

## **CONSIDERATIONS WITH RESPECT TO THE JURISDICTION AND THE STRUCTURE OF THE COURT INVESTED WITH THE APPLICATION OF SUSPENDING THE LEGAL ENFORCEMENT IN THE NEW CODE OF CIVIL PROCEDURE**

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### **Abstract**

*The new Romanian Code of civil procedure comprises a series of new legislative solutions with respect to the jurisdiction and the structure of the court invested with the request of suspending the legal enforcement. More specifically, in the case of provisional suspension of the execution, which will take effect up to the settlement of the application of enforcement suspension made in the framework of the opposition to execution, the legal provisions no longer expressly provide that it shall be settled by the chairman of the court, but only mentions that the demand shall be settled by the court. This article analyzes the implications of the new regulations with regard to the matter of jurisdiction and the structure of the court, in respect of both former and new Code. Nevertheless, we shall analyze the general legal rules on the jurisdiction of the court in the settlement of suspension, with reference to its competence in solving the opposition to enforcement and we shall highlight the provisions relating to the application in time of the legal provisions contained in the new Code of civil procedure.*

**Keywords:** *suspension of enforcement, provisional suspension, suspension itself (the fund), jurisdiction, incompatibility*

### **Introduction**

*The new Romanian Code of civil procedure regulates the institution of suspension of enforcement on the basis of opposition to execution in Article 718, under the provisions dedicated to the opposition to enforcement. As in the former Code, the new legal texts state that the suspension may be ordered by court at the request of the interested person in two stages: the provisional suspension, which takes effect pending the resolution of the suspension request itself or of fund and the suspension of fund, which takes effect pending the resolution of the opposition to enforcement or of any other applications on the execution.*

*Article 718 Civ. proc. Code provides that the request to suspend the enforcement pending the resolution of opposition to enforcement shall be settled by the competent court, without establishing therefore a special rule for this purpose. The formula is the same as the one of the former Code, the competent court being identified on the basis of the legal characters of the suspension's application.*

Taking into consideration the classification made by Article 30 Civ. proc. Code in principal, accessories, additional and incidental applications<sup>1</sup>, we appreciate that the request of suspension falls into the last category, i.e. applications “formulated in the framework of a trial in progress”. This qualification results also from the provisions of Article 718 paragraph (1) final sentence, according to which “the suspension may be required simultaneous with the opposition to enforcement or by separate application”. Therefore, it is not possible to make a main request of suspension, as it can be formulated only during a trial.

The incidental nature of the application of suspension based on the provisions of Article 718 Civ. proc. Code attracts the inadmissibility of the main application of suspension, in regard also to the legal effects that the request produces, i.e. in case of the admission. Thus, in the case of provisional suspension, this will produce effects only up to the settlement of the suspension request itself and, in the case of suspension of fund, it will take effect pending the resolution of the opposition to enforcement. Therefore, the application of provisional suspension is inadmissible as long as it has not been formulated a request to suspend the enforcement until the resolution of opposition to execution, and a request for suspension of fund is inadmissible as long as it has not been made an opposition to enforcement.

The legal qualification of the application of suspension, both in the provisional suspension, as well as in the version of suspension of fund, as an incidental request has consequences relating to the determination of the competent court to settle the application. According to Article 123 paragraph (1) Civ. proc. Code, incidental applications are under the jurisdiction of the court which solves the main application, both in terms of material, as well as territorial competence. By applying this rule, the request to suspend should be settled by the court invested with the opposition to enforcement<sup>2</sup>. In this respect, as a general rule, the competent court to settle the opposition to enforcement is the court of execution, in accordance with Article 713 paragraph (1) Civ. proc. Code. According to Article 650 Civ. proc. Code, “the court of execution is the court in which jurisdiction is situated the office of the executor in charge of the enforcement, in addition to the cases in which the law provides otherwise.” To this rule there are some exceptions, for example, in the case of real estate enforcement, the competent court shall be the one in which jurisdiction is located the real estate, according to article 819 NCPC.

In accordance with Article 713 paragraph (2) NCPC, in case of garnishment, if the residence or the headquarters of the debtor is located in the circumscription of another court of appeal than the one in which is located the court of execution, the opposition can be introduced to the court in which jurisdiction is located the debtor. This is a particular case of territorial alternative jurisdiction, in which the applicant may choose between multiple courts equally competent, according to Article 116 NCPC. Moreover, Article 713 paragraph (2) NCPC provides an alternative territorial jurisdiction also in the case of real estate enforcement, of legal fruits and general revenue of real estate, as well as in the case of forced submission of immovable property, if the real estate is located in the circumscription of another court of appeal than that where the court of execution is situated, the opposition can be introduced at the court of the place of real estate<sup>3</sup>. We consider that this rule can be applied only to direct enforcement of real estate, as well as in the case of enforcement of legal fruits and general revenue of real estate, because regarding the enforcement of real estate, the court of execution is, by way of derogation from the general rule, the court in which jurisdiction are the immovable assets, therefore an alternative territorial jurisdiction cannot operate.

The opposition on clarifying the meaning, the extent or application of executory titles is introduced at the court which has pronounced the decision that is being enforced, in

<sup>1</sup> For details, also see Mihaela Tăbărcă, *Drept procesual civil, Vol. I – Teoria generală*, Universul Juridic Publishing House, Bucharest, 2013, p. 253 ff.

<sup>2</sup> Evelina Oprina, Ioan Gărbuleț, *Tratat teoretic și practic de executare silită, Volumul I. Teoria generală și procedurile execuționale*, Universul Juridic Publishing House, Bucharest, 2013, p. 492.

<sup>3</sup> Andreea Tabacu, *Drept procesual civil*, Universul Juridic Publishing House, Bucharest, 2013, p. 463

accordance with Article 712 paragraph (3) NCPC. If such a dispute affects an executory title what does not originate from a jurisdictional body, the court of execution is competent to settle on this particular dispute, as well. Therefore, the request to suspend the enforcement up to the settlement of the opposition to a title is under the jurisdiction of the court which has delivered the judgment, whenever the title is a decision of a court, or the court of execution, in the event that the title emanates from another body.

An element of novelty is represented by the regulations applicable to the provisional suspension of enforcement. According to the former Code of civil procedure, the legal text (Article 403 paragraph (4)) provided that an application of provisional suspension of the execution shall be settled by “the president of the court”. In comparison, Article 718 paragraph (7) of the new Code states that “... the court may order [...] the provisional suspension of the execution pending the resolution of the application of suspension.

Therefore, the existing text no longer gives the president of the court operational competence for settling on the application of provisional suspension, which is conferred to “the court”, within the meaning of judge/body of judges invested with the resolution of the opposition to enforcement and of the application of suspension brought under Article 718 paragraph (1) Civ. proc. Code. We appreciate that the difference is not coincidental, the aim pursued by the legislator being to confer operational jurisdiction in resolving the application of provisional suspension to the judge/body of judges invested with the opposition to enforcement and the request to suspend the execution itself<sup>4</sup>. This body becomes fully competent to settle the opposition, as well as the request to suspend the execution, regardless of its structure. In the first phase, even if the procedure of regularization has not been issued, in regard to the opposition to execution, the court decides on the application of provisional suspension without giving the parties notice to attend and, after the parties were given notice to attend and even if the procedure of regularization has not been completed, the court is called upon to decide on the request to suspend the enforcement pending the resolution of the opposition to enforcement. The closure on the provisional suspension given on the basis of Article 718 paragraph (7) Civ. proc. Code is not subject to any appeal, while the closure by which the same court settled on the suspension of enforcement until the decision on the opposition to enforcement is, according to Article 718 paragraph (6) Civ. proc. Code, subject to appeal separately, the time limit for appeal being 5 days from pronouncement for those present in court and from the communication for those who were absent<sup>5</sup>.

The interpretation given to Article 718 paragraph (7) Civ. proc. Code regarding the functional competence of the court invested with the application of provisional suspension of the execution could be challenged on the basis of Article 99 paragraph (10) of the Regulation on Internal Organization of the Courts of Justice, approved by Decision of the Superior Council of the Magistracy No 387/2005, with subsequent amendments and additions. According to the latter, “the provisional suspension of enforcement in accordance with the conditions provided by the Civil Procedure Code will be settled after the model of specialized judge/body of judges in which composition is the chairman of the court or, as the case may be, the president of the department or their substitutes”. Taking into consideration the difference of formulation regarding Article 403 paragraph (4) of the former Code of civil procedure (in force at the time of drawing up Article 99 paragraph (10) of the Regulation on Internal Organization of the Courts of Justice) and Article 718 paragraph (7) of the new Code of civil procedure, we consider along with other authors<sup>6</sup> that the legal text should have priority and not the text of the Regulation, any discrepancies between the two leading to the

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<sup>4</sup> Evelina Oprina, Ioan Gârbuleț, *op. cit.*, p. 493 – 494.

<sup>5</sup> Dumitru Marcel Gavriș, *Contestația la executare*, in Gabriel Boroș (coord.), *Noul Cod de procedură civilă, comentariu pe articole*, Vol. II, Hamangiu Publishing House, Bucharest, 2013, p. 718.

<sup>6</sup> Gabriela Cristina Frențiu, Denisa – Livia Bâldean, *Noul Cod de procedură civilă, comentat și adnotat*, Hamangiu Publishing House, Bucharest, 2013, p. 1076; Evelina Oprina, Ioan Gârbuleț, *op. cit.*, p. 493.

need for amending the latter in order to be in accordance with the applicable legal provisions. The question may be one of great relevance even for the application in time of the rules of procedure: in the event that the procedure applicable to the opposition to enforcement and, by default, to the suspension request is that covered by the former Code of civil procedure, the application for provisional suspension formulated under Article 403 paragraph (4) shall be settled by the chairman of the court, the president of the department, or, as the case may be, their substitutes. If the provisions of the new Code of civil procedure are applied, the application for provisional suspension of forced execution based upon Article 718 paragraph (7) will be resolved by the court entrusted with the settlement of the opposition to enforcement and of the request for suspension on the basis of paragraph (1) of Article 718.

The provisions contained in the new Code of civil procedure relating to the opposition to enforcement, including those relating to the suspension of enforcement, are applicable only in the event that such opposition and, by default, the request to suspend affects an enforcement started after the date of its entry into force. In this respect, Article 3 paragraph (1) of Law No 76/2012 for the implementation of the Law No 134/2010 relating to the Code of civil procedure provides that its provisions shall apply only to the enforcements started after the date of its entry into force. But the opposition to enforcement, including the procedure to suspend the enforcement, must be regarded as a part of the executorial procedure, not as a distinct trial started by the introduction of that particular application. Therefore, the time of reference for determining the applicable law is not the date of the introduction of the opposition to execution or of the application to suspend the enforcement, but the date of the notice addressed to the body of enforcement. This is, as a general rule, the date when the application has been formulated by the creditor and addressed to the executor. Even if the opposition and the request to suspend are introduced to the court after the date of entry into force of the new Code of civil procedure, if they concern an enforcement in progress prior to the entry into force of it or an enforcement that has been started by a claim recorded by the executor prior to the entry into force of the new Code of civil procedure, such applications are subject to, in respect of all proceedings, the regulations of the former Code of civil procedure<sup>7</sup>.

In conclusion, if the provisional suspension of an enforcement that has started prior to the date of entry into force of the new Code of civil procedure, the application for provisional suspension will be settled by the chairman of the court, the president of the department or a replacement, in accordance with Article 403 paragraph (4) of the former Code of civil procedure and Article 99 paragraph (10) of the Regulation on Internal Organization of the Courts of Justice and, in the case the suspension regards an enforcement started after the date of entry into force of the new Code of civil procedure, the application for provisional suspension will be settled by the same body of judges who will solve the request of suspension itself and the opposition to enforcement.

Taking into consideration that the operational competence to resolve the request of provisional suspension of the enforcement, based upon the provisions of Article 718 paragraph (7) Civ. proc. Code, is that of the body of judges who was entrusted with the subsequent settlement of the application of the suspension itself and of the opposition to execution, this raises the question of the judge's compatibility to decide, subsequently, with respect to suspension, i.e. opposition. We consider, along with other authors<sup>8</sup>, that the judge who has settled the application of provisional suspension does not become incompatible to resolve the suspension request, in the same matter in which the judge who decides on the request to suspend the enforcement pending the resolution of the opposition does not become

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<sup>7</sup>In this matter, see also Gheorghe Liviu Zidaru, Traian Briciu, *Observații privind unele dispoziții de drept tranzitoriu și de punere în aplicare a NCPC*, available on <http://www.juridice.ro/244313/observatii-privind-unele-dispozitii-de-drept-tranzitoriu-si-de-punere-in-aplicare-a-ncpc.html>.

<sup>8</sup> Evelina Oprina, Ioan Gârbuleț, *op. cit.*, p. 494.

incompatible to settle on it afterwards. The solution is logical and corresponds to the aim of the legislator when it has regulated the reasons of incompatibility provided by Articles 41 to 42 Civ. proc. Code. Thus, the settlement of a procedural incident with prejudicial character, such as the suspension, does not attract the incompatibility of the judge, since he does not give a decision on the substance of the matter, in respect of the grounds on which the opposition to execution is based, whatever the reasons, but only with regard to the specific legal requirements relating to suspension (the payment of the security, the urgency etc.)

A particular situation might be encountered in practice in regard to the situations of mandatory suspension regulated by Article 718 paragraph (4) C. proc. Civ.<sup>9</sup> Therefore, if, for example, at point 1 is mentioned the situation in which “the judgment or the title that is being enforced is not, according to the law, enforceable”, such a reason may be invoked by the contestator who requires the cancellation of the enforcement itself. But, under the conditions in which the judge has to decide whether or not a title is enforceable under the law, in order to give a solution with respect to the application of suspension, he can no longer settle once again the same reason when he is invested with the settlement of the opposition to enforcement, in this case becoming incident Article 42 paragraphs (1) point (13) Civ. proc. Code. Therefore, the possible decision on the suspension of the enforcement based on Article 718 paragraph (4) point (1) Civ. proc. Code attracts the incompatibility of the judge for the settlement of the opposition to execution, if it is based on the grounds relating to the enforceability of title, incompatibility that can be invoked by the interested party by means of a request for challenge, in accordance with Article 44 and 47 Civ. proc. Code, respectively of the judge who formulating a statement of abstention, in accordance with Article 43 or 48 Civ. proc. Code.

In the event the judge that has been part of the body of judges invested with the provisional suspensions of enforcement based on the provisions of Article 718 paragraph (7) Civ. proc. Code is subsequently promoted, he is incompatible to resolve the appeal declared against the dismissal by which was settled the application of suspension of enforcement based on Article 718 paragraph (1) Civ. proc. Code, as well as for the settlement of the appeal filed against the decision regarding the opposition to enforcement. This is because, according to Article 41 paragraph (1) Civ. proc. Code, the judge becomes incompatible not only when he settles the dispute, but also when he has pronounced an interlocutory closure. In regard to the definition given by Article 235, second sentence, on interlocutory closures ( “interlocutory closures are those by which, without settling integrally on the dispute, are being resolved procedural exceptions, incidents or other procedural aspects”), obviously, the closure of resolving the application of suspension of the enforcement, as well as in the case of provisional suspension and in the case of the suspension itself, falls within the category of interlocutory closures, as it is an litigious incident claim. As a result, relative to the definition of the new Code of civil procedure given to incompatibility of public order, and the extension, in relation with the former regulations, to the situation of the judge who has pronounced an interlocutory closure, the judge who decided on the suspension itself, based on either paragraph (1) or (7) of article 718 Civ. proc. Code is incompatible to settle on the appeal against the decision on the suspension itself, in accordance with Article 718 paragraph (6) Civ. proc. Code or on the appeal against the decision by which was resolved the opposition to enforcement, in accordance with Article 717 Civ. proc. Code.

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<sup>9</sup> Some authors have considered that in the cases provided for in Article 718 paragraph (4) Civ. proc. Code “We are facing a true suspension *ope legis*, that court constated rather than decide upon” (Ion Deleanu, Valentin Mitea, Sergiu Deleanu, *Noul Cod de procedură civilă, Comentarii pe articole*, Vol. II, Universul Juridic Publishing House, Bucharest, 2013, p. 136). We do not fully agree with this qualification because framing in this situation implies an analysis made by the court in order to identify the features of the title that is being enforced according to Article 632 - 640 Civ. proc. Code (See, in this respect, Dumitru Marcel Gavriș, *op. cit.*, p. 211).

### Conclusions

In conclusion, the new Code of civil procedure transfers the plenitude of jurisdiction on all procedural incidents relating the suspension of enforcement to the body of judges invested with the settlement of the opposition to enforcement. In this respect, it is necessary to amend Article 99 (10) of Regulation on Internal Organization of the Courts of Justice, so that it would be in accordance with the current form of Article 718 paragraph (7) Civ. proc. Code. Nevertheless, at least as a general rule, the judge who has settle in a first stage the application of provisional suspension without giving the parties notice to attend, and then, under mandatory summoning of the parties, decides on the application to suspend the enforcement pending the resolution of the opposition to enforcement, is not incompatible. Nevertheless, in practice, the new regulations are likely to give an opportunity of formulating requests for objecting, particularly in those situations when the analysis of the suspension implies settling on aspects that may constitute also a ground for the opposition to enforcement, as is the case provided by Article 718 paragraph (4) point (1) Civ. proc. Code. *De lege ferenda*, a legislative solution partially different, for the purpose of regulating expressly a functional jurisdiction of another body of judges within one and the same court for settling applications of provisional suspension, in order to avoid incidents relating to structure of the court, could, therefore, be found.

### Bibliography

Mihaela Tăbârcă, *Drept procesual civil, Vol. I – Teoria generală*, “Universul Juridic” Publishing House, Bucharest, 2013;

Evelina Oprina, Ioan Gârbuleț, *Tratat teoretic și practic de executare silită, Volumul I. Teoria generală și procedurile execuționale*, “Universul Juridic” Publishing House, Bucharest, 2013;

Andreea Tabacu, *Drept procesual civil*, “Universul Juridic” Publishing House, Bucharest, 2013;

D. M. Gavriș, *Contestația la executare*, în Gabriel Boroș (coord.), *Noul Cod de procedură civilă, comentariu pe articole*, Vol. II, “Hamangiu” Publishing House, Bucharest, 2013;

Gabriela Cristina Frențiu, Denisa – Livia Băldean, *Noul Cod de procedură civilă, comentat și adnotat*, “Hamangiu” Publishing House, Bucharest, 2013;

I. Deleanu, V. Mitea, S. Deleanu, *Noul Cod de procedură civilă, Comentarii pe articole*, Vol. II, “Universul Juridic” Publishing House, Bucharest, 2013.