About the Effects of Sustaining the Inadmissibility Exception for a Counterclaim

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Abstract: In this paper we submitted to discussion the solution that a court can give when finding out, upon research made (by default or upon inadmissibility exception bringing up by the interested party) on the admissibility conditions for a counterclaim, that requirements provided by art. 209 in the Civil Procedure Code are not fulfilled. Our study was generated from a practical situation in which the court ordered for forwarding a counterclaim to random allocation although the same court had sustained the inadmissibility exception for that specific counterclaim. Thus, we have shown that a counterclaim dismissed as inadmissible, can not be analyzed in terms of the conditions for admissibility of a main demand, with the consequent submission to the random distribution.

Keywords: counterclaim; admissibility conditions; the order court for forwarding the counterclaim; disjunction action

1. Introduction

The legal issue raised for debate concerns the solution that a court can give when finding out, upon research made (by default or upon inadmissibility exception bringing up by the interested party) on the admissibility conditions for a counterclaim, that requirements provided by art. 209 in the Civil Procedure Code are not fulfilled.

Our analysis starts from a real case when the court ordered for forwarding a counterclaim "*and its attached writings (...) to the registrar's office at the 1st Civil*

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Department to random allocation" although the same court had sustained the inadmissibility exception for that specific counterclaim. [1]

Our intercession is hence meant to find an answer to the following question: Is such a solution a legal one?

Obviously, the answer to such a question implies:

2. Analysis of the Law Enactment Ruling on the Counterclaim Content

a) According to art. 209, align. 1 in the Civil Procedure Code, "*should the culprit have claims related to the complainant's claim, coming out from the same legal relationships or in direct connection to the claim, the culprit* ***can*** *submit a counterclaim*".

Out of the text above, it comes out that such a claim cannot be submitted when:

- the claims are not coming out from the same legal relationship;
- the claims are not closely related to the complainant's claim.

We do notice – without getting into details – that although the admissibility condition can be easily checked up for the first requirement, the judge being in position to decide whether the claims are founded on the same legal relationship as the main claim, a great amount of subjectivism is involved when studying the admissibility condition related to the second requirement because:

- the culprit's claims must also be related to the complainant's claim without any indication on the connection from the legislator.
- this connection must be closed without a measuring criterion specified for the connection closeness by the legislator.

Back to the case on debate, no controversy occurred on whether a connection exists between the main claim and the counterclaim: the culprit has not demonstrated a consistency between the counterclaim and the main claim after the inadmissibility exception raising either.

Therefore, the court had to sustain the inadmissibility exception for the counterclaim is grounded, requirements of art. 209 align. 1 in the Civil Procedure Code not being fulfilled.

[1] See Civil Sentence no. 306/205 pronounced by Galati Court in case no. 4019/121/2014. That sentence was appealed, the appeal was upheld by Decision. 128/2015 of the Court of Appeal Galați.

b) Sustaining the inadmissibility exception for the counterclaim, the court ordered for "*forwarding the counterclaim and its attached writings to the registrar's office at the 1st Civil Department to random allocation".*

When grounding such a solution, the court argued that "*in such a context, we consider that the inadmissibility invoked and previously studied concerns solely the procedural context where the respective counterclaim was submitted, and is not a definitive status for such a request that could (?!?) be studied as a free-standing claim*."

Such a solution made us to briefly consider the following:

- the inadmissibility exception and the effect of such an exception sustaining;
- identification of other situations when the court forwarded the claim for random allocation after appreciating the claim as unsustainable, because of the procedural context wrongly chosen.
- regarding the first situation, doctrine preceding the New Civil Procedure Code showed that "inadmissibility situations are in fact examples of procedural exceptions **having in common a specific solution to be stated by the court**, in case of their sustaining, that of rejecting the claim as inadmissible (...), the inadmissibility is not concerning the exception, but the effect to be induced by the same, a specific modality of rejecting the claim."[1] (Boroi, 2001, p. 348) (Popescu, 1987, pp. 47-52 quoted by Deleanu, 2005, p. 192)

[1]. The prohibition contained in the adding *nemo auditor propriam turpitudinem allegans* could be a "subjective" rank inadmissibility. Exceptions deducted from art. 111 in the Civil Procedure Code, claims wrongly addressing the court, disqualifications, wrong use of remedy actions, res judicata etc. could be "objective" rank inadmissibility situations. Inadmissibility situations could be considered as defending modalities with a mixed legal nature: they differ from the defending on facts and are much close to the procedural exceptions in term of their subject; meanwhile, they differ from the procedural exceptions and are much close to the exceptions raised on facts in terms of their results. (For some critical remarks on such an opinion, see V. M. Ciobanu, G. Boroi, *Issues Regarding the Procedural Exceptions*, in "Law" magazine, 1990, no. 9-12, pages 147 – 154; V. M. Ciobanu, quoted work, II, pages 120 – 124; M. Tăbârcă, *Procedural Exceptions in the Civil Case*, "Rosetti" Pyblishing House, Bucharest, 2002, page 78 and the next)., Idem, I. Deleanu, quoted work, page 192, footnote 3. The last author shows that "the inadmissibility solution must not be taken for the technical modality to reach such a solution (for example, inadmissibility of the claim as the preliminary mandatory procedure has not been fulfilled, inadmissibility of recourse to recourse, inadmissibility of the appeal against a conclusion which can only be contested paired with the sentence given for the facts, inadmisibility of a remedy action exerted by a person who had no quality in the legal procedures, should the law provide otherwise)".

In the context studied, such sustaining, which was not disputed, is not to be verified as, although a counterclaim was found as unsustainable, it was studied in relation with the admissibility requirements for a main claim and was consequently forwarded to random allocation.

We noticed that the court was not qualified to verify whether the claim submitted "could" be a main claim, but to decide whether the same can be registered or not.

On the same grounds, we may consider that an intervention in someone's own interest which is rejected as inadmissible in principle by the court, based on art. 64 align.[1] correlated with art. 61 align. 2[2] in the Civil Procedure Code, **must be forwarded to random allocation** as, obviously, the intervention request in someone's own interest *"could be studied as a main claim".*

Also, it may come out, from provisions of align. 7 of art. 209 in the Civil Procedure Code, saying that "*the complainant cannot submit a counterclaim against the initial culprit's counterclaim*", should be interpreted with the meaning that such a complainant's counterclaim is to be forwarded to random allocation too as, obviously, **it may be studied as a main claim**, solution that, in our view, was not intended by the legislator.

Also, considering the court's arguments, we understand that the main intervention made directly in the appeal court (art. 62 align. 3 in the Civil Procedure Code), without specific agreement from the parties, should be forwarded to the competent court too, for random allocation.[3]

Regarding the last example, although art. 62 align. 3 in the Civil Procedure Code indicate the **deadline** up to which such a claim can be submitted, it is not an error to assert that such a claim is to be rejected as inadmissible, with a subjective rank inadmissibility. By the other hand, the text stipulates that such a claim **can be submitted** to the appeal court only with specific mutual agreement of the parties, *per a contrario* such a claim **cannot be submitted**, thus inadmissible when such an

[1] Art. 64 align. 4 in the Civil Procedure Code stipulates that: "a conclusion for rejecting the intervention claim as inadmissible can be contested within 5 days since sentencing for the party present in the court and since communication for the party missing."

[2.] According to art. 61 align. 2 in the Civil Procedure Code, "the intervention is a main one when the intervening person asks for himself, in whole or on part, the right submitted for settlement or a right closely related to the same."

[3] According to provisions of art. 62 align. 3 in the Civil Procedure Code, "by expressly given parties' consent, the main intervention can be made in the appeal court too."

agreement does not exist. But, for sure, such a claim drawn up in compliance with the legal provisions "could be studied as a main claim".

c) We consider that such an interpretation and solution are totally missing the legal grounds, including that of a legal specific provision required as foundation whenever such a claim is sent to random allocation.

In this specific case, the court ordered forwarding of the claim to random allocation, expressly indicating that no **disjunction** action was taken for the counterclaim as the same was inadmissible. Thus, the separate settlement on the counterclaim could have been made should the counterclaim was admissible. But only the main claim was qualified to be settled.

Thus, as the court has not applied the provisions of art. 210 in the Civil Procedure Code, **can we identify the same as a legal ground** for an action of forwarding the case to random allocation to judges?

Obviously, the answer cannot be but a negative one, the legal grounds missing from the claim and impossible to be identified too.

According to the principle of party disposition, stipulated by art. 9 in the Civil Procedure Code, parties have the power to dispose on the subject of the procedures **and of the procedural modalities to defend such a right**. Such a principle transposes in practice the legal freedom of civil right owners to make use of the same according to their own appreciations.

There also can be taken into account an influence on the court's decision coming from the solutions given according to the old Civil Procedure Code when the deadline for submitting the counterclaim was disregarded.

According to art. 135 in the previous Civil Procedure Code anterior, "the counterclaim and intervention of other person in the legal case disregarding the legal term shall be separately settled except the case when both parties agreed for common settlement". This text, by the other hand, presumes that an admissible counterclaim was submitted but outside the legal term".

Moreover, such a permission from the legislator cannot be found anymore in the current legislation, art. 209 align. 4 in the Civil Procedure Code indicating the disqualification as clear sanction for disregarding the term for a counterclaim submission.

3. One Last Argument

According to art. 245 in the Civil Procedure Code, "a procedural exception is the modality by which the interested party, prosecutor or the court, as stipulated by law, can invoke, without discussing on the merits of the right itself, procedural irregularities concerning the panel or the court, jurisdiction or legal procedures **or malfunctions regarding the right to react,** in order to, as the case, obtain a competence declination, settlement postponing, redoing of documents, or cancelling, **rejection** or extinction of the claim."

In the case on study, the complainant submitted vices regarding the right to action. More specific, nor a claim like the one already submitted could be formulated anymore, and neither there was any doubt that the culprit invoked the inadmissibility exception staking on the dilator effect of the same; respectively, by no means has the culprit intended to have the case forwarded to random allocation when invoking such an exception.

Moreover, none of the solutions stated by the legislator can be found among those decided by the court[1]. Once the admissibility exception is sustained, the solution could be that of rejecting he claim, any other solution falling outside the law provisions stated.

4. Conclusions

It is difficult, beyond the above mentioned arguments, not to notice the "humanism" of the court's solution.

In fact, the court has quite "saved" the defense culprits drawn up (as it was carrying a stamp fee payment duty) but sent the case however for a separate settlement. By the other hand, such an attitude departs the judge from the neutral position owed to all parties involved in the trial.

Judge's active role in finding the truth, as stipulated by art. 22 in the Civil Procedure Code, is not incidental to the present case as the court itself made no reference to the same.

[1] Declination, postponing, redoing, canceling, rejection, or extinction of the claim.

In such conditions, it is hard to understand the judge's reservation in what regards a solution of rejecting the counterclaim as inadmissible as far as the court cancels[1] a claim for deficiencies much more unimportant than that discussed in the present case, briefly described as a wrong option on the procedural modality. For the same, the party is to be blamed, for submitting a counterclaim that was further proved as inadmissible.

5. References

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[1] Based on provisions of art. 200 align. (4) corroborated with provisions of art. 194 in the Civil Procedure Code, for example.