PARTICULARITIES ON THE REGULATION OF THE SUE PETITION, IN THE LIGHT OF PRACTICAL DIFFICULTIES AND LEGISLATIVE CHANGES

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Abstract

According to the Romanian Civil Procedure Code, one of the trial stages of first instance is represented by the written stage in which, as a general rule, the fulfillment of the requirements regarding the petition content is analysed.

This stage is a novelty of the new Civil Procedure Code. The purpose of this check is to prevent the introduction of an inform application, as well as for predictability reasons, in order to guarantee the other parties the right of defend oneself, in order to be able to effectively respond to the plaintiff's claims.

However, the institution has experienced some interpretation and enforcement difficulties, but also legislative changes that will be the subject of our analiysis.

Keywords: *sue petition, regulation, written stage, inform application, enforcement difficulties*

1. Introduction

The new civil procedural law, in force since February 15, 2013, meaning the New Romanian Code of Civil Procedure Code, surprised by a novel legislative element, namely the establishment of a distinct written stage in the first instance court, immediately after the introduction of the sue petition.[1]

At this stage, the parties are mutually aware of their claims and defense, as well as of the means of evidence they intend to administer.[2] The reason for setting up this procedure is, at least on a theoretical level, to increase the efficiency for the trial, to reduce the length of the civil trial, to ensure all procedural guarantees, in particular the right to defense and the principle of contradictory.[3]

As the Constitutional Court of Romania has also decided, in the Decision no. 479 of November 21, 2013, published in the Official Gazette no. 59 of January 23, 2014: "The procedure (...) is the option of the legislator and aims to remedy some deficiencies of the introductory action, so that, at the beginning of the procedure for fixing the first term of trial, it shall contain all the elements provided by Article 194 of the Code of Civil Procedure.

The legislator's purpose is disciplining the parties in a trial and thus respecting the principle of celerity and the right to a fair trial. Such a procedure would not affect the very essence of the protected right, since it is also accompanied by the guarantee given by the right to make a request for review under Article 200 par. (4) of the Code of Civil Procedure. Moreover, the court rules on a matter exclusively concerning the proper administration of justice.

However, as the European Court of Human Rights has repeatedly established, most of the procedural rights, by their very nature, are not "civil rights" within the meaning of the Convention and therefore fall outside the field of application of Article 6 of the European Convention for on Human Rights and Fundamental Freedoms (...).

Therefore, while the admission in principle procedure does not concern the substance of the application, the contested provisions do not infringe the provisions relating to the right to a fair trial, since the special procedure in question does not refer to the substance of the cases, the way Article 6 of European Convention for on Human Rights and Fundamental Freedoms requests, but only on matters of purely legal nature, the examination of which does not necessarily require a debate, with the parties being cited.

Moreover, the procedural means by which justice is carried out also mean the establishment of the rules of the process before the courts, and the legislator, by virtue of its Constitutional role established in Article 126 par. (2) and Article 129 of the Constitutional Law, is able to establish the court procedure, by law. These

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[1] The following provisions of Article 200 of the Code of Civil Procedure are relevant regarding the conduct of the written procedure: "(3) When the application does not meet the requirements of Art. 194-197, the applicant shall be notified in writing of the shortcomings, stating that within maximum 10 days after receipt of the communication, he shall make the ordered additions or modifications, subject to the sanction of petition annulment. It is exempt from this sanction the obligation to designate a common representative, in which case the provisions of Art. 202 par. (3) are applicable.

(4) If the obligations regarding the filling in or modification of the application provided in Art. 194 lit. a) -c), d) only in the case of factual reasons and f), as well as Art. 195-197, are not fulfilled within the time limit stipulated in par. (3), the application is annulled.

(4 ^ 1) The complainant may not be required to supplement or amend the sue petition with data or information which he or she does not have in person and for which the court is required to intervene.

[2] Gabriel Boroi, „Civil procedural law. Third Edition, revised and added'', Ed. Hamangiu, 2016, București, pag. 332;

[3] Gabriel-Sandu Lefter, „Sue petition regulation – a tool for achieving the right to a fair and and a predictible case'', Private Law Magazine, No. 4/2013, pag. 115-116;

constitutional provisions give expression to the principle also established by the European Court of Human Rights, which, for example, in its Judgment of 16 December 1992, *Case Hadjianastassiou v. Greece*, paragraph 33, stated that "the The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (Art. 6). The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, *inter alia*, which makes it possible for the accused to exercise usefully the rights of appeal available to him.''

The possibility of annulling the sue petition is in line with the case law of the European Court of Human Rights, which stated that the sanction of the annulling the application (...) complies with the requirements to be prescribed by law and to pursue a legitimate aim, namely the proper administration of justice (see the inadmissibility decision of April 15, 2014, Case *Lefter v. Romania*).[4]

The written stage is provided only for the sue petition, not for the incidental claims, even if they have the legal nature of a sue petition, because they are introduced or debated after fixing the first term for the trial.[5] Also, the written stage is incompatible with certain procedures, either because the elements of the sue petition are different from those of ordinary law, or there are situations where there is no need for prior judicial preparation.[6]

It should be noted that the rudiments of this written stage also existed in the old regulation, in Articles 114[7] and 114, index 1[8] of the Old Code of Civil Procedure, but there was no possibility for the judge to annul the sue petition in the case of failure to fulfill the missing requirements, only the possibility of suspending the trial.

Regarding the effectiveness of the written stage[9], a part of the doctrine criticized the limits of the judge's appreciation of the sue petition regularity, but also the increased duration for a case, given that, in the old civil procedural law, simultaneously with the filing of the petition for registration, the first term of the hearing was also set.

It was stated[10] that, in practice, the procedure proved to be extremely rigid, among the most often requested requirements in the notifications to complete the petition were the obligation to indicate the personal numerical code for the defendant, therefore the legal provision which establishes the obligation to communicate these data, "only to the extent that they are known", being neglected.

In addition, part of the doctrine[11] claimed that, in all cases where the applicant did not comply with the obligation to complete or amend the action, the court is entitled to annul the application. It was thus considered that the legislator makes no distinction according to the essential or non-essential nature of the requirements set out in Articles 194-197 or whether they are governed by mandatory or non-mandatory rules. In the absence of legal criteria, the importance assessment of the missing element would be discretionary, left only to the judge's discretion, and if an item is qualified as non-essential, there would be no reason to request the applicant to modify or complete the application.

Indeed, the sanction of the sue petition annulment may occur both for non-compliance with the intrinsic requirements of the petition and for the extrinsic requirements provided by Articles 194-197 of the Code of Civil Procedure. That is why, in principle, the analysis of the elements of the sue petitions concerns any of these aspects, and not just those provided by Article 196, under the penalty of nullity.

However, in order to examine the limits of the judge's discretion in the written procedure, account must be taken of the reason for establishing this stage. It is intended to communicate to the other party an application which allows him to make a complete defense, so that the sue petition annulment will only take place insofar as, because of the ill-formed petition, the conduct of the civil process would be difficult, and the opposing party could not defend itself against a

[4] Traian Cornel Briciu, Claudiu Constantin Dinu, ,,Civil procedural law. Second Edition, revised and added'', Ed. Național, 2018, București, pag. 293;

[5] Gheorghe Florea, ,,New Code of Civil Procedure, commented and annotated. Vol I. – art. 1-526'', Ed. Universul Juridic, 2016, București, pag. 737;

[6] G.-S. Lefter, *op. cit*, pag. 117;

[7] Article 114 of the Old Romanian Code of Civil Procedure provided as follows: "(1) Upon receipt of the sue petition, the President or the Judge replacing him shall verify that he meets the legal requirements. Where appropriate, the complainant is required to complete or amend the application and to file, in accordance with Art. 112 par. (2) and Art. 113, the application and certified copies of all the documents on which it bases the application.

(2) The claimant shall complete the application immediately. When filling is not possible, the application will be registered and will be given a short term to the complainant. If the application was received by post, the complainant will be notified in writing of its shortcomings, stating that it will make the necessary additions or amendments by the deadline. (...) "

[8] Article 114, index 1, paragraph 1, of the Old Romanian Code of Civil Procedure provided as follows: "The President shall, as soon as he establishes that the conditions laid down by the law for the sue petition are met, shall fix the trial term which, under his signature, is notified for the present applicant or his representative. The other parties will be summoned according to the law. "

[9] Andrei Pap, ,,Diverting the sue petition regulation procedure from the purpose for which it whas regulated in the NCCP. Incidents of judicial practice'', www.juridice.ro;

[10] Elena Ablai, ,,The sue petition regulation – an instrument for imposing a procedural discipline or a filter to prevent the trial?'', www.avocatura.com; For other examples, see also Bogdan Ionescu, ,,Law no. 310/2018. Panorama of amendments and additions to the Code of Civil Procedure'', Ed. Universul Juridic, București, 2019, pag. 57;

[11] Viorel Terzea, ,,New Code of Civil Procedure annotated'', Ed. Universul Juridic, București, 2016, pag. 425; G.-S. Lefter, *op. cit*, pag. 118-119;

claim with such vices. In other words, the sanction of the petition annulment must be proportionate to the reasons justifying it, and the court is supposed to analyze the proportion for the missing elements affect the proper conduct of the proceedings, so that it cannot communicate the petition to the defendant and, as a consequence, it is necessary to annul the request for summons in the written stage.[12]

2. Legislative changes regarding the written stage

The Romanian legislator made changes regarding the regularization procedure, through Law no. 310 of December 17, 2018 for amending and completing the Law no. 134/2010 on the Code of Civil Procedure, as well as for amending and completing other normative acts.[13]

Thus, Article 200 (4) has been amended in order to restrict the cases in which sanctioning the petition annulment in the written stage may be applied, meaning failure to state legal reasons or the evidence.

In such cases, the court still has the obligation to verify the fulfillment of the sue petition requirements provided by Articles 194-197 of the Code of Civil Procedure, but it can not annul the application anymore.[14]

As it regards the first case, namely the failure to indicate the legal grounds, before the amendment of the Code of Civil Procedure by Law no. 310/2018, it was considered that the absence of the legal grounds does not justify the sanction of invalidity except to the extent that there is proven an injury which cannot be annulled in other way than by the annulment of the petition. Also, if the factual exposition is sufficient to imply the existence of a legal rule, the court should frame the litigious deeds in order to be lawful. Also, the applicant may not be able to indicate the law applicable to his claim, in the context in which legal aid is not compulsory in Romania.[15] Other authors have argued that a sue petition which does not include the legal grounds does not generate a procedural injury which cannot be removed except by the annulment of the procedural act.[16]

However, the legislative amendment is necessary, in the context of a widespread judicial practice of annulling the petitions for failure to state reasons.

The rationale behind this legislative change is that only the factual reasoning is essential, not the legal grounds, the latter being the subject of the court's qualification, and that cannot be done without a contradictory debate.[17] Also, according to Article no. 22 paragraph (4) of the Code of Civil Procedure, it is the judge who gives or restores the legal classification of the trial acts and facts, which often involves a contradictory debate that can not be assured at the written stage.

However, the repeal of this annulment case is effective only at the written stage, the judge still being able to order the petition annulment under the common law. Thus, the judge has the role of establishing the exact legal classification of the trial acts and facts, only after having put this issue to the attention of the parties. Therefore, we appreciate that the solutions provided by the doctrine and the judicial practice before the amendment of the Code of Civil Procedure by Law no. 310/2018 are maintained, meaning that the lack of legal grounds leads to the annulment of the petition if the judge is effectively prevented from proceeding with the qualification and settlement of the application, the legal reasons not being clearly stated or contradictory[18]. This situation will not concern the written stage, but only after the completion of this procedure after contradictory debates.

Law no. 310/2018 repealed the basis for the petition annulment for failure to file evidence. The reason for introducing this amendment is the fact that the absence of evidence by the complainant entails the loss of the right to propose evidence. In addition, part of the doctrine[19] and the judicial practice considered that the sanction of annulment for the sue petition could not have acted insofar as the applicant had requested at least one evidence under procedural regularity, for example the offense report or even a copy of the identity card, for the attestation of the applicant's identity. The sanction of the petition annulment could also have been operating in the case of using a formula which is equivalent to the non-indication of the evidence, "any evidence useful to the case" or simply "witnesses" without indicating their names and addresses.[20]

Thus, the court cannot consider the applicant what type of evidence to submit at the written stage, but only at the end of that stage, under Article 203 of the Code of Civil Procedure, when the first term of the trial is set, the judge is able to provide measures to

[12] G. Boroi, *op. cit*, pag. 351-352;

[13] Published în The Romanian Official Gazette no. 1074/18.12.2018;

[14] Nicolae-Horia Ţiţ, Roxana Stanciu, ,,Law no. 310/2018 to modify and complete the Law no. 134/2010 regarding the Code of Civil Procedure'', Ed. Hamangiu, Bucureşti, 2019, pag. 49;

[15] Gheorghe-Liviu Zidaru, ,,Some issues regarding the sue petition regulation and the new regulation of stamp taxes'', www.juridice.ro;

[16] Gheorghe Florea, op.cit, pag. 741;

[17] Traian-Cornel Briciu, Mirela Stancu, Claudiu-Constantin Dinu, Gheorghe-Liviu Zidaru, Paul Pop, ,,Comments on the amendment of the new Civil Procedure Code by Law no. 310/2018. Between the desire for functionality and the trend of restoration'', www.juridice.ro;

[18] Delia-Narcisa Teohari, Gabriel Boroi (coordinator), ,,New Code of Civil Procedure. Comment on articles. Second edition, reviewed and added'', Vol. I, Ed. Universul Juridic, Bucureşti, 2016, pag. 573; The Minute of the Civil Departments Presidents' Meeting in Iasi, 7-8 May 2015,pct. 10, www.inm-lex.ro;

[19] Gheorghe-Liviu Zidaru, op. cit; G. Boroi, *op. cit.*, pag. 354;

[20] G.-S. Lefter, op. cit, pag. 128;

administer the evidence or to carry out the process according to the law.

However, we appreciate that, in the absence of some evidence, there still may be certain situations under which the judge would be able to order the annulment of the sue petition. We consider the situation of the documents provided by Article 194 letter c) of the Code of Civil Procedure, respectively the fiscal certificate or the land book extract, in the case of immovable property, insofar as failure to do so makes it impossible to determine the object of the claim or its value.[21] However, in this case, the annulment will also take place for not indicating the object or its value, and not for not stating the evidence.

Also, the lack of proof for the representative status, under Article 194 letter b) of the Code of Civil Procedure could lead to the petition annulment in the written procedure, at least at a theoretical level, but it was rightly considered that it would be more useful to fix the first term of trial and to grant a time limit for this irregularity removal, under Article 82.[22]

Even in the context in which the legislator has understood to remove this requirement from those which may lead to the petition annulment under Article 200 of the Code of Civil Procedure, we consider that there are no significant changes in the applicant's procedural conduct, except in terms of easier access to a court, in order to analyze the substance of the claim.

On the other hand, for the plaintiff, in the case of rights that need to be exercised within a certain time-limit laid down by law, Article 2.539 par. (2) of the Romanian Civil Code provides that the limitation of the substantive right to action is interrupted if the petition has been annulled by a final judgment if the applicant, within six months of the date on which the decision of rejection or annulment has become final, introduces a new application, provided that the new application is admissible.

Under the new rules, the applicant would no longer be able to benefit from the above-mentioned provisions if he did not indicate the evidence he requested, as the provisions of Article 204 par. (1) of the Code of Civil Procedure remain fully applicable, and it allows the plaintiff to indicate only new evidence at the first term, in relation to those already indicated in the petition.[23] Thus, the applicant will not request evidence which he intends to use directly at the first hearing, as the penalty of right loss, provided by Article 254 par. (1) of the Code of Civil Procedure generally operates.

It should also be noted that in Romanian law, in the absence of evidence, the sue petition will be dismissed as unfounded, and not as unproven. Therefore, we appreciate that sanctioning the right to propose evidence at the written stage is a sufficiently vigorous sanction to establish a certain procedural discipline for the parties. Even if there is no longer any risk for the plaintiff to have his petition filed without a substantive analysis, there is an even greater risk of looking at the merits of the application, in the absence of proposed evidence within the law prescribed time limit.

We note that the New Code of Civil Procedure does not regulate an often found situation in practice, caused by the failure to conduct a written procedure or superficial petition analysis by judges followed by observing its regularity, although it contains some shortcomings related to the provisions of Articles 194-197 (in particular by requesting testimony without indicating the names and addresses for the witnesses).

In that situation, it is clear that the court does not fulfill its obligation to apply the provisions of Article 200 of the Code of Civil Procedure, by not considering the applicant's shortcomings of its own petition and, thus, communicates it to the defendant in order to lodge a contestation. On this occasion, we need to point out that a possible regularity statement in a non-contentious procedure does not prevent the defendant from claiming petition irregularities in court. The question then arises: how the court will proceed, seeing the claim with unfulfilled shortcomings at the first hearing, and the defendant invokes those shortcomings?

We consider that, in this situation, at the first hearing, the court will continue to apply the sanction of annulment under the conditions of the common law or the sanction of right loss, with certain nuances.

Under Article 178 par. (3) of the Code of Civil Procedure, unless the law provides otherwise, the relative nullity must be invoked by contestation for the irregularities committed before the commencement of the trial, if the contestation is mandatory. Thus, if the defendant does not claim the petition irregularity of the or the applicant's right loss to propose certain evidence by contestation, we believe that the court might consider the plaintiff to fill the petition shortcomings at the first hearing, as a corollary of respecting the applicant's right of defense, in spite of the court's omission to consider the complainant to remedy the petition's shortcomings.

However, if the defendant invokes the petition irregularity, the applicant is, however, in a position to remedy the petition deficiencies himself, even though they have not been observed by the court, since possible sanctions of invalidity or right loss may only be applied at the first hearing that the parties are lawfully summoned. Therefore, the court would no longer be able to apply the sanction of annulment at the stage of sue petition regularization, because once this phase is over, the trial can no longer return to the initial stage.[24]

[21] See also Mihaela Tăbârcă, „Civil procedural law. Supplement containing comments of Law no. 310/2018'', Ed. Solomon, Bucureşti, 2019, pag. 117;

[22] G. Boroi, *op. cit.*, pag. 353;

[23] Mihaela Tăbârcă, ,*op.cit,* pag. 114; G. Boroi, *op. cit.*, pag. 397;

[24] G.-S. Lefter, *op. cit.*, pag. 130-131;

If, in the present case, there is an absolute nullity cause regarding the petition, in the sense of Article 178 par. (1) of the Code of Civil Procedure, the defendant or the court may, at any time, invoke the irregularity of the application even if it has not been remedied in the written procedure.

However, we appreciate, as a *de lege ferenda* proposal, that legislative clarification is required from the legislator, and our proposed solution could underpin this regulation.

Another amendment to Article 200 par. (4) is related to the repealing of the phrase 'given in the council chamber'. In this regard, we draw attention to the fact that, in reality, this does not represent a substantive change in the legislator's view of the way in which the procedures in the written stage take place, because the nature of the written procedure is still non-contentious.

Thus, from the time of filing of the petition to the court and until observing its regularity, followed by the filing of the petition to the defendant, the latter has no knowledge of the trial, so we can talk about the applicability of Article 527 of the Code of Civil Procedure, being the case of a petition that is not intended, at this stage, to establish an adversarial right to another person, since no other person is still involved in this procedure.

As to the non-contentious nature and the provisions of Article 532 of the Code of Civil Procedure, which is fully applicable in addition, it follows that, despite the deletion of the phrase 'given in the council chamber', the further annulment of the petition will still be made in the council room.

Another argument is the legislative technique, in the context in which, through Law no. 310/2018 was also amended and Article 402 of the Code of Civil Procedure, which no longer provides for the obligation to pronounce the judgment in public hearing.

Another argument in the sense that the legislative amendment is only apparent is the legal logic: the provisions of Article 200 par. (7) have not been amended, which means that the review of the appeal, namely the request for review of the annulment will also take place in the council room.

We therefore appreciate that this legislative change is only about the general aspect of the legal text, without any practical significance.

We are reporting another legislative amendment, namely the new paragraph 4, index 1, of Article 200 of the Code of Civil Procedure, which expressly provides that the claimant cannot be required to supplement or amend the sue petition with data or information which he does not personally dispose and for which the court is required to intervene.

This new legal provision aims to moderate certain trends observed in judicial practice, such as the possibility of annulling the petitions for the mere fact that the applicant did not indicate the data or information requested, although he had indicated that he cannot obtain this data personally.

In fact, there are certain situations in which the parties cannot access certain databases, and the court is able to take the necessary steps, these issues being considered by the legislator through the legislative amendment.

In the doctrine before this legislative amendment, it was rightly assumed that if the plaintiff proves that he has failed to find the defendant's domicile or any other place to be summoned, the court would be able to consent to public summoning or to carry out checks in databases or other electronic content systems held by public authorities and institutions, but the sue petition annulment will not occur.[25]

Moreover, the applicant can not rely on this legal provision if he is required to take action and he fails, even though he would have been able to obtain those information personally (for example, a Trade Registry extract, a land book extract, his own personal numeric code). However, if the plaintiff proves that although he has taken care to obtain the necessary information and the competent authority has refused for legitimate reasons (for example, general data protection) or even if the refusal is abusive, in this case the court can no longer ask the plaintiff to complete the information, but the court itself is going to collect this information.

The written stage has undergone a new amendment by removing the obligation to submit a response for contestation, as it can be seen from the new wording of Article 201 par. (2) and (3). In the old regulation, the plaintiff had the obligation to file a response for contestation, and the new text merely provides the possibility of responding, but the 10-day period after the communication in which this act of procedure can be filed, is maintained, under the same sanction, the right loss to submit this act.

We appreciate this amendment to the Code of Civil Procedure, given that most of times the issues raised in the response didn't bring something new, but the plaintiff reiterated the argument in the initial petition. Also, the deadline for submitting the response was within the written procedure and, in practice, extended its duration. As a result, it lengthened the first hearing date. Under the new circumstances, within 3 days of filing the contestation, the judge will directly determine the first term of the trial and communicate the response to the contestation, instead of running a 10-day deadline, only for the response to contestation.

In the new regulation, the plaintiff enjoys the same right to submit a response, but without being an obligation in the same time. Moreover, the plaintiff may continue to invoke any contestation irregularity or procedural pleas regarding the defendant's contestation and the first hearing to which the parties are legally summoned.[26]

[25] G. Boroi, *op. cit.*, pag. 352;
[26] Traian-Cornel Briciu, Mirela Stancu, Claudiu-Constantin Dinu, Gheorghe-Liviu Zidaru, Paul Pop, *op. cit.*;

Conclusions

Law no. 310/2018 aimed to correct some of the New Romanian civil procedural law shortcomings, and the new legislative amendments are, in part, the expression of the need for modernization or restoring the legal provisions functionality.

However, it can be noticed that most of legislative amendments in Law no. 310/2018 aim approaching to the Old Civil Procedure Code provisions, and this phenomenon can be explained, in part, by the existence of a real need and, in part, by the resistance to change. Even the waiving of the obligation to submit a response to the contestation, which was the subject of the present study, is an approach to the old legislation, which did not regulate this procedural act.

Indeed, even at the time of the new legislation issue, there were critical voices about the written procedure, and opinions were expressed in the sense that this stage prolonged the trial duration, neglecting the obvious usefulness of this filtering stage, in terms of shortening and streamlining the stage of the judicial investigation. In fact, in the case of the written stage there was only the necessity of making some corrections in order to make the act of justice more effective, aspects, largely done by the latest legislative changes, at least in the aspects considered in our approach.

In conclusion, we welcome the amendments to the New Civil Procedure Code in the matter of sue petition regulation, especially regarding procedure acceleration and creation of additional procedural safeguards for the plaintiff in order to achieve the final stage of the written procedure and to reach settling on the merits of the case.

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