

Private Law

Procedure on Small Claims in Regulating the Bill of the Code of Civil Procedure

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Abstract: For the smooth operation of the internal market and in order to build a space of freedom, security and justice the Community has adopted, among others, a series of measures that will eliminate the obstacles standing in the way of civil procedures on judicial cooperation in judicial matters with cross-borders implications in recovering small claims. In this context, CE Regulation no.861 on July, 11th 2007 was adopted by the Parliament and the Council on establishing a European procedure for small claims. Considering the fact that the Regulation expressly provisions that the European procedure on small claims is regulated by the norms of procedural law in the member state in which the procedure is deployed at the claimant's request, the draft of Code of civil procedure regulated, among the special judicial procedures, the “procedure on small claims”. In the present study we will analyze this form of special judicial procedure and will make some suggestions on the present completion and amendment of the draft, hoping that its authors will take it into consideration, with the purpose of recovering the small claims in due time and the parties will benefit of a fair trial. We consider that in its final form, the regulation of this procedure will correspond to the requirements of the Romanian legislation.

Keywords: special judicial procedures, small claims, competent instance, draft, regulation

1. Introduction

The special procedures are applicable only in the cases that impose a different regulation of common law. These, irrespective of the place in which they have been regulated, comprise, according to the specificity of the special procedure, only the derogatory matters of common law. Accordingly, the special procedure departs from the common law and is aimed at simplifying and accelerating the judging of the

disputes. But in all the cases in which a judicial norm that regulates a special procedure is applied, it has to be completed by the common law rule of procedure, as it does not always comprise a complete regulation of civil process in that matter.

The present Code of civil procedure regulates the special judicial procedure in Book VI, namely “Special procedures” in articles 581- 720¹⁰, including: presidential ordinance, restoring documents and missing decisions, payment offer and consignation, levy, seizure, divorce, procedure of judicial division, requests regarding possessions, solving litigations in commercial matters.

The draft¹ of the Code of civil procedure (named in the present paper ‘draft’) maintains Book VI with the same denomination and regulates in articles 884-1016, besides the judicial procedures mentioned above, the procedure of placing under judicial interdiction, the procedure of death declaration, procedure of payment ordinance, judicial bail and the procedure on small claims. In the present paper’s demarche we will analyze the regulation of the procedure on small claims by comparison with CE Regulation no. 861/2007 on July, 11th 2007² was adopted by the Parliament and the Council on establishing a European procedure for small claims, named in the present paper ‘regulation’. The aim of this procedure is to facilitate the access to justice in the EU member states. The regulation was adopted in order to guarantee identical conditions both for the creditors as well as for the debtors all over the EU.

By adopting the norms of European procedure on the requests with this object, the purpose was to simplify and accelerate the settlement of cross-border litigations and cost reduction. In the same time, the purpose was also to offer the interested parties an optional instrument that completes the possibilities regulated by the member states’ legislations, without bringing them prejudice. The scope of the regulation is limited to litigations that have a cross-border feature and this is the reason why the Romanian legislator has included this special procedure in the draft.

In the draft, the procedure regarding small claims is regulated in title XII, articles 1009- 1016 and in a vas extent, the procedure is assumed from the regulation.

¹ Bill on the Code of Civil Procedure, transmitted to the Parliament.

² Is applied starting with January 1st, 2009, except for article 25 that applies starting with January 1st, 2008 (article 29, al.2). The Regulation is mandatory in all its elements and is directly applied in the EU member states, except for Denmark, that did not participate to the adoption of this act and has thus no obligation under it.

2. Scope

In what concerns the scope, the text of article 1009, al. 1 defines the content of the collocation “small claims” as being that request formulated in civil and commercial matters, whose object, when referring to the instance, does not exceed 10.000 lei. This sum does not include the interests, legal charges and other accessory incomes. More inspired seems to be the collocation “other costs” comprised in the Regulation, rather than the “accessory incomes”, not defined in the content of the abovementioned article.

We assert as welcome the statement that this procedure does not apply to the requests regarding: martial status or judicial incapacity of private persons; patrimonial rights deriving from family relations; inheritance; insolvency; procedures on liquidating insolvable companies or other judicial persons and similar procedures; social insurances; arbitrary; labor law; rental of immobile goods except actions regarding claims on paying a sum of money; prejudice to the right to private life or rights concerning personality. This listing is comprised by the regulation that also adds calumny.

3. Alternative Feature in Choosing the Procedure for Claim Recovery

The special procedure on small claims is made available to the claimant, who has the possibility to choose between the procedure regulated by the present title and the common law procedure. We assert the fact that the regulation offers judiciaries an alternative to the procedures provisioned by the member states’ legislations and eliminates the intermediary procedures that are necessary for the recognition and execution in a member state, within the European procedure regarding small claims. Eliminating the *exequatur* procedure ensures the fast recovery of small claims as the Regulation marks a substantial progress at a European level. In what concerns the scope, in article 2, al. 1, the Regulation expressly provisions that it is applied to claims that do not exceed 2.000 euro when referring to the instance, both in civil and commercial matters in cross-border causes, irrespective of the instance’s nature if at least one of the parties has the premises or residence in a member state, other than the one in which the referred judicial instance is located.

Returning to the draft, we assert that regulating the alternative feature in art. 1019 al.1 was not necessary, as it is well known that the claimant is legitimate to choose the judicial procedure when one of his subjective civil rights has been violated or invaded. In the same article 1010 in the succession of paragraphs, par. 2 provisions the possibility to solve a request formulated under the conditions of common law according to the special procedure until the first term, at latest. The legislator understood giving efficiency to the principle of availability. In case the request cannot be solved by applying the special procedure, the instance is obliged to “inform the claimant and if the claimant does not draw back the request, it will be trialed according to the common law” (al. 3). A breach of the principle of availability is noticed here and an involvement of costs that regard the post taxes. We assert that the solution of suspending the cause would be more appropriate and the consequence would be the superannulation of the request, considering the fact that the suspension is communicated to the parties and can be appealed under the conditions of the law.

The collocations “informs the claimant” and ‘in case the claimant does not draw back the request”, are assumed from the Regulation (article 4, al. 3). As we can notice, the project does not provision the way in which the notification will be accomplished but we assert that it will be made through an address in which the instance communicates the claimant the reason for which his/her request cannot be solved using the special procedure and asks him/her to draw back the request. Although the text does not provision that, in our opinion, the instance will make a judgment that will not be appealed. In what concerns the Romanian judicial instances, because of the fact that enough judiciaries do not have a certain judicial culture, the application of the text analyzed above will act as a source of procedural incidents regarding the full court and by this we mean the re accusation but also a source of complaints towards the Superior Council of Magistrates against the judge of the cause. Accordingly, we assert that the definition of these collocations is imposed, as well as the specification of the procedure act of the instance that determines the draw back of the request and the appeal.

This procedure offers the claimant, in commercial matters, the advantage that he/she does not have to prove reading the entire procedure provisioned by the Code of civil procedure.

The ex settlement of the request according the common right procedure, without the claimant’s approval, violates the principle of availability, on one side and on the other side it requires the completion of the judicial stamp duty at the value of the 100

claimant's requests. We make this allegation because in the special procedures, the judicial stamp duty has a certain quantum, depending on the specific special procedure, while in the common law procedure, the judicial stamp duty is calculated according to the value of the request.

3.1. The Competent Instance

Regarding the material and territorial competence the draft provisions in article 1011, al. 1 that the court is competent to solve the request in the court of first instance. In what concerns the territorial competence, al. 2 provisions that it is settled according to the common law. These dispositions are in complete accordance with the dispositions of the Code of civil procedure regarding the common law procedural competence.

3.2. The Start of the Procedure

Analyzing the content of article 1012 shows (as well as in the common law) that the claimant is the one that starts the special procedure on small claims. The introductory request in a court consists in a form that the claimant has to fill in and submit or send to the competent instance. Sending will be made through "mail or any other means that will ensure the sending of the form and the confirmation of its receipt". More appropriate seems to be the collocation "the form will be personally submitted or sent through mail or through any other means of communication". Furthermore, the Regulation stipulates the submission of the form directly to the competent instance. The expression "will be submitted personally" ensures the content of the fundamental right on access to justice comprised by the Romanian Constitution.

An impediment to the application of the provisions in the procedure of small claims, immediately after coming into force, would be the lack of the form that has to be established by order coming from the Ministry of Justice (article 1012, al. 2). The claimant has the duty to attach to the form, if necessary, any supporting documents relevant in proving the claims, the name and statute of the one representing the party, if necessary and the proof of paying the judicial stamp duty.

The draft provisions in article 1012, al. 4 the possibility to fill in and rectify the form by the claimant, as well as provide additional information or documents. In this

purpose, the court will set a term and send the claimant a form, whose content will be decided upon by the Minister of Justice. How will the court proceed in case the claimant does not comply with those ordered through the form until the set term? The answer is provided by article 1012, al. 5 that mentions the fact that the request will be rejected as ungrounded or inadmissible, according to the case.

In case the claimant does not fill in or does not rectify the request form during the term set by the Court, the request will be invalidated.

In case the parties cannot afford the costs related to this procedure, they can solicit judicial public aid, under the conditions provisioned by the Government Emergency Ordinance no. 51 on April 21st, 2008 on public judicial aid (Tăbârcă, 2009, pp. 73-78).

3.3. The deployment of the procedure

Regarding the deployment of the procedure, article 1013 of the draft stipulates the following: the procedure is written and the small claims are solved in the council room; the court can dispose the attendance of the parties if it considers that it needs further information from them or at the request of one of the parties, for oral debates. In case the court decides that oral debates are not necessary, it can reject a request of this kind, but has the obligation to motivate in writing this rejection. We assert that the completion of al. 2, article 982 is imposed, meaning that the instance will decide on the request of one of the parties with a decision that cannot be appealed.

The regulation stipulates that the European procedure on recovering small claims is written and that the principle of speaking is involved only in the cases in which the court disposes the organization of an oral debate, if it considers this as being necessary or at the request of one party. But the European instance can organize an oral debate through videoconference or using other communication techniques when these are available.

In order to confer efficiency to the principle of equality in front of justice, as well as other principles that govern the civil trial applicable in the case of this special procedure, the court has the obligation to *immediately* send the request form correctly filled in by the claimant and copies of the relevant additional documents the claimant has submitted to the defendant. Furthermore, the defendant will receive a notification containing the answering form (article 1013, al. 3). We assert that replacing the collocation “immediately” with the expression “these documents will

be sent within 14 days from receiving the request form correctly filled in” is imposed, as the regulation mentions it (article 5, al. 2).

The draft provisions a 30 days period of time, starting from the notification of the claimant’s request to send the answer form correspondently filled in, as well as copies of the documents that he uses. But the defendant can answer through any other adequate means, without using the answer form (article 1013, al.4). The draft does not refer to the possible consequences the defendant might suffer in case an answer is not provided. Again the term “immediately” is used in article 5 that states that the defendant’s answer, together with the counterclaim, if formulated, as well as the relevant documents is communicated *immediately* to the claimant. We notice in this case as well that the regulation provisions a period of time of 14 days (article 5, al. 4) and this period of time has to be mentioned in the draft in order to eliminate arbitrary.

Establishing precise periods of time ensures the resolution of a case in due time and this is why we plead for the completion of the project according to the regulation. The defendant can formulate the counterclaim request when the defendant himself has claims on the claimant (Deleanu, 2000, p. 122 and fol.)

For equality in judicial treatment, the court will grant the claimant a period of time of 30 days from the notification of the counterclaim request to send the form correctly filled in or will answer thorough any other means.

In case the counterclaim request does not fulfill the conditions imposed by article 1009, it will be disjointed and trialed according to the common law (article 1013, al. 7). In this case, the principle of *accesorium sequitur principale* is not applied. The regulation expressly provisions that the counterclaim will be disjoint in case its value exceeds 2.000 euro. We assert that the provision comprised in the draft that sends us to article 1009, regarding not only the value of the request, but also stipulates the request this procedure cannot apply to and has a full scope.

In case the court decides as being necessary, it can “request the parties to provide more information within the term established in this purpose and that cannot exceed 30 days from receiving the answer form the defendant or, if the case, of the claimant’s answer” (article 1013, al.8).

From the above mentioned, we notice the fact that the procedure on the small claims, as provisioned in the regulation in the present, is not a plain procedure that

ensures the celerity solving of a case and recovery of the claim in due time, but a heavy procedure, the term granted being 30 days long each time.

Another argument in supporting this observation stems from al. 9, according to which the “court can approve other evidence other than the documents submitted by the parties”. Considering the value of 10.000 lei of such a request, we assert that the provision in this draft, meaning that “no evidence whose administration involves disproportionate costs from the value of the claim and the counterclaim will be accepted”. Can expertise evidence be accepted? The regulation stipulates that the court can approve the expertise or the witness evidence, but will take into account the costs this issue entitles and that “the court has to opt out for the most simple and onerous means to obtain evidence” (article 9, al. 2 and 3).

Regarding the abovementioned, the question if the parties will be summoned during the procedure is inevitable. The answer is provided by al.10 that stipulates that the parties will be summoned only in case the instance establishes a term for the parties’ attendance.

We consider that the completion of the project is imposed, in what concerns the role of the court when stating “whenever necessary, the court tries to determine the parties to get to an agreement” (article 12, al.3).

For guaranteeing the rights of the parties to a fair trial, the draft stipulates that in case the court establishes a term, the interested party is notified regarding the consequences of not respecting this term and in exceptional cases, the court can extend the terms if necessary.

The draft does not stipulate the manner in which the incidents that can appear during the solving of a small claim can be solved, but it is obvious that any incident regarding the competent instance and the full court will be solved according to the provisions of the Code of civil procedure and the Rules of procedure of the judicial instances (Leş, 2002, pp. 226-241). Regarding this aspect, the regulation stipulates in article 19 that the European procedure regarding the small claims is regulated by the norms of procedural law in the member state in which the procedure is deployed, without bringing prejudice to the dispositions of the Regulation. Also, during the solving of such a claim, the court can take note of the dispositions acts of the parties, according to the Code of civil procedure.

3.4. The court's solutions

The court, depending on the evidence administrated, will decide upon the main request and the counterclaim through the same decision and will either accept or reject them. The draft establishes a period of time of 30 days for the decision. Taking into consideration the reason for which this procedure has been instituted, we assert that the period of time in which the decision is drafted should be reduced to 10 days.

In what concerns the enforceability of the decision, the draft stipulates in article 1014, al. 3 that "*the decision of the first instance is enforceable starting with the moment it was pronounced and communicated to the parties*".

3.5. The costs

Within the expenses that can be carried in the procedure of small claims the judicial stamp duty is comprised, together with the lawyer's and the expert's fee and the costs related to the witnesses. These are granted at the party's request, situation in which the unsuccessful party will be obliged to pay them. That court has the right not to grant the successful party the costs that were not necessary or had a disproportional value in relation to the value of the request.

3.6. The appeal

Regarding the ways of appeal, the draft mentions the fact that the decision in this matter is subjected to an appeal within 30 days from notification and that the instance competent to solve it is the tribunal. In judging the appeal, the court for judicial review will respect the two rules that govern the procedure in this ordinary means of appeal (Leş, 2001, pp. 13-59). Considering the enforceability of the decision taken in small claims matters, we assert that the term of appeal of 30 days is excessively high and its reduction to 10 or 15 days is imposed, as well as in the common law procedure. The draft stipulates the possibility of the court of judicial review to suspend the forced execution at the party's request, for solid reasons, but only if a bail representing 10% of the contested value is consigned.

The decision through which the court solves the appeal is notified to the parties and is definitive. The dispositions regarding the payment of legal charges are applied also in the appeal.

The regulation establishes in article 18 minimal standards for the jurisdictional control of the decision. Although the regulation abounds in term imposed to the parties and even to the court, our attention has been held by the fact that in what concerns the jurisdictional control regarding the term in which the defendant has the right to invoke the grounds in article 18 a) and b), it is provisioned that he has to “act promptly”. Regarding this collocation that constitutes an extra argument for which the attention is focused on establishing the terms as stated in the present paper until the coming into force of the Code of civil procedure.

Based on the principle of mutual confidence in the judicial systems of the EU member states, the judicial decisions made in a member state are recognized “by right” in the other member states, without a special procedure being necessary. In this context, article 33 of the CE Regulation no. 44/2001 stipulates that:” a decision taken in a member state is recognized in the other member states without a special procedure being necessary”.

4. Conclusions

What the draft brings as new in what concerns the special judicial procedures is Title XII regarding the small claims procedure, namely 10.000 lei (apart from the interests, legal charges and other accessory incomes) with the purpose of facilitating justice. This procedure simplifies and accelerates the solving of the litigations in this matter without violating the parties’ right to a fair trial; it underlines the compliance with the principle of contradictory, oral debates (when the court decides that it needs edifications or when the parties request it), the right to protection etc.; it reduces costs. The draft imposes the parties to formulate the main request, reception and counterclaim by filling in forms that are approved through an order issued by the Minister of Justice. The procedure takes place in writing and the parties’ representation is not mandatory. The special procedure in this matter will reach its purposes if the amendment of the draft is accomplished, in what concerns reducing the term from 30 days (in some cases), as argued in the present paper.

5. Bibliography

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