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ENFORCEMENT SYSTEMS – DIFFERENCES AND SIMILARITIES

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ABSTRACT

In modern civil procedural law, there are different organizational structures of national civil enforcement systems.

According to the principle of national procedural autonomy, each state regulates the enforcement procedure independently. Because of this, it is very difficult to talk about special systems for the civil enforcement of court decisions and other judicial or non-judicial enforceable titles at the macro level. The main reason for this is the fact that the matter of enforcement procedural law was neglected for a long period of time, and the harmonization of the enforcement procedure only began to be considered in the middle of the XIX-th century.

However, in general, the International Encyclopedia of Comparative Law speaks of the existence of four systems for the enforcement of court decisions and other judicial or non-judicial enforceable titles, namely: 1) enforcement of decisions by courts, 2) enforcement of decisions by private enforcement bodies (bailiff system of enforcement), 3) mixed systems of enforcement and 4) administrative systems for enforcement.

The system for the enforcement of decisions and other judicial or non-judicial enforceable titles by courts without exceptions is specific to the Anglo-American procedural circle (common law system), while in the Romanian-German procedural circle of the civil law system the enforcement of decisions and other judicial or non-judicial enforceable titles can be under the competence of the courts or under the competence of bailiffs, although combined models can also be encountered. In the Scandinavian procedural circle as a part of the civil law system, is dominant the system of enforcement of decisions by private enforcement bodies or the administrative system of enforcement.

The aim of this paper is to perceive the similarities and differences between national enforcement systems analyzed at the macro level. To achieve this goal, the comparative method and the analysis method will be used.

Key words: enforcement systems, civil law, common law.

INTRODUCTION

People are not always inclined to fulfill their obligations within the deadline for voluntary fulfillment, therefore there is a need for an appropriate enforcement system.

The civil enforcement procedure is a relatively new topic in comparative research (Gorgieva, 2024, 40-48). Ruling national particularism in the domain of civil law enforcement, in the world context began to give way ideas about the harmonization of the enforcement procedure were given place only in the early nineties of the last century (Mads, Burkhard, Oberhammer 2005, 34-36). Thus, comparisons have become a necessary condition for mutual dialogue and, consequently, for the harmonization of national systems of enforcement (Kennett, 2021, 82-83).

The comparative study of the national systems for the enforcement of decisions and other judicial or non-judicial enforceable titles should first differentiate the specificities of the systems for the enforcement of decisions at the macro level - in the procedural culture of the civil law and the common law system. Second, the comparative study of enforcement systems should be introduced into a detailed analysis of how court decisions can be enforced in the fastest way and with minimal costs for the parties.

1. ENFORCEMENT SYSTEMS IN THE CIVIL LAW SYSTEM

In contrast to the common law system, where the enforcement procedure is always under the jurisdiction of the courts, in the Romanian-German procedural circle of civil law system, the tendency to abandon the judicial system for enforcement is more pronounced (the enforcement procedure was treated as an integral part of the civil procedure in the French Civil Code from 1806 year and the German Code of Civil Procedure from 1877, in order to become independent from the civil procedure for the first time with the Austrian Enforcement Law from 1898) (Zoroska Kamilovska, 2013, 450-453).

Namely, under the influence of the needs for the liberalization of the judiciary and technical innovations, reforms in the enforcement procedure began in the Romanian-German procedural circle, which never happened in the Anglo-American one. The reason for this should certainly be sought in the intention of ensuring greater efficiency of the judiciary, which should primarily be ensured by freeing the courts from non-disputable matters, matters that do not represent jus dicere in the true sense of the word, such as executive ones. For this purpose, the system of enforcement by bailiffs (Bailiff System of Enforcement) appeared for the first time in the Romanian procedural circle, which penetrates more clearly into the legal systems of the countries in the German procedural circle, where there are still countries where enforcement is under the jurisdiction of the courts (Court-oriented System of Enforcement) or mixed systems (Mixed System) where competent or non-competent enforcement can be carried out by both courts and bailiffs.

However, pro futuro, the dominance of the system for the enforcement of decisions and other judicial or non-judicial enforceable titles, by bailiffs is expected. That this is so indicated by the data that today in 19 of the 28 EU member states, the bailiffs are independent bodies responsible for enforcement (Centre for European Law, 2021).

1.1. System of enforcement of decisions in Germany

The general rules for the conduct of enforcement proceedings in Germany are contained in Book 8 of the Code of Civil Procedure - DZPO (Art. 704-945). Unlike in France where the huissiers de justice has full control over the enforcement proceedings, in Germany the creditor usually has the most control over the proceedings.

In German enforcement proceedings according to the Financial Report for Bailiffs Geschäftsanweisung für Gerichtsvollzieher (GVGA), the Federal Enforcement Act Gerichtsvollzieherordnung (GVO) and the DZPO the responsibility for enforcement is divided between the court and the bailiff. Hence, a mixed, complex system of decision-enforcing is adopted in Germany.

Thus, in Germany the courts (Vollstreckungsgerichte) carry out enforcement on real estate, enforcement for the purpose of collecting monetary claims and give permission to carry out enforcement outside the area of the court, while bailiffs (Gerichtsvollzieher), who in Germany have the status of civil servants, carry out enforcement on moving objects (Holzwarth, 2014, 22-30).

The German system of enforcement of decisions is a mixed system. In this country, enforcement proceedings are partly carried out by bailiffs or sheriffs (especially the seizure of movable property), while garnishments are ordered by the court.

1.2. System of enforcement of decisions in France

France is the oldest country in Europe to have a system of enforcement by bailiffs known as huissiers de justice who are hierarchically organized into local, regional and national chambers.

Under the influence of France, this system was accepted first in the countries of the Romanian procedural circle (Belgium, the Netherlands and Luxembourg), where the bailiffs have the powers of independent professionals, and at the moment it is more prominently accepted in the countries of the German procedural circle, with one difference because in them the bailiffs have the status of officials who are under the control of the courts.

The enforcement procedure in France is not regulated by a separate code but is regulated in the New French Civil Procedure Code - NCPC and the Decree on the enforcement of decisions in civil cases dated 30.05.2012. From here, the French enforcement procedure is regulated as a judicial procedure. According to Art. 420 and Art. 501 of the NCPC generally applies the rule that only a decision which has the character of res judicata can be enforced Levy, 2023, 7-10).

Enforcement in France is carried out by special bailiffs - huissiers de justice, as public servants who act with the approval of the French Ministry of Justice (Burkhard, 2005, 45).

However, these officials are not paid by the state but paid (rewarded and financed) by their clients, because they are also the representatives of their clients.

Specific to France is that only the huissiers de justice has the authority to enforce the decisions and deliver the decisions. These powers are monopolized in the hands of the huissiers de justice. Exception of this is the attachment of salaries, which is in practice one of the most important modes of enforcement, which is carried out by the president of the local courts (tribunal d'instance) (Burkhard, 2005, 32).

If the huissiers de justice must carry out enforcement, they should notify both parties beforehand. If a dispute arises during the execution procedure or legal remedies are applied, the huissiers de justice is obliged to submit the case to the judge juge de l'exécution who further takes the actions in the procedure.

Apart from the basic powers to carry out the enforcement of decisions and delivery, the French huissiers de justice may also have other powers: 1) to file lawsuits and represent the parties before the courts, 2) to collect debts in such a way as to conclude legal agreements between the parties acte sous seing prive, 3) to sell movable objects and 4) to issue certificates of facts.

1.3. System of enforcement of decisions in Sweden

A completely different enforcement organization is found in Sweden (also in Finland). In this country, enforcement is carried out by an administrative body which is operating completely outside the courts (Papadopoulou, 2014, 19-22).

The enforcement of decisions in civil cases in Sweden is the responsibility of the National Board (Risskattevereket) or the regional Enforcement Authority (Kronofogdemyndighet).

The responsibility and authority of enforcement procedures is vested with the National Board. The National Board in Sweden has a double role, the one being that of enforcement while the other of a more preventive role.

The enforcement tasks of the regional Enforcement Authority could be summarized to the following: enforcement of monetary claims; enforcement assistance (eviction, getting back objects, documents), notice to unknown creditors, which means urging unknown creditors to report claims to the Enforcement Authority when an estate of the deceased or an association is wound up, for example, registration of personal property purchases remaining with the seller, which is intended to protect the buyer from attachment of the property for the seller's debts, or its inclusion in the seller's bankruptcy estate, protest, which means certifying that a bill has not been paid on the due date and application for cancellation of a lost document, which is intended to allow a person who has lost an original document to assert, the loss notwithstanding, a right expressed in that document.

In Sweden, a distinction is made between ordinary and summary enforcement proceedings. The summary enforcement procedure (Supro) is conducted for the collection of undisputed claims.

2. ENFORCEMENT SYSTEMS IN THE COMMON LAW SYSTEM

In all countries in the Anglo-American procedural law, enforcement is under the jurisdiction of the courts (Court-oriented System of Enforcement). The reason for this is the casuistic way of creating this procedural system and the acceptance of the doctrine that enforcement is an integrated part of the trial (Yehuda, 2020, 9-10).

2.1. System of enforcement of decisions in England

In English civil procedure enforcement is treated as an integrated part of the trial and a judicial system of enforcement is established. Because of this, in England, enforcement law is not regulated in a separate law but is regulated in the Civil Procedure Rules (Bartlett, 2021).

Enforcement proceedings in England are treated as uncontested court proceedings and judges enforce the decisions.

The general provisions on enforcement are contained in rule 70.1-70.6 of the Civil Procedure Rules, while the specific enforcement provisions are contained in rules 71-73, 81, 83 and 84 (England Civil Procedure Rules from 1999). The English Rules of Civil Procedure under rule 74 distinguish between enforcement of domestic decisions (judgments originating in England and Wales) and the enforcement of judgments originating in other jurisdictions.

The specificity of the English enforcement procedure is the registration of the decisions whose enforcement is requested (rule 71). If the creditor has an enforceable document (judgment, order or fine) he fills out and submits himself or with the help of a lawyer: 1) a form, a request for registration of the enforcement decision which costs 60 pounds, and 2) a copy of the decision. The request for registration is submitted in the register of the debtor's area of residence. If an appeal procedure is in progress on the decision, in most cases the execution is postponed (rule 72).

The decisions are registered in special registers in the High Court or Register of Country Court which are competent to carry out enforcement. In the High Court generally all applications for registration of judgments are submitted, and before the Register of Country Court only applications for enforcement whose value does not exceed £5,000.

According to the Civil Procedure Rules, High Court enforcement services are particularly effective in cases where the debtor refuses to pay or where the claim is of greater value.

After the decision, which is an enforceable document, is registered, the court delivers it to the debtor with a clause to pay immediately (forthwith) or within 28 days at the latest. If the debtor pays the debt within the stipulated period, the debt is deleted from the register. If the debtor does not pay within the stipulated period, the enforcement procedure begins, in which court officials known as High Court Enforcement Officers or Country Court Enforcement Officers play a dominant role (until 2004, the term Sheriffs was used, a term that is used today in Scotland).

The most important activities of Enforcement Officers are freezing bank accounts, notifying the credit agencies that the debtor will no longer be able to withdraw credit, establishing a lien over the debtor's real estate, auctioning the debtor's movable objects, etc. However, if the debtor has no property and income, enforcement will not be possible. In fact, the High Court does not guarantee that enforcement will be carried out in every case. Because of this, at the written request of the creditor, the High Court can notify the creditor of the property the debtor has. The High Court can provide the creditor with information about the debtor's place of business, the amount of salary, data on additional income and expenses, real estate owned by the debtor, data on his assets in the bank and data on his investments in buildings.

2.2. System of enforcement of judgments in the USA

In all states within the USA, enforcement is the same as in England and Wales, which is under the jurisdiction of the courts. This is guaranteed by rule 69 of the Federal Rules on Civil procedure. The enforcement procedure itself is not regulated at the federal level, but is regulated at the state level, and the Federal Rules on Civil procedure contains only general provisions for the enforcement of decisions based on monetary claims (Perlette, Loza, 2022).

In the legal systems of the states within the United States, the enforcement procedure is usually regulated by the laws of civil procedure and practical rules (e.g.: Section 820 -860 California Code of Civil Procedure, art. 5401-5408 in New York Civil Procedure Law and Rules, part 6 (Enforcement of Judgments) in the Code of Washington, sections 34, 35 and 36 of the Texas Civil Practice and Remedies Code.

The enforcement procedure, as in England, is under the jurisdiction of the judicial officers. In doing so, a distinction is made between two types of court officials: officials who are public servants and independent bailiffs. For example, in the state of New York, Sheriffs are officers employed by the City of New York, while City Marshals are independent officers. Both types of officials are judges and according to art. 52 of the New York Civil Procedure Law and Rules can enforce decisions based on monetary claims, and the enforcement itself is carried out within the courts. For the sheriff to enforce the law, the decision needs to be registered, which is usually the job of US attorneys. Lawyers as representatives of the parties or the parties may request that the obligation from the executive document be fulfilled within a maximum period of 20 years.

However, in the last few years, the French influence is also felt in the American system for the enforcement of decisions. Namely, an attempt is being made to legally translate the French enforcement model of huissiers de justice into US law (Emerson, 2010, 143).

CONCLUSION

Enforcement procedure is a civil procedure in which the force of law is most clearly felt.

The effective enforcement of binding judicial decisions is a fundamental element of the rule of law and a key requirement for the operation of the area of justice.

In the past, in the countries of the civil law system, the enforcement procedure was a court procedure, but over the years in almost all countries there is a tendency to privatize the enforcement systems. The main reason for this is the length of enforcement procedures and the increased number of accumulated enforcement cases. This caused the dysfunctionality of the court system and the need to exempt the courts from enforcement of civil cases. This opened the need for private bodies to be entrusted with the task of enforcing court decisions. The French legislator made a reform in this direction for the first time.

From here, in the legal culture of the civil law system, the idea of enforcement of court decisions and other judicial or non-judicial enforceable titles by a bailiff was opened. From the Romanian procedural circle, this trend entered in the German procedural circle of civil law system. This trend is felt also in the Scandinavian process circle of the civil law system but from a different aspect. This is because of the unclear border between administrative and judicial proceedings in the legal tradition of the Scandinavian countries.

The main advantages of the system of enforcement by private bodies include relieving the courts of indisputable legal matters, easier access of citizens to the enforcement bodies and the greater speed of the enforcement proceedings.

In the procedural culture of the common law system, the enforcement of decisions by the courts is still dominant. This is due to the integration of the enforcement procedure with the litigation civil procedure, but also to the smaller number of court decisions that are subject to enforcement.

The main advantages of the court enforcement system are the greater control of the state in the sphere of enforcement and the concentration of enforcement in the same authority, and thus the uniformity of the practice for the enforcement of decisions.

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