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Article

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HOW FAR HAVE WE REACHED IN EUROPEAN COOPERATION IN CIVIL MATTERS? A VIEW ON EUROPEAN ENFORCEMENT

Nicolae-Horia TIT*

Abstract: *The EU judicial cooperation in civil matters system was developed following the needs of member states to achieve a common goal, which is to create a space of mutual recognition of judgements and distribute the juridical effects of the order created under one jurisdiction thru out the entire European space. One of the main pillars of this system is the creation of European Enforcement Orders, judgements or other titles enforceable in a member state without prior recognition of declaration of enforceability. This system has been developed other the years, starting with the European Enforcement Order for uncontested claims, continuing with the European Order for Payment procedure and European Small Claims procedure, and reaching its peak in Regulation (EU) 1215/2012. By virtue of this Regulation, entered into force in January 2015, a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required (art. 39). The article analyses the evolution of EU regulation regarding the enforceability of foreign judgements and the system created under Regulation (EU) 1215/2012, given its importance for the judicial cooperation in civil matters and its impact on the legislation of member stated. Also, a brief analysis of the provisions of the new Romanian civil procedure Code is made, given its amendments by Law no. 138/2014.*

Keywords: judgement; enforcement; European enforcement order; claim

JEL Classification: K33

Introduction

Any solid economic and social system is based on regulations that guarantee the realization rights and establish sufficient safeguards to comply with court rulings. The safety of the civil circuit plays a major role in boosting economic exchanges and increasing social welfare. From the point of view of a law system, it should be considered the substantial component, specific to private law, whose rules are mainly discretionary, and the procedural component, specific to public law, whose rules are mainly imperative. In this context, the enforcement law is on a middle position, because its purpose is to regulate effective procedures for completion of obligations under writs of execution. Therefore we are talking about private law relations between private individuals on an equal footing before the law system, but to which procedural rules apply, by public officials mandated with the enforcement¹.

Enforcement is governed by the principle of legality, with two main components: one that refers to the legal provisions, the rights of parties and interested third parties (art. 625 par. 1 CPC), closely

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¹ In this regard, according to art. 2 para. 1 of Law no. 188/2000 on bailiffs, "the bailiffs are invested to fulfill a public service" and par. 2 of the same article states that "the act performed by a bailiff, within its legal competence, bearing the stamp, signature, registration number and date, is the act of public authority and has probative value prescribed by law".

related to the principle of the right to a fair trial within optimal and predictable time; the second, on the prohibition of carrying out enforcement activities by persons other than the enforcement bodies provided by the law (art. 625 par. 2 CPC), closely related to the principle of achieving enforcement activity only through the enforcement body (bailiffs).

The legality of enforcement requires at the same time as all acts of enforcement to be carried out only under a writ of execution (enforcement order). The enforcement order is, both substantially and formally, the basis of enforcement in a positive sense (the procedure can be triggered only under it) and negatively (its cancelation leading to the cancelation of all acts of enforcement). Although the enforcement activity is specific to the legal relationship governed by private law, because it seeks the fulfillment of obligations correlative to subjective right, it has an important and significant public component, because it is carried on after the procedure prescribed by law and by an agent who is performing a service of public interest². Therefore, traditionally, in the international civil trial theory, the enforcement phase of the trial is subject eminently to the enforcement law of the forum; there can be no enforcement activity on the territory of a state other than the one regulated by the law of that state. This component of the general theory of international trial is the result of sovereignty principle and comes under the general rule that the procedure is subject to the law of the court, whether the legal relationship is subject to foreign law. This traditional design led to the generalization of rules on recognition of foreign judgments for enforcement in the territory of another State, via *exequatur*.

The need for international legal cooperation in civil matters gave rise to simplified forms of recognition and establishment of procedural safeguards capable to lead to subjective rights confirmation without significant barriers. In particular to the European Union, the creation of specific mechanisms of supranational law led to the removal of classical conception of *exequatur* recognition of judgments and the establishment of new procedural disciplines, to ensure uniform protection of the rights and minimum procedural safeguards in this respect (Edward *et al.*, 2013, pp. 672-676).

In this direction, two tendencies are observed: on the one hand, the developments of EU law towards the establishment of a European passport for enforcement, i.e. a certification procedure which once covered, leads to the possibility of enforcement in any Member State, without being required acknowledgments or any other formalities according to its legal system; on the other hand, the creation of European procedures, distinct from national and applicable independently of these, which

² In this respect, art. 623 CPC provides that "enforcement of any enforceable title except those which concern the consolidated budget, European Union budget and the European Atomic Energy Community budget is made only by the bailiff, even if by special laws is provided otherwise ". Likewise are the provisions of art. 1 of Law no. 188/2000. Therefore, Romanian law enshrines as a general principle the rule according to which the only competent body to enforce obligations under enforcement orders is the bailiff. This rule is without derogation.

once are followed by the creditor, lead directly to the emanation of a European Enforcement Order also apt to be enforced without be required to fulfill any other formalities (Crifo, 2009, p. 61 et sq.).

1. The evolution of regulation regarding European Enforcement Orders

As pointed out above, the enforcement order is the fundament of enforcement procedure (art. 632 par. 1 CPC), any execution procedure being unable to perform than under a judgement or another document which the law gives this character. This rule is materialized in at least two essential procedural regulations: on the one hand, the requirement that the original or copy of the enforcement order has to be attached to the application for enforcement to the competent bailiff (art. 664 par. 4 CPC); on the other hand, the cancelation of the enforcement order lead to the cancelation of all enforcement procedures performed under it and the restitution of benefits (art. 643 CCP) (Boroi, *et al.*, 2015, pp. 941-942).

Based on the definitions and classifications made in the CPC, we must distinguish between the execution titles represented by judgements and other documents which the law confers this status. In the first category is not required for a declaration of enforceability, while in the second case, the enforcement title may be enforced only after being declared enforceable (art. 641 CCP)³. This distinction is based on the subjective nature of the right claimed and the claim contained in the executory title: with judgments, the *res judicata* effect make the subjective right to be strengthened as a result of facts and legal verification made by the court; with the other documents, the verification made by the court is limited to the formal requirements of the title, in relation to the requirements of the law for it to be enforced. For these title, a potential substantial verification is to be made the enforcement court, if the debtor applies for a contests against enforcement procedures by invoking substantive defence against the writ of execution⁴.

³ According to art. 641 para. 1 CPC, "enforcement titles other than judgments can be enforced only if they are declared enforceable". According to art. 641 para. 2 CPC, the application for a declaration of enforcement shall be settled by the court in whose area if located the residence or place of business of the creditor or of the debtor, as applicable. In certain circumstances, the competence for the declaration of enforceability is attributed to another court (for example, contracts between lawyers and their clients are enforceable, under the condition to be concluded according to the law; the declaration of enforceability is a matter for the court in whose jurisdiction is the professional office of lawyers, according to art. 31 par. 3 of Law no. 51/1995 on the organization and exercise of legal profession).

⁴ According to art. 713 para. 2 CPC "where enforcement is carried out under another title than a judgment, the contest can rely on factual or legal reasons relating to the substance of the rights contained by the enforcement order, only if the law provides no other specific procedural remedy to cancel it". The phrase "specific procedural remedy" should be understood as a procedural means other than the application that would invoke the irregularity of the act (for example, an application for nullity).

According to the classical theory of international trial, the execution of a foreign enforceable title could be performed in a State only after its recognition under the law of the State where the execution would be carried. Expression of the principle of sovereignty (Cuniberti, *et al.*, 2011, pp. 2-3), the rule that enforcement is conditioned by the prior recognition and declaration of enforceability was adopted, in principle, by the CPC (art. 1103 CCP). The conditions of the declaration of enforceability of foreign judgments are the same as the ones provided for the recognition (art. 1104 and art. 1096 CPC), plus the condition regarding enforceability of the judgment according to the law of the state of the court which passed that judgment.

However, enforcement of a foreign judgment in Romania is conditioned on its definitive enforceability in the state of origin; the enforcement in Romania of a foreign judgements concerning precautionary measures or those that were given with provisional enforcement is not permitted (art. 1103 par. 2 CPC). Thus CPC links the recognition of the enforceability of a foreign judgment of its *res judicata*, reported in two parts: on the one hand, the substantial one, regarding the settlement by the judgment of conflicting rights; on the other hand, the procedural one, regarding the completion of appeals provided by the legislation of the court which delivered the judgment.

The system based on preliminary recognition of judicial decisions is inadequate in the legal order of the European Union. Moreover, the creation of a common economic space requires the establishment of procedural safeguards for individual rights to be exploited throughout the Union, with minimum formal requirements and costs. Otherwise, the imperative of defending the rights would be illusory and the possibility of abuse of rights would increase unreasonably, a debtor could easily speculate the legislative differences between Member States regarding the enforceability of foreign judgements. In this context, the establishment of a European Enforcement Order has been an ongoing concern at the decisional level, since at the time of the creation of the European Economic Community, by the Treaty of Rome (Gaudement-Tallon, 2010, p. 3).

European regulations was, in this respect, gradual, only in 2015 leading to the effective implementation of the principle of enforcement of foreign judgments without any prior formal declaration of enforceability by the courts of the Member State in whose territory the enforcement proceedings should be carried out.

The evolution of European legislation by stipulating a European Enforcement Order has been driven by the need to create a common space in which the free movement of judgments is ensured. It is noteworthy that the foundations of this legal current were laid by art. 220 of the Treaty establishing the European Economic Community (EEC) in 1957 (Treaty of Rome) (Raducan, *et. al*, 2011, p. 120). It stipulated agreements in order to simplify procedures and formalities that were subject to

recognition and enforcement of judgments in the Member States. These provisions were developed and adopted by the Brussels Convention of 1968 (entered into force on 1 February 1973), on jurisdiction and enforcement of judgments in civil and commercial matters. It provided a simplified procedure for granting exequatur, thus helping the establishment and functioning of the common market (Gaudement-Tallon, 2010, p. 51). Subsequently, the Lugano Convention was adopted in 1988 to regulate relations between Member States and non-member States. The two agreements were the basis for the adoption of Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), which, together with Regulation (EC) no 1347/2000 on the jurisdiction, recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for joint children (Brussels II) and subsequently Regulation (EC) no 2201/2003 on recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, have provided the basis for judgments regulation effectiveness in Union Member States (Stone, 2010, pp. 6-14).

The great shortcoming of Regulation (EC) no 44/2001, however, was that of lack of general regulations regarding the European Enforcement Order. Even if it eliminates the procedure of recognition, the Regulation still provided the need for a declaration of enforceability by the court or competent authority of the Member State in which the execution was to take place (Cuniberti, *et. al*, 2011, p. 48). Basically, in terms of the effect of execution of judgments, the Regulation did not bring anything new to the classical theory, which was considered a constant impediment to the realization of free movement of judgments in the Union. The effect of *de jure* recognition as provided for in art. 33 para. 1 of Regulation (EC) no 44/2001 was considered insufficient as far as, in order to be enforced in another Member State, it required a statement issued by the court or enforcement authority.

In this context, the theory of the European Enforcement Order was developed and applied gradually, leading to the creation of a tool that, once certified as enforceable by the courts or authorities of the issuing State is able to move freely throughout the Union, without the need for recognition or declaration of enforceability by the courts or authorities of the State where enforcement is to be made. This goal was accomplished by Regulation (EU) no 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), which eliminates the declaration of enforceability and institutes a procedure of certification of the judgement in order to become a European Enforcement Order (Stanescu, 2015b, p. 261).

At the moment, there are four types of judgements that can be certified as European Enforcement Orders: the European Enforcement Order for uncontested claims, governed by Regulation (EC) no 805/2004 creating a European Enforcement Order for uncontested claims;

judgments falling under Regulation (EU) no 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast); the European order for payment, subject to Regulation (EU) no 1896/2006 creating a European order for payment procedure and the judgement given under Regulation (EC) no 861/2007 establishing a European small claims procedure.

2. The conditions under which European Enforcement Order may be enforced in Romania

Art. 636 CCP refers to the European Enforcement Order, on which European Union law does not require preliminary recognition in the Member State which will be enforced in. We include in this category the following enforceable titles: European enforcement order for uncontested claims (Regulation (EC) no 805/2004), the European Payment Order (Regulation (EC) no 1896/2006), the titles emitted in the European small claims procedure (Regulation (EC) no 861/2007). Also, due to the application of Regulation (EU) no 1215/2012 starting from January 10th, 2015, recast of Regulation (EC) no 44/2001, the possibility of certification as a European Enforcement Order is extended over all decisions adopted in a Member State falling in the application area of the Regulation, no need for any recognition or approval of their enforcement in the Member State where enforcement is to be made.

These securities are enforceable by law without any prior formality. In this regard, Art. 39 of Regulation no 1215/2012 provides that "a judgment given in a Member State which is enforceable in that Member State is enforceable in other Member States without the need for a declaration of enforceability". The phrase refers to the enforceability provided by art. 1103 CPC, but not the declaration of enforceability governed by art. 666 CPC. In other words, the foreign decision, in so far as it is given in a Member State and subject to Regulation (EU) no 1215/2012⁵, is not subject to any prior formalities to be recognized as enforceable in Romania, but the enforcement procedure is the same as if a national title is carried out; therefore, the bailiff shall proceed to verify that conditions provided by art. 666 CPC are met⁶.

⁵ Art. 1 para. 1 of Regulation 1215/2012 provides in this respect that "this Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).". The meaning of "civil and commercial matters" for the purposes of Regulation (EU) 1215/2012 should be considered not according to the system of one of the States concerned but, on the one hand, the objectives and the system of the Regulation and, on the other hand, general principles emerging from all the national legal systems. (Gaudement-Tallon, H., 2010, pp. 29-33).

⁶ It is to be noted that the declaration of enforceability under art. 666 CPC is made by the bailiff, following the modification of CPC by Law no 138/2014, published in The Official Journal no. 753/16.10.2014. Following this modification, the CPC was republished in The Official Journal no 247/10.04.2015.

In this context, it should be noted that the term "declaration of enforceability" has a different meaning, referring in some cases to the title, while in others to the enforcement procedure itself. Art. 39 of Regulation (EU) no 1215/2012 relates simply to the acquisition by a foreign judgment of enforceable character. This is done *ex lege* without further formality before the courts or authorities of the State where enforcement is to be made only by issuing the European Enforcement Order Certificate (art. 53 of Regulation (EU) no 1215/2012), in a procedure regulated by European law, not by the national one. In this way, European legislation removes the applicability of national legislation on enforceability of foreign judgments (art. 1103 CCP), considering the preeminence of EU law and the mandatory provisions contained in a Regulation to the provisions of CPC⁷. However, as with any other enforcement titles, but it is necessary for the bailiff entrusted by the creditor with the enforcement application to declare the enforceability of this application, according to art. 666 CPC, including the verification of formal requirements for the title to be enforceable as a European Enforcement Order (Boroi, *et. al*, 2015, p. 955).

This conclusion emerges from at least two arguments: first, according to art. 41 para. (1) first sentence of Regulation (EU) no 1215/2012, the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. In other words, enforcement in Romania of a European Enforcement judgment in this case covered by Regulation (EU) no 1215/2012 will be under Romanian law, namely CPC. European law is governing only the enforceability of the title, materialized in the European Enforcement Order Certificate, but the actual enforcement procedure is governed by national law⁸.

According to art. 622 para. 2 CPC, the enforcement procedure is triggered when the application for enforcement is launched and registered with the enforcement body. It has a dual role: on the one hand, to establish the frame of the enforcement procedures, referring to the obligation to be accomplished and the ways of enforcement; on the other hand, to invest the enforcement body with the fulfillment of that obligation. It is therefore irrelevant to the enforcement proceedings if the title is emitted into the domestic legal order or it comes from the law of another Member State, the

⁷ In this respect, art. 4 CPC, marginal titled "Priority application of EU law" provides that "in matters governed by this Code, the mandatory rules of European Union law apply as a priority, regardless of the quality or status of the parties".

⁸ In this respect, the CJEU has held that "the term 'enforceable' (...) is to be interpreted as referring solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin. It is for the court of the State in which enforcement is sought (...) to determine, in accordance with its domestic law including the rules of private international law, the legal effects of a decision given in the State of origin (...)" (Case C-267/97 *Eric Coursier v Fortis Bank and Martine Coursier, née Bellami*). Therefore, European law strictly regulates the formal requirements of the title, certified by issuing the European Enforcement Order certificate, according to art. 53 of Regulation (EU) no 1215/2012. Enforcement law rules, namely those governing the enforcement proceedings are essentially national, at the moment there are no European enforcement rules.

enforcement of the judgment being made by the same rules⁹. All procedural forms done after the registration of the application of enforcement are governed by national law. Therefore, the enforcement of a European Enforcement Order cannot miss a declaration of enforcement procedure, which takes place after the registration of the enforcement application (art. 665 CCP).

Second, art. CPC 636, which refers to the European Enforcement Orders expressly refers to prior recognition of the title. The elimination of the recognition procedure constitutes the essential characteristic of the European Enforcement Order and art. 636 CCP does nothing else than to translate this principle in national legislation. It would be a mistake to believe that the wording of art. 636 refers also to the declaration of enforcement procedure regulated by art. 666 CPC (Gavris, 2013, p. 153). The procedure regulated by art. 666 CPC does not cover checking the conditions for the declaration of the enforceability of the title, but the conditions for proceeding to enforcement. As made clear in the listing of art. 666 para. 5 CPC, concerning the reasons for the request for execution to be rejected, it appears that the verification done by the bailiff covers a lot more substantial and formal issues than the formality of the title.

Basically, in connection with the enforcement order, its certification as a European Enforcement Order dispenses the creditor carrying out any other formalities required by law for the purposes of conferring recognition or enforceability. In the light of the provisions of art. 39 of Regulation (EU) no 1215/2012, the formal enforceability of a judgment is given by the substantial and procedural rules applicable in the trial in which it was given, i.e. enforceability is given by *lex fori*¹⁰. Issuing of the European Enforcement Order Certificate is a sufficient guarantee for the enforcement bodies of the requested State to enforce the title in question without being required any further formalities, including the recognition. At the same time, the enforcement procedure is the same regardless of the nature of the title, therefore the declaration of enforcement of the application launched by the creditor is necessary, irrespective of whether it is a national or European title.

Conclusions

The classical system of recognition of the foreign judgment for reasons of enforcement in the territory of another State proved inadequate for the legal and economic order of the European Union. Therefore, since the advent of Community law, the question of a simplified system of recognition and

⁹ In this respect, Art. 41 para. 1, second sentence of Regulation (EU) no 1215 / 2012 provides that „a judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed.”

¹⁰ See above, footnote 8.

then eventual elimination of exequatur was raised. As regards the enforceability of a judgment, the need to create a European Enforcement is the basic idea of the principle of free movement of judgments in the European Union.

In this direction, two trends emerged: on the one hand, the development of regulations providing that a judgment given in a Member State according to its judicial proceedings can be certified as a European Enforcement Order, following that with this certification can move freely, without the need for a declaration of enforceability in the State where enforcement is to be made; on the other hand, the creation of European procedures, distinct from national ones, but to be applied by the national courts, of which emanate Enforceable European Orders enforceable throughout the EU. The first category include the European Enforcement Order for uncontested claims, governed by Regulation (EC) no 805/2004, as well as judgments falling under Regulation (EU) no 1215/2012. The second category includes European order for payment, subject to Regulation (EU) 1896/2006 and the judgement given under Regulation (EC) no 861/2007.

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