

The Right to an Effective Enforcement and State Responsibilities (including Transnational Aspects)* GREECE

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GENERAL COMMENTS

Enforcement of judgments is conceived as one of the 3 aspects of the legal protection that is guaranteed by the article 20 of the Greek Constitution/1975¹.

Therefore, the claim to enforcement is the claim that the creditor has against the state, based on his enforcement title, for the realization of the necessary means of enforcement. Accordingly, there is the obligation of the state to proceed by its organs/agents to the acts of the enforcement². This public law claim is not the same with the claim that is being enforced. The latter is usually based on private law. Therefore, the enforcement officers may never examine, neither at the beginning nor during the enforcement procedure, whether the enforced claim does exist and for that reason stay the enforcement procedure. This control is only possible after a caveat is filed by the debtor (article 933 par. 1 Code of Civil Procedure). If no caveat is filed, the individual acts of the

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1 G. Mitsopoulos, *The influence of the Constitution on the Civil Jurisdiction [in Greek]*, in: *The influence of the Constitution of 1975 on the Private and the Public Law*, Athens 1976, 55. A different issue is whether the right to enforcement is guaranteed when the enforcement title is a notary document (art. 904 par. 2 Code of Civil Procedure). N. Klamaris, *The right to judicial protection according to article 20 par. 1 of the Constitution [in Greek]*, Athens-Komotini 1989, 172, denies it.

2 Areios Pagos (Plenary), judgments 19/2001 and 21/2001.

enforcement already realized, are considered as procedurally valid (article 159 Code of Civil Procedure)³.

However, the constitutionally guaranteed claim to enforcement presupposes the state intervention in the private sphere of the debtor, especially in his constitutionally guaranteed rights.

SOME SPECIFIC ISSUES OF THE ENFORCEMENT PROCEDURE

The judgment does not become enforceable until the time period for an appeal has expired without an appeal being lodged, or, if an appeal is lodged, until judgment has been given on the appeal. The creditor may obtain provisional enforcement of the judgment, bearing the risk to have to repay amounts paid to him or to make compensation for losses suffered by the debtor as a consequence of enforcement, if the judgment is later overturned on appeal⁴.

Provisional enforcement is obligatory for some judgments (art. 910 Code of Civil Procedure), while others may never be declared provisionally enforceable. It is in the discretion of the court to permit provisional enforcement on the application of the judgment creditor (art. 908 Code of Civil Procedure), if it considers that there are special reasons to justify it⁵, or if delayed enforcement could cause harm to the creditor. The court will not declare a judgment provisionally enforceable if that could cause irreparable harm to the judgment debtor. According to the article 911 Code of Civil Procedure, if the judgment debtor requests it, provisional enforcement may be made dependent on the provision of security by the judgment creditor. The judgment debtor can lodge adequate security himself and thus prevent provisional enforcement, in case he applies to have a default judgment set aside or in case he lodges an appeal within the time-limits prescribed by the law⁶.

3 P. Gesiou-Faltsi, Protection against the abusive enforcement: Principle of proportionality or application of the article 281 of the Civil Code? [in Greek], in: *Procedural Legal Order. IV. Studies and legal opinions of law of enforcement of judgments*, Athens - Thessaloniki 2009, 125, 128.

4 E.N. Moustaira, Greece, in: Enforcement of judgments (co-ordinator: W. Kennett), *European Review of Private Law* 1997, 321-428 (331).

5 For example: the judgment was based on the fact that the debtor recognized the claim as valid, or on a public or recognized private document, or concerns maintenance, copyright, tort, labour disputes, commercial disputes, choses in action, etc.

6 E.N. Moustaira, Greece, in: Enforcement of judgments (co-ordinator: W. Kennett), *European Review of Private Law* 1997, 321-428 (333).

Enforcement is only possible when the enforceable title has been served on the defendant – and/or third party (articles 926 I, 924 Code of Civil Procedure).

Judgment debtors should not be unnecessarily threatened by enforcement at times set aside for sleep or specific reasons, as religious worship. Nevertheless, special permission may be obtained from the enforcement court for enforcement to take place outside normal hours (article 32 V Law 434/1976, article 34 Law 2010/1972, articles 929 III and 125 II Code of Civil Procedure)⁷.

Search and seizure: Greek law protects the right to privacy and does not permit house search, except in accordance with the law and in the presence of representatives of the judiciary (article 9 Constitution).

If the bailiff has to force access, either because the debtor refuses permission or because the debtor or a representative of his is not present, the bailiff must engage the offices of one additional bailiff or two adult witnesses (article 930 II Code of Civil Procedure). In case there is a real threat of violence, the bailiff may call on the assistance of the *force publique* (article 292 II Code of Civil Procedure and article 25 Decree law 1210/1972).

THE CONSTITUTIONAL BASES OF THE ENFORCEMENT TRIALS

The enforcement itself, for the satisfaction of monetary claims, using the seizure and the public auction of all debtor's assets, is in conflict with the individual right of property (article 17 Constitution).

When the seizure of movable assets (articles 953 ff Code of Civil Procedure) or the enforcement of judgment ordering the rendering of movable objects (articles 941, 942 Code of Civil Procedure), requires search in the debtor's (article 929 Code of Civil Procedure) or a third person's domicile (article 982 Code of Civil Procedure), protection of domicile's refuge (article 9 Constitution) is stepping back. In case body search of the debtor's is permitted, in order to discover money or other precious objects that could be seized (article 929 par. 1 Code of Civil Procedure), then there is an issue of human value's offence (article 2 par. 1 Constitu-

⁷ E.N. Moustaira, *Greece*, in: Enforcement of judgments (co-ordinator: W. Kennett), *European Review of Private Law* 1997, 321-428 (356).

tion) as well as of violating the prohibition of offending human dignity (article 7 par. 2 Constitution).

Furthermore, while protection of the debtor by establishing a list of objects that cannot be seized (articles 953 pars. 3-5, 982 par. 2 Code of Civil Procedure), until fairly recently was connected to the idea of humanism, contemporary procedural theory consecrates it as an institution constitutionally guaranteed. According to the principle of respect to human value (article 2 par. 1 Constitution), the institution of objects that cannot be seized must guarantee the minimum necessary for the debtor's life. This guarantee is also derived by the social rights in a State, as for example the social right to health's protection (article 21 par. 3 Constitution). Furthermore, defining objects that cannot be seized also protects the debtor's family, according to the constitutionally guaranteed social right to marriage and family's protection (article 21 par. 1 Constitution)⁸.

In all those cases, legal order has to weigh principles and rights already constitutionally guaranteed. Since Greek Constitution does not follow an hierarchical order, as far as individual rights are concerned, weighing of priorities is often an issue of factual circumstances and has to be done with objective criteria. The legislator has the competence to proceed to this weighing of principles and interests, while legislating, but it is the judge competent for the enforcement of a decision, he who has that duty, while interpreting the law.

ABUSE OF RIGHT

Greek case law as a rule denies the application of article 281 Civil Code in civil procedural law. This article provides that the exercise of a right is forbidden when it evidently supersedes the limits set by bona fide or bonos mores or the social or economic aim of the right.

The situation changes when it is about abuse of right at the enforcement procedure. In this case, the majority of courts do apply the article 281 Civil Code in order to set limits to the enforcement, setting forth as excuse, that the realization of the creditor's claim against the debtor constitutes exercise of a substantive right belonging to public law. Sometimes they use in parallel the interpretative argument that article 281

8 P. Gesiou-Faltsi, The constitutional bases of the enforcement trials [in Greek], in: *Procedural Legal Order. IV. Studies and legal opinions of law of enforcement of judgments*, Athens - Thessaloniki 2009, 301, 307-308.

Civil Code is a general rule that is applied in all law branches, public and private⁹. Some courts, in parallel with article 281 Civil Code, also invoke article 25 par. 3 Constitution, on the ground that the constitutional order refers generally and indiscriminately to the exercise of all rights, or article 116 Code of Civil Procedure.

In Greek legal doctrine, two opinions are supported. According to the first, the article 25 par. 3 Constitution is applicable. It is a superior rule, prohibiting abuse of right in all law fields, therefore in public as well as in private law. According to the second opinion, the analogous application of article 281 Civil Code is also possible.

There are voices, both in Greek case law and doctrine, which deny both the application of the article 25 par. 3 Constitution in private law relations, on the ground that the constitutional prohibition of abuse of right only concerns the individual and social rights, as well as the extension of the application of article 281 Civil Code in the field of procedural law. According to that opinion, only article 116 Code of Civil Procedure could be applied.

Dominant is the opinion according to which, the prohibition of the abusive enforcement may be derived directly from the article 25 par. 3 Constitution. Methodologically, it is thus explained: The creditor has a public law claim (*Vollstreckungsanspruch*) against the state for the realization of the necessary means of enforcement. The State has a corresponding obligation to proceed by its organs to the acts of the enforcement. This obligation appears as power of enforcement towards the debtor, and extends as far as at the limits of the obligation of the debtor towards his/her creditor.

The individual procedural right to legal protection, in the specific form of the claim to enforcement, is subject to the limitations that all individual rights have. Therefore, the claim to enforcement may be exercised only if it does not offend the prohibition of the abusive exercise of the individual rights (article 25 par. 3 Constitution)¹⁰.

9 P. Gesiou-Faltsi, Abuse of right in enforcement of judgments [*in Greek*], in: *Procedural Legal Order. IV. Studies and legal opinions of law of enforcement of judgments*, Athens - Thessaloniki 2009, 141, 146.

10 P. Gesiou-Faltsi, Abuse of right in enforcement of judgments [*in Greek*], in: *Procedural Legal Order. IV. Studies and legal opinions of law of enforcement of judgments*, Athens - Thessaloniki 2009, 150.

GARNISHMENT OF THE DEBTOR'S BANK ACCOUNT

The validity of bank secret has never been questioned. In the past, and according to a specific legislative provision (article 1 Decree Law 1059/1971, as formed by the article 10 par. 1 Law 1858/1989), a specific bank secret had been enacted, saying that “Every form of bank deposit is secret”, except in cases foreseen in specific legislation and under strictly described requirements¹¹.

Following the enactment of this provision, there was a discordance of case law. In 1975, the majority of the plenary of Areios Pagos connected the bank secret to the rule that certain assets cannot be attached and judged that the garnishment of a debtor's bank account is invalid. In 1993, again, the majority of the plenary of Areios Pagos reiterated this judgment – in both cases there was a strong minority.

The authors were, almost unanimously, of the opposite opinion. They claimed that since the power of execution of the judgment creditor is constitutionally guaranteed (article 20 Constitution), the invalidity of the garnishment of the debtor's bank account could not be constitutionally tolerated.

The inferior courts totally aligned with the interpretative stance of Areios Pagos, until 1996, when the first break happened, which led to a new, opposite judgment by Areios Pagos¹².

The plenary of Areios Pagos, in its decision 19/2001, decided that the legislative provisions which establish the secret of the deposits in Greek Banks refer exclusively to the bank secret and not to the admissibility of the bank account's garnishment. An opposite interpretation, it said, would be contrary to the article 20 par. 1 of the Constitution which defines that everyone has the right to legal protection. The enforcement of judgment a form of which is the garnishment of debts (articles 982 ff Code of Civil Procedure) is included in that legal protection.

Greece having ratified the Treaty of Human Rights (Decree Law 53/1974), the claim to enforcement of judgment is also derived by the ar-

11 P. Gesiou-Faltsi, The attachable as a problem of interpretation according to the Constitution and the International Conventions – Bank accounts [in Greek], in: *Procedural Legal Order. IV. Studies and legal opinions of law of enforcement of judgments*, Athens - Thessaloniki 2009, 177, 182-183.

12 P. Gesiou-Faltsi, The attachable, as a problem of interpretation according to the Constitution and the International Conventions – Bank accounts [in Greek], in: *Procedural Legal Order. IV. Studies and legal opinions of law of enforcement of judgments*, Athens - Thessaloniki 2009, 185.

ticle 6 par.1 of this Treaty¹³. According to the European Court for Human Rights' case law (arrêt Hornby/Grèce¹⁴, 19.3.1997: « *l'exécution d'un jugement ou arrêt, de quelque juridiction que ce soit, doit être considérée comme faisant partie intégrante du procès au sens de l'art 6* »).

Article 1 par. 1 of the Additional (First) Protocol to the above mentioned Treaty of Human Rights (also ratified by Decree Law 53/1974) guarantees that the right of every natural or legal person to the enjoyment of its property, must be respected. According to the fundamental decision of the plenary of Areios Pagos, 40/1998, this article safeguards respect of every patrimonial right, whichever its nature might be¹⁵. Consequently, it protects the creditors' claims, therefore also the right to their enforcement. As a conclusion, prohibiting the garnishment of bank accounts would also violate article 1 par. 1 of the First Protocol of the Treaty of Human Rights.

CONSERVATORY MEASURES

Pending a hearing on the merits, conservatory measures to preserve the position of the plaintiff are available. An application for such measures may be filed even before the commencement of proceedings on the merits.

It is possible to proceed to a temporary seizure even when there is no court order, if the creditor has an enforceable title (article 724 I Code of Civil Procedure). Pending proceedings in another country, Greek courts may grant conservatory measures to the applicant plaintiff. Competent court is the court of the place where enforcement of the conservatory measures will take place.

The procedure is generally quick. If it is considered necessary, conservatory measures may be granted on an *ex parte* application (article 687 I Code of Civil Procedure).

The applicant has to comply with a reduced burden of proof of fact, the only requirement is to show a "probable" case¹⁶. The court must

13 K. Beyr, Grundgedanken des griechischen Zivilprozessrechts in ihrer Fortentwicklung durch die EMRK, ZZP 109 (1996) 37, 45-46.

14 Recueil des arrêts et décisions 1997-II, 459, 510.

15 G. Kasimatis, Judgment 40/1998 of the Plenary of Areios Pagos – The bases of application of the principle of respect and protection of the human value and of the property's guarantee [*in Greek*], *Nomiko Vima* 47 (1999) 705, 717.

16 Kerameus/Kozyris, *Introduction to Greek Law*, 1993, 290.

be satisfied that there is an urgent need to avoid imminent danger (article 682 I Code of Civil Procedure). In case the conservatory measures are granted before proceedings on the merits have been lodged, the court can specify time within which proceedings should be commenced (article 693 Code of Civil Procedure).

In case of an abusive application by a creditor, which may have led to a conservatory seizure of more debtor's assets than needed to satisfy the claim, the debtor can ask the court to limit the conservatory seizure to specified assets (articles 702 III, 692 III, 951 II Code of Civil Procedure)¹⁷.

PRIVILEGES OF THE STATE

A hot issue is that which concerns the procedural privileges of the State. According to the law, the State and other legal persons of public law receive a special procedural treatment in various issues. Although this fact has been criticized by the theory of Greek Procedural Law and Greece has been condemned more than once by the European Court for Human Rights, the law has not been changed.

The Plenary of Areios Pagos decided in two cases¹⁸ that the specific procedural privileges that the Agricultural Bank of Greece had¹⁹, were violating the constitutional principle of equality (article 4 Constitution), since they were putting the Agricultural Bank's creditors in disadvantageous position, compared with that of other banks' creditors.

LAW REFORMS OF THE LAST 20 YEARS

During the last 20 years there have been reforms of the law of enforcement, not all of which could be considered as needed or really efficient. However, some of them really were beneficent to the institution of enforcement of judgments.

Law 2298/1995, "sealed" by the eminent jurist, late Emer. President of Areios Pagos, Stefanos Matthias, had as principal aims, on the one

17 E. N. Moustaira, *Greece*, in: Enforcement of judgments (co-ordinator: W. Kennett), *European Review of Private Law* 1997, 321-428 (401-407).

18 Areios Pagos (Plenary) 24/2006, *Elliniki Dikaïosyni* 2007, 97 & Areios Pagos (Plenary) 25/2006, *Elliniki Dikaïosyni* 2007, 99.

19 Things have changed, since in 2013 the Agricultural Bank was absorbed by a private bank, Piraeus Bank.

hand to obstruct the abusive handling by the enforcement agents and on the other hand to accelerate the enforcement procedure and make it more efficient.

An important step to the acceleration of the enforcement procedure was the establishment of the corrective caveat (article 954 IV Code of Civil Procedure) and its separation from the general caveat against the execution (article 933 Code of Civil Procedure)²⁰.

Law 3714/2008 brought radical changes to the public auction procedure.

The recent procedural reform by the Law 3994/2011 had as result lenient interventions to the enforcement of judgments. Among the most important are the abolishment of imprisonment for commercial debts and the considerable increase of the amount of the monetary penalty.

The protection of the weak parties constitutes a steady aim of the contemporary legislator²¹.

ENFORCEMENT OF FOREIGN JUDGMENTS

In order that a foreign judgment be declared enforceable, the defeated party must not have been deprived of the right to defense and generally of the right to participation in the trial, except if this deprivation is based on a law provision that is also valid for the citizens of the State a court of which has issued the judgment (article 323 no 3, 905 par. 3 Code of Civil Procedure).

This requirement refers to those cases, where a party files an application asking for a foreign judgment issued abroad *ex parte* to be enforced²². The declaration of enforceability of the *ex parte* judgments cannot be excluded, although it does create problems.

20 N. Nikas, Forty five years of application of the Code of Civil Procedure. Enforcement of judgments (past, present and future) [*in Greek*], *Review of Civil Procedure* 2012, 265, 267.

21 N. Nikas, Forty five years of application of the Code of Civil Procedure. Enforcement of judgments (past, present and future) [*in Greek*], *Review of Civil Procedure* 2012, 268, mentions that this is really a duty created by the nature and the function of law itself – *Lex secunda plebis*. Nevertheless, he is worried that the extreme leniency towards the judgment debtor might not only weaken the legal protection of the judgment creditor, but also damage the debtor him/herself, by augmenting his/her debt and perpetuating his/her “captivity”.

22 P. Gesiou-Faltsi, *International enforcement of judgments* [*in Greek*], Athens – Thessaloniki 2006, 104-105; A. Anthimos, *Recognition and enforcement of ex parte foreign judgments. Internal law – Bilateral and multilateral conventions – European Community Law* [*in Greek*], 2002, 22 ff.

ORDRE PUBLIC

In Greek law, the control of whether a party was not deprived of the right to defense, before the foreign court, is complemented with the *ordre public* control. It is pointed out that the recognition of foreign *ex parte* judgments is possible, provided that “the foreign judge does not appear as having tried inconsiderately all those that had a legal interest to be heard, either nationals of the State or not”²³, since in that case the judgment would be contrary to the *ordre public*²⁴.

A basic requirement for a foreign judgment to be declared enforceable, is that it must not be contrary to the *bonos mores* or the *ordre public* of the State of enforcement (articles 323 no 5, 905 pars. 2-3 Code of Civil Procedure). It is not possible to deny the recognition or the declaration of enforcement of a foreign judgment, on the ground that it would be contrary to the *ordre public* of a third State.

Ordre public is an indeterminate concept, which becomes determinate in concrete cases and not beforehand. According to the Greek authors, followed by the case-law, a foreign judgment is contrary to *ordre public* when its enforcement would cause circumstances incompatible to the moral, state or economic order of Greece²⁵. The reasons, for which a foreign judgment would be contrary to *ordre public*, could be either of procedural or of material law²⁶ - *verfahrensrechtlicher ordre public* and *materiell-rechtlicher ordre public*.

1. For a foreign judgment to be considered as contrary to the Greek procedural *ordre public*, it is not enough that procedural principles of the Greek procedural law have been violated; the violated principles must be the fundamental ones of a State of law, concerning the civil procedure and the infrastructure of the Greek procedural *ordre public*²⁷. Such fundamental principles are the principle of the judge’s independence and impartiality,

23 G. Maridakis, *The enforcement of foreign judgments [in Greek]*, 3d edition, Athens 1970, 64.

24 Ath. Pouliadis, *Die Bedeutung des deutsch-griechischen Vertrages vom 4.11.1961 für die Anerkennung und Vollstreckung deutscher Entscheidungen in der griechischen Praxis*, Athen-Komotini 1985, 29.

25 P. Gesiou-Faltsi, *International enforcement of judgments [in Greek]*, Athens – Thessaloniki 2006, 120.

26 K. Kerameus, *Improving the Procedures for the Recognition and Enforcement of Foreign Judgments and Arbitral Awards*, *Studia Juridica* III, 1995, 455.

27 P. Faltsi, *International enforcement of judgments [in Greek]*, Athens – Thessaloniki 2006, 122.

the principle of hearing of both sides²⁸, the principle of the parties' equal treatment, the principle of due process, etc.

According to the majority opinion in Greek legal theory, rather followed by case-law too, the respondent abroad may claim before the Greek court which has to decide on the enforcement of a foreign judgment that has violated fundamental rules of the Greek procedural law, that it is contrary to the Greek *ordre public*, only when this default could not have been invoked by appeal before the foreign courts.

The fact that issues of the law of evidence are treated differently abroad, does not constitute by itself a reason for non-recognition of a foreign judgment, considering it as contrary to the Greek procedural *ordre public*.

For example, the fact that the foreign court took into account testimonies of witnesses who, according to the Greek procedural law would be exempted, or the fact that it did not take into account testimonies by witnesses who, according to the Greek procedural law would not be exempted, cannot be an obstacle to the declaration of enforcement of a foreign judgment, claiming that it would be contrary to the Greek *ordre public*. Neither the different distribution of the burden of proof, nor the valuation of evidence according to procedural rules that are different to the respective Greek procedural rules, could lead to that result²⁹.

Likewise, when a foreign judgment was issued, based on evidence brought during the pretrial discovery, according to the Greek theory it should not be denied enforcement in Greece.

Concerning the specific issue of whether a foreign judgment which does not state the grounds that led to it, can be declared enforceable in Greece or should be considered as contrary to public order, Greek authors support both answers³⁰, while Greek case law is rather positive, except in cases where non stating the grounds could cover a deprivation of the right to defense or a settlement of the dispute that would be contrary

28 A. Anthimos, Der prozessuale ordre public bei der Anerkennung und Vollstreckung ausländischer Gerichtsentscheidungen nach deutschem und griechischem Zivilprozessrecht und nach dem Europäischen Gerichtsstands- und Vollstreckungsübereinkommen, in: *Harmonisierungsprobleme im Europäischen Wirtschaftsrecht* (Hrsg. A. Anthimos/M.-A. Delp/H. Harazim), 2000, 11, 67-75.

29 P. Gesiou-Faltsi, *International enforcement of judgments [in Greek]*, Athens – Thessaloniki 2006, 125.

30 G. Maridakis, *The enforcement of foreign judgments [in Greek]*, 3d edition, Athens 1970, believed that in such a case, there would be an obstacle to the enforcement of the foreign judgment. Other authors believe that the judgment could be enforced.

to the Greek *ordre public*. The basic argument in favor of this opinion is that, although the grounds of the courts' judgments are constitutionally guaranteed (article 93 par. 3 Constitution 1975/1986/2001), the judgments that do not state the grounds are not nonexistent (article 313 Code of Civil Procedure), on the contrary they are enforceable except if legal remedies have been lodged.

2. The recognition or the enforcement of a foreign judgment is not excluded in case the foreign judge applied a different substantive law from the one that would be applicable according to the Greek private international law rules. The declaration of the enforceability of a foreign judgment is only obstructed when the concrete rule applied by the foreign judge is incompatible to the fundamental principles of the Greek legal order. According to the Areios Pagos case-law³¹, a foreign judgment is contrary to the Greek *ordre public* when its consequences are directly contrary to the valid in Greece fundamental principles, concerning the social, moral, economic, political and other common concepts that regulate the lives of people in the Greek territory.

A foreign judgment could be considered as contrary to the Greek material public order and thus non-enforceable, if for example its consequences violate individual rights protected by provisions of the Greek Constitution or if it condemns the defeated party to do something that according to the Greek law would be criminal.

Closing my text let me add that as far as the enforcement of judgments in the frame of EU Regulations is concerned, the situation in Greece is identical with that in every Member State of the European Union.

31 Areios Pagos 108/2001, *Dike* 32 (2001) 765, comments by K. Beys, 768 ff.