

# THE POSSIBILITY OF THE DEBTOR TO REQUEST PUBLIC JUDICIAL ASSISTANCE IN THE FORM OF BAIL EXEMPTION OR REDUCTION DURING A PROVISIONAL SUSPENSION OF THE FORCED EXECUTION CASE

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## Abstract

*The situation is becoming more and more common nowadays. A debtor, lacking in sufficient funds, is forced to request public judicial assistance from the Court so that he may be exempted from the obligation of paying bail during a provisional suspension of the forced execution case. The article shall focus on the applicability of Article 6 of the E.C.H.R., on the national provisions and on whether or not they may allow such a request to be analysed by the Court and not be rendered inadmissible. Some practitioners have viewed this possibility as inadmissible in accordance to our national legislation. In their view, no legal text allows the debtor to request this type of aid and no legal means are offered to regulate this type of legal problem. Others have granted public judicial assistance after careful consideration of the economic situation of the debtor, in regard to the fact that his right to a fair trial extends even to this particular situation. By not granting him the opportunity to present his arguments at this stage of the trial due to a lack of funds, a sort of discrimination may be generated in favour of the debtors who can financially afford to present their case as opposed to those who cannot. The article shall thus carefully ponder the interests and obligations of the parties involved in the trial so as to establish some useful conclusions or good practices regarding the issue at hand.*

**Keywords:** *public judicial assistance, bail exemption, provisional suspension, forced execution, Court's role.*

## 1. Introduction

### 1.1. What matter does the paper cover?

The paper deals with the situation of a forced execution of a legal title. The debtor considers that his creditor is not entitled to execute the title and thus calls upon the court to suspend the execution. However, the timing is not financially acceptable for the debtor. He is unable to pay bail, despite the obligation as laid out in Article 719 par. 7 of the Civil Procedural Code<sup>1</sup> and thus his

request to suspend the execution cannot be analysed by the court. Thus, some debtors have chosen to employ the use of Emergency Ordinance no. 51/2008, soliciting public judicial assistance in the form of the exception or reduction of the bail fees. The effect of this request means placing the judge into a situation of not being able to establish the legal text that may address this particular issue.

The main objective of the study is to come accros an acceptable solution for this legal difficulty, one which may provide the legal subjects with a means of establishing both a predictable and accessible course of

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<sup>1</sup> Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Journal of Romania no. 247 of April 10, 2015.

action as laid out in the jurisprudence of the European Court of Human Rights.

### **1.2. Why is the studied matter important?**

The studied matter is very important because there are a great number of cases regarding a provisional suspension of the execution of the title in which the debtor has invoked the right to be exempted from bail or at least its reduction. Finding a balance between his interests and the interests of the creditor is of the utmost importance, and the courts are obligated to balance the two so as to reach an equitable solution. In doing so, potential infringements of Article 6 of the European Convention of Human Rights<sup>2</sup> may be avoided, thus allowing for a lawful trial and a proper analysis of the merits of the suspension request.

### **1.3. How does the author intend to answer to this matter?**

After a proper analysis of the applicable legal texts, and a further study of the opinion of nationally renowned authors, some key insights regarding the issue may be found. Thus, a future consensus may be reached between both the courts and the other legal subjects, so as to avoid inconsistencies in the jurisprudence of the courts, which have generated tremendous inequalities in the past. The European Court of Human Rights jurisprudence shall also be the subject of scrutiny, in order to retain the conventional standard applicable in this legal situation and thus align the potential solution to the rigours of European values regarding the civil rights of the individual.

### **1.4. What is the relation between the paper and the already existent specialized literature?**

Despite the evident importance, there are only a few analyses regarding the proper course of action which is to be employed in order to solve the legal problems which stem from the application of Emergency Ordinance no. 51/2008 in this particular situation. The merits of each opinion expressed by the studied authors shall receive the proper attention, in enabling the article to establish acceptable solutions which may be easily implemented in practice.

## **2. The legal applicable texts and European Court of Human Rights rulings**

### **2.1. The Civil procedural Code**

Firstly, our national Civil Procedural Code<sup>3</sup> outlines in Article no. 719 the legal framework regarding the suspension procedure of the forced execution: “*Until the appeal to the enforcement or other enforcement request has been resolved at the request of the interested party and only for good reasons, the competent court may suspend execution. Suspension may be requested with the challenge of execution or separate request.*”

(2) In order to order the suspension, the person who requests it must give a preliminary bail, calculated at the value of the object of the appeal, as follows:...

(6) On the request for suspension, the court shall, in all cases, pronounce by conclusion, even before the time limit set for

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<sup>2</sup> European Convention on Human Rights: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

<sup>3</sup> Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Journal of Romania no. 247 of April 10, 2015.

the examination of the appeal. The parties will always be quoted, and the conclusion may be appealed separately, only on appeal or, if it is delivered by the court of appeal, only on appeal, within 5 days of pronouncement for the present part, or from the communication for the missing one.

(7) If there is an emergency and if, in the cases provided in paragraph (2) and paragraph (3), the bail was paid, the court may order, by concluding and without summoning the parties, the provisional suspension of the execution until the settlement of the request for suspension. The decision is not subject to any appeal. The bail referred to in this paragraph shall remain unavailable even if the application for interim suspension is rejected and is deductible from the final bail, as the case may be...

The law has sought to establish a general rule regarding the issue at hand, by obligating the debtor to forfeit a fixed sum of money in order to protect the interests of the creditor. The funds are to remain unavailable so as to serve four purposes, in accordance with Article no. 720 of Civil Procedural Code: *“If the appeal is rejected, the claimant may be ordered to pay damages for infringements caused by delay of execution, and when the contestation was conducted in bad faith, he will also be liable to pay a fine from 1,000 lei to 7,000 lei ... When the appeal was dismissed, the sum representing the bail will remain unavailable, and will serve to cover the receivables shown in par. (3) or those established by the enforceable title, as the case may be, in which case the bailiff will be notified and the receipt for the payment of this amount.”*

## 2.2. Emergency Ordinance no. 51/2008

Article 1 of the Emergency Ordinance no. 51/2008<sup>4</sup> points out the main objective of the law: “Judicial public assistance is that form of State assistance **aimed at ensuring the right to a fair trial and guaranteeing equal access to justice**, for the realization of legitimate rights or interests by judicial process, including the enforcement of judgments or other enforceable titles “.

The forms in which the scope may be attained are laid out in Article no. 4 -” Any natural person may solicit the provision of public legal aid under this Emergency Ordinance in the event that he or she **can not afford the costs of a trial** or those involving legal advice to defend a right or legitimate interest in the law, **without jeopardizing his or her family's maintenance**. “ and in Article no. 6 :” Public judicial assistance **may be granted in the following forms:...(d) exemptions, reductions, staggered payments or deferrals from the payment of legal fees provided for by law**, including those due at the forced execution stage. “.

As it can be easily noticed, the list of possible methods of soliciting the aid of the state in order to avoid “**jeopardizing his or her family's maintenance**” is an exhaustive one. No other requests can be made, should the natural person wish to invoke these legal texts. **There are no express provisions regarding the exemption or reduction of bail fees.**

## 2.3. European Court of Human Rights ruling in the case of Weissman and Others v. Romania- 63945/00 [2006]

The conventional standard is indicated at par. no. 37<sup>5</sup> and reads as follows: “ the

<sup>4</sup> Emergency Ordinance no. 51/2008, published in the Official Journal of Romania no. 327 of April 25, 2008.

<sup>5</sup> European Court of Human Rights, *Weissman and Others v. Romania* - 63945/00 [2006].

amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired " thus leading the Court to concur that " the State failed to strike a fair balance between, on the one hand, its interest in recovering the costs of proceedings and, on the other, the applicants' interest in having their claims examined by the courts."

There are cases in which the debtor bases his request of bail exemption or reduction on the Emergency Ordinance no. 51/2008, Article 6 of the European Convention on Human Rights or on the jurisprudence of European Court of Human Rights.

### 2.3. European Court of Human Rights rulling in the case of Iosif and Others v. Romania- 10443/03 [2006]

The conventional standard is indicated at par. No. 60<sup>6</sup> and reads as follows:" The Court observes that the obligation imposed on the applicants to pay an **extremely high sum of money to enable them to bring an action was deprived of the opportunity to obtain an examination of the substance of the case** and, consequently, of their right of access to a court. Moreover, it notes that the Constitutional Court, which has been notified in another case with an exception to the unconstitutionality of the legal provision on the establishment of the value of the bail, decided that it was not in compliance with the Constitution ".

## 3. The interpretation of the courts and legal authors

### 3.1. The opinion of the Courts

Most of the cases in which the matter at hand has been brought before the courts, the solution was to repeal the request as inadmissible, given the fact that no legal framework has been provided in order to regulate this type of situation.

With an almost overwhelming majority, the request has been repelled, with the mention of the possibility for the applicant to subject it to a re-examination by another judge, in accordance with article no. 43<sup>7</sup> par. 4 :” *Against the conclusion, interested parties may file a review request within 5 days of the date of the communication of the conclusion. The request is exempt from stamp duty.*”.

The opinion can be subjected to criticism, given the fact that since the request was deemed as inadmissible in the first place, it is evident that the review itself is inadmissible. Despite this, some judges indicate a means of appealing an initial decision that is not mentioned in any legal text.

Other judges<sup>8</sup> base their analysis on the European Court of Human Rights conventional standard previously indicated, interpreting it in such a way that a reduction or exemption be granted in order to avoid an infringement to the right of the debtor to a fair trial. The precarious economic situation of the debtor is invoked to justify the measure, given the fact that the request may be the only chance that he shall have to temporarily suspend the execution before a proper analysis can be made regarding the opportunity of suspension in accordance

<sup>6</sup> European Court of Human Rights, *Iosif and Others v. Romania* - 10443/03 [2006].

<sup>7</sup> Emergency Ordinance no. 80/2013, published in the Official Journal of Romania no. 392 of June 29, 2013

<sup>8</sup> [https://www.luju.ro/static/files/2013/octombrie/09/madularescu\\_ghica\\_Incheieri\\_26.09.2013-dosar\\_37103.pdf](https://www.luju.ro/static/files/2013/octombrie/09/madularescu_ghica_Incheieri_26.09.2013-dosar_37103.pdf)

with article no. 719 par. 1 of the Civil Procedural Code.

### 3.2. The opinion of the legal authors

Some legal authors have expressed the idea that it is mandatory for the courts to perform the analysis of the request, since it is not inadmissible. *“It is clear that the courts can not refuse to hear claims for reduction or exemption from bail. On the contrary, they have to analyze on the merits such requests, assessing, in particular, whether they are founded or not. In this approach, the courts will consider various criteria, such as: the amount of the bail, the income of the party, the stage of the procedure, the purpose of the tax, the proportionality of the interference for that purpose, the procedural guarantees granted to the party, the foreseeability of the tax.”*<sup>9</sup>

Other legal authors, in recently analysing the jurisprudence of the European Court of Human Rights have stated that “the Court's reasoning shows that Article 6 of the Convention is applicable, under certain conditions, also to those procedures referred to by the Court of Justice, that is to say those procedures which do not directly address the substance of civil rights and obligations (such as, for example, with the proceedings for suspension of enforced execution, discussed in the present case, other procedures such as the presidential orders or the precautionary measures, etc<sup>10</sup>)”.

Another prominent author<sup>11</sup> has stated that the analysis of the conditions needed to temporarily suspend the execution of the title is more formal, and that a more thorough one is to be carried out later on. This is indicative of the fact that the request usually is subjected to a proper inquiry only during the debate during the normal suspension request, as stated in Article no. 719 par. 1 of the Civil Procedural Code.

The matter has been further treated in other works. Another problem has been identified by an author<sup>12</sup>, in the sense that the judge who has already expressed his opinion regarding the necessity of the provisory suspension may be incompatible to decide on the suspension request until the first instance court's decision.

### 4. The interpretation of the author

Firstly, upon a proper analysis of the European Court of Human Rights jurisprudence, one can note that article 719 par. 7, in its present form has never been the subject of any criticism.

Also, the Constitutional Court of Romania has never stated that this legal text may be unconstitutional. Neither the interpretation of Emergency Ordinance no. 51/2008 in the sense that such a request is inadmissible.

Thus, at this moment, until further notice, the provisions and their interpretation are valid in the opinion of the two Courts.

<sup>9</sup> Marinela Cioroabă, Florin Radu, *“Despre reducerea cautiunii sau scutirea de la plata acesteia in materia suspendării executării silite”*, <https://www.juridice.ro/126524/despre-reducerea-cautiunii-sau-scutirea-de-la-plata-acesteia-in-materia-suspendarii-executarii-silite.html> [last access on 27.02.2018].

<sup>10</sup> Claudiu Drăgușin, *“Aplicabilitatea art. 6 CEDO în privința cererilor de suspendare a executării silite, în special sub aspectul scutirii / reducerii / eşalonării sumelor stabilite cu titlu de cauțiune - decizia de inadmisibilitate în cauza S.C. Eco Invest S.R.L. și Ilie Bolmadar c. României”*, <http://www.hotararicedo.ro/index.php/news/2017/01/aplicabilitatea-art-6-cedo-cererilor-suspendare-a-executarii-silite-scutirii-reducerii-esalonarii-cautiune-inadmisibilitate-sc-eco-invest-srl-ilie-bolmadar-c-romaniei> [last access 27.02.2018].

<sup>11</sup> Răducan, Gabriela et Dinu, Mădălina (2016), *„Fișe de procedură civilă”* [Civil Procedure Charts], Hamangiu Publishing House, Bucharest, p. 387.

<sup>12</sup> Boroi, G. (ed.), (2013), *“Noul Cod de Procedură Civilă Comentat”* [The Commented New Civil Procedural Code], vol. 2, Hamangiu Publishing House, Bucharest, p. 213.

However, the interpretation can be justfully criticised up to one point.

Should the judge establish a bail obligation for the debtor based on improper calculations, the debtor, under article 6 of the European Convention on Human Rights should be allowed to subject the calculations to a proper re-examination by another of his colleagues. Despite the fact that our national legislation does not specify such a means, challenging the calculations should be allowed. Repealing such a request as inadmissible *prima facie* can be viewed as an infringement on the right to a fair trial of the debtor.

However, subjecting the request for public judicial assistance to an analysis in terms of the economic situation of the debtor in justifying a potential reduction or exemption of the fee can lead to an infringement of the rights of the creditor.

In the European Court of Human Rights case of Weissman against Romania, the impediment for the applicant was regarding the legal fees which would should have been paid to the state. Indeed, the margin of appreciation of the state in this regard may be reduced in **order to allow a private individual to present his case before the court**. Should he win, the costs shall be supported by the opposing party. Should he loose, the state may regain the sum, under the provisions of the article 19 par. 2 of the Emergency Ordinance no. 51/2008.

In the European Court of Human Rights case of Iosif against Romania, the impediment for the applicant was regarding the bail which had to be paid in order to be able to **challenge the legality of the forced execution**, in order to defend himself against the creditor. Not being able to present his defence due to a financial impossibility was justly viewed by the European Court of

Human Rights as an infringement to the applicant's right to a fair trial.

However, the situation analised in the article deals only with the obligation to pay bail **in order to temporarily suspend the execution**. The amount of bail can in some cases prove rather burdensome for any individual. Despite this, the debtor is able to present his defences before the court regarding the legality of the execution itself. The failure to pay the bail fees can not constitute an impediment in exercising this legal right.

The greatest dangers which may arise from the impossibility of provisionally suspending the execution can stem from the sale of the property of the debtor at the price well below the market. Should he successfully contest the execution, he may request the return of his property, in accordance with article 723 par. 1 of the Civil Procedural Code<sup>13</sup>: "*In all cases where the enforceable title or enforcement itself is annuled, the person concerned has the right to return the enforcement by re-establishing the previous situation. The enforcement costs for the acts performed remain with the creditor.*" He may also request the difference between the actual value of the goods and what the adjudicating third party paid for them, in accordance with article 1349 of the Civil Code since the fault for an unlawfull execution belongs to the creditor.

Thus, the risks involved for the debtor which may arise from not paying the bail fees are less problematic that in the past when the old legislation obligated him to pay them in order to be able to **annul the execution itself**.

Another important matter that is relevant to the subject at hand is to weigh in these risks with the ones created for the creditor should the request be admitted.

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<sup>13</sup> Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Journal of Romania no. 247 of April 10, 2015.

Firstly, should the request for bail reduction or exemption be accepted by the judge, the imminent danger may arise from the deprivation of the creditor of the sums of money needed to fulfil one of four purposes stated in article 720 of the Civil Procedural Code: “ **pay damages for infringements caused by delay of execution, and when the contestation was conducted in bad faith, he will also be liable to pay a fine from 1,000 lei to 7,000 lei** When the appeal was dismissed, the sum representing the bail will remain unavailable, and will serve to cover the receivables shown in par. (3) or those established by the enforceable title, “<sup>14</sup>.

No doubt these specific provisions have been drafted in order to ensure certain rights for the creditor, so that he may satisfy his claim.

To infringe upon them, by limiting his capability to satisfy his claim, to prolong the moment of execution, just because the other party is unable to support the financial burden of paying the bail fees, is by itself an infringement on the creditor’s right to property.

Should a hypothetical claim be made before the European Court of Human Rights by the creditor in which he would raise these arguments, soon after it would be established that both Article no. 6 and Article no. 1 of Protocol no. 1 are applicable. The analysis would then concentrate on whether or not the measure was in accordance with the national provisions.

Most certainly, the European Court of Human Rights would not be able to find a legal provision that could regulate the benefit created for the debtor and limit the right of the creditor to benefit from the sums paid as bail fees. “*The principle of lawfulness also presupposes that the applicable provisions of domestic law be*

*sufficiently accessible, precise and foreseeable in their application* “<sup>15</sup>. Since there are no legal texts which may allow for the judge to grant such a request, there can be no discussion regarding the *accessible, precise and foreseeable* conditions for the text in order to justify the measure.

Thus, the evident conclusion would be that a violation of the rights of the creditor protected by Article 1 of Protocol 1 and Article no. 6 of the European Convention on Human Rights has taken place. And the analysis would not even reach the point of verifying whether or not a fair balance has been maintained between the interests of the debtor and those of the creditor.

The state, which enjoys a large margin of appreciation in this respect in regulating the conditions needed to solicit the temporary suspension, has established the obligation to pay the bail fees.

To interpret the legal texts in order to justify such a measure by the judge, under the umbrella of the necessity to respect the debtor’s right to a fair trial is erroneous and unlawful.

It would also create a difficult situation for the creditor, who after the efforts of obtaining the executory title, has to support the risks of the postponed execution, without the scenario ever even been regulated by law.

Moreover, the analysis of the European Court of Human Rights jurisprudence as previously laid has yielded the fact that the obligation to pay the bail fees by the debtor beforehand, should he solicit the temporary suspension of the execution, has never been viewed as problematic in the case law.

<sup>14</sup> Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Journal of Romania no. 247 of April 10, 2015.

<sup>15</sup> European Court of Human Rights, *Dickmann and Gion v. Romania*, 10346/03 and 10893/04 [2017].

## 5. Conclusions

### 5.1. Summary of the main outcomes

There is no doubt that there are some who view the solution of granting the request of bail exemption or reduction as equitable and in complete accordance with the highest values promoted by the European Court of Human Rights.

Indeed, the aid for the debtor is evident, as he needs merely to prove his precarious financial situation in order to present to the court his arguments.

However, there are other interests involved which require a most careful analysis on whether or not to proceed with this course of action.

Given the arguments previously presented, the necessity to ensure the rights of the creditor, as granted to him by the state, should prevent any legal *contra legem* interpretations in order to avoid any violations of Article no. 6 or Article no. 1 of Protocol 1 to the European Convention on Human Rights. The state has specifically established this safeguard for him, in order to discourage further impediments to this right to execute his title.

Since he has already reached the point where he is obligated to call upon the

coercive force of the state because the debtor has failed to fulfil his obligations, to reach an equitable outcome would mean for the judge to refrain from granting the debtor's request.

### 5.2. The expected impact of the research outcomes

The aim of the article is to endeavour to shed light on the subject, in order to aid the reader to circumvent potential difficulties in deciding on the matter.

Also, it is also hoped to spread the idea of potential *de lege ferenda* solutions in the form of explicitly mentioning in the provisions of *Emergency Ordinance no. 51/2008* that it is not applicable in this particular situation.

### 5.3. Suggestions for further research work.

Given the fact that the European Court of Human Rights can sometimes radically change its views, such as in the case of *Micallef v. Malta* of 2009, further research could potentially follow the case law of the Court, in identifying future instances in which the legal texts mentioned in the article have been subjected to an analysis.

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