

THEORETICAL AND PRACTICAL ASPECTS CONCERNING THE LIMITATION ON FORECLOSURE

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Abstract

The prescription concerning the right to action is one of the most important penalties provided for by civil legislation, but at the same time one of the exceptions that may be raised by a debtor by way of an appeal on enforcement's prescription because even if observed by the court which authorizes the enforcement, this thing will not invoke enforcement's prescription of because under the new provisions of the code of civil procedure, it is not an exception concerning public order.

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1. Preliminary considerations about enforcement and enforceable title

Enforcement represents the procedure made available by the legislature by which the creditor may exercise the right established by a judgment or another enforceable title against the debtor who has not executed (paid) willingly the correlative obligation or obligations.

Enforcement is carried out by means of the competent legal representatives, bailiffs and under a writ of execution in accordance to art. 632 paragraph 1 Civil Procedure Code. No enforcement can be initiated unless under an enforcement title order which includes an uncontested, liquid and due debt. The debt is uncontested when it results expressly from the legal act that represents the writ of execution, liquid when the object of the claim is determined or determinable and payable when maturing.

Typically, the court order is a final judgment, but there may be other documents that may be categorized as writs of execution under the provisions of the law. The judgements are enforceable according to the provisions of art. 633 Civil Procedure Code are those not likely to be appealed or subject to a second appeal, decisions given in the first instance (the judgments) without the right to appeal and second appeal, the final decisions following them not being appealed, the judgments passed on appeal, without the right to a second appeal, the judgments passed on appeal, the decisions passed on the second appeal that have awarded a solution to the matter of trial. All these judgments become final only after the expiry of the term in which they can be appealed or the date on which they were delivered, as applicable.

Even if it is not part of the enumeration in art. 634 par. 2 Code of Civil Procedure, there is a way in which decisions may become final on the date the parties waive the appeal before the trial court in accordance with art. 404 Civil Code of Procedure. This concerns a possible waiver of the appeal of all parties, not only of the party that has been unsuccessful, since even the successful party in the first instance may choose to appeal under the law.

The moment when a judgment becomes final is of a special importance since it can be identical to the time at which commences the limitation of the right to request the enforcement of the obligation contained in the enforceable title.

A different situation is where the sentences given by trial courts and which are enforceable by law.

Art. 448 Code of Civil Procedure determines the decisions that are enforceable by law, depending on their subject.

The enforceable decisions are those which have as their object: establishing the way of exercising parental authority, setting the accommodation of the minor, the way a parent exercises his/her right to have personal relations with the minor, the payment of wages and other rights arising from legal employment relationships, as well as the amounts due to the unemployed, compensation for work accidents, rents and amounts due as child support or child allowance, as well as pensions granted within the national insurance contribution in case of death or injury if in the form of regular benefits, prompt repairs, sealing or removing the seal or taking an inventory, requests regarding the possession, regarding only the possession, judgments given within recognizing the defendant or in other cases provided by special laws. These court decisions are enforceable before being definitive, being an exception and being enforceable provisionally.

If they remain definitive by failure to file an appeal or rejection of the appeal, there is no consequence on the enforcement begun. Where decisions are modified or cancelled, then the enforcement started on their basis is void.

Besides the final judgments, given by the national courts, the Civil Procedure Code also states the European enforcement orders (titles) issued in another EU Member State for which it is not requested for the prior recognition procedure to be followed.

Also, the arbitration awards rendered enforceable can also be enforceable titles, even if they were attacked with action for annulment and decisions of the bodies with final jurisdictional attributions, not being contested by the party concerned in the courts of law.

Apart from the final judgments given by the national or European courts for which the procedure of preliminary recognition is not necessary, arbitration decisions or those given by judicial bodies, a number of documents are considered to be enforceable titles if they are declared enforceable.

The decisions and minutes of bailiffs, the authentic documents, the credit bonds or any other written documents enforceable under the law can be subject to enforcement. All these documents must establish an uncontested, liquid and exigible debt, otherwise they cannot be regarded as enforceable titles.

The credit instruments are checks, bills of exchange and promissory notes and they may be enforceable titles if they are provided by the special Law 59/1934 as amended.

Except for the judgments, all enforceable titles can be enforced if they have been previously rendered enforceable with the formula provided by art. 640 par. 6 Code of Civil Procedure

2. General considerations on the limitation of the right to obtain enforcement

2.1 Definition and regulation of prescription.

The prescription is one of the institutions of civil law or civil procedure law which has important implications on the rule of law, being the object of theoretical research on the scope, functioning and effects.

The prescription was seen as a way of discharging from obligations by old doctrine¹ while remaining a so-called natural obligation, as it was called by the ancient doctrine that can be extinguished only through a voluntary payment.

The legislative evolution brought by the issuing of the Civil Code, but also of the New Civil Code has determined that the prescription be perceived by theorists, but also by practitioners as a way of terminating the right to action which concerns a property right. Following the intervention of limitation, the holder of the violated, challenged or broken right loses the opportunity to obtain the state's support through its competent bodies to exercise the right. In this respect, article 2500 par.1 New Civil Code provides that "the material right to action, hereinafter referred to as the statute of limitations is extinguished by prescription, if not exercised within the period prescribed by law".

The Statute of limitations is defined in art. 2500 par. 2 new Civil Code as the *right to compel a person using public force to render a certain service, to observe a certain legal situation or incur any other civil penalty, as the case may be.* "

After the expiry of the limitation, it is possible to extinguish the right of action, but the subjective right and the related obligation still exists, the person concerned (the person the benefits from the limitation) may oppose the limitation or may renounce to it. If the person concerned invokes or opposes the limitation, the right to action of the respective right holder is terminated and in case s/he does not invoke the limitation, the right to action cannot be extinguished.

¹ M.B. Cantacuzino, *Elementele dreptului civil*, Cartea Românească Publishing House, Bucharest, 1921, p.2.

Given that the limitation affects the right to action and not the subjective right, we conclude that it is an institution closer to the civil procedural law, being considered a defence used in litigation, rather than to the civil law, even if the new codes, the civil and of civil procedure ones maintained the previous legislative solution enshrined in the Civil Code of 1864.

But the limitation is an institution known in all branches of law, so that it is inappropriate to say that it should be circumscribed only to one of them. The legal status of limitation can be characterized or determined in terms of the result it produces by every branch of law in which it is known and the legal grounds are in the Civil Code, Criminal Code, Administrative Litigation Law, etc.

The legal basis of limitation is in the New Civil Code, Book VI, "About the limitation, decay and the calculation of deadlines" Title I "The limitation" in the Criminal Code, Title VII, Cases eliminating the criminal liability" art. 153-156, in the administrative court, the legal basis of limitation is article 7 of Law 554/2004, etc.

2.2. Prescription of the right to obtain enforcement.

The prescription may impact enforcement. The creditor of the obligation contained in the enforceable title, being legally obliged to ask the bailiff's assistance in order to capitalize the claim in the enforceable title.

The legislature uses the terminology of limitation of the right to request enforcement in order not to confound it with other prescriptions that can affect a right of action and at the same time, make a clear distinction between the right of action represented by the physical act of submitting a request for enforcement by the obligee and the other documents completed in respect to the enforcement by the competent authorities.

The prescription of the right to obtain enforcement is regulated in the Code of Civil Procedure, Book V, "About enforcement" Title I "General Provisions" Chapter V, "Prescription of the right to obtain enforcement" art.2.

In terms of the civil procedure law, the exception related to the prescription of the right to request enforcement is a relative exception in the proceedings, invoked only in a civil trial, the appeal against enforcement, by way of exception by the person concerned, usually the debtor of the obligation contained in the enforceable title for which the enforcement was started.

Unlike the previous legislation, the Procedure Code of 1865 which regulated the prescription of enforcement as an absolute exception, according to the new regulations of the new Civil Procedure Code, the prescription of enforcement is a relative exception that can be invoked only by the person concerned.

In the old regulatory prescription of the right to request enforcement, this exception was necessarily invoked by the court of its own motion, the prosecutor,

the debtor or even by the debtor². Moreover, the court was obliged to proceed to an ex officio verification of the fulfillment of the limitation period, and if so to reject the application for enforcement of whose judgment it was invested according the dispositions of Art. 373¹ Code of Civil Procedure of 1865.

The provisions of art. 707 Civil Procedure Code show expressly that the enforcement is inoperable, expressly stating that "*limitation does not operate as of right, but only at the request of the person concerned*". As it is shown in the plea invoking the right to obtain enforcement in the appeal in execution by the person concerned, usually the debtor. The advantage of this rule consists in avoiding to trigger complaints to enforcement during which the prescription of the right to enforce to arise, so to a reduction of pending court cases. Checking the prescription and invoking ex officio the exception occurred when the court admitted the enforcement. Noting the expiry of the limitation, the court rejected the application for enforcement, thus avoiding drawing up new documents voidable by the bailiff or investing the court with an appeal against enforcement.

The current regulation radically modifies the exception of the right to obtain enforcement, considering it a relative exception, bringing a benefit to the creditor who cannot be opposed limitation by the debtor or any other interested person through the only procedural means available, namely the appeal against enforcement.

However, the judicial practice has embraced the view that the limitation of the right to obtain enforcement may be invoked both by way of action³ and by way of exception. A declaratory action was considered admissible

² M. Tăbărcă, *Objections from the procedure in the lawsuit*, 2nd edition, Universul Juridic Publishing House, Bucharest, 206 p. 346.

³*The court acknowledges that the limitation of the right to request enforcement is an institution whose purpose is to ensure the stability of the civil circuit to the creditors who did not have a diligent attitude and have not enforced the rights of claim won through debt an enforcement title within a period of 3 years.*

Further, analysing the relevant legal provisions in question and considering the purpose and the finality of the institution of limitation, the court acknowledges that both the statute of limitations and the one in enforcement can be raised by the debtor of the claim not by way of exception made in a dispute initiated by a creditor, but also by mean of an action filed separately by the debtor, without any legal text that would limit raising the statute of limitation only by way of exception.

In this regard, the court acknowledges that the debtor of the claim in respect of which the limitation period of three years has passed, has the possibility of submitting a declaratory action contradictory to the creditors in the enforcement title, action through which to seek the ascertainment of the creditors not having the right to request enforcement due to the fact that the legal provisions establishing the statute of limitations after the expiry of three years from the date on which the enforcement may be requested. As such, related to the applicable legal provisions in question, the court finds that the petitioner's application requesting finding limitation of the right to request enforcement is admissible and seeks a practical, direct and current use, respectively removing the possibility of the defendants in the present case to request enforcement based on the

3. The statute of prescription to the right to obtain the enforcement

3.1. The notion

The statute of prescription to request enforcement is a period (range) time established by the law during which the right of action may be exercised for the enforcement of an obligation contained in an enforceable title, after the expiry of which it can be lost. We say can it be lost so long as the prescription of the right to request enforcement is a relative exception which can be invoked by the person concerned by appeal against enforcement and, therefore, at least at the time of the declaration of enforcement, the prescription cannot take effect.

The prescription on enforcement periods can be classified:

- In general terms or specific terms, according to the legal standard by which it is regulated;
- Terms relating to enforcement regarding property rights, non-property rights and related to real properties.

The general term for the limitation of enforcement is 3 years and is governed by the dispositions of art. 706 par. 1 thesis 1 according to which "*the right to obtain enforcement is prescribed within 3 years, unless the law provides otherwise.*"

Special prescription period is 10 years and applies to all the securities issued in the subject area of real properties regulated by the dispositions of art. 706 par. 1 2nd sentence according to which 'In the case of securities issued in the subject area of real properties, the limitation period is 10 years. "

3.2. Beginning of the period for requiring the limitation of enforcement.

The prescription period shall run from the date when the right to request enforcement appeared.

For the enforceable titles represented by court decisions, the limitation period shall run from the date on which they become final. Decisions may remain final once the deadline for the appeal expires, the appeal is settled, the second appeal is settled. The decisions of the appeal, if they award a solution on the main issue of the trial are final from the time of their delivery. The deadline for preparation and provision of the judgment does not influence the time when they remain final.

In case of the judgments of the trial courts which were not appealed, they become final when the deadline to appeal expires. In this case, the deadline for drafting, communication and appeal interests in order to establish when the judgment becomes final as this is the expiry term for the appeal.

In case a final judgment provides a grace period, in which the debtor must perform the task, then the prescription's period for enforcement begins to run from the expiry of the grace period.⁴

3.3 Suspension of the prescription's period to the right to request enforcement.

The suspension of prescription's period consists in suspending the limitation period for the duration of the case which keeps the lender unable to request the enforcement.

The creditor cannot be penalized by the lack of the right to ask for enforcement if s/he was impeded objectively to start the enforcement by filling an application to the bailiff.

After the disappearance of the cause that led to the suspension of the period of prescription, the right to request enforcement, the prescription's period runs further.

The causes of suspending the prescription's period of the right to request enforcement are listed in article 708 par. 1 Code of Civil Procedure as follows:

- in the cases established by law for the suspension of the prescription's period of the right to order the defendant;
- during the suspension of enforcement by a legal provision by the court or by another competent judicial body;
- during the period the debtor has no traceable assets or it evades his goods. the law provides that the suspension of enforcement lasts while the debtor evades his revenue and assets from prosecution. This expression is the least deficient since the revenue also represents assets from the legal point of view, usually claim goods;
- as long as the goods could not be capitalized;
- other cases provided by the law.

The provisions of the Civil Procedure Code regarding the limitation of the right to request enforcement, according to art. 711 Civil Procedure Code are supplemented by the provisions of the Civil Code, so they should be considered and provided for by art. 2532 Civil Code which are:

- between spouses, as long as their marriage lasts and are not separated in fact. When the prescriptio's period began to run before marriage, the course of the limitation period is suspended during it;
- between parents, guardian or custodian and those lacking legal capacity or with limited legal capacity or between curators and those whom they represent as long as the protection lasts and the calculations were not done and approved;

⁴ S. Zilberstein and V. M. Ciobanu, *Civill Procedural Law, The Enforcement*, Lumina Lex Publishing House, Bucharest, 1996.

- between any people who, under the law, following a judicial or a legal act, administer other people's assets and those whose assets are thus managed, as long as the administration has not ceased and the calculations were not given and approved;

- in the case of the one lacking legal capacity or limited legal capacity, while s/he does not have a legal representative or guardian, except for the cases where there is a contrary legal provision;

- while the debtor deliberately hides the creditor the existence of the debt and its chargeability;

- during the negotiations aimed to settle the disputes between creditor and debtor amicably, but only if they were held in the last six months before the expiry of the prescription's period;

- in case the creditor must, by law or contract, use a certain preliminary procedure, while he did not know or should not have known the outcome of that procedure, but no more than 3 months from the commencement of the proceedings, if no other term was settled by law or contract;

- in case the creditor or debtor is part of the Romanian armed forces, while s/he is during mobilization or war. The civilians who are in the armed forces for operational reasons imposed by the necessities of war, and the military forces are also considered;

- in case the creditor is prevented by force majeure to interrupt, as long as this impediment has not stopped.

And the Civil Code provides that the limitation period is also suspended in other cases provided by the law.

3.4. The interruption of prescription's period of the right to request enforcement.

The interruption of the prescription's period consists in removing the prescription's period of the right to request enforcement elapsed before the emergence of the cause determining a new prescription's period.

Once the prescription's period is interrupted, another prescription's period begins. This fact represents an advantage for the creditor who, showing interest to limitation fulfill the right, carries out various acts that lead to the interruption of the limitation period.

The causes which interrupt the prescription of the right to request enforcement are listed in article 709 par. 1 Code of Civil Procedure as follows:

- the completion by the debtor before the start or during the enforcement of a voluntary act of executing the obligation contained in the enforceable title;

- recognition in any way, by the debtor, of the debt;

- filing in an application to intervene in the enforcement started by other creditors;
- carrying out an act of enforcement during the enforcement;
- submitting a request to resume the enforcement by the lender;
- other cases provided by law.

These causes of interrupting the prescription's period of the right to request enforcement are completed with those provided in art. 2537 Civil Code. Some of the causes of interrupting the prescription's period course specified in the Code of Civil Procedure are identical to those of the Civil Code, therefore we enumerate from the latter:

- the inclusion of the claim in the list of creditors within the insolvency proceedings;
- by setting up as a civil party in the criminal proceedings, either during the criminal prosecution or during the trial, but by the start of the judicial inquiry;
- by any act through which the debtor is put in default.

Also, art. 2537 Civil Code provides that in the event interrupting the prescription's period and the invocation by way of exception of the right whose action is prescribed. However it is difficult or impossible to appeal by way of exception the right to request enforcement, since it can be requested only through action.

Even if the Code of Civil Procedure does not provide a cause for interrupting the course of prescription of the right to request enforcement, we consider the writ of execution drafted by a creditor and addressed to the bailiff as the cause of interrupting the prescription of the right to request enforcement. By the writ of execution, the creditor expresses his/her willingness and interest to collect the claim. The bailiff according the provisions of art. 665 Code of Civil Procedure will rule by the decision the immediate filling of the request for enforcement and the opening of the enforcement file and, under the provisions of art. 666 Code of Civil Procedure shall request within 3 days of the registration, the writ of execution from the enforcement court.

Compared to the nature of demand for enforcement and at the time it is drafted, the consequences it produces, as it requests the state's participation through its competent bodies to earn the lender's right, it can be considered a cause for interrupting the interrupts the limitation of the right to request enforcement.

On the other hand, when we assert that the request for enforcement leads to the interruption of the limitation of the right to request enforcement, we bear in mind the provisions of art. 709 par. 3 Code of Civil Procedure which provides that "*the limitation period is not interrupted if the enforcement was rejected*". The rejection of enforcement may be made by the enforcement court rejecting the writ of execution.

3.5 Requesting the relief from the effects of expiry of the limitation period

Requesting the relief from the effects of expiry of the limitation period to request enforcement finds its relevant provisions in art. 710 Code of Civil Procedure.

After the expiry of the limitation period, the lender has the opportunity to request the relief from the effects of expiry of the limitation period if it was prevented by reasonable grounds and request enforcement. The application requesting the relief from the effects of expiry of the limitation period is in the jurisdiction of the national court and may be made within 15 days from the time the reasonable grounds have ceased. Judging the request occurs only after summoning the parties and the judgement settling the request on the application is subject to appeal.

The court is the one who, based on the sentence passed, may request the relief from expiry of the creditor in order to request enforcement.

As long as invoking the statute of limitations to request enforcement is, as noted, a relatively substantive exception in the trial court, the court cannot invoke ex officio, the request to relief from the effects of expiry of the limitation period appears as a solution only if the debtor asserts the limitation of the right to request enforcement.

This raises the question whether there is interest for requesting the relief from the effects of expiry. We believe that so long as the limitation of the right to request enforcement may be invoked by the debtor by action and the request for the relief from the effects of expiry may be required even if the debtor did not raise this exception.

On the other hand, as long as there is a legal provision that provides for relief from the effects of expiry even if the prescription is a relative exception, the interest is presumed.

4. Conclusions

After analyzing the limitation of the right to request enforcement, this can be characterized as one of the most important defenses that a debtor can use in order to penalize the passivity of a debtor in obtaining the right included in an enforceable title. However, that this exception is a relative one, the court not being able to invoke it ex officio represents an advantage which the legislature created for the creditor. *Thus*, we propose de lege ferenda that the limitation of the right to request enforcement becomes once again a public policy and be raised ex officio by the enforcement court when settling the writ of execution. When we make these proposals, we bear in mind the social realities which highlight the fact that the main creditors are professionals who must show interest to enforce the claims contained in enforceable titles.

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