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Does Law no. 202/2010 Ensure the Acceleration of the Civil Matters' Settlement?

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Abstract: In this paper we are trying to offer those practicing law a theoretical and practical approach of some dispositions in Law 202/ October 25, 2010 regarding some measures to accelerate the adjudication of matters, known as the Law on the Small Justice Reform, that amended and completed the Code of Civil Procedure. The law on accelerating justice was adopted only three months and 11 days after the New Code of Civil procedure was published. This law is important due to the content of some dispositions regarding certain institutions of civil procedural law, that have the role intended by the Romanian legislator, to accelerate the determination of matters, institutions that are not found in the New Code. The reform (change) in the Romanian civil trials took into consideration the respect of some principles such as the access to justice, equality of the parties in civil lawsuits, the right to due and fair trial as well as the fact that any reform has to guarantee that the judicial system is efficient, answers the necessity of transparency and democracy. Still, the application of the new dispositions of civil procedure, beginning with Law no. 59/1993 and until the coming into force of law on accelerating the determination of matters, namely the past 17 years, the amendments brought to the Code of Civil procedure have not always been beneficial for the Romanian litigant by the fact that they determined different interpretations leading thus to a non unitary judicial practice even within the same institution. The present law is not safe either from critics that some theoreticians and practitioners of law have expressed, being interested in accomplishing the purpose the Romanian legislator has set in that law. In this paper, the authors aim at analyzing the impact of the abovementioned law, regarding the material competence of the tribunal in trials and the requests regarding claims with the object of payment up to 2000 lei; adjudicating the objection to jurisdiction of the instance and the effect of non invocating it on legal basis; the solutions that the appeal court can issue. At the same time, without getting into theoretical disputes regarding these issues raised in this study (to avoid issuing decisions that could be given in applying the same norm of procedure, obviously with negative effect on the litigant parties), we will try to propose solutions in case they will be transposed into judicial norms of civil procedure (until the coming into force of the New Code of civil procedure) will have a positive effect in the accelerated development of the Romanian civil

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trial. We assert that "acceleration in adjudicating civil trials" should not remain a collocation empty of content and this is the reason for which the judicial norms of civil procedure have to be characterized by accuracy and flexibility in application, without the necessity of elaborating an application "guide".

Keywords: accelerating the adjudication of matters; reform; reasonable time; objection to jurisdiction; solution in appeal

1. Introduction

A democratic state involves an independent justice, impartial and efficient and for these parameters to be met, in the last 21 years the Romanian Justice was constantly reformed. Looking back, we can strongly affirm that were targeted and accomplished the following: the modernization of the judicial system and the statute of the judge, establishment of new tribunals, specialized tribunals, courts of appeal, introducing the informatics system – judicial computerization, legislative amendments in civil and criminal matters, as well as civil and criminal procedure, introducing mediation in adjudicating certain categories of litigations, ensuring the access to justice, establishment of the National Institute of Magistracy (institution for initial preparation and continuous training o magistrates) and the National School for Actuaries (centre of initial preparation and continuous training of actuaries), National Institute for Professional Preparation of Lawyers etc. It was envisaged that any reform will guarantee that the judicial system is an efficient one and answers the necessities of transparency and democracy, as well as strengthening the confidence o the citizens in justice. In the matter of civil procedure in the past 21 years, the Code of civil procedure was amended and completed several times, and following the new economic and social transformations and the Romanian adhesion to the European Union, the adoption of a New Code of civil procedure[1] was necessary, named hereafter NCPC (that did not come into force) and after three months from publishing the Code in the Official Monitor within the measure "small reform" was adopted Law 202/2010 on some measures for accelerating the determination of matters[2], known as the Law on Small reform of Justice (named hereafter LA) that came into force on November 25, 2010, with the exception of the provisions regarding administrative and notary divorce, which came into force within 60 days from the date of publication of this law, namely 25 December 2010 (article XXVIII on the law).

[1] In the Official Monitor of Romania, Part I, no. 485/ July 15, 2010.
[2] Published in the Official Monitor of Romania, no. 714/ October 26, 2010.

This law amended and completed the Code of civil procedure, republished in the Official Monitor no.25 on February 24, 1948, with the subsequent amendments and completions, with the purpose of ensuring the access to justice and accomplishing the content of the principles on which the fair trial solved in reasonable time are based on. The right of the litigants to have their cause solved in reasonable time is consecrated in article 6 in the European Convention on Human Rights, together with a due and equitable trial. In this context, the Romanian legislator established that in some matters, the appeal will be trialled within 10 days[1], that the territorial trials is urgent and particular[2], that adjudicating conflicts involving rights are urgent and the terms cannot exceed 10 days[3]. At the same time, it regulated the special judicial procedures, such as presidential ordinances, through which the interested parties can solicit the court to take urgent measures in emergency cases with or without summoning the parties; precautionary measures meant to ensure civil action and subsequently a precautionary sequestration turn into a definitive sequestration that would ensure the sufficiency of the creditor's claim; the procedure of suspending the execution of the sentence at the request of the person interested, under the conditions of the law; adjudicating the requests and trials in electoral matters etc.

Given that the LA, through its norms of civil procedure, can be considered a great success, although some of these norms generate discussions in their application and that until the coming into force of NCPC it can also be amended and completed, we try, without entering in theoretical disputes regarding some issues raised in this study (in order to avoid pronouncing a different decision that could be issued in applying the same procedural norm, obviously with negative effect over the litigant parties), we will make some propositions *de lege ferenda* that will have an echo in case of eventual amendments and completions and that we hope to have a positive effect in the accelerate development of the Romanian civil trials.

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[1] "*The appeal will be trialed by specialized competencies, within 10 days from registering the case file at the court of appeal*", article 8, paragraph 3 in the Law no. 85/2006 on the procedure of insolvency.

[2] "*The trial of land ownership causes will be made in emergency and in particular, including in the period of judicial holidays*", article 2 paragraph 1 in Title XIII named "*The acceleration of trials in the matter of restitution of land ownership*" in Law no. 247/2005 on the reform of justice and property, as well as some adjacent measures.

[3] "(1) *The requests regarding the conflicts of rights are trialed in regime of emergency.* (2) *The hearings cannot exceed 10 days.* (3) *The parties are legally summoned, if the summons has been handed at least one day before the day of hearing*", article 74 in Law no. 168/1999 on adjudicating labor conflicts.

2. Material Competence of the Court of Justice

According to paragraph 1^1 introduced after paragraph 1 of article 1 in the Code of civil procedure, the courts of justice judge "*1^1 in first and last instance trials and requests regarding claims involving the payment of an amount of maximum 2000 lei*". The collocation "first and last instance" express the fact that the decisions rendered in a request whose object has a material value, in amount of maximum and including 2000 lei, enter in the category of irrevocable decisions (article 377, paragraph 2.5., Code of civil procedure). Accordingly, the ways of attacking an appeal being eliminated, such a decision can be subject to extraordinary mans of appeal, namely the contestation and review, which are means of withdrawal. But these means can be exerted only if the conditions expressly mentioned in articles 317 and 322 in the Code of civil procedure are met (article 497 and article 503 in the NCPC), which limits the right of every person to an effective appeal. The lack of means of appeal breaches article 6, paragraph 1 in the European Convention on protecting human rights and fundamental liberties[1] and the right to effective appeal, right which is protected by the European Convention in article 13, according to which "*any person whose right and liberties recognized by the present Convention have been breached has the right to be given an effective appeal in national instances*…".

Therefore, the positive obligation of the Romanian legislator is to establish an appeal that, at the request of the interested parties, would trigger the judicial control, with the purpose of eliminating the errors of the first instance and issue a decision that contains reparation given to the litigant for the invoked delays (Sudre, 2006, p. 308). We adhere at the idea that the existence of the right to an effective appeal at Romanian instances is "tightly connected to the classic rule of exhausting internal ways of appeal" (Sudre, 2006, p. 306) and underline that from the interpretation of the text of article 13 mentioned above results without any doubt that the plaintiff has to solicit the national judge to examine his cause in the appeal at national court and only after that he should address to the European judge. The Romanian Constitution consecrates the access to justice in article 21, paragraph 1,

[1] "*Every person has the right to equitably and public trial and in due time related to the cause by an independent and impartial instance, instituted by law, that will decide either on breaching the rights and obligations of civil character or on the validity of any accusation in criminal matter against them*".

according to which "Any person can address to justice for the protection of their rights, liberties and legitimate interests" involving "the effective right to use a way of appeal provisioned by the law" (Voicu, 1997, p. 10) as well as the right to refer to the supreme court of the state, the High Court of Cassation and Justice. The text of the Constitution does not contain the collocation "right to impartial tribunal" but, compared to article 6, paragraph 1, ECHR ruled that it "guarantees every individual the right to refer to a competent tribunal for all contestations related to rights and liberties of civil character" (Voicu, 2001, p. 47). In doctrine (Giunchard, 1999, p. 477) the right to a tribunal was expressed in wordings such as the right to a new jurisdictional appeal or the right to exert an effective jurisdictional appeal. Eliminating a way of appeal breaches article 6 in the Convention and the right to an effective appeal, so that under this aspect, the abovementioned law does not represent "a progress" as it breaches an essential right of the litigant in elaborating this law, the Romanian legislator ignored the European regulations, such as: Regulation (EC) no. 1896/2006 on the European procedure of collection letters, that stipulates the possibility that the defendant formulates an opposition and in the virtue of article 20, paragraphs 1 and 2 would solicit, at the competent instance in the member state of origin the reexamination under the conditions of the law; Regulation (EC) no. 861/2007 on the European procedure regarding claims with reduced value (the value of the claim does not exceed 2000 EUROs when receiving the request form by the competent instance, without taking into consideration the interests, expenses and other costs) stipulates the possibility of appeal against a judicial decision ruled within a European procedure regarding the claims with reduced value in relation to the norms of procedure of each member state (within this procedure, Romania informed the Commission that the appeal can be exerted within 15 days); Regulation (EC) 805/2004 on the European enforcement regarding undisputed claims stipulates in article 19, named "Minimum standards for review in exceptional cases" the cases in which the debtor can make an appeal.

Therefore, the European legislator, for as much as wanting to simplify and accelerate the procedure of recovering reduced value claims or undisputed claims in cross-border litigations, his understanding was to ensure the interested parties the right to effective appeal. The present regulation, namely article 1, paragraph 1^1 Code of civil procedure, in the opinion of the present authors, limits the access to justice. It is worth mentioning that the NCPC, in the matter of collection letters (article 1009) provisioned that the decision can be contested with request of annulment in maximum 10 days from notification of the payment ordinance and in

the matter of the reduced value claims (article101- the value of the request will not exceed 10.000 lei when referring to the court, without taking into consideration the interests, legal costs and other accessory incomes) provisioned the appeal within 30 days from notification.

Regarding the application in time of the provisions of article 1, paragraph 1^1 Code of civil procedure, the judicial norm has immediate application (article 725, paragraph 1 Code of civil procedure and article XXII, paragraph 2 in Law no. 202/2010 will be applied to trials immediately after its coming into force (November 25, 2010); in case of pending trials, at the date of entering into force of the LA, even if the trial was began before the entering into force, as resulting from the interpretation *per a contrario* of article 725, paragraph 3 Code of civil procedure, namely that the decision rendered subsequent to the entering into force of the new law are not subject to the appeal provisioned by the law; in case the decision was rendered prior to LA's entering into force and following the appeal, the decision was annulled and the cause was resent for trial at the court of justice, the decision that will be rendered after the annulment is irrevocable and no longer subject to appeal.

3. Objection to Jurisdiction. Resolution

Following the accelerated adjudication of matters deduced trials LA brought a limitation to the principle of the active role of the judge that affects the judicial control, consisting in the fact that it cannot raise, ex officio, the objection to jurisdiction of the first instance if the titular of the appeal does not invoke the incompetency of the court that rendered the criticized decision. The text of article 158, paragraph 1 in the Code of civil procedure expressly provisions the obligation of the judicial instance, in case its competency is questioned, to establish the competent instance or, if necessary, another competent organ with jurisdictional activity.

Article 159^1 paragraph 2 Code of civil procedure introduced by LA obliges the litigant parties and the judge to invoke the objection to material and territorial jurisdiction of public order until the first day of appearance at the court of first instance "but no later than the beginning of the debates on the cause" meaning before the court gives speech in the cause. It is thus imposed that the judge of the cause disposes the documentation at the end of the meeting when "the first day of

appearance is considered to be"[1] motivated also by the fact that until the first day of appearance the litigant parties are obliges to perform certain acts of procedure. In case in which at the first day of appearance the court cannot solve the objection to jurisdiction, administration of evidence being necessary, for example to establish the value of the object of the call into court, will prorogate the discussion regarding the judgment on the objection to jurisdiction at the given hearing date. What happens in case the court dissolves the objection to jurisdiction and holds the cause for adjudication? From the wording of article 159[1], paragraph 5 in the Code of civil procedure[2] it results that the judge, until the debate of the cause, can reconsider the way of adjudicating the objection to jurisdiction[3] (which initially he dissolved) and admit it with the consequence of sending the case file to the competent court. From the manner in which the legal dispositions mentioned above were drafted, we conclude that the ruling that initially adjudicated the objection to jurisdiction is not an interlocutory ruling (that ties the court, in the meaning that it will continue the trial following the dissolution of the objection to jurisdiction, ruling that can be appealed only together with the matter). In the practice of the courts, there were isolated cases in which the judge presiding after the objection to jurisdiction was dissolved by another judge resumed discussions related to the matter of this objection and admitted it and sent the cause to another court for competent ruling, accelerating thus the ruling. At that time, this ruling was not regulated in the Code of civil procedure.

The objection to territorial jurisdiction of common law (article 5 in the Code of civil procedure) cannot be raised by the instance ex officio but only by the defendant by brief motion and when the brief motion is not mandatory, the latest at the first day of appearance (article 159[1], paragraph 3[4]). Still, the general objection to jurisdiction of the judicial courts, which is of absolute public order, (article 159[1], paragraph 1) can be invoked by the parties and the judge at any moment of the trial, as well as the objection of international jurisdiction (article 157, paragraph 2

[1] Article 134 Code of civil procedure: "*The first day of appearance is considered to be the one in which the parties, legally summoned, can conclude*".
[2] Article 159[1], paragraph 5: "*The verification of the jurisdiction according to paragraph 4 does not impede the formulation of objections to jurisdiction in the cases and under the conditions provisioned at paragraph 1-3, on which the judge will rule under the conditions of the law*".
[3] Article 159[1], paragraph 2: "*Objection to material and territorial jurisdiction of public order can be invoked by the parties or by the judge in the first day of appearance at the first instance but not later than the beginning of the debates on the matter*".
[4] "*Objection to private jurisdiction can be invoked only by the defendant by brief motion or when the brief motion is not mandatory, latest in the first day of appearance*".

in Law no. 105/ 1992 on the regulation of certain relations of international law, introduced by LA).

Related to the abovementioned, there is always the question regarding the solution in case the objection to jurisdiction of public order[1], material and territorial, was not invoked in the due time provisioned by law, namely the first day of appearance. The answer is given by the fact that operating the decay, it cannot be invoked in the appeal either and not even ex officio. But what if in the appeals the erroneous ruling regarding the objection to jurisdiction is not invoked? The instance of judicial control, in case it observes that the first instance wrongfully dissolved the objection to jurisdiction and issued a ruling on the matter and in virtue of article 297, paragraph 2 Code of civil procedure will admit the appeal and send the cause to adjudication to the competent instance. In case the party did not invoke the objection in the appeal, the control instance will not raise, ex officio, the objection to jurisdiction of the first instance, regulations in LA not allowing this procedure.

Regarding the application of the legal dispositions mentioned above in reasonable time, article XXII in LA provisions that they apply only to trials began subsequent to the coming into force of this law.

4. Rulings of the Court of Appeal

Regarding the rulings that the court of appeal can issue, we notice a mismatch between the text of article 297, paragraph 1 of LA[2] and the provisions of article

[1] Article 159 Code of civil procedure amended by LA provisions that: "*Objection to jurisdiction is of public or private matter. Public jurisdiction: 1. In case of breaching genera competence; when the matter is not of the competence of the judicial instances; 2. In case of beaching material jurisdiction, when the cause is of competence to a judicial instance with a different degree; 3. In case of breaching the exclusive territorial jurisdiction, when the matter is of the competence of another judicial instance with the same degree and the parties cannot eliminate it. In all the other cases, objection to jurisdiction is of private matter*".

[2] In case in which it is notices that, wrongfully, the first instance gave a ruling without judging on the merits or the judgment was made in absence of the part that wasn't legally summoned, the instance of appeal will annul the decision appealed and will retrial the matter, evoking the merits. Still, in case the first instance judged the trial without judging on the merits the court of appeal will annul the present ruling and will send the cause to be judged again, one time only, to the first instance or to an instance with the same degree and from the same circumscription, if the parties have expressly solicited taking this measure by request of appeal of brief motion. Also, the court of appeal will annul the decision attacked and will send the cause for retrial, one time only, to the first instance or to an instance with the same degree and the same circumscription, in case the ruling of the first instance was made in the absence of the party that wasn't legally summoned and the party expressly solicited

474, paragraph 4 and paragraph 5 in NCPC, which leads to the conclusion that they were modified when entering into force of the new code, in the meaning of those in LA and taking into account the non unitary practice that will emerge by the application of the dispositions in this law. The solution regarding the annulment of the contested decision and judgment of the cause, evoking the matter, in cases in which the first instance adjudicated the trial without judging on the merits or the judgment was made in the absence of the party that wasn't legally summoned, in the opinion of the authors of the present paper, is objectionable. The old regulation, respectively the text of article 297, paragraph 1 in the Code of civil procedure[1] obliged the judges of the merits to professionally solve the matter, since at the annually evaluation of the judge the percentage of rulings dissolved or annulled by his fault was verified and the "quality" indicator was ranked accordingly (this indicator is no longer available). At the same time, in case of dissolving and sending the cause to retrial, the case file was and is assigned to the judge that was initially invested[2] because not ruling on the merits of the cause does not classify as incompatibility. The present regulation allows the judge that observes the complexity of a cause to rule on a certain exception (insufficient stamping of the request for trial, prescription of the right to action etc.) or does not notice that the procedure of summoning is not legally fulfilled, as resulted from the jurisprudence of the instances, the court of appeal being put in the situation to judge on the merits, as the related exception was not judged correctly. It is true that in the second thesis, article 297, paragraph 1 provisions the possibility that the court of appeal dissolves the decision and send the cause to retrial one time only, to the first instance or another instance with the same degree and in the same circumscription, but the text stipulates the approval of the plaintiff expressed in the request for appeal or the approval of the plaintiff expressed in the brief motion. In case the first

taking this measure by request of appeal. The solutions given to law problems by the court of appeal as well as the necessity of administrating evidence are mandatory for the judges of the matter".

[1] Article 297, paragraph 1 Code of civil procedure introduced by Law no. 59/1993 amending the Code of civil procedure, Family code, Law of administrative contentious no. 29/1990 and Law no. 94/1992 on the organization and functioning of the Court of Auditors (published in the Official Monitor of Romania no. 177 on July 26, 1993) stipulated that "*In case there is observed that the first instance wrongfully judged the matter without judging the merits or the judgment was made in the absence of the party that ant legally summoned, the court of appeal will dissolve the contested decision and will send the cause for retrial to the first instance*".

[2] Article 99, paragraph 6 in the Regulation of procedure of judicial instances approved by the Decision of the Supreme Council of Magistrates no. 387/2005, amended, disposes: "*The matters send to retrial after dissolution or annulment are received by the initially invested judge panel. The dispositions of article 98 are applied correspondingly in case of incompatibility*".

instance ruled in the absence of the party that wasn't legally summoned and that party solicits, by request for appeal, the cause to be sent to retrial, the instance of judicial control will annul the decision and will send the matter to retrial, one time only, to the first instance or to an instance with the same degree and in the same circumscription. Even if the law stipulates the collocation "one time only", we assert that we cannot talk about a real acceleration of adjudication, the defendant having being interested to prevail from these dispositions and the plaintiff, even in the case in which he would solicit the institution of a precautionary measure for the matter, would be placed in the situation to recover the claim with the breach of the principle of ruling in adjudicating the matter in reasonable time. This is the reason for which we support the return to the text of article 297, paragraph 1 in the Code of civil procedure, introduced by Law no. 59/1993 whose text we assert to ensure the right of the parties to a fair trial.

The text of article 297, paragraph 2 in the Code of civil procedure[1] also stipulates other solutions that do not require explanations, the judicial practice being crystallized. Still, the court of appeal after the coming into force of the LA, will take into account the norms regulating the objection to jurisdiction of the instance and the way of resolution for this objection, as noted above.

5. Conclusions

Doing justice interests the internal order and this is the reason for which justice is and will remain a main and important factor of stability and balance for society. Through the law on accelerating the adjudication of matters, named also the Law on the small reform of justice, the legislator had in mind, almost three years after the Romanian adhesion to the European Union, to ensure the Romanian citizen, European citizen and stateless people a quality act of justice. Obviously, the purpose of the mentioned law is to respect the right of the litigant parties to fair trial in reasonable time. But the deletion of appeal in the requests for trial involving payment of an amount up to 2000 lei breaches article 6, paragraph 1 in the European Convention on human rights and fundamental liberties. In such requests,

[1] "If the first instance was declared competent and the court of appeal establishes that it was out of jurisdiction, dissolving the contested decision, the matter will be sent to retrial to the competent instance or to another competent organ with jurisdictional activity, except for the case in which it notices its own competence. In this case, as well as when there are other reasons for nullity and the first instance judged on the merits, the court of appeal, fully or partly annulling the followed procedure and decision issued, will retain the matter for retrial".

the interested party does not have available an effective and useful appeal, but only ways of withdrawal such as the contestation in annulment and review. Considering that, with all the concern for accelerating adjudications, that also EU Regulations contain norms regulating a way of appeal and the conditions in which it can be exerted, even in the matters in which involve a claim with reduced value or undisputed claim, we assert that this law must be completed with the possibility to contest the decisions taken in this matter by means of appeal. The exertion of the judicial control in appeal consists not only in the analysis of the grounds for appeal, as provisioned by article 304^1 Code of civil procedure, because the decision which is object of the appeal is not subjected to appeal. We hope that the practice of the judicial courts, regarding the judgment of the appeals according to the amendments mentioned above will determine the return at the text of article 297 Code of civil procedure, reintroduced by Law no. 59/1993, text that does not generate a non unitary practice. The new elements brought by this law regarding the resolution of the objection to jurisdiction do not leave room for different interpretations with different effect on a non unitary practice. We assert that until the entering into force of the New Code of Civil procedure, the imperfections in the Law on the small justice reform will be proven and corrected in due time.

6. References

Sudre, Frédéric (2006). *European and international human rights law*. Iasi: Polirom.

Guinchard, Serge (1999). *Droit et pratique de la procedure civile*/*The law and the practice of civil procedure*. Paris: Dalloz.

Voicu, Marin (1997). Accesul liber la justiție/Free acces to justice. *Law Magazine no. 4/1997.*

Voicu, Marin (2001). Convenția Europeană a Drepturilor Omului (IV) – Dreptul la un proces echitabil și la un tribunal imparțial – Examen teoretic al jurisprudenței Curții Europene a Drepturilor Omului/European Convention on Human Rights (IV) - The right to a fair trial and to an impartial tribunal - Theoretical examination of Jurisprudence of the European Court on Human Rights. *Commercial Law Magazine no. 9/2001.*

*** Law no. 202/2010 on Measures to Accelerate the Adjudication of Matters.

*** New Code of Civil Procedure published in the Official Monitor, Part I, no. 485/ July 15, 2010.