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THE ACTS OF THE BAILIFF

(summary)

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(PhD. Thesis)

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Abstract:

The actuality of the research topic

Enforcement is one of the fundamental institutions of the civil procedure and an important component of justice in a state of law. Public confidence in the judiciary also depends to a significant extent on the effectiveness of enforcement mechanisms and it is absolutely necessary that a judgment obtained by a judicial approach, often lengthy and costly, to have a real and practical applicability, so as the litigant to realize the benefits of getting a positive result from the trial. Otherwise, in the absence of procedural means that are consistent, clear, flexible, fast and meant to ensure the effective carrying out of the enforcement order, the party in the trial would be unable to enjoy the winning process, thus the writ of execution awards the creditor only a theoretical and illusory right.

The explanatory memorandum to the Law on the new Code of Civil Procedure indicates that the current procedural system regulated by this normative act (the former Code of Civil Procedure – *s.n.*) has been subject to frequent legislative interventions on different institutions and this has led to an uneven and inconsistent application and interpretation of the law of civil procedure, with repercussions on the duration, efficiency and finality of justice. Given that judicial proceedings have often proved cumbersome, formal, expensive and lengthy, it has been realized that the effectiveness of justice administration rests largely on the speed with which the rights and obligations enshrined by judgments enter the civil circuit, thus ensuring the stability of the legal relations submitted to justice. Thus, non-compliance with a fair trial in terms of length of proceedings or failure to comply with the judgment requirement was the subject of several cases before the European Court of Human Rights with Romania as a party. Therefore the provisions of the new Code of Civil Procedure aim to meet current goals, such as individuals' access to resources and procedural forms that are simpler and more affordable, as well as the acceleration of the procedure also in its enforcement phase.

Accordingly, it is clear that by the development of a new Code of Civil Procedure, the lawmaker had in mind the creation of simple and affordable procedures, as well as their celerity not only during trial, but also during enforcement. The initiative on developing a new Code of Civil Procedure was indeed a positive one, yet we consider that, at least in the part regulating enforcement, the lawmaker failed to accomplish what he originally proposed, and created procedures that are more cumbersome and formalistic than the previous ones, with higher costs by inserting certain legal provisions that are practically useless and, at the same time, he failed to correlate certain pieces of legislation or left without regulation certain situations that are encountered in the enforcement practice, and as regards celerity, this is hardly achieved.

Given the importance of enforcement and the bailiff's role in the second phase of the civil trial, we aimed to accomplish a thorough research of the acts issued by the bailiff in the exercise of powers established by law in order to apply the writs of execution.

Thesis purpose and objectives

This research work aims to achieve a thorough analysis of the procedures that the bailiff performs in order to carry out the duties related to the application of the writs of execution.

In order to achieve the purpose described above we have set the following research objectives:

- Definition of acts of bailiff and their classification;
- Establishing all elements that must be included in the documents issued by the bailiff;
- Identification of all types of acts in enforcement proceedings;
- Similarities and differences between the main acts of the bailiff;
- The types of penalties that occur with each act issued by the bailiff;
- *de lege ferenda* suggestions;
- Guiding models for the acts issued by the bailiff

Therefore, a thorough research work for the identification of all documents issued by the bailiff in carrying out his duties established by law with the purpose enforcing the writs of execution is justified in at least two aspects: first, such a work has never been done in our country, and within our researches we have not identified a similar work in the comparative law, so that this represents a novelty in the field, and secondly, the fact that the bailiff's acts

are regulated in a single paragraph of art. 655 of the Code of Civil Procedure is a true challenge for any researcher in this field of law that requires a in-depth study.

Methodology of research

The above objectives were addressed by using several specific methods of legal research, namely the logical method, the comparative method, the historical method and the quantitative method.

Thesis summary

This work is structured in five chapters.

The first chapter of the thesis is devoted to some general considerations about enforcement. In *Section I*, we defined the notion of enforcement and showed its great importance for the creditor, as this represents the last way to make use of the right in case of opposition by the debtor. We have also shown that this phase of the civil process does not lack importance, not even on the general level of law, as state coercion intervenes not only to restore a private individual right, but also in order to safeguard the rule of law; thus the enforcement institution also has a preventive character because it warns the participants in the juridical life about the patrimonial consequences in the event of failure to observe the assumed obligations.

In *Section II* we analysed, succinctly, the historical development of enforcement in the Roman law, German law, French law, English law, on the American continent, but also in the Romanian law.

This institution was known early in history, the documents indicating that the Romans were the ones who implemented this procedure. Initially the creditor enforced his right by himself and, to the end of the classical period, the institution of enforcement was not yet known as a state body. The debtor that did not pay was considered a criminal and was held liable with his person to pay his debts. The creditor could kill or sell him, and if there were more creditors, they divided the body of the debtor, and his estate was confiscated and divided. Only with the advent of the Laws of the Twelve Tables, the enforcement began to lose its exclusive criminal character, trying to follow first the debtor's assets to recover the debt, and with the emergence of *Poetelia Papira* Law, the rights of the creditor against the debtor's person were supressed.

Section III is devoted to the legal nature of enforcement, which over time has been a contentious issue, being the object of concern for all Romanian procedural specialists. Currently, the majority of authors consider that enforcement has an administrative and

jurisdictional character, the administrative side being predominant because the bailiff is the main actor of enforcement procedures, while the role of the court is a sanctionary one, as it only intervenes to censorship unlawful enforcement and harmful acts.

The fundamental principles of enforcement were analysed within *Section IV* of the first chapter. The new Code of Civil Procedure regulates expressly only some of the fundamental principles governing enforcement (the principle of legality, the principle of the active role of the bailiff, the principle of willingly performing the obligation established by an enforcement order, the principle of ensuring information confidentiality), while the other principles don't have a specific regulation, yet they can be deduced, on the one hand, from the interpretation of the legal provisions governing this institution, and on the other hand, from the general rules of civil procedure and other legal provisions which apply to this area or, from international documents to which Romania is a party (the principle of the right to a fair trial in the enforcement phase, the principle of debtor protection, the humanitarian principle, the principle of availability, the principle of notification of the debtor, the principle of the publicity and celerity of the enforcement proceedings) .

In *Section V* we analysed the case law of the European Court of Human Rights in the matter of enforcement. The European Court held that the right to a fair trial does not cover the procedure only until the judgment, but also until its execution, and the state has the obligation to execute a judgment given against it, holding that enforcement is an integral part of the concept of trial as implied by art. 6 of the European Convention on Human Rights. The right of access to justice would be illusory and ineffective in practice if the domestic law of the state, which observes the pre-eminence of law, would allow a court order or other document that is enforceable to remain inoperative to the detriment of one party.

In the presented court cases one can notice that the European control court recognizes more and more the important role of the bailiff profession in the administration of justice and requires states to provide unreservedly public intervention to support the enforcement bodies in order to support them in carrying out their assigned tasks. This is just one of the reasons for which the lawmaker must be concerned with providing clear, flexible and fast regulations, thus allowing the bailiff to perform tasks related mainly to commissioning enforcement of civil provisions of the writs of execution with celerity, accountability and professionalism.

The second chapter of the thesis is devoted to the bailiff. Thus, in *Section I,* we made general considerations on the profession of bailiff, holding that currently the lawmaker confers the bailiff unlimited jurisdiction in conducting enforcement of the civil provisions from the writs of execution, except enforcements that have as object revenues owed to the

general consolidated budget or to the EU budget and the European Atomic Energy Community budget.

We appreciated that, currently, the bailiff carries in the second phase of the civil trial the role that the judge has in the first phase, since both types of judicial bodies enjoy all the guarantees of independence and impartiality, as regulated by the European Convention on Human Rights, even if their competencies are different, since the respective phases of the trial are different.

In *Section II*, we analysed the bailiff competence in terms of general jurisdiction, subject-matter jurisdiction and territorial jurisdiction. Thus we underlined that the bailiff has general jurisdiction to apply the writs of execution that concern claims of civil nature, with the following exceptions: tax claims, which are enforced by tax enforcement officers under the Fiscal Procedure Code; enforcement procedures for State Assets that are carried out by the tax enforcement bodies under art. 50 of Government Emergency Ordinance No. 51/1998 as amended by Law no. 76/2012; the revenues owed to the general consolidated budget, or to the budget of the EU and the European Atomic Energy Community, which shall be carried out under the provisions of the Fiscal Procedure Code.

The material competence of bailiffs is regulated both by the art. 7 of Law no. 188/2000 (enforcement of the civil provisions of the writs of execution, notification of judicial and extrajudicial documents; communication of the procedure, the amicable recovery of any claim, the enforcement of the insurance injunctions ordered by the court; the acknowledgment of the facto situations in terms of the Code of Civil Procedure, drafting the minutes, in the case of a real offer followed by recording the amount by the debtor, according to the Code of Civil Procedure; preparation, according to law, of the protest for the non-payment of bills of exchange, of promissory notes and cheques, as appropriate; any other documents or transactions that law set under their competence), as well as by the Code of Civil Procedure (in the subject matter of the enforcement of movable assets, art. 730 -779; in the matter of attachment, art. 780-793; in the matter of enforcement of not harvested fruits and crops with roots attached, art. 794 – 798; in the matter of enforcement of the general revenues of the properties, art. 799 – 811; in the matter of enforcement of fixed assets, art . 812 – 862; in the matter of issuance and distribution of the amounts resulting from enforcement, art. 863 – 886; in the matter of enforced consignment of movable assets, art. 892-894; in the matter of enforced consignment of fixed assets, art. 895-901; in the matter of enforcement of other obligations to do or to refrain from doing, art . 902 – 908; in the matter of enforcement of judgments relating to minors, art. 909-913) .

Regarding the territorial jurisdiction of bailiffs, this is determined by art. 8 and art. 9 of Law no. 188/ 2000, republished and art. 651 of the Code of Civil Procedure. Thus, according to these texts, bailiffs perform their duties in the jurisdiction of court of appeal within the county where the attached local court functions, with the following exceptions: if governed by art. 7, letter a) of Law no. 188/ 2000, republished, by which it is competent the bailiff located in the jurisdiction of the court of appeal in whose territorial jurisdiction the enforcement is to be made, as provided in the Code of Civil Procedure; in the case of art. 7 letter f) of Law no. 188/2000, republished, by which it is competent the bailiff in the jurisdiction of the court of appeal in whose territorial jurisdiction the acknowledgement is to be made; in all other cases provided in art. 7 of Law no. 188/2000, republished, it is competent any bailiff vested by the interested party according to the law.

Section III is devoted to the organization of the work of bailiffs. Thus, we held that the passing of Law no. 188/2000 marked an important step in the bailiffs' activity, the bailiff profession becoming a liberal and independent profession. Before this law, bailiffs worked besides local courts and county courts, being appointed by the Minister of Justice. The presidents of the courts that the bailiffs were attached to, had rights of guidance and control over them. The performance of the acts of enforcement was made only at the order of the court that the bailiff was attached to.

Currently, according to art. 12 of Law no. 188/2000, republished in conjunction with art. 4. Paragraph 1. of the Regulation for implementing Law no. 188/2000 and art. 40 of the Statute of the National Union of Bailiffs and of the profession of bailiff, bailiffs' activity can take place within an individual office or in a professional partnership of two or more bailiffs, under a civil contract. Through the association to this professional partnership, the bailiff does not lose the right to individual office.

According to art. 43 of the Statute of the National Union of Bailiffs, the office of the professional bailiff and the civil professional partnership are not legal persons. All patrimonial disputes between bailiffs, including those generated by taking over the files among their offices, as well as those regarding the associative forms of the enforcement activity, are to be settled amicably. Otherwise, reconciliation of the Chamber Board is required.

The assets of the bailiff have the legal status of the goods attached to his profession and the assets of the associated bailiffs have the legal status corresponding to each member's share in the professional partnership with no legal personality.

The personal debts, which the associated bailiffs are liable for, have the legal regime corresponding to each member's share in the civil professional partnership with no legal

personality. These personal debts of the bailiffs can be paid by the enforcement of the assets of the associated bailiffs'office only after the separation made with the other associates.

No matter the form of organization, individual or in association, the personal duties and liability for the acts falls exclusively under the responsibility of the bailiff that drafted those documents. Also, bailiffs are required to comply with applicable legal and statutory regulations for financial and accounting matters, and are subject to liability under the law.

In *Section IV* we analysed the bailiffs' representative bodies. In accordance with Law 188/2000 and the Regulation for the implementation of this law, bailiffs' representative body on the national level is the National Union of Bailiffs and, on the territorial level, in the jurisdiction of the court of appeal, the Bailiff's Chamber.

The National Union of Bailiffs is a professional organization with legal personality composed of all bailiffs appointed by the Minister of Justice; it operates under its own status and has its headquarters in Bucharest. The governing bodies of the National Union of Bailiffs are: the congress, the council and the president.

According to art. 26 of Law no. 188/2000, republished, a Bailiff's Chamber with legal personality operates in the jurisdiction of each court of appeal. Given that currently in Romania there are 15 courts of appeal, to which is added the Military Court of Appeal, with another subject matter and territorial jurisdiction, we have only 15 Bailiff's Chambers. The Bailiff's Chamber includes all bailiffs in the court of appeal's jurisdiction, including trainee bailiffs.

Furthermore, we showed that among the provisions of art. 29 paragraph 1 and art. 26 paragraph 2 of Law no. 188/2000, republished, there are some inconsistencies, namely the fact that the trainee bailiffs belong to the Bailiff's Chamber but are not part of the National Union of Bailiffs. We considered that it would be natural that a bailiff who is part of the Chamber to join the Union and vice versa. In this regard, we proposed to amend Art. 29 paragraph 1 of Law no. 188/2000, republished so that the National Union of Bailiffs to include all bailiffs, including the trainee ones and not only those appointed by the Minister of Justice.

The chamber has, by law, legal personality, it has the status of a business, it has its own stamp and seals, and its headquarters are in the locality of the court of appeal in whose jurisdiction it is established. The governing body of the Chamber is the College Board. The College Board consists of a President, a Vice President and 3-7 members. The Board of Directors is elected by the General Assembly of the Chamber, from the members of that

Chambera and for a period of three years. The functioning of all Chamber bodies shall be according to the Statute of the Union.

The legal liability of bailiffs is analysed in *Section V*. Law no. 188/2000 on bailiffs, the Implementation Rules of this Law, the Statute of the National Union of Bailiffs and bailiff profession and the Code of ethics governing the bailiff regulate only two types of liability, i.e. the civil liability and disciplinary liability. These laws do not regulate the criminal liability of the bailiffs, yet this is fully applicable in situations where a bailiff commits a crime, in this case the principles of criminal law and criminal procedure being applied. One should note that the three kinds of liability coexist and they do not dismiss each other.

The conditions under which civil liability of bailiffs may arise are provided by art. 1.357-1.371 and art. 1.381-1.395 of the Civil Code and consist of: the existence of damage, the existence of an offense, the existence of a causal link between the wrongful act and the damage and the bailiff's guilt.

The disciplinary liability of the bailiff occurs not only when he violates work duties established by Law. 188/2000, republished, the Implementation Rules of this Law, the Statute of the National Union of Bailiffs and bailiff profession, the Code of Civil Procedure, or other related laws, but also when his actions affect the bailiff profession.

Disciplinary offenses are strictly and limitedly established by art. 47 of Law no. 188/2000, republished and they can not be extended by analogy to other situations. Thus, according to the text of the law, the disciplinary liability of the bailiff arises in the following deviations: breach of professional secrecy, violation of incompatibilities and prohibitions prescribed by law; committing acts prejudicial to honour, professional integrity or morality; failure to fulfil the obligations regarding the professional training of the trainee bailiffs employed on contract; constant delay and negligence in performing work duties; unjustified absence from office, failure to post notices of sale through the Electronic Register of advertising the sale of goods subject to enforcement under Art. 35 paragraph (2).

According to art. 49 of the law, the disciplinary sanctions shall apply in relation to the seriousness of the offenses and they are: reprimand, warning, a fine of 500 to 3.000 RON, suspension from office for a period of one month to six months, exclusion from the profession.

In accordance with art. 48 paragraph 1 of Law no. 188/2000, republished, the disciplinary action shall be exercised by the Minister of Justice or by the Board of Directors of the Bailiff's Chamber.

The jurisdiction to settle the disciplinary action belongs to the Disciplinary Board, elected by the General Assembly of the Bailiff's Chamber for a period of three years and this consists of 3 members.

The decision of the Disciplinary Board may be challenged by the parties by *appeal* within 15 days from the notification to the High Commission for Discipline of the National Union of Bailiffs, and this is tried by a panel of five members.

Chapter III analyses the acts of the bailiff. In *Section I,* we indicated that the documents issued by the bailiff are procedural acts; in the legal terminology by a procedural act we understand any manifestation of will and any legal action taken during and within the civil trial by court, by the parties or by the other participants in the trial, in connection with the exercise of their rights and the fulfilment of their procedural obligations, namely to produce legal effects on the procedural level.

Also in this section we classified the acts issued by the bailiff according to several criteria, namely: according to the procedural subjects, according to the object of regulation, according to the conduct nature that they prescribe and according to the place of execution.

In *Section II*, we analysed the resolutions of the bailiff, which in my opinion represent the most important and complex documents issued by the bailiff.

The new Code of Civil Procedure regulates not only the situations in which the bailiff is obliged to issue resolutions, but also the requirements that they must include. Thus, according to art. 656 paragraph 1, the postponement, suspension and termination of enforcement, the release or distribution of the sums of money received from enforcement, as well as other measures specifically provided by law, shall be settled by the bailiff through resolution.

This paragraph provides only a list with examples for the situations in which the bailiff shall give his resolution, yet there are many other situations in which the bailiff, in performing his tasks, needs to issue resolutions.

The resolutions issued by the bailiff under this law are neither court decisions on the meaning of the art. 424 paragraph 5 of the New Code of Civil Procedure, nor preliminary or interlocutory resolutions provided by art. 235 of the same law, as one might think at first sight, but procedural documents prepared for the fulfilment of his tasks and duties related to the enforcement of the writs of execution.

The items of the resolution issued by the bailiff in exercising his duties are governed by the provisions of art. 656 paragraph 1 of the Code of Civil Procedure. Under this legal text, the resolution must include: the name and address of the enforcement body, date and place of resolution's drafting and the enforcement file number; the writ of execution under which enforcement procedure is performed; the name and residence or, where appropriate, name and address of the office of the creditor and the debtor; the enforcement procedure subject to resolution; the issue on which resolution is concluded; the factual and legal reasons that led to resolution issuance; the provision made by the bailiff; the means and time to appeal the resolution; signature and stamp of the bailiff.

Under the new procedural provisions in carrying out his duties relating to the enforcement of writs of execution, the bailiff is obliged to issue a total 48 types of decisions.

In *Section III* we analysed the minutes drafted by the bailiff. According to art. 678 paragraph 1 of the Code of Civil Procedure, if the law does not indicate otherwise, for all acts of execution performed during enforcement, the bailiff is obliged to draft minutes. By this text of the law, the lawmaker has established unequivocally that in all cases where the law does not provide the conclusion of a certain type of document (resolution, notification, address, etc.), the bailiff is obliged to draw up the minutes when performing an act during enforcement.

The content of the minutes signed by the bailiff is regulated in art . 678 paragraph 1 of the Code of Civil Procedure. According to this text, the minutes shall include the following particulars: name and address of the enforcement body, name and position of the person who completes the minutes, the date of the minutes and the enforcement file number; the writ of execution under which enforcement is performed; name and address or, if applicable, name and office address of the debtor and creditor; date and time of enforcement; the measures taken by the bailiff or his findings; the record of explanations, oppositions and objections of the participants to enforcement; other mentions required by law or regarded as necessary by the bailiff; mention, where appropriate, the absence of the creditor or the debtor, or refusal or deterrence to sign the minutes; state the number of copies the minutes was drafted, as well as the people to whom it was served; the signature of the bailiff, and, where appropriate, of other persons interested in or assisting to enforcement; the bailiff stamp .

In the exercise of the powers established by law, we have identified that the bailiff is obliged to conclude a number of 80 types of minutes by which to ascertain the performance of the acts of enforcement.

In *Section IV* we analyzed the similarities and differences between the resolutions and the minutes issued by the bailiff. The first similarity between the two acts, and most important

one, is that both the resolutions and the minutes are acts of enforcement. A second similarity between the minutes and the resolutions is that both are issued by the bailiff in carrying out the tasks and duties related to the enforcement of writs of execution. A third similarity between the two documents made by the bailiff is that they can be challenged in principle by appeal to enforcement.

Although both the resolution and minutes are procedural documents issued by the bailiff in the performance of tasks and duties related to the enforcement of writs of execution, they differ in several respects. The first difference between the two documents issued by the bailiff is that the decisions are in principle acts of disposition, while the minutes are acts of findings.

The second difference between the two acts is that through the resolutions the bailiff decides on important aspects of enforcement (application registration, the opening of the file for enforcement, the suspension of enforcement, its deferral, the distribution of the sums of money resulting from enforcement etc.), while as regards other issues that are not so important in this phase of the civil trial, the bailiff records them in the minutes.

A third difference lies in the content and form comprised in the two acts made by the bailiff. Taking into consideration the provisions of art. 656 of the Code of Civil Procedure, we consider that the resolution issued by the bailiff should include three parts, namely: the introductory part, the reasoned part and the operative part, while the minutes do not contain these three parts.

A final difference between the two documents issued by the bailiff lies in the ways they can be challenged. While the resolution may be appealed either by lodging a complaint within 15 days of notification, or by appeal within 5 days of notification, the lawmaker establishing the appeal means and special terms in this respect, and while some resolutions cannot be appealed, as they are final, the minutes can be appealed only by way of the common law, with appeal to enforcement within 15 days from the date when the person concerned acknowledges the enforcement act that he/she challenges.

At the same time we cosider that as regards the acts issued by the bailiff, the lawmaker was inconsistent, meaning that he did not consider thoroughly this issue. Thus, not in a few cases where the law provides for acts of disposition, the bailiff does not issue resolutions, since the law does not expressly stipulate so, and consequently he must draw up minutes, or where the law expressly provides that resolutions should be issued, the lawmaker derogated from these dispositions and established that the bailiff shall draw up minutes.

Thus, the first case relates to the provisions of art. 753 paragraph 1 of the Code of Civil Procedure. Under this legal text, the bailiff, with the consent of the creditor, can entrust the debtor himself to recover the value of the seized goods.

Therefore, the legal text refers unequivocally to the consent, which means that this is an act of disposition of the bailiff; thus, in this situation, the issuance of a resolution should have been required. As the text of law is silent in this respect, and taking into consideration that the provisions of art. 656 paragraph 1 of the Code of Civil Procedure expressly stipulate the conditions for issuing resolutions, the bailiff can not issue a resolution, having to draw up a minutes, since this text of law prohibits this, stating that resolutions can be issued when it is imposed the "postponement, suspension and termination of enforcement, release or distribution of sums of money from enforcement, as well as other measures specifically provided by law;" however, we are not in any of these situations, and this measure is not specifically stipulated by law in order to make possible the issuance of such acts.

Another example of the inconsistency of the lawmaker in matters of the acts of the bailiff is to be found within the provisions regulated by art. 746, Thesis 1 of the Code of Civil Procedure. According to this text of law, neither the administrator of the distraint, nor the debtor or the third party owner will be able to transport the seized goods from the place where they were authorized to keep them, unless they have the approval of the bailiff. Therefore, the displacement of seized goods can be made only with the approval of the bailiff. Since this is a disposition act of the bailiff, it would have been natural to have this decided by a resolution, but taking into consideration the provisions of art. 656 paragraph 1 of the Code of Civil Procedure, the bailiff will have to complete a minutes in this regard.

A similar situation is found in art. 832 and art. 808 of the Code of Civil Procedure. According to these pieces of legislation, if the debtor or a third party that will get ownership has no other means of subsistence than the income generated by the property subject to enforcement, at their request, the bailiff will establish by means of a minutes a share of up to 20% of this income in order to assure a reasonable maintenance of them and of their families throughout the enforcement period.

Therefore, in these two cases it is also about a disposition act of the bailiff which naturally should be ordered by resolution, but the lawmaker has expressly established that the bailiff shall draw up a minutes.

Another example, this time contrary, regards the setting of the costs of enforcement. According to art. 669 paragraph 6 of the Code of Civil Procedure, the bailiff establishes the enforcement costs by resolution. So by the text of the law, included in the general provisions

on enforcement, the lawmaker stated, as a principle, that all costs of enforcement shall be determined by resolution, however, in the case of direct enforcement, he departed from this principle in the sense that costs are determined by minutes. Thus, art. 889 paragraph 1 of the Code of Civil Procedure provides that for fulfilling the obligations under direct enforcement, the bailiff will complete a minutes in accordance with art. 678, establishing at the same time the enforcement costs that the debtor has to pay.

At the same time, a similar situation occurs in the case provided by art. 770 paragraph 3 and 849 paragraph 3 of the Code of Civil Procedure. According to these pieces of legislation, if the tender bidder for the movable or fixed assets does not submit the price or the price difference, thus being necessary to resume the tender, the first bidder shall be liable for lowering the price obtained at the second sale, as well as for the expenses incurred for this; these sums of money will be determined by the bailiff in the minutes, which shall represent a writ of execution, and they will be retained mostly from the amount deposited as security. Therefore, in such situations the enforcement costs are determined by minutes and not by resolution as required by the norm principle.

The summons issued by the bailiff were analysed in *Section V*. In principle, no enforcement can be initiated without first notifying the debtor. The principle of debtor notification during the enforcement phase is actually a transposition of the adversarial principle and of the right to defence during the trial phase and is performed by notifying the debtor of the initiation of enforced execution against him, as well as regards all enforcement documents undertaken later.

The summons was defined as the procedural act which must be fulfilled by the bailiff before the initiation of the actual enforcement and it consists of the written invitation from the bailiff to the debtor to pay the creditor the amount due, and the warning that if otherwise, enforcement procedure shall be initiated.

However, in some cases, the legislator provides the exempt of obligation to communicate the writ of execution and the summons, as follows:

- In the case of art. 674 of the Code of Civil Procedure (debtor's falloff from the payment period benefit) and in the cases of orders and rulings given by courts and declared by law as enforceable (the resolution by which it is established the misconduct, the fine and the compensation by the court in front of which the committed offense is presented, or where appropriate, by the President of the enforcement court - art. 190 of the Code of Civil Procedure); the resolution which consents insurance measures as well as measures to ensure evidence (art. 203 paragraph 2 of the Code of Civil Procedure); the resolution which

determines the amount of compensation due to witnesses (art. 326 paragraph 2 of the Code of Civil Procedure); the resolution to increase the fee due to the experts (art. 339 paragraph 2 of the Code of Civil Procedure); the resolution for the admission of the insurance application (art. 361 paragraph 2 of the Code of Civil Procedure); first instance decisions under Art . 448 of the Code of Civil Procedure; the resolution by which it is settled the application for the release of the amounts of money or other recorded assets or securities, as well as any other goods held in court or in another storage, where appropriate, in connection with the trial (art. 539 paragraph 2 of the Code of Civil Procedure); the resolution that establishes the amount of the arbitrators fees and other arbitration costs, as well as the ways to record, initiate and pay for these (art. 598 of the Code of Civil Procedure); the orders issued by the enforcement court (art. 650 paragraph 3 of the Code of Civil Procedure); the resolution for the attachment cessation (art. 793 paragraph 1, the final thesis of the Code of Civil Procedure); the resolution for the appointment of experts (art. 835 paragraph 6 of the Code of Civil Procedure); the resolution by which the bailiff shall decide on the payment of the amount resulting from enforcement (art. 878 paragraph 2 of the Code of Civil Procedure) ;

- In the matter of attachment, art. 782 paragraph 1 of the Code of Civil Procedure provides that the attachment is set up without summons, based on the resolution for the enforcement approval, by means of a notification, which will mention the writ of execution under which the attachment was created, which will be communicated to the third person as mentioned by art. 780 paragraph (1), together with the resolution for the enforcement approval, or a certificate on the outcome of the case. The measures taken shall be notified to the debtor, who will be served in with the copy, the notice of the attachment initiation, which will have attached certified copies of the resolution for enforcement approval, or of the certificate on the outcome of the case, and the writ of execution, if the latter ones have not been previously disclosed;

- In direct enforcement, art. 888 of the Code of Civil Procedure provides that at the creditor's request, if there is an urgent need or suspicion that the debtor will evade prosecution, conceal, destroy or damage the goods to be delivered, the court may order, by resolution of enforcement approval, that the enforcement be made immediately and without a summons;

- In the matter of enforced consignment of fixed assets, in the situation of the reoccupation of the building after the enforcement minutes has been concluded, art. 901 paragraph 1of the Code of Civil Procedure provides that if, after concluding the enforcement minutes, the debtor or any other person without express prior consent or a court decision, enters or resettles in the building, at the request of the creditor or other interested person, a new enforcement can be made under the same writ of execution without summons or any other prior formality;

- as regards judge's order, art. 996 paragraph 3 of the Code of Civil Procedure provides that, at the request of the applicant, the court may decide that the enforcement be carried out without summons or without a due time.

The Code of Civil Procedure does not expressly provide the elements that must be included in the summons, stating only that it must be communicated to the debtor, which means that it must be in a written form. In the absence of provisions in this regard, we consider that the summons shall include the followings: name and address of the enforcement body, date of issue of summons and the enforcement file number, name and address or, if applicable, name and office address of the debtor; the writ of enforcement under which enforcement was initiated; the period within which the person summoned is to willingly execute the obligation contained in the writ of execution; the indication of the consequences of non-compliance; signature and stamp of the bailiff. Since these elements are not expressly established by law, the absence of some of these can be sanctioned by relative nullity, the interested party's injury without being presumed.

In this section we also analysed the types of summons that should be issued by the bailiff and we identified a total of 15 types of such acts.

In *Section VI* we focused on selling ads and notices of sale made by the bailiff in the development of enforcement proceedings. Thus, within the enforcement of movable assets, distinction is made between selling ads and notices of sale, which are differentiated in that the notices of sale do not need to include the place and date of display, and the signature and stamp of the bailiff, as the case of selling ads.

At the same time, the bailiff shall, in addition to forms of advertising established by the Code of Civil Procedure, advertise the sale of movable assets worth over 2,000 RON, also via the Electronic Register of advertising the sale of goods subject to enforcement, administered by the National Union of Bailiffs, the omission of this representing a disciplinary misconduct.

In the case of enforcement on property, under Art. 837 of the Code of Civil Procedure, within 5 days from the pricing of the property, the bailiff will establish by final resolution the deadline for the sale of the property and this will be made public through notice of sale. At the same time, the provisions of Art. 35 paragraph 2 of Law no. 188/2000, republished, are enforceable.

In the case of enforcement of non-harvested fruits and crops with roots attached, the publicity of the sale will be done through selling ads as regulated by art. 761 paragraph 1 of the Code of Civil Procedure, and it is mandatory for it to be announced in the following

locations: at the village hall where the non-harvested fruits and crops with roots attached are located, at the debtor's home, at the place where sale is organized and at other public places where the bailiff finds it necessary for appropriate publicity of the sale.

We also need to specify that also for this form of enforcement the provisions of Art. 35 paragraph 2 of Law no. 188/2000, republished are applicable.

In the case of the enforcement of the general revenues of the properties, publicity is not done by notices of sale and selling ads, as the property is put on sale, but by certified copies of the resolution for the approval of enforcement, which are displayed, recorded or published in places strictly indicated by the lawmaker.

In the situation of the enforcement of movable assets and of the enforcement of non-harvested fruits and crops with roots attached, according to art . 761 paragraph 2 and art . 798 paragraph 8 of The Code of Civil Procedure, the notices of sale and the selling ads will include : a) the name and address of the enforcement body; b) the number of enforcement file; c) the name of the bailiff; d) the surname, the first name and address or, if applicable, the name and office address of the debtor and creditor; e) date, time and place of the tender; f) indication and a summary description of the goods to be sold at public tender, with the tender starting price for each item, namely the price set out in the minutes of distraint or where appropriate, that determined by expertise; in case of non-negotiable securities, there will be indicated also the location from where, the tender book referred to in art . 756 paragraph (4) can be purchased at the expense of the applicant; g) the mention, if appropriate, that the goods are sold encumbered of rights of use acquired after entry of any mortgage and, if the creditors pursuing claims cannot be covered in the first tender, then the same day a new tender for the sale of goods free of those rights shall be organized. The price from where these tenders will begin will be the one provided in Art. 768 paragraph (6) and (7); h) the summons for all those who claim any right over the goods to notify the bailiff before the date of sale, within the terms and subject to the sanctions provided by law; i) an invitation to all who want to buy the goods to attend the sale, at the settled time and location, and to submit bids until that time; j) the place and date of display for the selling ads; k) the signature and stamp of the bailiff for the selling ads. The particulars referred to at points a) and c) - k) are provided under penalty of nullity, which means that as they are present with an explicit nullity, damage is presumed, the interested party being able to prove otherwise in terms of art. 175 paragraph 2 of the Code of Civil Procedure.

In the case of property enforcement, according to art. 838 paragraph 1 of the Code of Civil Procedure, the notices of sale will include the following particulars: a) the name and address of the enforcement body; b) the number of the enforcement file; c) the name of the bailiff; d) the name and address or, if applicable, name and office address of the debtor, of the third party acquirer, if required, and of the creditor; e) the writ of execution under which the property is enforced; f) identification of the property by its real estate registration number or topographic number and the Land Register number, as well as its brief description; g) the price at which the property was rated; h) the mention, if appropriate, that the property is sold encumbered by rights of beneficial interest, use, habitation or easement, registered in the Land Register after the recording of any mortgage and that, if the claims of creditors pursuers cannot be covered the first tender, a new tender for the sale of the property, free of those rights, shall be organized the same day. The starting price for these tenders will be the one provided in Art. 845 paragraph (6) and (7); i) date, time and place of tender; j) the summons for all those who claim a right over the property to notify the bailiff before the date of the sale, under the terms and subject to the sanctions provided by law; k) the invitation to all who want to buy property to be present at time of sale, at the settled place, and to submit bids by that time; l) the mention that bidders are required to submit to the date of sale, a guarantee for 10% of the starting price of the tender; m) the signature and the stamp of the bailiff. The mentions included at letters a) and c)- m) are provided under penalty of nullity .

At the same time, according to art . 839 of the Code of Civil Procedure, a copy of the notice of sale will be communicated, as provided by the rules of summons communication and handing in: a) to the creditor and debtor and, where appropriate, to a third-party purchaser, to co-owners or other persons having a right entered in connection with the property on sale; b) to mortgage lenders, registered in the land register, and those who have provisional entries or notations about any real property right, provided the entries or notations are prior to the enforcement recording. The communication will be made for mortgage lenders, at the address chosen in the act that established the mortgage right, and if missing, at the domicile or at the effective office; c) to local tax authorities. When enforcement is on the property of a minor or of a person under interdiction order, a copy of the notice of sale of the property shall be communicated to the Public Prosecutor's Office attached to the court of enforcement.

Also in this section we analysed the types of selling ads and notices of sale made by the bailiff, and we identified a number of three such types of procedural acts.

In *Section VII* we also analysed the act and the certificate of tender deed issued by the bailiff. Thus, within the enforcement of movable assets, art. 773 paragraph 1 of the Code of

Civil Procedure requires the bailiff to issue under his signature, to each tender bidder a certificate of tender deed, which shall include the date and place of tender, the name of the successful tender bidder, the mention of property awarded and, where appropriate, of the price paid or to be paid. As the tender deed certificate is a subsequent act to the minutes of the tender, this shall be issued by the bailiff to each bidder individually, after closing the tender, without conditioning its release by the payment of the price, and it shall represent the proof of ownership of the goods sold.

In the case of enforcement on the non-harvested fruits and crops with roots attached, art. 798 paragraph 8 of the Code of Civil Procedure makes reference to the provisions of art. 752-779 of the Code of Civil Procedure, applicable in the case of enforcement of movable assets, thus, in this situation the bailiff is also obliged to issue a certificate of tender deed.

In the case of enforcement on property, after paying full price or the advance as referred to in art. 851, the bailiff is obliged, based on the minutes of the tender, to draw up the act of tender deed. According to art. 854 of the Code of Civil Procedured, any interested person may apply to the enforcement court, within one month from the date of provisional registration in the land register, for the cancellation of the act of tender deed by way of appeal to execution.

Therefore, compared to the procedure of movable assets, when the tender bidder becomes the owner at the time of the delivery of the assets, within property enforcement, the lawmaker established a different time when the tender bidder becomes the owner of the awarded property, respectively on the date of the tender deed completion.

The certificate of tender deed, according to art. 773 paragraph 1 of the Code of Civil Procedure, shall include the followings: date and place of tender, the name of the successful tender bidder; indication of property awarded, the price paid or to be paid, the bailiff signature. We appreciated that besides the mentions provided by art. 773 paragraph 1 of the Code of Civil Procedure, the certificate of tender deed should also include the header of the bailiff's office, the enforcement file number and the stamp of the enforcement body.

Regarding the claims that must be included in the *act of tender deed*, art. 852 of the Code of Civil Procedure provides that it shall contain the following particulars: name and address of the enforcement body; bailiff's name, number and date of the minutes of the tender, the full name and address or, if applicable, name and office address of the debtor, the third party acquirer and of the successful bidder; the price of which was sold and the manner of payment if the sale was made in instalments; mention, if any, that the property was sold encumbered with rights of beneficial interest, use, habitation or easement, or, where

appropriate, free of these rights, as provided in art . 845 paragraph 6 and 7; the identification details of the property with the real estate registration number or topographic number, the Land Register number, as well as the details of the former owner; the mention that the tender deed act represents a title of property and can be recorded in the Land Register; the mention that for the tender bidder, the act of tender deed represents a writ of execution against the debtor or, where appropriate, the third party purchaser, as well as against any person who owns or holds the property awarded without having the possibility of claiming a right that is binding under the law; the mention that for creditor, the act of tender deed is enforceable against the tender bidder that does not pay the price difference if the sale was made with instalment payment; the date of drawing up the act of tender deed, the signature and stamp of the bailiff, and the signature of the tender bidder; the mention that the act of tender deed is subject to enforcement appeal under Art . 854. Since none of the terms of the act or the certificate of tender deed is regulated by law under the penalty of nullity, this means that nullity can be invoked in terms of art. 175 paragraph 1 of the Code of Civil Procedure, in that injury caused to the person alleging nullity can be removed only by cancelling the act or the certificate of tender deed.

The requests submitted by the bailiff are analysed in *Section VIII*. Since the bailiff's role in the enforcement phase is closer to some extent to the role of the judge in the trial, his capacity to submit requests is quite restricted.

The cases of active intervention of the bailiff in the judicial enforcement proceedings are justified mainly on the grounds of ensuring the legality of the enforcement acts that he performs and also give expression to the principle of the enshrined active role of *in terminis* in art. 627 of the Code of Civil Procedure.

Also in this section we analysed the types of requests submitted by the bailiff and we identified a total of 36 such types of procedural acts.

In *Section IX* we analysed **notifications** made by the bailiff. The notification issued by the bailiff is a procedural act that either communicates another act concluded in the line of exercising duty, either requires certain information or taking action, or orders the preservation of the goods under enforcement, in the latter case, the notification of the bailiff being a disposition act (e.g. the notice of attachment initiation).

The Code of Civil Procedure does not provide the elements that the notification made by the bailiff should contain, with the exception of the notification for the attachment initiation. Therefore we considered that from the interpretation of the general provisions governing enforcement and of the law regulating the profession of bailiff, the notification

should include the followings: name and address of the enforcement body; date of notification issuance and the enforcement file number; name and address or name and office address of the parties; the subject of the notification; signature and stamp of the bailiff.

Not being an act of enforcement itself, the notification issued by the bailiff can not be challenged by an appeal to execution, except the notification of attachment initiation.

Also in this section we analysed the types of notifications issued by the bailiff and we identified a total of 47 such types of procedural acts.

The project for the distribution of the sums of money resulting from the enforcement was analysed in *Section X.* Project drafting is the fourth step in the procedure for the distribution of the amounts resulting from the sale of the enforced property. Thus, according to art. 873 of the Code of Civil Procedure, within five days after the deadline for submission of debt securities, the bailiff will draft the project for the amounts distribution, according to the order of priority provided in art. 864-867, and if among the creditors involved in enforcement and intervening, there are creditors that belatedly intervened, after the expiry of the period provided by art. 690, their claims will be allocated on the part of the amount remaining after covering the rights of the creditors within enforcement and of those who have intervened in time.

Art 873 of the Code of Civil Procedure does not provide the elements that must be included in the project for the distribution, thus we considered that this should include the followings: name and office address of the enforcement body; the date of project drafting and the enforcement file number; name and address or name and office address of the parties, as appropriate; name and address or name and office address of intervening creditors; the writ of execution under which enforcement was made; the order of distribution of the sums of money resulting from sale according to art. 864-867 of the Code of Civil Procedure; the possibility of submitting objections in a written form; signature and stamp of the bailiff.

In *Section XI* we examined other documents signed by the bailiff. Thus, together with the documents presented in the previous sections, the bailiff, in the performance of tasks and duties related to the enforcement of writs of execution, also has the obligation to conclude notifications, communications, notices, acknowledgments, etc. addressed either to the parties of the enforcement report or to third parties.

The notification is the procedural act issued by the bailiff in fulfilling his statutory duties and obligations, by means of which he informs a natural or legal person that a particular act or legal deed was performed or is to be performed in a certain time.

The legal provisions governing enforcement do not include the items that must be included in the notification, but they only refer to the issuance of such an act, so we appreciated that the notification must contain the following particulars: name and address of the enforcement body; date of the notification and the enforcement file number, if applicable; the name and address or name and office address of the person to whom it is addressed; the subject of the notification; signature and stamp of the bailiff.

In this subsection we also analysed the types of notifications issued by the bailiff and we identified a number of three such types of procedural acts.

Communication. During enforcement not only the debtor should be informed or acknowledged, but also the other participants to the enforcement. For example, the creditor, the heirs of parties, third parties, etc.

Although the lawmaker sometimes uses the term of communication (e.g. art. 666 of the Code of Civil Procedure, art. 675 paragraph 2 of the Code of Civil Procedure, etc.) and in other cases that of acknowledgment (e.g. art. 688 of the Code of Civil Procedure), in reality it is the same thing, these words being synonymous.

The Code of Civil Procedure has not established the elements that must be included in the communication at this stage of the civil trial, but from reading the legal provisions governing enforcement, we considered that it should contain the following particulars: name and address of the enforcement body; date of the communication and the enforcement file number; name and address or name and office address of the person to whom it is addressed; the subject of communication, signature and stamp of the bailiff.

Also in this subsection we analysed the types of communication issued by the bailiff and we identified a total of 14 such types of procedural acts.

In addition to the presented acts, the bailiff, in the performance of tasks and duties related to the enforcement of writs of execution, must draft **notices, tender books, inventory lists,** and **payment orders**.

The fourth chapter of the thesis is devoted to suggestions of *de lege ferenda* for the acts drafted by the bailiff.

We argued that the lawmaker failed to achieve what he originally proposed in the enforcement matters, and he created some procedures more cumbersome and formalistic than those he replaced, with higher costs, inserting certain legal provisions that are practically useless; at the same time, he did not correlate certain pieces of legislation and left outside regulation some situations arising in the practice of enforcement and, as regards the celerity of procedures, this is hardly achieved.

The same thing happened in respect of acts which the bailiff must issue, so we appreciated that it is absolutely necessary to review, at least partly, if not possible fundamentally, Book V of the New Code of Civil Procedure. In this respect we formulated 25 suggestions of *de lege ferenda* by means of which, if adopted, the enforcement procedures would be much faster and more effective and would partially eliminate excessive formalism in this matter.

The last chapter of the thesis is reserved for patterns indicative of acts made by the bailiff.

Therefore, in order to support the enforcement bodies we drafted guiding samples of resolution, minutes, summons, selling ad/ notice of sale, certificate of tender deed, act of tender deed, request, notice, project for distribution, notification, communication, notification of the court, tender book, list of asset inventory, payment order.

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