within the right to action.

In view of all these considerations, we can state that the institution of statute of limitations is an institution of substantive law, and not one of procedural law.

3. The moment by reference to which the law applicable to the statute of limitations is established

The qualification of the statute of limitations of the right to obtain the forced execution as a material law institution allows the determination of the law applicable to it, which will be the one in force at the time the term of the statute of limitations began to run, and not the one in force at the time of submitting the forced execution request- hypothesis applicable only in the situation of qualification the statute of limitations of the right to obtain the forced execution as an institution of procedural law. Consequently, regarding the transitional norm applicable to the institution of the statute of limitations, this will be the one from art. 201 of Law no. 71/2011 for the implementation of the Civil Code (Romanian Parliament, 2011) according to which „the statutes of limitations started and not fulfilled on the date of entry into force of the Civil Code are and remain subject to the legal provisions that established them”, and not the one from art. 3 para. (1) of Law no. 76/2012 for the implementation of Law no. 134/2010 regarding the Civil Procedure Code (Romanian Parliament 2012), which establishes the law applicable to the forced execution procedure itself. According to art. 3 para. (1) of Law no. 76/2012: „The provisions of the Civil Procedure Code apply only to trials and forced execution procedures initiated after its entry into force”.

Thus, if the forced execution request was introduced by the creditor after the entry into force of the new Civil Procedure Code, the consequence will be that the entire forced execution procedure will be subject to the law in force at the time of its formulation. However, in relation to the statute of limitations of the right to obtain the forced execution, the applicable law will

be the one in force at the time when the term of the statute of limitations began to run.

The conclusion is of practical interest because, if the term of the statute of limitations began to run before the entry into force of the new Civil Code, the institution is to be treated as one of public law, forcing the court to invoke it *ex officio*, including the court of appeal which must solve the appeal against the judgment by which the first instance court solved the enforcement appeal against the forced execution procedure itself (Ît, 2016 p. 301). In this sense, according to art. 18 of the Decree no. 167/1958: „The court and the arbitral body are obliged, *ex officio*, to investigate whether the right to action or forced execution is prescribed”. However, if the term of the statute of limitations began to run after the entry into force of the Civil Code, „the competent court cannot apply the statute of limitations *ex officio*”, but the statute of limitations is going to operate „only at the request of the interested person”, according to art. 2512 para. (2) of the Civil Code corroborated with 707 par. (1) of the Civil Procedure Code.

Although art. 18 of the Decree no. 167/1958 has provided for courts the obligation to invoke the statute of limitations of the right to action *ex officio*, the judicial practice (Giurgiu Tribunal, 2012). considered that it is not possible to go so far as to reach the suppression of the contradictoriness principle, being necessary to put this issue beforehand the contradictory debate of the parties. For this reason, it was considered that in the procedure for requesting judicial authorisation of the enforcement proceedings, even if the regulation provided by Decree no. 167/1958 would be applicable, the court could not reject the request for judicial authorisation of the enforcement proceedings on the basis of the statute of limitations because this request is resolved in the council chamber, without summoning the parties, in a non-contentious and non-contradictory procedure.

4. The moment by reference to which the term of the statute of limitations of the right to obtain the forced execution begins to run

Establishing that the law applicable to the statute of limitations of the right to obtain the forced execution is the one in force at the moment

when the term of the statute of limitations began to run, it is further interesting to find out which is exactly this moment.

Article 706 para. (2) thesis I of the Civil Procedure Code establishes the rule according to which „the term of the statute of limitations begins to run from the date when the right to obtain the forced execution is born”. Therefore, in the matter of the statute of limitations of the right to obtain the forced execution, the legislator establishes a purely objective moment from which the term of the statute of limitations begins to run.

In the case of non-jurisdictional enforceable titles, this moment is usually represented by the date on which the debtor's obligation matured or the date on which the debtor was forfeited from the benefit of the term. For example, in the case of bank credit agreements, the term of the statute of limitations of the right to obtain the forced execution will begin to run from the due date of each credit rate because this is the time when each credit rate becomes susceptible to be subject to forced execution, respectively the time when the creditor's right to obtain forced execution has born.

However, given that in most cases (Necula, 2020 p. 122), on the basis of the credit agreement, the bank declares the loan exigible before the due date, in such situations, the term of the statute of limitations will begin to run from the date of this bank's declaration (Constanța Tribunal, 2021), with bringing up that, regarding the credit rates due prior to the declaration of early due and unpaid within 3 years, the term of the statute of limitations of the right to obtain forced execution occurs (Lazăr & Penteleev, 2021 p. 408). This was also the opinion of the National Institute of Magistracy expressed during the meeting of the presidents of the specialized sections of the High Court of Cassation and Justice and the courts of appeal from December 15, 2020 and unanimously endorsed by the other participants (High Court of Cassation and Justice and of the courts of appeal, 2020)

For the hypothesis of the jurisdictional enforceable titles, art. 706 para. (2) thesis II of the Civil Procedure Code provides that „the term of the statute of limitations begins to run from the date of their finality”. Therefore, in the case of court or arbitral decisions which are enforceable titles, despite the fact that they may still be subject to judicial control by way of appeal or recourse, the term of the statute of limitations will begin to run

only from a later time, respectively from the time the court or arbitral decision- enforceable title- remained final (Dumitru, 2017).

5. Invoking the statute of limitations of the right to obtain the forced execution by way of enforcement appeal

With regard to the ways in which the debtor can invoke the statute of limitations of the right to obtain the forced execution, as noted in the legal doctrine (Pop, 2017 p. 390), if he is positioned at a time prior to the commencement of enforcement proceedings, he can invest the court with a declaratory action, by which he asks the court to ascertain the creditor's right to obtain the forced execution prescribed (Constanța Tribunal, 2020). In this way, a diligent debtor is one step ahead of the creditor and will obtain, pursuant to art. 719 para. (4) point 1 of the Civil Procedure Code, the obligatory suspension of the forced execution procedure, without being obliged to pay the bail.

However, if the debtor has not filed a declaratory action and the creditor has initiated the forced execution procedure, the declaratory action becomes inadmissible, because the debtor is opened the way of enforcement appeal. In this sense, we remind that, according to art. 35, thesis II of the Civil Procedure Code, the declaratory action „cannot be accepted if the party can request the realization of the right in any other way provided by law”.

With regard to the time-limit for filling the enforcement appeal, by which the debtor invokes the statute of limitations of the creditor's right to obtain the forced execution- fulfilled before the commencement of enforcement-, before its setting, the object of the enforcement appeal must be determined, according to which the form that the enforcement appeal takes can also be specified. Thus, correlating the fact that the debtor wishes to invoke the statute of limitations of the creditor's right to obtain the forced execution with the fact that the effect of the expiry of the term of the statute of limitations leads to the loss of enforceable character of the enforceable title, which represents the basis of the forced execution procedure, it results that the debtor actually appeals the validity of the forced execution procedure, as a whole. In other words, it is about an actual enforcement appeal, exercised against forced execution procedure itself.

So the term for exercising the enforcement appeal against the forced execution itself will be calculated according to art. 715 para. (1) point 3 of the Civil Procedure Code, according to which „the enforcement appeal regarding the actual forced execution may be made within 15 days from the date when: (...) 3. the debtor contesting the forced execution itself received the conclusion of judicial authorisation of the enforcement proceedings or the demand for payment or from the date when he became aware of the first act of forced execution, in the cases in which he did not receive the conclusion of judicial authorisation of the enforcement proceedings and neither the demand for payment or in the case in which the forced execution is made without demand for payment” (Huruba, 2015).

Therefore, the possible formulation by the debtor of an enforcement appeal against a subsequent enforcement act, for which the debtor would be within 15 days, but by which he does not appeal the strict illegality of that act of forced execution, but the illegality of the enforcement itself, by invoking the statute of limitations of the creditor's right to obtain the forced execution, will be doomed to failure. In other words, the enforcement court will classify the enforcement appeal against the enforcement act as, in fact, an enforcement appeal against the enforcement procedure itself, and the latter will be rejected by the enforcement court as belatedly formulated as a consequence of the debtor's forfeiture of the right to invoke the statute of limitations by way of the enforcement appeal.

6. Conclusions

Summarizing the above, we conclude that, on the one hand, the creditor must remain anchored in the present time, but also with a vital care for the future, the current legislation giving him the opportunity to act at risk, based on the simple hope that the debtor will not invoke the statute of limitations of his right to obtain the forced execution. On the other hand, the debtor is also under the pressure of time, because he must not only be vigilant before a forced execution procedure that the law allows him to appeal and, eventually, cancel, but he must also be aware of the fact that what law allows him to do, it allows him to do it in a very limited time.

A very important role, as we have seen, will also be played by the court, which must carefully investigate when the term of the statute of limitations began to run, and then determine, depending on this moment, what law is applicable and finally, depending on what law is applicable, to treat the statute of limitations as an institution of public or private law, with the consequences that arise in each case.

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