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Interim and Substantive Difficulties in Enforcement

اشكالات التنفيذ الوقتية والموضوعية

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Article abstract:

The stage of compulsory enforcement constitutes a natural extension of the judicial process, as ejudicial protection of the creditor's right is not realised unless the judicial decision is effectively implemented in practice. To ensure the integrity of this stage and safeguard the parties' rights, the Algerian legislature has assigned a fundamental role to the judicial officer, who is responsible for drafting official records documenting all enforcement procedures and attesting to their execution in accordance with the law. Nevertheless, the enforcement process is confronted with a range of interim and substantive impediments that make compulsory enforcement difficult and cause the principle of balancing the parties' interests in enforcement to oscillate between competing considerations.

Keywords: *Enforcement impediments; attachment; compulsory enforcement; substantive disputes;*

ملخص المقال :

تُعد مرحلة التنفيذ الجبري امتدادًا طبيعيًا للعملية القضائية، إذ لا تتحقق الحماية القضائية لحق الدائن إلا بوضع الحكم القضائي موضع التطبيق العملي. ولأجل ضمان سلامة هذه المرحلة وحماية حقوق الأطراف، أسند المشرع الجزائري دورًا أساسيًا للمحضر القضائي الذي يتولى تحرير محاضر رسمية تُوثِّق جميع إجراءات التنفيذ وتُثبت وقوعها وفقًا للقانون الا ان عملية التنفيذ تعترضها مجموعة من الاشكالات الوقتية والموضوعية تجعل عملية التنفيذ الجبري صعبة وتجعل مبدا الموازنة بين اطراف التنفيذ يتارجح بين كفتين .

كلمات مفتاحية:إشكالات التنفيذ ;الحجز ;التنفيذ الجبري ;منازعات موضوعية.

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Introduction

The notion of compulsory enforcement is premised on the assumption that the holder of the enforceable instrument is also the holder of the right itself, entitling him to initiate enforcement procedures without the need to obtain a new judicial judgement. This assumption, however, may prove inconsistent with reality, as the enforceable instrument may be defective or fail to satisfy the legally prescribed conditions, or enforcement may be carried out against property that is not legally subject to attachment or that does not, in fact, belong to the debtor. To balance the creditor's interest in enforcing the instrument and satisfying their rights with the debtor's or third parties' interest in preventing unjust or unlawful enforcement, enforcement disputes have emerged as a legal mechanism to regulate compulsory enforcement procedures and ensure their fairness.

Within this framework, enforcement disputes are classified, according to the nature of the ruling sought, into substantive disputes and interim disputes. Jurisdiction over interim enforcement difficulties is vested exclusively by the President of the Court, in his capacity as the enforcement judge. Substantive disputes constitute ordinary contentious proceedings in which the substance of the right or the validity of the enforceable instrument is examined; they are governed by general procedural rules and are brought before ordinary courts.

The study of interim and substantive enforcement difficulties is highly important, as they represent some of the most frequently raised disputes before the judiciary, given their direct impact on the progress of enforcement, whether through temporary suspension or determination of their substantive legality. Moreover, such difficulties constitute an effective means of preventing harm that may result from unlawful or noncompliant enforcement, making familiarity with them a fundamental necessity for researchers, students, and legal practitioners alike.

This study aims to clarify the legal nature of these difficulties, determine their conditions, and establish the procedures followed before the competent authority, as well as the legal effects of the judgments rendered thereon. Accordingly, it distinguishes between interim difficulties, which concern the conduct of enforcement as a matter of urgency, and substantive difficulties, which address the existence of the right itself or the extent to which the enforceable instrument is legally valid.

Therefore, the following research problem has been formulated: What are the interim and substantive difficulties in enforcement?

In addressing this problem, reliance has been placed on the descriptive method of presenting the rules governing interim and substantive difficulties, identifying the conditions for their admissibility, and explaining the procedures prescribed for bringing them. The analytical method is employed to examine the effect of increasing difficulty, as well as the judgment rendered thereon.

Section One: Interim Difficulties in Enforcement

The Algerian legislature has not defined interim enforcement difficulties, nor has it established a criterion for distinguishing such disputes from other types of disputes. It is well known that the Algerian legislature avoids providing definitions to avoid restricting the judge's authority to interpret the text or the law.

Although the legislature has employed the term “difficulties in enforcement” in Articles 631–635 of the Code of Civil and Administrative Procedure, its meaning has not been clarified, leaving this task to legal scholarship.

Accordingly, interim difficulties in enforcement may be defined as those disputes that arise in the course of enforcing judicial judgments and enforceable instruments before enforcement has been completed, where the relief sought is of an interim nature that does not affect the substance of the right, such as temporarily staying for enforcement or allowing it to proceed on a provisional basis.

Subsection One: The Conditions Required for the Admissibility of Difficulty and the Procedures for Bringing It

Branch One: The Specific Conditions for the Admissibility of Difficulty

First Condition: That the Difficulty Be Raised Before the Completion of Enforcement

The difficulty must be increased before enforcement is completed, as its purpose is to temporarily suspend enforcement. If enforcement has already been completed, there is no interest in ruling either to stay enforced or to allow it to continue, and the application will not be admissible, as it would lack meaning and subject matter once enforcement has been completed. The existence of an interest in increasing difficulty, therefore, requires that it be submitted prior to the completion of enforcement, as a difficulty is not admissible after enforcement has been thoroughly carried out (Khellassi,2021).

Second Condition: That the Relief Sought Be of an Interim Nature

The request submitted with difficulty must be for an interim measure. A difficulty, by virtue of being an interim dispute, acquires this character only if the subject matter of the request is a ruling ordering an interim measure. Accordingly, a request by the objector, that is, the party raising the difficulty for a declaration of the nullity of enforcement or a ruling that enforcement is impermissible, does not constitute a difficulty in enforcement, as such requests relate to the substance of the dispute. The requirement that the relief sought in a difficulty be of an interim nature necessarily entails that the merits of the action or the substance of the right must not be affected; instead, a ruling is issued temporarily staying enforcement pending adjudication of the substance of the dispute or the underlying right, namely, the nullity of the procedures (Khellassi,2021).

Branch Two: Procedures for Raising an Interim Difficulty

Article 631 of the Code of Civil and Administrative Procedure provides that, where a difficulty arises in the enforcement of one of the enforceable instruments provided therein, the judicial officer shall draw up a record of the difficulty and summon the parties to submit the difficulty to the President of the Court, whose territorial jurisdiction enforcement is being carried out, by way of urgent proceedings.

Article 632 further provides that an action increasing the degree of difficulty in enforcement may be brought by the beneficiary of the enforceable instrument, the person against whom enforcement is directed, or a third party with an interest in the presence of the judicial officer charged with enforcement.

If the judicial officer refuses to draw up a record of the difficulty raised by one of the parties, any of them may apply to stay enforcing to the President of the Court by way of an urgent action brought from hour to hour, while summoning the judicial officer and the other parties to appear before the President (Khellassi,2021).

Accordingly, the legislature has provided two avenues for raising difficulties in enforcement:

The first avenue is to increase the difficulty before the judicial officer at the time of enforcement (Khellassi,2021).

The second avenue is resorted to where the judicial officer refuses to draw up a record of the difficulty raised by one of the parties.

Subsection Two: The Effect of Raising a Difficulty in Enforcement and the Judgment Rendered Thereon

Branch One: The Effect of Raising Difficulty

The legislature has provided that the mere raising of a difficulty before the judicial officer results in the suspension of enforcement by operation of law. The same principle applies to an application for a stay of enforcement raised by one of the parties; that is, enforcement is maintained until the President of the Court rules on the difficulty or application for a stay of enforcement, as provided in Article 632, paragraph 3, of the Code of Civil and Administrative Procedure.

There is no doubt that excessive suspension of enforcement merely upon the submission of any difficulty, until a judgment is rendered either rejecting or accepting it, leads to procrastination in enforcement. For this reason, comparative law distinguishes between the first and second difficulties, assigning a specific legal effect to each. (Khellassi,2021) .

Article 632, paragraph 3, of the Algerian Code of Civil and Administrative Procedure provides that enforcement procedures are suspended merely upon the submission of any difficulty or application for a stay of enforcement. This has opened the door to abuse and allowed judgment debtors to obstruct enforcement by submitting a new difficulty whenever a previous difficulty is rejected, thereby undermining the effectiveness of judgments, decisions, and notarised contracts. Consequently, it has become necessary to amend this provision by stipulating that enforcement shall not be suspended upon the submission of any new difficulty, except upon a ruling of the President of the Court (Algeria, Law No. 08–09, 2008).

Moreover, with respect to Article 635 of the Code of Civil and Administrative Procedure, which prohibits the introduction of a second action after a ruling has been issued on the basis of a difficulty in enforcement or an application for a stay of enforcement, legal scholarship considers that it should be deleted, as it does not affect the suspension of enforcement and does not, in practice, prevent the initiation of new actions (Khellassi,2021) .

The permissibility of the judicial officer continuing specific measures after a difficulty has been raised may be accomplished only by way of precaution and without completing enforcement prior to the judge's ruling. He may not complete enforcement in a single step, such as delivery or eviction. When enforcement consists of multiple stages, such as attachment followed by sale, he may proceed with the attachment but not with the sale to protect the interests of the party seeking enforcement. Any measure undertaken by the judicial officer during the period in which the difficulty is pending is subject to the supervision of the urgent matters judge: if a ruling is issued to order the continuation of enforcement, the measures taken are confirmed; if a ruling is issued to order the suspension of enforcement, such measures are deemed never to have occurred, since a judgment staying enforcement extends to what has been carried out during the period between the submission of the application and the ruling thereon (Mustafa,1980).

Branch Two: Ruling on Difficulty

The President of the Court examines enforcement disputes on an interim basis in his capacity as the judge of urgent matters, in accordance with Article 630 of the Code of Civil and Administrative Procedure. His powers are those of the urgent matters judge, and he adjudicates the difficulty in accordance with the general rules governing urgent actions, without prejudice to the substance of the right. Consequently, his role is confined to determining whether the apparent state of the documents and the parties' submissions justifies staying in enforcement or allowing it to proceed; he may not rule on substantive matters such as the nullity of procedures, the nonexistence of the debt, its extinction, or the discharge of the debtor.

He may examine the documents in a summary and expeditious manner that does not affect the substance of the right, solely to assess the seriousness of the dispute and to determine which of the parties is more deserving of interim protection. He may not interpret judgments or contracts subject to enforcement but must enforce them as they stand. If the interest of the objector prevails, he orders the suspension of enforcement for a period not exceeding six months from the date on which the action is brought; if he finds no justification, he rules to dismiss the difficulty and to continue enforcement.

About the enforcement of the ruling issued on the difficulty:

•If the difficulty is dismissed, enforcement immediately resumes its normal course without the need to notify the objector, since enforcement is based on the enforceable instrument, not on the ruling on the difficulty, which merely declares the right of the party seeking enforcement and removes the obstacles thereto.

•If a ruling is issued staying enforcement, it operates prospectively by preventing the continuation of enforcement temporarily, bearing in mind that enforcement has already been suspended by operation of law from the moment the difficulty was submitted.

The ruling on the difficulty is, by its nature, an interim ruling; it does not affect the substance of the right and acquires only provisional authority. It is not subject to any form of appeal pursuant to Article 633 of the Code of Civil and Administrative Procedure.

Section Two: Substantive Difficulties in Enforcement

The Algerian legislature has not defined substantive enforcement difficulties, nor has it defined interim difficulties. Accordingly, it is necessary to refer to doctrinal definitions. Among the most significant of these is the definition according to which substantive enforcement disputes are those in which one of the parties to enforcement or a third party seeks the issuance of a substantive ruling in enforcement, that is, a ruling on the permissibility or impermissibility of enforcement, its validity or invalidity, its fairness or unfairness, or any of its procedures (Abou Atiya Heikal,2008).

Subsection One: Raising the Substantive Difficulty in Enforcement

Branch One: The Time for Raising Substantive Difficulty

Legal doctrine is unanimous that an action increasing substantive difficulty may be brought either before the commencement of compulsory enforcement, during its execution, or after its completion.

First: Raising the Substantive Difficulty Before the Commence of Enforcement

Once a creditor obtains an enforceable instrument enabling him to initiate compulsory enforcement procedures, substantive difficulty may arise before he commences enforcement. This may challenge the validity of the enforceable instrument, the standing of the party seeking enforcement, or the failure to undertake the preliminary steps of enforcement, among other grounds. Likewise, a third party who apprehends that enforcement may be directed against his property may face difficulty before enforcement commences as a precaution against potential harm (Hindi,2006).

Second: Raising the Substantive Difficulty During the Enforcement Process

A substantive difficulty may also arise during compulsory enforcement and in the course of its procedures, such as when the standing of the party seeking enforcement ceases to exist or when the property subject to enforcement perishes (Bacha Omar,2017).

Third: Raising the Substantive Difficulty After the Completion of Enforcement

It is likewise permissible to increase substantive difficulty after the completion of enforcement for the purpose of invalidating the enforcement procedures, challenging the validity of distribution procedures, or bringing an action for the nullity of a compulsory sale. This stands in contrast to interim difficulties in enforcement, which are not admissible after enforcement has been completed (Hosni,2006).

Branch Two: Subject Matter of Substantive Difficulties in Enforcement

First: Disputes Concerning the Validity of Enforcement

Disputes Concerning the Validity of the Enforceable Instrument

The difficulty may be related to denying the enforceable force of the instrument, whether it concerns a judgment or any of the other enforceable instruments referred to in Article 600 of the Code of Civil and Administrative Procedure, or to alleging the nonexistence or nullity of the judgment (such as arbitral awards),

or the lapse of an order on petition sought to be enforced owing to its nonsubmission within three months, as required by Article 313, paragraph 3, of the Code of Civil and Administrative Procedure (Bacha Omar,2017).

Disputes Concerning Preliminary Measures of Enforcement: These measures may be confined to two essential procedures: notification of the enforceable instrument and the formal demand for performance (Chahatt, Al-Arabi, & Saqar, 2010, p. 10).

Although these preliminary measures are not considered part of compulsory enforcement procedures, it is nevertheless permissible to raise a dispute on the basis of the failure to observe one of them, as provided in Articles 602 and 613 of the Code of Civil and Administrative Procedure. These measures consist of formally requiring the person against whom enforcement is sought to comply with the terms of the enforceable instrument within a maximum period of 15 days (Oulhadj, 2016).

Disputes Concerning the Elements of Enforcement:

These relate to the parties to enforcement, the subject matter of enforcement, and its form.

Disputes Concerning the Parties to Enforcement:

Such disputes include challenges related to the standing, interest, or legal capacity of one of the parties or allegations concerning acts performed by the judicial officer outside the scope of his territorial jurisdiction.

Disputes Concerning the Subject Matter of Enforcement:

A difficulty may relate to the property subject to enforcement, as it is not subject to enforcement, as addressed in Article 636 of the Code of Civil and Administrative Procedure.

Disputes Concerning the Form of Enforcement:

These concerns concern the set of procedures the law requires to be followed to carry out enforcement. The legislature has imposed specific procedural methods that must be observed. Where the subject matter is not a sum of money but rather the performance of an act or the delivery of a specific object, the method of direct enforcement must be followed. When the subject matter is a monetary sum, the method of attachment must be followed.

Second: Disputes Concerning the Fairness of Enforcement

These are disputes that revolve around the substantive right for which or by virtue of which enforcement is pursued. Disputes concerning the validity of enforcement differ from those concerning the fairness of enforcement, as a ruling in the latter gives rise to res judicata with respect to the substantive right and precludes the party seeking enforcement from initiating it anew with respect to the same right. In contrast, in disputes concerning the validity of enforcement, a ruling declaring enforcement null is confined to the procedures themselves. This does not prevent the party from seeking enforcement from lawfully and correctly renewing the procedures.

In conclusion, substantive difficulties in enforcement generally concern the validity or invalidity of enforcement, or the enforceable instrument, where the aim is to deny its enforceable force; that is, they are

directed at the right to enforcement itself. The relief sought therein is a judgment determining the fate of enforcement by declaring it invalid or valid, lawful or unlawful, fair or unfair (Oulhadj, 2016, p. 12).

Branch Three: Applications of Substantive Difficulties in Enforcement

Reference will be made to the principal actions related to substantive difficulties in enforcement provided for in the Code of Civil and Administrative Procedure, by way of, for example, and not limitation:

First: Action for recovery

The action for the recovery of attached movable property is an action brought by a third party who claims ownership of the attached movables or any right relating thereto, seeking a declaration of his ownership of such movables or the recognition of any right relating to them and the lifting of the attachment imposed thereon (Abou El-Wafa, 1980).The Algerian legislature has regulated this action in Article 716 of the Code of Civil and Administrative Procedure. Although this dispute is substantive in nature, jurisdiction to hear it has been conferred upon the urgent matters judge by way of exception to the general rule.

Second: Action for the establishment of ownership

This is a substantive dispute caused by a third party claiming ownership of immovable property against which enforcement has commenced, after enforcement has begun and before its completion. The claimant seeks a declaration of his right in the immovable property and the nullity of the enforcement procedures (Chahatt & Saqar, 2010).

The President of the Court decides it in urgent proceedings within a maximum period of thirty days from the date of registration of the action. If the date fixed for sale falls before the President of the Court has ruled on the action, an application for a stay of sale must be submitted by petition to the President of the Court at least three days prior to the sale hearing.

Third: Action for Lifting a Conservatory Attachment

This action is provided for in Article 633 of the Code of Civil and Administrative Procedure. It is an action brought by the debtor whose property has been attached before the urgent matters judge, seeking the lifting of the conservatory attachment, where the creditor has failed to bring an action to confirm the attachment within fifteen days from the date on which it was imposed (Badawi, 1996).

Fourth: In the Context of the Distribution of Proceeds Obtained from Enforcement

Where the sums of money obtained from enforcement are insufficient to satisfy the claims of all attaching creditors who have intervened in the attachment, the judicial officer and the auctioneer are required to deposit them with the registry of the court. Thereafter, the President of the Court prepares a provisional list for the distribution of the sums among the creditors. One of the creditors may object to the provisional distribution list, and such an objection constitutes a substantive difficulty in enforcement aimed at challenging the validity of one of the debts or modifying his share of the proceeds of enforcement (Chahatt & Saqar, 2010)

Fifth: The Action for the Nullity of the Compulsory Sale (Judgment of the Award of the Auction)

The procedures of the public auction sale of the attached immovable property are void, such as where the sale is conducted in a nonpublic session, a person is unlawfully prevented from entering it, a bid is accepted from a person legally prohibited from bidding, or for other similar reasons, the question arises as to whether it is permissible to challenge the judgment awarding the auction by means of an action for nullity.

Article 795 of the Code of Civil and Administrative Procedure provides that no appeal may be brought against the judgment awarding the auction by any of the ordinary or extraordinary means of appeal, since the Algerian legislature reserves such appeals for judicial judgments, resolving a judicial dispute. This does not apply to the judgment awarding the auction, which does not adjudicate a dispute but merely constitutes a record evidencing the procedures carried out during the sale session and the fact that the auction has been awarded to the successful bidder (Hassanin,2006).

Subsection Two: The Competent Authority and the Effects of the Judgment Rendered Thereby

Branch One: Subject-Matter and Territorial Jurisdiction of the Competent Authority

First: Subject-Matter Jurisdiction in Relation to Substantive Difficulties in Enforcement

As a general rule, actions related to substantive difficulties in enforcement are adjudicated by the judge of the merits, insofar as they constitute purely substantive actions aimed at overturning the enforcement process by means of a final substantive judgement rendered on the underlying right. However, the Algerian legislature, in the new Code of Civil and Administrative Procedure, has departed from this general rule by enacting several exceptions scattered throughout the Code, thereby conferring jurisdiction to decide actions concerning substantive difficulties in enforcement on the urgent matters judge. Actions for recovery, establishment of ownership, annulment of enforcement, and lifting of attachment are all substantive in nature; nevertheless, the legislature has entrusted their adjudication to the urgent jurisdiction. In so doing, the Algerian legislature has introduced exceptions to the general rule that has no equivalent in comparative law to enhance effectiveness and expedition, thereby avoiding prolonging the enforcement process (Zoubeiri, n.d.).

It would have been more appropriate for the legislature to entrust substantive enforcement disputes to the judge of the merits while requiring that they be adjudicated in accordance with the rules governing urgent proceedings, as is the case with actions for the division of estates pursuant to Article 183 of the Family Code. Judgments rendered by the Family Affairs Division of the court concerning the division of estates are judgments issued by the judge of the merits. However, they are subject to the rules governing urgent jurisdiction (Mahami, 2011).

Second: Territorial Jurisdiction in Relation to Substantive Difficulties in Enforcement

The Algerian legislature has established a general rule of territorial jurisdiction, under which jurisdiction lies with the judicial authority within whose territorial scope the defendant's domicile is located. If the defendant has no known domicile, jurisdiction reverts to the judicial authority, whose territorial scope his last domicile was located. Where a domicile has been elected, territorial jurisdiction lies with the judicial authority, whose territorial scope the elected domicile is located, unless the law provides otherwise. In addition to this general rule, the Algerian legislature has provided for exceptions that confer territorial jurisdiction on a specific court to hear the dispute. The court is not concerned with territorial jurisdiction unless the parties raise it, as Article 46 permits a departure from the general rule by providing that: "The parties may appear before the judge by choice, even if he lacks territorial jurisdiction. " (Maafi, 2011, p. 38)

Branch Two: The Nature of the Judgment Rendered

First, the Judgment in an Action Raising a Difficulty Issued by the Judge of the Merits

Substantive difficulties in enforcement are substantive actions to which the general rules applicable to judicial actions apply, both in terms of the procedures for bringing them and the effects resulting from their institution, as well as the judgement rendered therein. The judgment issued in an action concerning substantive difficulties in enforcement acquires the authority of res judicata. It is subject to appeal, as it involves a determination of the underlying right and is capable of resolving the dispute. Moreover, the court that rendered it is prohibited from departing from it, as its jurisdiction is exhausted upon its issuance, saving for the correction of material errors related to it (Bacha Omar, 2017).

Second, the Judgment in an Action Raising a Difficulty Issued by the Urgent Matters Judges

The substantial difficulty faced before the urgent jurisdiction is confined to some instances provided by the Algerian legislature and constitutes a departure from the general rule. The Algerian legislature has imposed constraints on the urgent matters judge in adjudicating some of these actions, as is the case, for example, with the action for recovery, which Article 717 of the Code of Civil and Administrative Procedure requires being decided within fifteen days from the date of registration, and the action for establishment of ownership, which Article 772 of the same Code requires being decided within a maximum period of thirty days from the date of registration of the action (Mahami, 2011).

With respect to the effects of the issuance of the urgent order resolving the substantive difficulty, it undoubtedly acquires the authority of res judicata, in accordance with the provisions of Article 300 of the same Code. (Dallanda, 2009).

Conclusion:

In conclusion, addressing the subject of enforcement difficulties with clarity and precision is not an easy task, given the complexity and intricacy of procedural law in general and enforcement procedures in particular, owing to the multiplicity and divergence of their governing rules.

This is what has been attempted through this modest effort: the concept of difficulties in compulsory enforcement has been examined, as have the procedural aspects of actions raising such difficulties, which are addressed in greater detail in the Code of Civil and Administrative Procedure. That Code has laid down several rules, the most significant of which may be summarised as follows:

1. The legislature's departure from the general rule assigns jurisdiction over substantive enforcement difficulties to the judge of the merits, with respect to the action for recovery, the action for establishment of ownership, the action for annulment of enforcement, and the action for lifting attachment, all of which are substantive actions but whose adjudication the legislature has entrusted to the urgent jurisdiction.
2. The determination of a maximum period for adjudicating the difficulty brought before the court, namely, fifteen days from the date on which the action is brought.

3. Where an action increasing difficulty or an application for a stay of enforcement is upheld, the President of the Court orders the suspension of enforcement for a limited period not exceeding six months from the date of the action.
4. When an application for a stay of enforcement is rejected, the claimant is ordered to pay a civil fine of not less than 30,000 Algerian dinars, without prejudice to the civil compensation that may be awarded to the defendant.

Accordingly, the legislature has imposed a sanction on the party seeking a stay of enforcement when its application is rejected, thereby preventing actions whose sole purpose is to obstruct enforcement.

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