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## THE FORCED SALE OF REAL - ESTATE PROPERTY ASPECTS REGARDING PROCEDURE AND PRIVATE INTERNATIONAL LAW

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**Abstract:** Indirectly enforcement is regulated by the Code of Procedure, as a form of enforcement, seeks the recovery of the creditor's claim through valorization of the debtor's property or the seizure of income that it has to receive from a third party. Collection action on real estate as a form of indirect civil enforcement is made by the forced sale of immovable property belonging to the pursued debtor, so that the pursuing creditor would cover the claim. In this scientific approach we will examine the issues of pre-sale formalities, the sale and auctioning of real estate property and adjudicating the real-estate property in the regulation of the Code of Civil Procedure, which came into force in February 2013, as well as in the provisions of private international law incidental in the matter.

**Keywords:** enforcement, sale, real estate, auction

### 1. Introductory issues relating to enforcement

Enforcement constitutes the second phase of the civil trial, which is reached when the debtor refuses to conform to the provisions of the enforcement order. This phase can take two forms: direct enforcement and indirect enforcement.

From the point of view of the creditor, enforcement is the last way that the creditor can assert his right in case of opposition by the debtor.

The special importance of enforcement also emerges from certain judgments of the European Court of Human Rights. Thus, one of these judgments states that the execution of a final judgment is an integral part of the concept of trial, in the sense of art. 6 of the Convention (C. Birsan, p. 477).

The Code of Civil Procedure establishes five forms of indirect enforcement:

- a) *movable pursuing* ([art. 726 - 779 C. proc. civ.](#));
- b) *seizure* of money sums, securities or other intangible movable property owed to the debtor by a third party or which will be due in the future, on the grounds existing legal relations (art. 780-793 Code of Civil Procedure);

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c) *enforced collection action on unpicked fruits and rooted crops* belonging to the debtor (art. 794 - 798 Code of Civil Procedure);

d) *collection action on general revenues from buildings referring to tracking* current and future revenues from buildings owned by the debtor or over which he has a right of usufruct, as well as revenues of the lessee or tenant debtor originating from the exploitation of leased or rented buildings (Code of Civil Procedure);

e) *collection action on real-estate property* ([art. 812 - 862 Code of Civil Procedure](#)).

Among these stands out the collection action on real-estate property.

This is governed by Chapter II, Title II of Book V entitled "On enforcement" from the Code of Civil Procedure, entered into force in 2013.

For the purposes of art. 812 of the Code of Civil Procedure, the following may be an object of a collection action on real-estate property: immovable property, right of usufruct over a real-estate property and the right of superficies. It should be noted that the easement right may be enforced only with the dominant fund to whom it profits.

With regard to jurisdiction in matters of collection action on real-estate property, the provisions of art. 818 para. (1) of the Code of Civil Procedure, amended by Law no. 138/2014 amending and supplementing Law no. 134/2010 on the Code of Civil Procedure and amending and supplementing certain related normative acts state that this pertains to the court bailiff in the jurisdiction of the court of appeal in whose district the property owned by the debtor or another person is located, if a mortgaged property used by him is pursued.

The conclusion of a declaration of enforceability must be communicated, in certified copy, by the bailiff to the debtor and the third-party acquirer, accompanied, in both cases, by the enforcement order and injunction, and the must be notified that within 15 days of its receipt they must pay off the entire debt, including interests and costs of enforcement.

With regard to formalities related to the advertising of collection action, art. 821 of the Code of Civil Procedure states that the bailiff, in addition to notifying the declaration of enforceability, must request the territorial cadaster and land registration office to order, on the basis thereof, the registration of the collection action into the land register, stating the pursuing creditor, and the amount for which the collection action is conducted. If the request for enforcement and its accompanying documents do not contain details regarding the pursued building, the bailiff must require the start of advertising formalities as soon as the building will be identified with the data required for fulfilling advertising formalities.

The rules of art. 825 of the Code of Civil Procedure establish the following methods for valorizing property in a collection action on real-estate: through amicable sale, direct sale or sale by public (I. Les, 2013).

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Regarding amicable sale, similar to the valorization of movable property, by referring text of art. 825 to art. 753 of the Code of Civil Procedure, the debtor is conceded by the bailiff, with the creditor's consent, as in the case of collection action on real-estate property, to handle the valorization of the goods himself. The solution is also found, expressly regulated, in French legislation.

The valorization of real estate can also be done through direct sale (F. J. Pansier, p. 246), In compliance with certain procedural legal rules.

The effects of collection action on real-estate property (I. Deleanu, V. Mitea, S. Deleanu, 2013) are classified by legal provisions into two categories: unenforceability of rights entered in the Land Register subsequent to the registration of collection action on the building, and the lease and assignment of revenues. With regard to the first effect, art. 826 of the Code of Civil Procedure states that real rights, as well as any other rights registered subsequent to the registration of collection action on the building in the land register will not be enforced to the pursuing creditor or bidder, except as expressly provided by law or if the creditor or the bidder agreed with that right, or if the debtor or a third-party acquirer recorded the amounts needed to cover claims that are pursued. Leases or rentals, as well as revenue transfers made by the debtor or a third-party acquirer after the registration of collection action will not be invoked against the pursuing creditor and bidder. Quite rightly, however, laws recognize the enforceability of leases or rentals prior to registration, with regard to both pursuing creditors and bidders.

## **2. The forced sale of real estate in the regulation of the Code of Civil Procedure**

The procedural rules governing this issue are focused on three main issues: pre-sale formalities, sale of the real-estate property, as well as auctioning and adjudicating the building.

Subsequent to the conclusion of a declaration of enforceability and registration of collection action in the land register, certain formalities must be completed in order to organize the sale. Thus, the bailiff, seeking to identify the pursued building, will travel to its location, preparing a report on the situation (Gh. Chelaru, p. 52), describing the pursued building, as well as other data, if needed, such as: tax obligations with regard to the building and amounts due as contribution share to the owners' association expenses. If the debtor does not provide these items, the bailiff will seek to obtain documents and relations making it possible to identify and assess the pursued building [art. 828 para. (1) Code of Civil Procedure].

Procedural rules also establish the mode of action of the bailiff in the event that the property subject to collection action is not registered in the land register. If this is ascertained, the bailiff will request the cadaster and land registry office, on behalf

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of the debtor, to open the land register, based on a cadastral documentation prepared by an authorized person and property titles obtained. The expenditure incurred to this end will be advanced by the creditor and claimed from the debtor as enforcement expenses.

Another measure that can be taken in this context by the enforcement court, at the request of the creditor or bailiff, if the debtor or a third-party purchaser occupies the pursued building himself, is eviction from the property, in whole or in part, either immediately or within a certain period.

Also, if this measure is necessary for better management of the pursued building, the bailiff shall proceed to disqualify the debtor or, where appropriate, third party acquirer, from the right to perform acts of administration over the pursued building, whilst appointing a seizure administrator who is responsible for administering the building, collecting revenue, making necessary expenses and providing defense in disputes concerning this property. Even the debtor or third-party acquirer can act as a seizure administrator.

According to art. 831 of the Code of Civil Procedure, the seizure administrator shall:

- to keep and maintain the pursued property, with all its accessories;
- to collect rents and other revenues;
- to pay insurance premiums, local taxes;
- to denounce the existing lease contracts, respecting contract terms, and to request eviction of the occupants;
- to conclude, with the approval of the enforcement court, given in writing, by summoning the parties, lease contracts for a maximum term of 2 years;
- to collect fruits and crops and sell them.

In the event that the debtor or a third-party acquirer has no other means of subsistence than revenues from the pursued building, at his request, the bailiff will set, by minutes, a share of no more than 20% of this revenue for reasonable support for himself and his family, throughout the collection action.

Civil procedural rules provide that the sums collected by the seizure administrator will be distributed to creditors even before the distribution of the price from the sale of the pursued building.

The procedural rules make available to the debtor a term of 15 days after the conclusion of the declaration of enforceability to pay the debt, otherwise the bailiff shall start the sales procedure.

In the event that the object of enforcement consists of several distinct buildings of the debtor, a sale procedure by public auction will be performed for each item.

The price estimate of the building will be determined by the bailiff immediately, in writing, depending on the average market price in the locality. This amount will be communicated to the parties.

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Another measure to be adopted by the bailiff will be to require the cadaster and land registry office to communicate real rights and other liens on the pursued property, as well as any rights of preference entered in favor of other persons. Holders of these rights should be notified about the enforcement and summoned on the dates set for the sale of the property.

The expertise is made at the initiative by the parties or bailiff. The parties may request the expertise within 15 days of the conclusion, under penalty of forfeiture, or it may be requested by the third-party acquirer, co-owners in the case of art. 822 as well as intervening creditors.

The bailiff will assess the building or appoint an expert to determine the estimate price of the building. The expert will be appointed by the bailiff by writ of execution, also mentioning the deadline for submission of the expert report.

If the debtor refuses to allow the expert access to the building for assessment, then this assessment shall be conducted on the basis of documents submitted in the enforcement file, and any other data or information available.

The price of the building which will be the starting price of the auction will be established by the bailiff, by final judgment, given without summoning the parties. Independent of the price of the building, the value of the rights of usufruct, use, habitation or easement is also set, if those rights were tabulated after the registration of any mortgages. For buildings registered in the land register the value of those rights will be taken into account as mentioned in the land register, and in the event that it is not recorded, it will be determine, when appropriate, by expertise.

The deadline for the sale of the building will be determined by the bailiff by final judgment and cannot be shorter than 20 days or longer than 40 days of the publication of the sale at the place where the auction will take place. It will be brought to public knowledge through sale publications.

Civil procedural rules establish that the sale publication be displayed on the premises of the enforcement body and the enforcement court, at the place where the pursued property is located, at the town hall in whose jurisdiction the property the property is situated and at the place where the auction takes place, if other than the place where the property is situated.

Also, under art. 838 of the Code of Civil Procedure, excerpt publications must be made, under penalty of nullity, in a national newspaper if the property value exceeds the sum of 250,000 lei, or in a local newspaper, if it does not surpass that amount, but also in the Electronic Advertising Registry for the sale of goods subject to enforcement, and in newspapers, magazines and other existing publications intended for the sale of buildings of the type of that being auctioned, including open internet pages for the same purpose.

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Regarding the communication of sale publications, art. 839 of the Code of Civil Procedure states that copy of the sale publication must be handed to:

- a) the pursuing creditor and debtor and, where appropriate, third party-acquirer, co-owners or other persons having a registered right in connection with the property offered for sale;
- b) mortgage lenders registered in the land register, as well as those who have temporary registrations or entries in connection with a real right, if the registrations or entries are prior to the entry of collection action. The communication shall be made, for mortgage lenders, at the address selected in the act that established the mortgage right, and failing that, to the real domicile or office;
- c) local tax authorities.

As a particularity determined by the need to defend the rights of people lacking full legal capacity, a task which falls to prosecutors, procedural rules establish that if the building of a minor or a person placed under judicial interdiction is pursued, a copy of the sale publication for the shall be communicated to the prosecutor's office attached to the enforcement court.

In the terms of art. 840 of the Code of Civil Procedure, the seller of the pursued building will be ordered by publication to opt, in writing, within 5 days of the publication, for the valorization of legal mortgage or the right to demand or declare rescission for failure to pay the price of one of these rights. If rescission is chosen, the action for rescission of the sale is made as part of the appeal on enforcement within 15 days of the dispatch of the option to the bailiff. At the same time, a unilateral declaration of rescission of the sale must also be made.

In the same context, the provisions of the procedural law provide that the collection action on the building is suspended on the date when the seller of the pursued building submits proof of on-term registration of appeal on enforcement to the bailiff.

Also significant are the procedural rules relating to the auction and adjudication of the building. These comprise a set of procedural rules in the matter.

As regards the place of sale, art. 841 of the Code of Civil Procedure provides for several variants. Thus, the sale may take place at the office of the enforcement body or enforcement court, or at the place where the property is located, or in any other place, or even in the town hall in whose jurisdiction the property is located.

Any person with full legal capacity and ability to acquire the property that is up for sale has the right to participate in the auction as bidder. It should be noted that the debtor cannot bid either personally or through intermediaries, and for pursuing or intervening creditors there is a ban on adjudicating the property offered for sale at less than 75% of the starting price of the first auction.

In this context, since these are regulatory acts, it is provided that the agent will have to submit a genuine special proxy that will be kept in the enforcement file.



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A prerequisite for participation in the auction is the deposit by the persons who want to buy the property at auction in the unit required by law, on a bailiff order, until the deadline set for sale, of a guarantee representing 10% of the starting price of the auction for that period. Exempt from the deposit of this guarantee are persons who, together with the debtor, have shared ownership interest in the pursued building or are holders of a pre-emption right. Proof of the deposit must be attached to the purchase tender, and the deadline for submission of the purchase tender accompanied by the proof of deposit is the day before the auction.

The sale is made publicly. It begins with the bailiff reading the sale publication and tenders received to date. The bailiff will offer the property for sale by three successive announcements.

In the event that the property is encumbered by any right of usufruct, use, habitation or easement tabulated after the entry of any mortgages, the legal provisions require that on the first term of sale the bids start at the highest price offered or, failing that, the one set in the publication, deducting the value of such rights. If not even the price at which the property was assessed is offered at the auction, the sale will be postponed to another term not exceeding 30 days, for which a new publication will be made, except for the publication of the notice in a national or local newspaper. It should be noted that, at this time, the auction will start at the price of 75% of the starting price of the first auction. If the starting price of the auction is not obtained and there are at least two bidders, at the same term, the property will be sold at the highest price offered, but not less than 30% of the starting price of the first auction. It is also noted that, in the terms of art. 845 para. (8), the sale will be carried out even if there only one person present offering the starting price of the auction.

In the terms of art. 847 of the Code of Civil Procedure, introduced by Law no. 138/2014, the auction minutes which record adjudication should be entered in the land register, at the immediate request of the bailiff and at the expense of the successful bidder, and can be appealed within one month from the date of registration of adjudication in the land register, by the debtor or a third-party acquirer, pursuing creditors and any other interested person by way of appeal on enforcement.

Regarding the deadline for submission of the price by the successful bidder of the building, it is noted that the price should be submitted to the bailiff within 30 days of the sale date, taking account of the guarantee deposited in the account of the price. If the successful bidder is a creditor, he may deposit his claim in the account of the price, being obliged, if necessary, to deposit the difference in price also within 30 days. At the request of the successful bidder, the bailiff, with the consent of the creditor and the debtor, can establish the payment of the price in installments with the applicable statutory interest.

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In the event that the successful bidder shall fail to submit the price within that term, the property will be sold out again in his account, at the starting price of the auction at which the property has been adjudicated.

After the adjudication of the building by one of the bidders, upon request, the bailiff will order the return of guarantees deposited by the other participants.

The adjudication act will be drawn up by the bailiff after full payment of the price or advance, based on the minutes of auction.

Art. 853 of the Code of Civil Procedure stipulated that a copy of the adjudication act should be handed to the successful bidder to serve as property title, and if the property was sold with the payment of the prices in installments, a copy should be handed to the pursuing creditor and, where applicable, the debtor, to serve them their as enforceable title against the successful bidder for the case where he does not pay the difference in price.

As regards the tabulation of property right and the issuance of ownership for the successful bidder, it is noted that simultaneously with the submission by the successful bidder of a copy of the adjudication act, upon the bailiff's request made immediately, by default, the property right will be tabulated in the land registry for the successful bidder, at his expense. If the right acquired by the successful bidder was provisionally registered, only provisional registration will be ordered.

In the same vein, following a request by the successful bidder, he will be granted ownership of the property adjudicated by the bailiff. It is noted that there is no need to make the adjudication act enforceable.

A special feature is highlighted when the property was sold for installment payment, in which case the bailiff will decide, through the same conclusion, and entry in the land register of the prohibition of alienation and encumbrance of the building until full payment of the price and the corresponding interest.

By adjudication act, the real-estate property is transmitted from debtor to the successful bidder.

According to the statutory texts in the matter, as an effect of adjudication the successful bidder becomes the owner of the auctioned property. Following the tabulation, the successful bidder acquires the right to dispose of the property purchased under the rules of the land registry [[art. 856 para. \(1\)-\(2\) Code of Civil Procedure](#)], and the building is transferred to the ownership of the successful bidder free of any mortgages or other burdens on guaranteeing rights of claim, except for those that the successful bidder would agree to be maintained.

### **3. The law applicable to the sale of real-estate property in private international law**

In private international law, the principle of autonomy of the parties is designated by the expression *lex voluntatis*. Under that principle, the parties may determine, in



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addition to the content of the legal act, the law applicable to their contract (I. Macovei, 2011).

The choice of law applicable to the contract between the parties is permitted by the provisions of the Romanian Civil Code at art. 2640. According to it, the law applicable to contractual obligations is determined according to EU law.

The *lex voluntatis* applies to the sale and purchase contract not only when the object of the contract is a movable property, but also if the contract refers to a real-estate property, because the principle of autonomy of will of the parties (expressed by *lex voluntatis*) is general, as shown in art. 3 of the ROME I Regulation.

In the absence of *lex voluntatis*, the criteria of objective location of the contract are different, depending on the object of sale. Thus, as regards the sale of movable property, it shall be governed by the law of the seller's country (*lex venditoris*). On the other hand, the sale of real estate is governed, in absence of *lex voluntatis*, by the law of the State where the property is located. As such, the sale of real-estate property is objectively located under the law of the place where the property is located (*lex rei sitae*)(art. 4 let. c of ROME I Regulation).

The law of the State in which the immovable property is located also regulates other aspects such as (D. Lupascu, D. Ungureanu, 2012, pp. 195-196; O. Ungureanu, C. Jugastru, A. Circa, pp. 204-208):

- classification of property – it is usually made according to *lex fori*. For example, in this sense, "Platforms and other long-term installations for the exploitation of submarine resources located on the continental shelf of a State" [art. 2613 para. (2) Civil Code];
- classification of property;
- property located in the civil circuit and that which are tradable;
- real rights that may relate to such property, as well as the classification of these rights (art. 2613 para. 1 Civil Code);
- the conditions of existence of real rights;
- the legal regime of the property right and other real rights;
- the tax burden on property;
- collection and enforcement measures;
- modes of acquiring, transmitting or extinguishing real rights

As provided in art. 2613 para. (1) of the Civil Code, the *lex rei sitae* rule applies property, unless otherwise provided by special provisions. This law is not applicable, in principle, to the following aspects of the legal relation on property:

- the capacity of the person who contracts in connection with a property, even immovable, is regulated by national law;
- the form of legal documents can be governed by the law of the place where the document is concluded (*locus regit actum*);

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- substantive conditions and the effects the contract produces are governed by the law of contract;
- a universality of properties is not always governed by the *lex rei sitae*;
- certain conflicting issues involving property belonging to legal persons are governed by the national law of the legal person;
- *scriptae in rem* obligation is subject both to the law of the legal act from which it is derived and to the law of the immovable property

The contract concerning an immovable property right or the right of location on a real-estate property shall be governed by the law of the country in which the property is situated (pt. 19 art. 3 let. c of Regulation 593-2008).

The contract that covers an immovable property right or a location right over an immovable property is to the formal conditions prescribed by the law of the country where the property is located, to the extent that, according to that law:

- the conditions are applied irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and
- no derogation can be made from those provisions by convention (Regulation 593-2008).

## Conclusions

Enforcement has important connotations both at a procedural level, because it allows the creditor to valorize his legitimate right pursued in justice, and on an overall, social level, because it contributes to maintaining public order.

The forced sale of real estate owned by the pursued debtor, so that the pursuing creditor would cover his claim, is, due to its effects, but also its stages, one of the most difficult ways to valorize property in a collection action on real estate. Also significant in the matters are the provisions concerning the applicable law in private international law.

We conclude that the legislation on forced sale, under provisions of the current Code of Civil Procedure, adjusted by Law no. 138/2014, enables efficient valorization of debts certain, liquid and payable contained in a writ of execution.

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