UNIVERSITY ‘LUCIAN BLAGA’
FACULTY OF LAW ’SIMION BĂRNUȚIU’

ENFORCEABLE TITLE OF THE THESIS OF ENFORCED EXECUTION IN ACCORDANCE TO THE NEW CODE OF CIVIL PROCEDURE

SUMMARY

Thesis coordinator:

Prof. Ioan LEȘ, PhD.

Doctoral candidate:

Marius RADU

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This paper is a deeper and relatively extended approach on writs of execution allowing to start foreclosure, both in Romania and within the European Union.

We say a deeper and relatively extended approach because in scientific research conducted on writ of execution as the basis for foreclosure, we have tried to identify and analyse the enforceeability, both of writs of execution of judicial origin and those of extrajudicial nature.

In this research work we have started from the fact that to the subjective right of the creditor, acknowledged by a judicial or extrajudicial procedure, corresponds the right to obtain the collection of receivables resulting from this acknowledged right.

Therefore, within the work will be found not only a list of writs of execution, but also practical solutions based on legal grounds, so that the rights of claim not to remain theoretical and illusory.

In our intention to include our own contribution to the topic covered, we referred to national law, European Union law, international law and comparative law as well.

As a consequence of this, in the research of writ of execution institution, we have aimed to reveal the force of the European Union law, and consequentially, to show Community instruments that allow foreclosure of writs of execution, both in the home Member State and in the executing Member State.

In this respect, in the thesis, we have addressed issues enabling that the foreclosure of a writ of execution in the executing Member State should not be impeded or influenced by specific rules, and therefore the proposed solutions are based on the principle of European law according to which "*to the law stemming from the Treaty and might not oppose a national text, regardless of its nature, without losing its Community character and without being put into question the legal basis of Community itself*".

The present thesis includes 5 chapters.

Chapter I is divided into 4 sections.

Section 1 refers to matters related to foreclosure in general.

In this Section we have highlighted that the general, national, European and international legal framework consisting of substantial requirements and procedural requirements undoubtedly contribute to good social, economic, cultural relations.

We have also shown that the State governs the society through the functions it has (legislative function, executive function, jurisdiction function, social function, etc.), and the law, as a means of organising state institutions is the instrument through which a system of

rules of conduct for all the members of the society is made available to the society and therefore the social functions is achieved.

For the specified purpose to discipline social relations, it offers and imposes patterns of conduct by establishing legal rules of procedural and substantive law.

If the substantive law establishes behaviours, facts, actions of the subjects in a legal relationship, the procedural law makes available to them procedures, methods and practices through which the rules of substantive or material law are applied.

Therefore, I have specified that if a legal subject does not comply with the conduct imposed by substantive rule and, as a consequence of this behaviour, he/she causes harm to another subject, the last one, in order to protect his/her subjective right, turns to the civil procedural rule.

In order to achieve the purpose of civil proceedings and, eventually, of civil obligation, the civil procedure provides the creditor with legal instruments needed to achieve his claim, both through voluntary enforcement, and foreclosure.

Thus, the creditor's right to resort to coercion of the state to achieve his claim appears as a sanction of civil law directed against the debtor, as a result of the failure to willingly perform his obligations resulted from a definite legal relationship.

In light of the aforementioned it appears that the lawsuit goes through two phases, respectively:

- *judgment (cognito),* stage of civil proceedings by which the creditor resorts to coercion of the state to exercise and acknowledge his right, in court;

- *actual execution (executio),* stage of civil proceeedings by which the creditor proceeds to foreclosure in order to collect his receivables resulted from a writ of execution;

Therefore, we may say that in order to sanction a debtor in bad faith, the creditor has two legal offensive means at hand, legal action and foreclosure.

If the first action seeks to obtain a writ of execution, the second cannot occur in the absence of such an instrument because "foreclosure can be carried out only under a writ of execution"

One should however note that the lawsuit does not have to go through the two phases in order to collect the creditor's receivables.

Likewise, in this section there is a brief analysis on the historic evolution of the writ of execution in Romania, starting with 1775, analysis that has led to the conclusion that, with the historic developments of the writ of execution institution, one may note that has it largely lost

its deeply private nature and become an activity , respectively a bailiff as an agent of the state, according to art. 626 NCPC.

I have said 'largely' because the New Civil Code has left to the creditor has, in our view, in breach of warranty provided by Art. 6 of the ECHR and Art. 6 of NCPC, to do himself actions of execution in the case of foreclosure under a chattel mortgage agreement [taking over the asset by own means (art. 2440 NCC); sale of the mortgaged asset 2.445-2.477 NCC)].

In this section, I have also referred to the *legal nature of foreclosure,* where I said that from a conceptual standpoint, providing justice designates not only the trial stage, as resulting from the spirit of Constitutional provisions, but we consider that providing justice also means exercising, by foreclosure means, the rights enshrined in a writ of execution.

To considered that providing justice is achieved only by courts, that would mean to deny the very right to a fair trial since, as European Court of Human Rights has consistently stated, the right of access to justice remains illusory if the internal legal order of a Contracting State allows a writ of execution remain inoperative to the detriment of the successful party and requested the foreclosure.

The protection of subjective right is not considered accomplished only through the action of its acknowledgement, but also by the action of its exercising because the right is not exercised yet by giving a final judgment.

Therefore, in the action of establishing the legal nature of foreclosure, one has to assume that the legal nature of foreclosure should not to be related to the enforcement agents, but to the intended purpose, more so since in the contentious administrative matters, some provisions laid down in the writ of execution shall be fulfilled by the enforcement court and not by the bailiff.

According to the New Code of Civil Procedure, foreclosure is presented as a true foreclosure trial, which is part of the civil lawsuit and aims to the completion of the civil trial.

We may therefore say that the civil lawsuit shall be incurred with the writ of summons of the court and shall cease with the bailiff decision given under Art. 703 NCPC.

One may therefore notice that bailiff and enforcement court institutions, are part of a procedural mechanism which aims to carry out the obligations included in the writ of execution and in the aim of civil lawsuit.

Thus, foreclosure, even if it is triggered at the the creditor's claim, it cannot be started without the approval of the enforcement court, and if it was approved, it continues and ceases

under the authority of the bailiff's whose pleadings are subject to the enforcement court, under the law.

From the perspective that foreclosure may be initiated only with the approval of the court, and bailiff's documents are drawn up on its orders, by adding the enforceable formula, being subject to the control the enforcement court under the law, we may say that foreclosure has a jurisdictional character.

But it is unequivocal the fact that the document prepared by the bailiff is a procedural act and not an administrative act or an administrative-jurisdictional act.

On the other hand, the bailiff is not an agent of special administrative jurisdiction.

A natural question arises here: "What is the nature of bailiff's work, in his action towards exercising the creditor's rights arising from a writ of execution?".

Obviously, it is not one of judgment, but one of providing justice.

Hence we conclude that foreclosure has a mixed legal nature.

The legal *'Symbiosis'* between the bailiff and the enforcement court, as part of a legal mechanism created by the state in order to fulfil the obligations contained in the writ of execution, leads us to the conclusion that foreclosure has a characteristic administrative-jurisdictional nature, which is not influenced by the quality of the enforcement body, but by the methods used in order to exercise the creditor's right.

In the research done, I did not set aside *the principles governing foreclosure*, because knowing the foreclosure proceedings must start from the examination of how law principles work on this institution, knowing that foreclosure, as part of civil lawsuit, is governed both by principles specific to foreclosure proceedings, and by the general principles of civil trial

Without wishing to make an exhaustive presentation of these principles, in the thesis I referred to some of them, namely the principle of legality, willingly performing the obligations established by a writ of execution, the right to a fair trial with its components:

- the right to obtain foreclosure;

- the right of access to an independent and impartial enforcement body established by law;

- the right to obtain the foreclosure of writs of execution orders promptly and effectively;

This 'desire' of legality is a natural consequence of the principle of constitutional law, according to which 'In Romania, the observance of the Constitution, of its rule and of laws is mandatory'.

Moreover, the entire lawsuit should be carried out in line with the legal provisions (art. 7 NCPC).

Therefore, the principle of legality governs not only the stage of acknowledging the right and obtaining the writ of execution, but also exercising the right acknowledged by this title.

The failure to comply with this principle during the foreclosure stage results in the nullity of the foreclosure act or of foreclosure itself.

Monitoring the compliance of the principle of legality, in the foreclosure stage, is provided by the challenge on enforcement institution, where the enforcement court, invested by those interested or damaged by the enforcement, control the challenged execution documents.

But this invalidity shall not automatically intervene and it must be found, as I have already mentioned, by the court, due to the admission of the appeal, under art. 720 NCPC, that is "under the principle of legality, if admitting the appeal, the court, taking into account its object, if necessary, shall correct or cancel the enforcement act challenged, shall order the cancellation or end of execution itself, shall cancel or clear the writ of execution".

In accordance with the provisions contained in Art. 622 par. (1) and (2) NCPC, the obligation established by decision of a court or by another writ of execution shall be brought out willingly.

This legal provision represents the transposition, in procedural law matters, of the principle of the right to complying execution, according to which the *creditor is entitled to fulfil the full, accurate and timely obligation.*

Therefore, voluntary execution of obligations resulting from a writ of execution is a right the debtor benefits until triggering the foreclosure, because if he does not willingly perform his obligation, resulting from a writ of execution, it is carried out by foreclosure [art. 622 para. (2) NCPC)], without being able to defend himelf by invoking the exception of non-performance.

Of the above mentioned, unequivocally results that foreclosure is possible only when the debtor fails to perform his obligatin willingly.

In conclusion, we may say that foreclosure is triggered as a result of its failure to comply with the principle of willingly performing one’s obligations resulting from a writ of execution; State constraint intervenes to sanction the debtor, as a resul of his failure to comply with this principle.

Without the benefit of a special regulation until 15 February 2013, the right to a fair trial is enshrined with the rank of principle, from the very beginning, in the New Code of Civil Procedure - art. 6 para. (1).

Acknowledging and imposing this principle are not only the consequences of ECHR case-law, but also the effects of the rule of European law into national law.

Further, the Code of Civil Procedure expressly states that the provisions of para. (1) shall apply correspondingly in the foreclosure phase as well- art. 6 para. (2) NCPC.

Although established with the rank of principle, in Article 6 of the Law of Civil Procedure, the right to a fair trial has a complex dimension, which is the result of several legal provisions.

Thus, the Romanian Code of Civil Procedure contains a number of legal institutions specific to foreclosure proceedings, which converge in the sense that the right to a fair trial should not be only illusory, but an effective one.

According to art. 623 of NCPC, the "foreclosure of any writ of execution, except those concerning the revenue due to the consolidated general budget, or the budget of the European Union and the budget of the European Atomic Energy Community are made only by the bailiff, even if so provided by law".

Therefore, the Romanian State, as guarantor of the right to obtainthe foreclosure, in Romania has delegated its authority to the bailiff, as a guarantee on compliance with the right of access to an independent and impartial enforcement body; bailiff's responsibility and power is clearly established both by the Code of Civil Procedure, and by Law No. 188/2000, without encroaching on those entrusted to the judge.

Bailiff's independence is also guaranteed by the provisions contained in art. 651 para. (1) and (3) because *only the enforcement court* o*rders the initiation of foreclosure and only it has* the *legal competence to pronounced on the legality of the foreclosure.*

Contrary to some opinions, bailiff's right to a fee for the work provided is the guarantee that he is independent and impartial, including when the debtor is the state, and the advance payment of legal debt fees is precisely the consequence of "*cost of justice*", cost that does not violate free access to justice, as long as it does not "constitute pecuniary hindrance designed to discourage litigants in bringing an action directly before a court", and also "by the high amount of stamp duty, does not prevent the enforcement of the judgment".

The guarantee of compliance with free access to justice, as a component of the right to a fair trial, in the foreclosure phase, is the appeal against foreclosure institution because "The unitary character of the civil trial enforces the compliance with the guarantees characterizing

the right to a fair trial both in the judgment and foreclosure phases, the most important of these guarantees being "the right to a court" within the meaning of art. 21 of the Constitution and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, i.e. free access to an independent and impartial court established by law, and control of acts performed in both phases of the trial by the courts".

Failure to perform or delay in the foreclosure of a writ of execution may lead to depriving of substance for the right to justice, eventually for the right to a fair trial.

In order to avoid such an effect that can ultimately lead to cancelling the purpose of civil trial and even to social disorder, the Code of Civil Procedure Article 628, under the marginal name, "The Role of the State in Foreclosure" has set out on it the obligation to ensure, through its agents, prompt and effective enforcement of judgments and other writs of execution".

Therefore, disregarding this principle makes justice to be provide with delays, and its efficiency and credibility is thus compromised".

In order to avoid these consequences, and also to exercise creditor's rights, *promptly and effectively*, the bailiff is bound throughout the foreclosure to play an active role and to persist through all legal means, in order to fulfil the obligation resulting from the writ of execution fully and with celerity.

However 'promptly and effectively' means, first of all, 'reasonably' and therefore, the legal provisions contained in the texts cited (art. 626 and 627 NCPC) ensure that, within a reasonable time, under a writ of execution and through the bailiff, the uncertainty in which a person finds himself regarding his position as debtor or creditor has to end; simultaneously the compliance with the principle of legal security being guaranteed.

In complying with these guarantees, the legislator has imperatively established, that "in case of refusal, the injured party isentitled to full compensation for the damage suffered" (art.627 NCPC).

Throughout this section, I have also referred to the rules governing foreclosure.

The centre of the material is represented mainly by the Code of Civil Procedure, which, in Book V, regulates the enforcement of judgments and other writs of execution.

From Art. 631 para. (2) NCPC unequivocally results that the provisions of Book V constitute the common law on foreclosure, regardless of the source or nature of the obligations contained in the writ of execution or the legal status of the parties.

Moreover, this legal text reiterates what has been stated and elevated to principle, since the beginning of the Civil Procedure Code, namely that its provisions "constitutes the common law procedure in civil matters" (art. 2 NCPC).

If the legislator has established that the provisions laid down in Book V shall constitute the common law in foreclosure matters, from the provisions of Art. 2. para. (2) NCPC the exception to the general rule contained in the Art. 631 para. (2) results, and, as a result, whenever a special law governs the foreclosure proceedings, the special rule will apply.

The applicability of the special rule on foreclosure is not based only on the legal principle, s*pecialia generalibus* derogant, but also on the provisions of Art. 622 para. (2) NCPC, where the general rule refers to the legal possibility that foreclosure takes place in another way as well, other than that provided for in Book V, if so provided by the special law.

One must specify that the special rule, applicable to a certain matter is the one that derogates from the general rule.

Consequently, in cases where the foreclosure in a particular matter is governed by a special law, the bailiff or the enforcement court must apply the procedure regulated by the special rules and not the rule in the common law.

In all cases, the special law is of strict interpretation and therefore it cannot be applied by analogy to situations that it does not provide, especially as a general rule for foreclosure cannot disapply a special rule in that matter.

One should point out that the coexistence of a general rule fot foreclosure with a specific rule for enforcement, obviously simultaneously in force, *does not create a conflict of law*, but multiple laws, where the special rule will apply as a priority in the situation that it regulates, with the possibility that, if the special law is silent, it should be completed with the general rule, except for the situation when they are not incompatible.

As an exception, by amending Law no. 554/2004 through Art. IV of Law no.138/2014, the coexistence of the general rule for foreclosure contained in Art. 623 NCPC, with the special one contained in Art. 24, *has created a conflict of law*.

The conflict is all the more pressing as, according to Art. 83 letter k) of the Law no.76/ 2012 on implementing the Code of Civil Procedure, from the date of entry into force of the Civil Procedure Code, "any other provisions to the contrary, even if contained in special laws" shall be repealed; Law no. 76/2010, seeking thus to unify procedures and remove conflicts of law.

Thus, although according to Art. 623 NCPC, foreclosure of any writ of execution is carried out by the bailiff, *even if so provided for by special laws*, the provisions of Art. 24 para. (3) and (5) of Law no. 544/2004, confers the status of *enforcement agent of the enforcement court.*

Although the coexistence of a general rule for foreclosure with a special rule for enforcement, *usually creates* multiple laws, with the consequence that the special rule shall apply as a priority in the situation it governs, there is an exception from this rule in foreclosure matters, where the creditor has the opportunity that in exercising his right resulting from a writ of execution *to choose between the special rule and the common law*.

Hence, according to Art. 2.432 NCC, the mortgagee is entitled to collect his claim under a writ of execution consisting of a chattel mortgage agreement, either according to the procedure laid down by Art. 2 435-2477 NCC, or under the Code of Civil Procedure of his choice.

It should be recalled that when the general rule does not regulate and there is no special rule to be applicable in the matter, the principles of law shall apply.

Therefore, in the light of the provisions of Art. 5 para. (3) NCPC, when the bailiff, vested with the authority to enforce a writ of execution, finds that the Situation arisen is not regulated (the general rule is silent and the special rule does not exist), he will use the analogy of law, that is, he will apply its general principles on the logic grounds that "in the absence of relevant rules or customs governing a fact, there at least one general principle to do it and several methods to obtain a correct solution".

In settling a foreclosure file, the bailiff, as well as the enforcement court, on the occasion of the writ of execution, should rely on national civil procedural law, stating that, simultaneously, the two authorities are bound to relate to the European Union law as well, pursuant to constitutional provision stipulating that "as a result of accession, the provisions of the constituent treaties of the European Union, and the other binding Community regulations take precedence over the provisions to the contrary from internal laws, in compliance with the provisions of the act of accession [Ar. 148 para. (2) of the Romanian Constitution].

Therefore, European Union law is an integral part of the Romanian legal system, and immediately consequently, the provisions of the internal rule (whether ordinary or special) shall be applicable only to the extent they are not inconsistent with the European Union law.

However, the relationship between the European Union law and the national law of the Member State is governed by *the principle of priority of application of Community law*, that is "the provisions of the Treaty and the regulations of the institutions directly applicable

have as the effect, in their relations with the national law of the Member States, by the mere fact of their entry into force, not only to determine the inapplicability in law of any provisions to the contrary of the existing national law, but also - to the extent that those provisions and acts are integral part, higher-ranking internal rules, of the applicable legal order in the territory of each Member State - to prevent the valid adoption of new legislative acts, to the extent that they were incompatible with EU rules".

Therefore, the bailiff and not only the enforcement court, "*must apply, within its competence, the provisions of Community law and ensure the full effect of these rules, removing, if necessary, ex officio the application of any provisions to the contrary, even subsequent ones, of the national law, without having to request or await its prior removal by legislative or any other constitutional proceeding."*

However, not all European Union rules, incidents in the case submitted for foreclosure procedure, take precedence over the national civil procedural law, but only those binding rules of the EU law [Art. 4 para. (1) NCPC and Art. 288 TFEU].

Obviously, after this journey, we could not move on without referring to the purpose of foreclosure, especially since exercising the right acknowledged by a writ of execution, operation related to the effectiveness of lawsuit, is a public order condition, and "a constitive element in the governing the society" as well.

If the existence of a certain, liquid and exigible debt results from a writ of execution, this means that there is the right of the creditor to obtain the foreclosure.

As a consequence of the existence of this right, the law of civil procedure gives the creditor, as the owner of the rights of claim, the possibility of resorting to coercion of the state in order to regain the right acknowledged by a writ of execution so that this right should not be illusory.

The purpose of foreclosure is not only exercising the creditor's subjective right, but restoring the rule of law infringed and reinstatement of the parties in the previous situation.

The state has therefore an objective interest in carrying out the foreclosure of a writ of execution.

Compared to the preceding, we may say that the foreclosure aims to fulfil the obligations contained in a writ of execution, through the bailiff and other authorities authorised by law, in compliance with civil procedural rules on foreclosure, the rights of the creditor and debtor, and of other participants in the foreclosure as well, in the subjective interest of the creditor and the objective one of the state to provide civil justice.

Instead of a conclusion, we have stated that providing justice is not carried out only through the trial phase of the civil lawsuit, or judicial process phase respectively, but also through the foreclosure, in the case of debtor's refusal to comply with the writ of execution, *procedural stage that ensures the effectiveness of the process.*

If the effectiveness of the civil lawsuit is nothing but meeting of creditor's claims, the foreclosure is the institutions that provides civil procedural means through which the obligations are fulfilled, or they are likely to be fulfilled, obligations resulting from a writ of execution.

In fact, "The right exists to be exercised" and "the existence and exertion of the right are the conditions of public order".

Section 2 of Chapter I, approaches the topic of writ of execution in general.

Correlatively, for the creditor's subjective right, acknowledged by judicial or extrajudicial procedure, there is also his right to obtain the collection of the debt resulting from this acknowledged right.

As a result, the acknowledged right, in order not to remain theoretical and illusory needs a bridge between its acknowledgement and its effective exercise, as an expression of the efficiency and effectiveness of the civil lawsuit.

However, this bridge cannot be achieved but through a certificate of findings- *instrumentum* – to which the law confers such quality.

To this end, and to provide legal safety as well and adequate protection to the creditor's rights acknowledged by a procedure provided by law, Book V of the Code of Civil Procedure specifies in Art. 632 NCPC, that in Romania the foreclosure should be carried out only under a writ of execution; this principle being also known in other legislations governing the foreclosure.

So the basis of foreclosure is represented by only a writ of execution legally recognized, and more precisely the civil provisions contained in a judgment or in another document, which by law, is the writ of execution, and which are likely of foreclosure.

Given that in its expression, the legislator uses, in Article 632 NCPC, the words *only*, there results that this enacted rule is an imperative one.

Hence we conclude that the lack of the writ of execution does not allow to trigger the foreclosure; the principle of legality specific to the rule of law manifesting this time its presence.

With respect to the legal texts cited above, they show that the ***parties cannot,*** by their expression of will, ***confer a document the quality and power of a writ of execution.***

In addition, according to the principle of freedom of will included in the provisions provided by Art. 1169 NCC, "the parties are free to enter into any contracts and determine their content, within the limits imposed by the law, public order and morals"

Also in this respect, there should be noted that the principle of freedom of will is limited by the rules which enshrine public order and good morals.

As a result, only the law confers the enforceable nature to a document, and more precisely, the law in force upon issuance of the document.

Another interpretation we think it is against the law.

The enforceable nature of a document is not given by the effects of the judicial document on legal duties, which was the basis of arising the certain, liquid and exigible debt, but by the law that confers the document ascertaining the judicial document the enforceable attribute.

A document that on the date of its issue did not have the enforceable character, acknowledged by law, may acquire the status of writ of execution by a law subsequent to its production, except for the situation whn it states that only applies in the future.

The allegation is supported by the fact that the action of the new law in the respect shown above, is also dictated by the location of the text in the matter regarding the rules of foreclosure, which, as rules of procedure, are neither retroactive not survive to it, but they shall apply immediately.

Moreover, foreclosure being of public order, there results the existence of a legal objective situation, with respect to which any new law has immediate effect.

The above is based on the view consistently expressed by the Constitutional Court, according to which "a law is not retroactive when it modifies in the future a state in law previously created and not even then when it suppresses the production of future effects of a legal situation established under the rule of the old law, because in these cases the new law would only refuse the survival of the old law and regulates its way of action after it comes into force, i.e. in its own scope".

Also on the principle of non-retroactivity of the law, the Constitutional Court also stated that "The new law, however, is applicable immediately to all situations that will occur, will change or be extinguished after its entry into force, and all the effects produced by legal situations formed after the repeal of the old law".

In a contrary view, the idea was expressed according to which a document which, upon its issuance, did not have the enforceable character, acknowledged by law, it cannot acquire the status of a writ of execution by law subsequent to its production.

It was argued that the allegation is based on the constitutional and essential principle for the protection of human before the law, the principle of non-retroactivity of the law, according to which, the law orders only for the future, except for the more favourable criminal law or contraventional law.

Even if our opinion expressed above is based on the case-law of the Constitutional Court, as well as a referral in the interests of the law with all the effects arising from its settlement and publication, we however appreciate that in the light of the new regulations, the contracts which Law no. 287/2009 on the Civil Code *gives them for the first time the enforceable character,* are only those entered into after 1 October 2011.

The allegation is based on the provisions contained in Art. 102 para. (1) of the Law no.71/2011, according to which the contract *is subject to the provisions of the law in force on the date when it was entered into,* in all regarding its conclusion, interpretation, *effects, execution and termination,* and those provided by Art. 6 para. (5) NCC as well, which shows unequivocally that the *provisions of the new law applies to all acts and facts entered into or, where applicable, produced or committed after its entry into force, and also to legal situations arisen after its entry into force,* provision reinforced by the provisions contained in paragraph 2 of the same article.

Therefore, if the law, when entering into the contract, did not attribute to it the enforceable character, referring to the provisions of Art. 102 para. (1) of the Law no.71/2011, and to the adequate principle of lawas well, with which *time governs the document* , the new law cannot confer this quality, "since the enforceable power is categorised as effects that the "contract" produces, and the effects can only be those that the law acknowledges on the date of its conclusion.

It should be noted that the legislator by Law no.76/2011 for the implementation of the New Code of Civil Procedure, removed, by the regulations of Art. 5, in our opinion unconstitutional, the enforceable attribute acquired by law, court decisions or other documents issued, or where appropriate, drafted before the entry into force of the New Code of Civil Procedure.

Hence, according to Art. 5 of Law no. 76/2011, the ***provisions*** of the Code of Civil Procedure on writs of execution, also ***apply*** to judgments or other ***documents pronounced or, where appropriate, drafted before the entry into force*** of the Code of Civil Procedure.

I mean, even if the law ackowledged the enforceable character of a document, prior to February 15, 2015, in the light of the provision of Art. 5 this character can be maintained or, on the contrary, removed.

It is true that, according to Art. 3 of Law no. 76/2012, the provisions of NCPC apply only to trials and foreclosures started, after its entry into force, but Art. 5, as shown above, provides that the provisions of the New Code of Civil Procedure on writs of execution also applies to judgments or other documents issued or, where appropriate, drafted before the entry into force of the Code of Civil Procedure.

As a result, the provisions of art. 3 of Law no. 76/2012, to be applied in conjunction with the provisions of art. 5 of the law, because although the document has acquired the status of enforceable by law in force until 15 February 2013, the enforcement of that title is subject to the provisions of the new Code of Civil Procedure.

In respect to the decisions of the Constitutional Court previously mentioned, we consider that under the provisions of Art. 6 NCC (even if contained in an organic law), of the principle of legal safety, and also of the predictability of rules, the opinion of the Constitutional Court is required to be reconsidered, in the sense that it should be borne in mind that the effects of a document cannot be but those that the law acknowledges upon its conclusion, obviously *except for the situation where its effects are contrary to public order or national safety*, and cancelling its effects should be based on the cases and conditions provided by Art. 53 of the Romanian Constitution.

In light of the analysis above, we have defined the writ of execution as the document drawn up in compliance with the legal provisions, under which the creditor may trigger the foreclosure, through the agents of the state, in order to fully exercise the right acknowledged by this very title, respectively the right to claim that it establishes.

From this definition, we have retained the main features of the writ of execution:

- it is always a document drawn up in compliance with legal provisions;
- it allows the creditor to trigger the foreclosure;
- the foreclosure carried out under it, must fall within the objective which it determines;
- it is a legal document which may be enforced directly, at the request and under responsibility of the creditor, against the debtor in bad faith, in order to collect the debt that it establishes

The legal doctrine, against the lack of a legal definition (neither the Code of Civil Procedure of 1865, nor the New Code of Civil Procedure has regulated in this respect), has provided more definitions over time, definitions which do not differ in substance one from the other.

Neither the French Civil Procedure defined the writ of execution, but the doctrine "has outlined three options in an attempt to define the writ of execution".

In defining the writ of execution, one has started from the idea of the title rendered enforceable- *instrumentum*-, up to that capacity of the writ of execution to allow the recipient to follow the foreclosure, resorting, if necessary, to the public force.

The writ of execution not only provides the creditor with the right to obtain the foreclosure of obligations contained in it, but it is the argument for the actions of the bailiff, taken as the agent of public forcde, actions taken in order to enforce the writ of execution.

In conclusion, we may say that the writ of execution aims at completing the lawsuit and implicitly, the foreclosure, as its goal, in that the *writ allows both triggering the foreclosure and its performance.*

Although as a rule, triggering the foreclosure is done under the control of the court, through the institution of the writ of execution; there are certain writs of execution whose enforcement is carried out without the enforcement given by the enforcement court, and consequently, without rendering enforceable.

a) Documents prepared by the bailiff , which the law recognizes their enforceable character, except for the deed (and not in all cases), can be enforced ***without a writ of execution.***

The allegation is supported by the provisions laid down in Art. 666 para. (4) third thesis, according to which the writ of enforcement extends to the writs of execution to be issued by the bailiff within the foreclosure.

b) Final judgments pronounced according to the contentious administrative law.

Thus, in accordance with Art. 25 para. (1) of the contentious administrative Law no. 554/2004, the enforcement court which, in contentious administrative matters is the court that had settled the trial of the dispute, shall apply, respectively grants the sanction and the penalties referred to in Art. 24 para. (3), ***without the need to render it enforceable*** and admit the foreclosure by the bailiff.

This first hypothesis, in which it is not necessary to be rendered enforceable, and which does not imply other interpretations, is specific to foreclosure of a writ of execution, consisting of a final judgment by which the public authority is required to enter, replace or modify the administrative act, to issue another document or to carry out certain operations; the enforcement agent, in this situation, being the enforcement court and not the bailiff.

The question is whether, in the case of foreclosure under a writ of execution, consisting of a final judgment by which the public authority is obliged to pay a sum of money, shall add the writ of execution.

Although the answer to this question could be affected by the provisions of Art. 25 para. (4) of the Law, according to which the provisions of paragraph (1) shall apply for the enforcement of awrit of execution, consisting of a final judgment, pronounced for the settlement of the dispute dealing with an administrative agreement, we consider that in the case of contentious administrative judgments on the payment of a sum of moneythe ***writ of execution shall be added,*** because enforcement of these writs of execution is done according to the Code of Civil Procedure.

The fact that the foreclosure of such writs of execution is enforceable under the Code of Civil Procedure, and not the Administrative Proceedings Act, results both from the provisions of Art. 24 para. (1) of the Act, and from the provisions laid down in the Ordinance of the Government no. 22/2002 as well.

The allegation is also supported by the provisions of Art. 28 of Law no. 554/2004, according to which this Law shall be filled with the provisions of the Civil Code and the Code of Civil Procedure, to the extent to which they are not inconsistent; Art. 623 NCPC, allowing the foreclosure of these obligations included in the writs of execution, under Book V.

As a result, if the public authority is obliged to pay certain amounts of money, by a final decision of the administrative court, in case of failure of voluntary enforcement, the creditor may resort to foreclosure provided by Book V of the Code of Civil Procedure, where, ***the writ of execution shall also be added*** in the procedure of enforceability.

Without being limiting the commented case, we have found that the common law procedure also applies where the public authority is forced to dismantle certain works, constructions or plantations, to execute goods, other similar obligations, which may also be fulfilled by persons other than the public debtor authority.

c) The decisions by which precautionary measures have been ordered

Hence, according to Art. 955 NCPC, the distraint measure is carried out by the bailiff, according to the rules of this Code on foreclosure, which shall apply properly, ***without requiring any authorisation or enforceability to this effect.*** The provisions of Art. 665 remain applicable.

Consequently, the bailiff, after filing the application and opening the foreclosure file shall forthwith proceed to carry out the measure ordered by the court without requiring the enforceability and consequently ***without a writ of execution.***

This time, ***the order of execution, results from the enforceable effect*** of the decision pronounced by the enforcement court.

The situation is identical in the case of precautionary garnishment, where according to Art. 971 NCPC the enforcement of the measure is carried out by the bailiff, according to the rules of this code on foreclosure, which shall apply accordingly, ***without requiring any authorisation or enforceability to this effect.***

d) Injuction, for which enforcement the court has decided that the enforcement should be carried out without summons and without a deadline had passed

According to Art. 997 para. (3) NCPC the court may decide on the applicant's request that the ***enforcement of Injuction should be done without summons and without a deadline had passed.***

The phrase "the enforcement should be done without summons and without a deadline had passed", in our view, means that the legislator **wished** ***to establish a specific procedure for foreclosure*** , an injuction other than the one under the common law, i.e. among other things, to suppress the procedure of prior writ of execution governed by Art. 666 NCPC.

In the letter and spirit of the legal provisions cited, we consider that *decree of injuction*, besides the provision that has to be carried out, also *includes the institutions of writ of execution.*

That is so, also results from the fact that in all other situations, the law does not confer the right to a court, when pronounced a judgment which also has enforceable attribute, to order on the method of enforcement.

Moreover, the Code of Civil Procedure, in Book V, regulates in Title VI, the **injuction procedure**, that is not only the judgment ***but also its enforcement***.

On the other hand, even if the procedure regulated by Art. 997-1002 NCPC, does not refer to the institution of writ of execution provided by Art. 666 NCPC, and this article of the law does not exclude the injuction from this procedure, this does not mean that one has to remove the spirit of the regulation, which aims at preserving a right that was damaged by default, preventing an imminent damage or removing the obstacles that arose upon an enforcement; especially since the ***ordinance is enforceablein law*** -Art. 997 para. (2)

To interpret otherwise would mean that the Injuction institution should be deprived of content, and ***should be removed, by an elegant procedure*** what court the court ruled that the enforcement shall do "without a deadline had passed", i.e. immediately.

It is noteworthy that in regulating this institution, one took into account the time factor, which is why the enforcement measures ordered by the court, after receiving the writ of execution, are incompatible with urgency.

Related to those deadlines, it was considered that the injuction "enforceable without summons and without a deadline had passed" is subject to the procedure stipulated by Art.666 NCPC, this would mean removing its urgent character and implicitly removing the purpose for which it the injuction procedure has been established.

Even if our assessment is not unique, there are opposing views, stating that "although in the spirit of regulating the injuction institution, would require the interpretation with the effect of eliminating the writ of execution formalities in the case governed by Art. 996 para. (3) [n.n. Art. 994 after republishing] the point of the legal provision mentioned is clear, non-susceptible of interpretation, not being requiredtherefore, to resort to the rules of interpretation of legal norms", reason why "it does not justify the conclusion that by the provisions of Art. 996 para. (3) Code of Civil Procedure, the legislator has regulated a virtual exception from complying with writ of execution formalities".

In conclusion, based on our view, we consider that the *Enforcement order is given, by law*, without rendering enforceable provided by Art. 666 para. (8) NCPC, because the injuction is enforceable in law, and the way of enforcement results from the decree of the Injuction, which is why the writ of execution is no longer useful.

As a result, at the foreclosure of the enforceable injuction, without summons and without a deadline had passed, the writ of execution shall not added; an order that already exists, albeit in a different form not being able to be added.

e) European writs of execution.

The provisions of the Regulation (EC) no. 805/2004, of the European Parliament and of the Council of 21 April 2004 on creating a European writ of execution for uncontested claims, establish in essence, that the recognition and enforcement of a judgment which has been certified as a European writ of execution in the State Member of origin, is carried out in the executing Member State without the need for enforceability and without any possibility of challenging its acknowledgement.

Hence, by the provisions of Art. 5 of the Regulation the exequatur procedure has been eliminated in the recognition and enforcement of judgments come from the European Union.

Though the provisions of Art. 666 NCPC do not exclude the writs of execution from the prior procedure of enforceability, however Compared to the strength of the Regulation and the provisions of Art. 148. Para. (2) of the Romania Constitution, it is clear that the

enforcement of judgments, legal and authentic transactions, certified as European writs of execution in the Member State of origin, may be made in Romanian territory without enforceability.

The allegation is also supported by the provisions of art. 636 NCPC, according to which the European writs of execution on which the European Union law does not require prior acknowledgement within the Member State in which the enforcement will be carried out *are enforceable in law without any further formality.*

The situation is similar for judgments pronounced in a Member State which are enforceable in the Member State of origin andcovered by Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012.

As a result, foreclosure under European writs of execution with respect to which EU law does not require prior acknowledgement in the Member State in which is carried out without rendering it enforceable.

f) Another exception from the rule of writ of execution *and whatever the nature of the writ of execution***,** judgment, deed or authentic document, but of which there results the debtor's obligation, to deliver a property, to leave it in possession or in use, as appropriate, or evacuate in the case that after drawing up the forced delivery report, the debtor or another person, without his/her prior express consent or a judgement, enters or reestablishes on the property, *the creditor will be able to obtain the repossession of the building* without the need for a new declaration of enforceability and, implicitly, without a writ of execution.

The allegation above is supported by the provisions of Art. 902 para. (1) NCPC- reentry to the property -, according to which, at the request of the creditor or other interested party, a new foreclosure could be made under the same writ of execution without summons and ***without any prior formality. T***herefore, the bailiff ***will proceed to evacuate the property reentered to,*** the debtor or any other person, without requiring the declaration of enforceability, but only if the foreclosure under the same writ was carried out, by closing the delivery-receipt protocol, provided by Art. 900 NCPC.

As a result, pursuant to the provisions of Art. 902 para. (1) NCPC, one may say that a writ of execution, concerning the obligation to deliver a property, does not lose its enforceability, once it has been enforced, it may be enforced several times, "even against different persons".

Subjects of the Writ of Execution

The structure of the writ of execution, as an instrument of enforceable law, shall consist of the same elements that make up any legal relationship: subjects, purpose and content.

Unlike the first phase of the lawsuit, when uncertainty on the part to be bound, hanging until the court pronounces by a final decision, in the second phase of the lawsuit, both the holder of the right acknowledged by the writ of execution and the holder of the correlative obligation, are known as early as the day of triggering the foreclosure.

Hence, according to Art. 645 para. (1) NCPC, the creditor and debtor are parties within the foreclosure proceedings.

Consequently, both the plaintiff and the defendant, after pronounced a final judgment of conviction, may acquire the status of creditor or debtor or both quality, in the cases when the writ of execution includes mutual obligations.

Therefore, the enforceable legal relation includes as parties the active subject, called creditor and the passive subjective called debtor.

In terms of enforceable procedural law, *the creditor* is the person entitled, under the conditions provided by law, to demand the foreclosure, as the holder of a right of claim, expected of foreclosure, resulting from the contents of a writ of execution.

The debtor is the person who can be constrained, in terms laid down by law, by his creditor, in order to achieve entire fulfilment of an obligation resulting from a writ of execution.

Also, the status of a creditor or debtor may be transmitted at any time during the foreclosure, according to the law.

In order to produce legal effects, including towards the participants in the foreclosure, the transmission of the status of debtor or creditor must be disclosed.

Without development the ways of transmitting the enforceable procedural quality or an exhaustive enumeration of these ways, we may say that the status of creditor or debtor may be transmitted by convention, by law, by inheritance or by any other way permitted by law.

Relativity of the Writ of Execution

Under the principle of mandatory enforceability of the writ of execution, it establishes or notes, where appropriate, obligations borne by the debtor, or the person who is held to undertake the obligations resulting from that writ.

As a result, the writ of execution can take effect only on the creditor and the debtor's rights as parties in the enforceable trial.

This allegation is based on the principle of relativity of the effects of legal documents, according to which a legal relationship may give rise to rights and obligations only in favour respectively, lain on the parties in the relationship.

Relativity of the writ of execution is a natural consequence of binding force and as a result one **cannot become a creditor** or **debtor** if he/she ***did not participate as a party to*** *the* ***arising of the writ.***

As regards the judgment, this jurisdictional document produces, in addition to the binding effects between the parties, based on the principle of relativity, enforceability effects as well against third parties.

Hence, the judgment cannot be ignored by third parties on the grounds that they did not participate in the trial completed by adopting it.

However, this enforceability *erga omnes*, cannot manifest, purely simply because, on one hand, it may be removed as long as the third party can prove otherwise under the law, and on the other hand, in the second phase of the lawsuit, a person cannot acquire the status of borrower, if he/she ***did not participate as a party in the first phase of the lawsuit.***

Exception to the Principle of Relativity for the Writ of Execution

It is noted that in the case of judicial foreclosure of real estate, the foreclosure "affects" not only the debtor who attended the "arising of the writ of execution", but the persons occupying the property in fact or without any title, the building which foreclosure must be done.

Hence, according to Art. 898 NCPC the bailiff, "will evacuate from the building in question **the debtor together with all persons** occupying the property in fact or without a title enforceable against the creditor" ..... "putting the creditor into his rights".

From the legal provision cited, there appears that the creditor is no longer required to obtain a new writ of execution against the persons occupying the property together with the debtor, without a title enforceable against the creditor.

This exception specific to judicial foreclosure of real estate also results from the provisions of Art. 854 letter i) NCPC, according to which "the adjudication act is an enforceable title against the debtor or, where appropriate, the third party bailee, as well as against any person who possesses or owns the building awarded, without claiming an enforceable right in terms of the law"

One finds that in the case of the adjudication act, this writ of execution produces effects including against individuals who occupy the property pursuant to an enforceable right that could have been invoked in the case of foreclosure under other enforceable titles, other than the adjudication act.

This action, expanded to others, is the consequence of the effects of the adjudication act, effects resulting from the provisions of Art. 857 NCPC.

Claims. Rights of Claims

The enforcement legal relationship between the creditor and the debtor is based on an enforcement legal bound under which the lender can claim his debtor to render services acknowledged by a writ of execution.

The content of this enforcement legal relationship consists of the right to claim of a party called creditor and the duty of the other party of this relationship, called debtor.

More specifically, we may say that the enforcement legal relationship involves two behaviours, namely:

- creditor's right to demand his debtor to enforce the obligation acknowledged by a writ of execution,
- debtor's duty to enforce what he was bound to do by that writ of execution.

As a result, we may say that the enforcement legal relationship gives the creditor a right to claim and the debtor a payment obligation;

If the right to claim is part of the creditor's assets, the debt affects the debtor's assets.

The right of claim together with real rights, is part of the civil and patrimonial rights.

Moreover, the case law of the European Court for Human Rights ruled that the right of claim falls under the term "good" within the meaning of Art. 1 of Protocol No. 1 to the Convention.

We may therefore say that t**he right of claim** is that subjective and relative patrimonial right, under which, its holder, the creditor may claim his debtor, the enforcement of the correlative obligations to give, to do or not do something, enforcement without which the right cannot be asserted.

From definition of the right to claim the conclusion unequivocally results that the notion of claim has to be broadly interpreted, as an obligation expected to be enforced and not narrowly interpreted as "money".

This allegation is also grounded on the provisions of Art. 628 para. (1) NCPC, according to which the obligations may be enforceable which concern the payment of a sum of money, the execution of a good or its use thereof, dismantling certain constructions, a plantation or other works, or taking other measures established by writ of execution.

If the legal base of foreclosure is the write of execution, the foundation of foreclosure is the existence of a certain liquids and exigible claim, owned by the creditor, claim resulting from the writ of execution itself.

The presence of a certain, liquid exigible claim is the substantive condition for the existence of a writ of execution not only in Romanian law.

This substantive, necessary and mandatory condition is also imposed by other legal systems.

The certainty of claims

The claim is certain when its undoubted existence results from the writ of execution itself- Art. 663 para. (2 NCPC.

There may be seen that, unlike the Civil Procedure Code from 1865, when the existence of a claim could be proved ***from other documents as well, even not authentic*** , issued by the debtor or acknowledged by this, in the current regulation, the existence of the claim must result from the writ of execution itself.

Therefore, in the new conception, the civil procedure does not allow triggering the foreclosure on the grounds that the certainty of claims results from documents other than the writ of execution.

In conclusion, the Civil Procedure Code imposes two necessary and mandatory conditions for the existence of the certainty of claims, namely:

- the existence of the claim should be indisputably
- the claim should result from the writ of execution itself;

The need for a claim to be certain is obvious, because foreclosure cannot occur when it is not certainly known whether a debt exists or what it consists of; the more so since any payment supposes the existence of a debt.

Otherwise it would lead to an abuse of rights having as a consequences the occurence of damage in debtor’s assets and the creditor obtains unjustified profit.

There should be noted that sometimes, although the claim has a certain character when triggering the foreclosure, until it is completed or even after its completion, its purpose may be modified or abolished.

This situation may be found both in the case of judgments that represent writs of execution even if they are subject to appeal or second appeal, and in the case of arbitral rewards.

Claims contained in these titles can be changed or even abolished on the settlement of means of appeal, and "the modification of writ of execution necessarily determines reinstatement of the parties in the previous situations".

The Liquid Nature of the Claim

The claims is liquid when its object is determined or when the writ of execution contains elements for its determination- Art. 663 para. (3) NCPC.

The determined or determinable nature of claims is essential in triggering the foreclosure since, from the writ of execution must unequivocally result what the debtor owes and obviously what the creditor is entitled to receive from him/her, under this writ.

If in the old civil procedure, claim was liquid when its "tithe" was determined or determinable, we note that as of 15 February 2013, the Code of Civil Procedure waived at this phrase that used to create uncertainty to the interpret and practitioners, and introduced the notion of object.

Like when establishing the certainty of claims, the liquid nature of the claims must come from the writ of execution itself.

This conclusion emerges from the definition itself given by the Code, definition showing that:

- The object of the claim is determined by the writ of execution itself, or
- The object of the claim may be determined using the elements, criteria indicated by the writ of execution itself;

There is also an exception to this rule, respectively, when the liquidity of the claim may be established by applying ***a criterion external to the writ of execution*** , but required by law; respectively, when updating the claim takes place according to the inflation rate under Art. 628 para. (3) the second thesis of NCPC and Art. 531 para. (2) NCC.

Through this mechanism made available to the creditor, one does not try to change the right acknwledged through a writ of execution and, implicitely, the amount of debt, but one

gives relevance to the principles ensuring legal protection to the right of claim, acknowledged by a writ of execution, given the fact that from the date of arising the right to action up to the effective exercise of the right, a significant period of time may run out, period that may affect the acknowledged right.

This claim updating operation is specific to foreclosure and meets the elements of a legal administrative act, against which the person who considers himself prejudiced in his rights - the creditor or debtor of payment obligation - may file an appeal against foreclosure.

The bailiff, on this occasion, does not carry out a judicial activity, but he only performs in strict compliance with the provisions of the judge, contained in the court judgment.

Moreover, the creditor is entitled to full, accurate and timely performance of the obligation imposed on its debtor.

One has to mention that according to the object of claims, its execution method is chosen, provided by law, to obtain what has been acknowledged by the writ of execution.

As a result, the lack of a liquid debt makes impossible for the bailiff to choose the actual method of execution, having as a consequence the failure of creditor's subjective right; in fact, an order included in a writ of execution cannot be carried out unless the practical way to execute it cannot be chosen.

Converting the object of certain debt from the obligation of delivering a good into the obligation to pay a sum of money.

There are situations when the obligation of delivering a good resulting from a writ of execution is impossible to be carried out because of the debtor sbehavior.

For such a situation the legislator put out of reach for the creditor, a procedural instrument that would give him the opportunity of obtaining a monetary equivalent, from his debtor as a consequence of the the creditor's right to remedy impossible or faulty execution .

The change of the claim's object is not unconditional , but it may intervene only at the request of the creditor to the enforcement court and in compliance with the following preliminary requirements:

- after the cessation of foreclosure, because of the impossible good's forced rendition for the good's destruction, concealment or deterioration whose rendition was disposed or in other similar circumstances;
- only if it has not been established by writ of execution the sum that must be paid as equivalent of the good/ asset impossible to be rended;

- based on the minutes / conclusion by which the bailiff establishes the impossibility of the forced good's rendition for the reasons stated in Art. 891 NCPC
- In such a situation, the claim's object is transformed under the conditions of art. 892 NCPC, from the right to obtain a movable, into the creditor's right to receive a sum of money as compensation.
- Noting that in case of admission of the creditor's action,the judgment pronounced by the enforcement court is enforceable by law, though subject to appeal.
- Therefore, the creditor will sett off a new foreclosure under the writ of execution obtained under the Art. NCPC 892; the first foreclosure already ceased pursuant to art. NCPC 891, respectively, before the application for the compensation claim to the enforcement court.

Choosing the Object of the Claim

Civil Procedure allows under some circumstances the choice of the debt's object to be executed in case of alternative obligations respectively when the writ of execution includes an alternative obligation, without showing the term of choice.

However, such a procedure can occur even previously the foreclosure s,starting both at the request of the creditor as at the requestof the debtor, but within the limits included in the writ of execution; the benefit's choice representing the privilege of the debtor.

The institution of choosing the service included in the writ of execution is based on the concept of the alternative obligation.

The Need of Obtaining an Authorisation

Depending on the claim's object the realization of the obligations contained in the erits of execution may be conditioned or not, where appropriate, by the obtaining of a prior license.

Such a situation may occur in case of forced indirect movable pursuit, respectively when **the pursuable goods** belonging to the debtor **are held by a third** and the writ of execution is represented by another certificate than a judgment.

The statement is supported by the provisions of the art. 680 par. (2) NCPC, according to which " ***in case of other writs of execution than court orders and***, at the request of the creditor or legal executor the competent court will ***authorize the entry*** in the places mentioned in paragraph 1. The court urgently pronounces/decides in the council chamber, the

summoning of the third that holds the good by enforceable closing that is not subject to any appeal."

The Exigible Character of the Claim

According to art. 663 par. (4) NCPC the claim is demandable if the debtor's obligation established by a writ of execution reaches the due date or if the debtor is deprived of the deadline.

From this definition stated by the Code follows that the chargeability of the payment obligation resulting from a writ of execution is affected by a future event called term.

Provisions of the art.663 par. (4) are an expression of the principle laid down by law, according to which "what it is owed in term can not be demanded before the end of that term."

The term, in the matter of foreclosure, is that future event, until which the start is delayed or, as appropriate, the extinction of the right to obtain the foreclosure under a writ of execution.

Therefore, the term does not suspend the execution of an obligation resulting from a writ of execution; it only postpones its execution; the debtor having the possibility to execute voluntarily the the provision, not necessarily by coercion by means of state authority.

The importance of the term in the relations of the enforceable law, is given by two of its components, namely:

- the moment of the start of the term's flowing;
- the moment of the term's fulfillment;

Therefore, the creditor's right to start the foreclosure under a writ of execution is influenced not only the law, the court order or the convention of the parts but also by the time factor.

So when it has been established a payment term by writ of execution , the execution can not be made before the completion of this term.

The date of the claim's chargeability corresponds to the term when the creditor holder of a certain and liquid claim, resulting from a writ of execution is entitled to appeal to the legal executor with a request for foreclosure based on the existence of a writ of execution and from which it results an obligation susceptible of foreclosure.

If by that date the debtor made the payment, the claim's demandable character ceases .

Grace Period

The Court settling the civil action, may give the debtor a term for the enforcement of the order, motivated even by the order that solves the motive.

The granting of a payment period , at the debtor's request, is a right of the court and not an obligation .

By a provision at least at least objectionable, art. NCPC 673, second sentence, allows that by the closing of the approval decision of foreclosure to be granted a payment term for the debtor.

Though this procedure is not commonly used we think that could be applied only in the case of writs of execution, other than court orders , given that for judicial writs of execution the law has provided the procedure settled by Article. 397 par. (3) NCPC.

Another period of grace is settled by the by the provisions contained in art. 896 NCPC.

The situation settled by this legal provision is an exception to the rule that the whole expeditiously *completion of the obligation provided in the writ of execution is the warrant for the respect of the right to a fair trial* .

As specifies the text of the law, the exception may intervene only in case when the appartment from which it has ordered the evacuation has the destination of residence.

Obviously, in all the situations the debtor is an individual.

In the enforcement of that institution does not prevail only the destination of the appartment but other necessary conditions that lead to the benefit of the period.

Failure to Meet Payment Deadline

When it was granted a payment period and the claim included in the title has not been paid by the debtor within the time limit, the claim’s title becomes a writ of execution.

As stated above, foreclosure can not take place unless the claim is certain, liquid and demandable.

The claim becomes exigible?if the debtor’s obligation has matured or **it is deprived of the benefit payment period, when obviously** by a writ of execution has been established a payment deadline.

From the perspective of these laws discussed above, results also the hypothesis of the possibility of forfeiture the debtor’s payment obligation from the payment period granted under the circumstances provided for by Art. 675 NCPC.

It should be mentioned that forfeiture of the debtor's payment deadline is established by the court at the request of the creditor; the latter assuming the obligation of proof.

It should be noted that as regards the joint debtors the forfetiture of one of them from the payment deadline does not produce effects on the other joint debtors, l.

Therefore, the creditor may require the enforcement only against the joint debtor deprived of the benefit payment period, situation that represents an exception to the rule that "prosecution started against one of the joint debtors does not prevent the creditor turn against others co-debtors "

Accelerated Maturity Date

Mortgagee is entitled to apply foreclosure before the deadline for payment, if it has reasonable grounds to believe that the mortgaged good is about to be put in danger or there is the possibility that the obligation s enforcement be prevented.

In such situations, the performance's enforcement becomes necessary before reaching the guaranteed obligation's maturity.

In conclusion, both the debtor's forfeiture from the payment period benefit and the anticipated chargeability are civil law penalties that occur in circumstantial cases by the law.

Although the debtor's obligation has matured, the foreclosure is can not start law establishing also and other preliminary conditions.

These preliminary conditions may result from the writ of execution or from its exterior legal dispositions.

a) there are cases when the claim though exigible the foreclosure can not start if the bail disposed by the court was not paid when the approval of the provisional enforcement Art. 678 NCPC.

As a result, if the creditor does not prove the bail's payment within the deadline settled by the court or in the absence of such term until the date of application of the execution's request, the court will reject the approval request for foreclosure under art. 666 par. (5) Section 7 NCPC, even if the claim is exigible.

We find an exception from this rule, in the case of precautionary measures, specifically in the case of seizure, where the start of the execution procedure is not conditioned by the contravention/bail's payment in advance.

Chapter II contains an analysis of the writs of execution represented by the cort order pronounced by the commun lawcourts also by the European Rights Court and the order of the European Union Court of Justice.

In Section 8 are analized issues related to the foreign order..

Chapter III refers to the writs of execution under EU law.

The European Union is based on the Treaty on European Union is organized and functions according with the Treaty on the European Union Functioning.

The two treaties promotes and defends the values of the respect of the human dignity freedom, democracy, equality, rule of law, human rights, including the rights of other minorities.

As a result, the European Union is a space of freedom, security and justice respecting the fundamental rights and different legal systems and juridical traditions

Among other goals, it has settled as objective to maintain and develop a space of freedom, security justice to facilitate, inter alia, the access to justice, in particular through the principle of the mutual acknowledgment of the judicial and extrajudicial orders documents in civil matters.

Some differences between internal rules of each Member State and governing recognition of judicial or extra-judicial decisions, impede the proper functioning of internal market.

In order to overcome these obstacles, unifying rules to ensure quickly and simply recognition and enforcement in a Member State, of orders pronounced in another Member State is mandatory and should be a constant concern of the Union institutions.

This objective is in accordance with the provisions contained in art. 81 para. (1) TFEU, according to which the Union shall develop judicial cooperation in civil matters incidence cross-border recognition based on the principle of mutual judicial and extrajudicial decisions. This cooperation may include the adoption of measures for the propinquity of the laws, regulations regulations of the Member States.

In this respect the European Parliament and the Council, adopt measures aimed at ensuring:

- Mutual judicial and extrajudicial decisions recognition between Member States and their enforcement
- Compatibility of the rules applicable in the Member States concerning conflict of law and competence

- Eliminating obstacles of civil proceedings carrying out, if necessary by promoting the compatibility of the on civil procedure rules applicable in the Member States
- Eliminating obstacles from smooth functioning of civil proceedings, if necessary by promoting the compatibility of rules on civil procedure applicable in the Member States.

Regulating the right to obtain the foreclosure in Romania for writs of execution pronounced in the Member States of the European Union.

Before Romania's accession to the European Union the regulation of private international law relations, including the right to obtain the foreclosure of writs of execution pronounced in another state, were governed by Law no. 105/1992.

From 16 May 2004, Law no. 105/1992 was repealed by Law no. 187/2003 on jurisdiction, acknowledgement and enforcement in Romania of judgments in civil and commercial matters pronounced in the Member States of the European Union, normative act, which by paragraph 2 of Article 1 stated that the provisions of Law no. 105/1992 remain applicable only to the extent that Law no. 187/2003 does not set other regulation.

According to this law [art. 41 para. (1) of Law no. 187/2003] judgments pronounced in a Member State and which are enforceable, according to the law of the courts that have pronounced them, shall be enforced in Romania on the writ of execution at the request of the interested party, by the court in whose jurisdiction the party has his/her residence or registered office, party against which the foreclosure is sought or in whose jurisdiction foreclosure is to be carried out.

Considering the provisions contained in art. 249 of the Treaty for the establishment of European community, according to the regulation is the Community regulation directly applicable in all Member States, not being necessary a rule of transposing it into national law, Romania has decided that it should be revoked - where appropriate, partially or entirely - the internal regulations adopted in order to accelerated apply a series of Community regulations and of creating the institutional framework, allowing direct implementation of the latter,on the date of accession, January 1, 2007.

Thus, the Romanian Government through the Emergency Ordinance no. 119/2006, repealed with effect from 01.01.2007, Law no. 187/2003.

The repeal was necessary to avoid potential legislative conflicts between internal rules and the European standard (prevailing over internal rules), all the more that since maintaining the national standards which doubles Community rules was (is) likely to create inconsistent judicial and administrative practice in respect of interpretation andapplication of Community

rules, with its consequences of attracting the liability of the Romanian state for failure to fulfil the obligations deriving from its membership of the European Union.

Also, the repeal measure was necessary to ensure uniformity in applying the communautaire acquis.

Moreover, since 2003, the Romanian Constitution through Art. 148. para (2) enshrined the principle of mandatory and priorities for the provisions of the constituent treaties of the European Union and other binding community regulations into national law, ***on the date of accession,*** setting aside applying in Romania the provision of the national laws, contrary to the binding rules that make European law.

Therefore, from 1 January 2007, in order to recognize and enforce in Romania judgments, judicial transactions and authentic acts apply directly the Regulations of the European Parliament and of the Council (Regulation (EC) no. 44/2001, Regulation (EC) no. 805/2004 Regulation (EC) no. 2201/2003, etc.)

Likewise, in the spirit of EU Law, the new Romanian Code of Civil Procedure explicitly accepted as the basis for foreclosure in Romania the European writs of execution.

Hence, according to Art. 636 of the New Code of Civil Procedure, the European writs of execution on which the **European Union law does not require prior acknowledgment** in the Member State where the foreclosure shall be made, they are enforceable by law without any further formality.

As a result, the situation in which it applies for enforcement of European writs of execution for which the **European Union law requires prior acknowledgment** of this title within the requested Member State (the executing State), foreclosure of this title in Romania, **does not have as basis in the national law, respectively Art. 636 NCPC.**

Chapter IV covers issues relating to the enforceability, foreclosure modality and prescriptions of the right to obtain foreclosure on the basis of extrajudicial writs of execution represented by arbitration, location agreement**,** loan consumer contract, the mortgage, pledge agreement, letter of bank guarantee.

Chapter V contains brief consideration on the nature of enforceability of documents issued by the bailiff, protection order, decision / provision for restitution in kind of immovable property, Lease contract contract for legal assistance, legal authentic notarial document.

In Section 3 of this chapter, we have **Proposals for amending certain provisions influencing the enforceabilityof writs of execution.**

Thus, as we have shown throughout the study, in terms of incident legal provisions in foreclosure, and in enforceablility practice, there has been revealed that both the removal of ambiguity and to fulfil the obligations resulting from the content of some writs of execution, and ultimately for providing justice in civil matters, *it is necessary to make some legislative changes.*

To this end, we made some proposals *ferenda law*, as follows:

The writ of execution proceedings must be prior to the notification of the bailiff.

Argument: *Although foreclosure has not been yet enforced* by the enforcement court, *the bailiff is required to issue a procedural act* and submit diligence in the name of the creditor, under which the enforcement agent has no interest in fulfilling the obligtions resulting from an writ of execution.

Amendment of paragraph (3) of Article 676 NCPC *, known with the marginal name "The case of alternative obligations"*

Completion to paragraph 2 of Article 706 NCPC, with marginal title "Limitation period" meaning that:

"Limitation period begins to run out from the date when arises the right to obtain foreclosure. In the case of court and arbitral judgments, the limitation period begins to run out from the date when they have become final", "*except for decisions through which a payment deadline has been granted, in which case, the period shall begin on the day of expiry for the payment deadline granted. "*

Exemption from the decision of validating the garnishment from the writ of execution procedure.

According to *law ferenda*, it must be exempted from the writ of execution and decision of validating the garnishment because this enforcement order *is an foreclosure act issued during foreclosure proceedings already admitted* , following a contradictory procedurecarried out in front of the enforcement court, under judicial control (the judgment on validation of garnishment can be appealed only by appeal-art. 791 NCPC)

The exemption of the injunction from the rule of foreclosure.

Argument: We consider that it should be exempted from foreclosure the injuction, *by express provision,* for the strong and sufficient argument that *by the writ of execution procedure (preliminary procedure that requires time) the urgent character of the Injuction is removed.*

Reconciliation of the provisions on writ of execution, which aims at putting in possession of the successful bidder over the property awarded on **the basis of a writ of execution consisting of a judgment act.**

Argument: Although, according to Art. 666 para. (4) NCPC, third thesis, *foreclosure extends to the writs of execution to be issued by the bailiff (the adjudication act, as well*) within the foreclosure procedure, the provisions of Art. 856 para. (2) NCPC contradict this provision and state that the vesting of possession of the successful bidder, over the property awarded is done in accordance with Art. 664 and the following, that is that the bailiff is bound under Art. 666 para. (1)to require foreclosure after completing the formalities provided by Art. 665.

Completion of Art. 1107 NCPC, with the marginal title "The issuance of the writ of execution"

Argument: Although according to this legal text, *"based on the foreclosure final decision, the writ of execution is issued under the law in Romania",* this legal text *is "silent"* in respect of the document forming the writ of execution.

We therefore propose *filling this legal text with the document title* [resolution issued, judgment, or why not certificat, according to the ways imposed by (EU) or (EC) Regulations *which shall be enforceable*]

Keywords:

performance of justice in civil matters; Administration of Justice; foreclosure; writ of execution; European writ of execution; enforceability; claims; enforcement court; bailiff; creditor; debtor; protection order.

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