THE COMPLAINT ABOUT THE PROTRACTION OF PROCEEDINGS

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Abstract

The complaint about the protraction of proceedings ("contestația privind tergiversarea judecății") has the role of sanctioning the passivity of the court of law which does not use the means necessary for correcting irregular conduct, or even worse, it disregards the legal provisions requiring a certain conduct from the court itself. The complaint about the protraction of proceedings should not be seen as a possibility to sanction the judge empowered to solve the case. This appeal is actually a remedy provided by law, intended to correct those situations in which the court of law is causing undue delay to the cases, or even more, it doesn`t take the necessary measures for protecting the right to a fair trial within a reasonable and foreseeable time.

Keywords: *The complaint about the protraction of proceedings, fair trial within a reasonable and foreseeable time.*

1. The Right to a Fair Trial within a Reasonable and Foreseeable Time

Having a strong set of principles aiding the civil trial is vital to the strength of the legal system. According to J. Pope`s vision, if we want to highlight the importance of the principles of law, we should imagine the justice system as an "intuitive model of an ancient temple"[1]. The roof of the temple shall remain balanced as long as the foundation is solid and the pillars are uniformly built. Just like this, the Romanian legal system will be balanced only if we all respect the principles of law while judging according to a specific rule of law value system. The stability of the entire legal system depends on all of its elements: "the solidity of its foundation (value system) and the harmony of its structure (the balanced development of all its pillars)"[2]. Moreover, having a strong and harmonious legal system requires "to identify in a systematic manner the weaknesses and the ways to strengthen and integrate the pillars into a coherent whole"[3].

In our current Civil Procedure Code (abbreviated as "CPC"), the legislator regulated these fundamental principles that underlie the civil trial. Before our Civil Procedure Code came into force, these principles were derived from the interpretation of the old Civil Procedure Code articles in relation to the Constitution and of course, by means of jurisprudence. Thus, the doctrine had an important part in successfully shaping "the pillars" of the entire judicial systems, which were even more reinforced by a coherent jurisprudence.

These legal principles are means of understanding the civil procedural rules and are mainly used in solving procedural issues without express regulation. These legal principles are included in the Articles 5-23 CPC.

The Article 6 of the Civil Procedure Code, guarantees everyone`s right to a fair trial within a reasonable and foreseeable time. The trial is to be ruled in a promptly manner by an independent, impartial and legal court of law. The promptness of the act of justice is guaranteed by the court of law that has to take all the legal measures to assure this.

The phrase "in an optimal and predictable period of time" has a particular importance, because according to the Civil Procedure Code, the judge has the obligation to set short hearing dates to assure the promptness of the act of justice.

A hearing date may be considered optimal when it`s short enough so as the parties does not lose sight of their purpose when they started the lawsuit. Under the provisions of art. 238 CPC, the judge is obliged to estimate the period of time in which the trial will be solved by consulting the parties at the first hearing. According to the complexity of the case and the facts that are to be judged, the court of law must set hearing dates that are both optimal and predictable. Thus, the hearing dates should be not only reasonable but also useful to the trial and adapted to the needs of the parties.

On the other hand, given the fact that a hearing date is by nature essentially relative and also that the judge can reconsider the date of the trial with no sanction whatsoever, the provisions of art. 238 CPC have a preventive role in a psychological way at most.

According to the European Court of Human Rights (ECHR) jurisprudence, the condition of setting hearing dates of a reasonable length, aims on the one hand "to create an effective judicial system that does not allow administrative or procedural delays" and on the other hand must provide "effective remedies for the situation of exceeding the length of judicial

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[1] Jeremy Pope, "Scoala – un sistem de integritate", *Transparency International*, 2007, 2, http://www.transparency.org.ro/publicatii/ghiduri/GhidScoalaSistemIntegritate.pdf.

[2] Idem 2.

[3] Idem 2.

proceedings"[4]. In order to support the idea of having predictable hearing dates the legislator has regulated a number of new rules likely to prevent delay in trial cases and encourage the rule of trials with greater rapidity. Whether we are talking about the Complaint about the protraction of proceedings or the regulations of having maximum limits for setting hearing dates, the aim of the legislator was to facilitate the act of justice, to make it faster and more transparent.

To what extent this has been achieved by regulating the Complaint about the protraction of proceedings, we shall discover from analyzing the regulations, both in terms of its impact on civil trials and its effectiveness compared to the practice developed over the years in the Romanian courts of law.

2. The Premises of Regulating the Complaint about the Protraction of Proceedings

This procedure has emerged as a consequence of the jurisprudence of the Strasbourg court that has ruled on the need of internal procedures that allow interested parties to contest the period of time in which their trials are being solved. Thus, the Complaint about the protraction of proceedings appears as a mean to achieve the ruling of the European Court of Human Rights.

The European Court of Justice pointed out on numerous occasions the need for such procedures, obligating the states to regulate a procedure for those cases that are solved in a long period of time. In this case, before the regulation of this new procedure, Romania was sanctioned on the one hand for not finalizing trials in a short period of time and on the other hand, for the lack of legal procedures in order to the correct the irregularities of long lasting trials. After the Civil Procedure Code came into force, and regulated these procedures, the European Court of Justice can only penalize Romania for disregarding the principle of finalizing trials within an optimal and predictable period of time.

In full accordance with the decisions of the ECHR, which sanctioned the absence of legal means to act in cases of exceeding the reasonable time in which a case should be solved, this new procedure enables the party, that believes that its right enshrined in Art. 6 CPC is violated, to ask the court to take action in order to correct that situation.

3. The Reasons for the Regulation of Trial Delay Appeal

The main objective of this procedure is the administration of justice in a firm and fast way. Thus, the Art. 6 in the Civil Procedure Code establishes the right of everyone to have its cases solved in an optimal and predictable period of time, by an independent, impartial and legal court of law. This is why, the court of law is obliged to take all necessary legal measures to conduct a fast trial case.

One of the solutions provided by the legislator to solve this cases in an optimal and predictable period of time is the procedure of Trial delay appeal.

This procedure is designed in such way that, when the judge does not respect the deadlines, and does not take legal measures to correct the situation, the interested party can file the complaint about the protraction of proceedings. This procedure can be used even when the deadline to fulfill a particular procedural act was not respected by the party itself or even the prosecutor or judge.

As noted by the High Court of Cassation and Justice in Decision no. 5313/2013, the complaint about the protraction of proceedings has the purpose of sanctioning the passivity of the court that, even though it has the legal measures to correct the reasons why the trial takes too long to be solved, the judge does not use them.

Furthermore, the Complaint about the protraction of proceedings must not be seen as an opportunity to punish the judge hearing the case. This procedure is in fact a remedy provided by the rules of procedure, "applicable in situations which cause undue delay or even the court`s lacks of measures to ensure the trial completion in a reasonable period of time"[5].

4. Effects and Consequences

The Complaint about the protraction of proceedings has the following effects: it prevents the trials to be finalized in a long period of time and it sanctions those responsible for the delay.

Specifically, the court seized with this procedure will set a new hearing date for the procedure to be completed. The question that we may ask is what will happen if not even during this new hearing date, the situation is not corrected. Will the party be able to seize the court with a new Trial delay appeal? Regardless of the answer, if it does not correct the situation even during the second hearing date, the procedure`s efficiency is questionable.

With no penalty expressly provided for this, one can conclude that the role of this procedure is purely psychological. This procedure will certainly produce effects for those who already respect the court of law, the procedures and the promptness of the act of justice. For the other category of recipients, because of the lack of coercive means and penalties, this procedure will not be able to change their attitude.

Furthermore, if the judge targeted by such a procedure could be disciplined for failing to take the

[4] Gabriel Boroi, O. Spineanu-Matei, et al., *The New Civil Procedure Code* (Bucharest: Ed. Hamangiu, 2003), 1015

[5] Decision no. 5313/17.05.2013 of the High Court of Cassation and Justice having as object the Complaint about the protraction of proceedings

legal measures to ensure the promptness of trial (either by court`s internal regulations or by a new law coming into force), the measure would not be equitable having regard to the many situations in which, the trial is delayed by the parties (sometimes even intentionally).

However, there are situations in which the delay of trial is a direct effect of the case is administrated by the court. Thus, in the matter of evidence, after the expiry of the date provided for this situation, you need to administer new evidence that emerged from the debates, this situation will become increasingly rare given the possibility that the judge may be penalized for exceeding the optimal and predictable length of trial, set at the first hearing date. As a result, the reluctance of judges to approve the proposed evidence in such cases will lead to a rapid resolution of the case, thus respecting the principle of promptness, but at the expense of a fair solution.

5. Regulations

This special procedure of Complaint about the protraction of proceedings, is a non-contentious and incidentally appeal and is regulated by art. 522-526 CPC. The Complaint about the protraction of proceedings is intended to ensure that the principle of trial promptness is respected and guarantees the right to trial ruled within an optimal and predictable period of time.

5.1. The Parties and Causes of Action

According to the provisions of Art. 522 para. 1 CPC, every party to a civil trial, as well as the public prosecutor taking part in the proceedings, is entitled to bring a complaint whereby they allege a violation of the right to a trial within a reasonable and foreseeable time and consequently request that adequate measures be taken to efficiently deal with the alleged violation. In the second paragraph of the same article are listed the cases in which the Complaint about the protraction of proceedings may be filed:

a. where a statutory deadline for the finalization of a case, the delivery of a judgment or the drafting of a statement of reasons is reached without any of the requisite action having been taken;

b. where a party to the proceedings fails to comply with a court order urging it to carry out a specific procedural act by a deadline and the court does not take statutory measures against that party;

c. where an authority or other third party to the proceedings fails to observe a time-limit set by the court to submit to it a document, data or any other information deemed essential to the case, and the court does not take statutory measures against the defaulting authority or third party;

d. where the court defaults in its duty to dispose of the case within a reasonable and foreseeable time by not taking the required statutory measures or by not carrying out a procedural act, as imposed by law, even though it could have done so in the time that had lapsed from its last procedural act.

To file such a complaint, is necessary to have a law suit in front of a court of law. Although this is not expressly provided, it follows logically from art. 522 CPC.

The first case under consideration by the legislator regards the situation when judges does not comply with the procedures required by law. Since this complaint will be judged by a panel of judges that are invested with the proceedings on the merits, it is hard to believe that such a complaint could be accepted, given the reason that such a delay would exist mainly because of the volume of activity due to the high number of trials in Romania.

Of course, in cases of gross negligence or bad faith on the part of the judge, such an approach would be justified but these cases are limited in number in relation to the situation described above. The main effect will be contrary to the objective of the new Civil Procedure Code, generating even more lawsuits.

Another reason which would excessively lengthen proceedings could be the judge`s poor time management, which of course can be improved but not by such a measure.

In this first case, the Complaint about the protraction of proceedings, can be considered as a "reminder" for the judge. The same result would have been achieved by a simple request during the hearings.

In the other two cases provided for by art. 522 para. 2.2 and para. 2.3 CPP, it is clear that the complaint holders will issue guidance on resolving the situation, and even considering the opportunity of certain procedural acts. In this situation, the risk for the parties to replace the court`s ruling is quite clear.

Furthermore, just like it shown before, the parties could "remind" the judge by means of a written or verbal request, and the court could oblige the ones that delay the procedures to act accordingly under penalty of warning or fine.

Such a use of the complaints will delay the trial even more, given that in addition to the numerous cases a judge has to rule upon, they will have to analyze and decide upon these new ones. Moreover, these complaints can be and most likely will be attacked separately, and thus resulting in an even greater number of cases that have to be ruled upon.

Regarding the fourth case referred to in art. 522 para. 2.4 CPP, it gives the party the possibility to file a complaint when the court does not take legal actions or does not fulfills certain procedural acts, which is contrary to the principle of judge`s independence. Thus, the party is able to replace the court`s ruling indicating which procedural acts should be met. Even if the judge does not meet the procedural act willingly, this may be due to its appreciation in terms of opportunity and on the basis of the active role of the judge.

5.2. Withdrawal of the Complaint. Formal Requirements

According to the provisions of Art. 523 CPC, the Complaint about the protraction of proceedings may be withdrawn at any time up until a decision has been rendered. Once withdrawn, the complaint cannot be repeated.

Although it is not expressly provided this, in the situation of new reasons, distinct from the one that already was the subject of the first complaint, a new complaint is possible.

These rules also apply to the appeal ("plângere") provided by art. 524 CPP for the following reasons: the legislator did not distinguish in art. 523 CPP between the two kinds of complaints and the possibility of withdrawal the complaint is regulated prior to the appeal of the complaint.

Regarding the formal requirements, according to the provisions of art. 524 CPP the complaint shall be filed in writing or made orally within the court dealing with the case in respect of which allegations of undue delays have been raised. If the complaint is made orally, in this case, it will be taken note of it, together with its legal grounds, in the interlocutory judgment.

An important aspect to remember is that filing of such a complaint does not halt the course of the legal process, and thus cannot be used as an abuse of rights in order to delay the proceedings. A contrary approach would have been contrary to the very purpose for which this special procedure was created

5.3. Examination and Determination of the Complaint

The Complaint about the protraction of proceedings is examined without delay, and at the latest within five days from its submission, by the panel of judges sitting in the main proceedings and no party shall be summoned.

The interlocutory judgment that is delivered if the complaint is well-founded cannot be subject to appeal. Moreover, the judges will order the adequate measures to remove the situation that had led to the protraction of the proceedings to be taken forthwith. The concerned party shall be immediately notified.

If the complaint is unfounded, it is reject it by an interlocutory judgment as well, but in this case, it can be appealed ("plângere") against by the interested party, within three days from the date on which service of process has been effected.

The appeal ("plângerea") is filed through the court that rejected the complaint, which submits it immediately to the higher court together with a certified copy of the case file. In the special situation of the case being heard before the High Court of Cassation and Justice, the appeal will be examined by a different panel within the same court.

The appeal against the decision to reject the complaint is examined and determined within ten days from the receipt of the case file by a panel composed of three judges and no parties are summoned. This decision is final.

If the appeal is well-founded, the panel will admit it and the decision will indicate what action is to be taken and also, if needed it will also set a deadline for it to be implemented.

Please note that the court that ruled upon the appeal cannot, by its own ruling, give guidance or express its opinion on the facts or points of law that may anticipate the judgment on the merits or otherwise infringe upon the freedom of the judge to decide on the ruling to be adopted. In this way, "the independence of the judge hearing the main proceedings will not be affected, having full discretion on the facts subject to judgment"[6], and so, the higher court will only address the reasons regarding the delay of the trial.[7]

Even with such express regulations it`s difficult to say to what extent the judge`s ruling independence will be respected, considering the instructions given by the higher court. Although the goal of this complaint is to report any irregularities likely to delay the trials, through this special procedure are created the premises to exercise possible pressure from higher courts.

Another problem that may arise regarding this complaint is the sanction applied to not respecting the guidelines given by the higher court; to be more exact what kind of sanctions? Such procedures could be used for disturbing the judges, leading eventually to an even higher number of trials, which would definitely counter the purpose for which this procedure was created.

5.4. Sanctions for a Complaint Filed in Bad Faith

In the situation that the complaint and appeal are likely to become themselves a way to delay the trial, the legislator regulated in art. 526 CPP the possibility of sanctioning those that file this procedure in bad faith. Thus, the filing of a complaint or an appeal in bad faith is sanctioned by a fine of between Lei 500 and 2,000. Moreover, the interested party, can also order request an additional payment of compensation for damages caused by the abusive filing of a complaint or appeal. This sanction is applicable to any of the subjects of the complaint or appeal, including the prosecutor, since the legislator did not make any distinction between the subjects.

Given the difficulty of proving bad faith, the legislator provided in the second paragraph of the same article how it can be determined: "Bad faith shall be discerned from the manifestly ill-founded nature of the complaint or appeal, as well as from any other circumstances that make it reasonable to assume that the right was exercised abusively or served a different purpose than that allowed for by the law".

[6] Idem 5.

[7] Legislative Information Bulletin no. 4/2009

It is worth mentioning that filing appeals on complaints is also sanctioned in the same way.

6. The Conclusion

In conclusion, it is necessary that to guarantee any person both the right to a fair trial within a reasonable and foreseeable time and the right to file claims and to report irregularities regarding the trials. However, this can also be achieved by filing written claims or orally request them, without regulating the special procedure of Complaint about the protraction of proceedings, that can also be used as an element of disturbing the judge and even delay the trials furthermore.

The Complaint about the protraction of proceedings will be an effective tool for those who don`t master a good management of time, those who lack interest or are poorly trained, those who hurry and thus make mistakes or even for those who delay trials with bad faith.

This procedure would prove successful given a situation in which all the holders would act in good faith, would be concerned of having a fair trial, and also where the truth and honor would triumph. Because all of this is unlikely to happen in the near future, having such a procedure is more than welcomed, given the degradation of people`s good spirit and understanding one another.

Given the current context of a high number of trials and the "legislative instability that generates periodic waves of lawsuits"[8], the filing of such complaints needs to analyzed accordingly to its opportunity, and thus, avoid arising the already high number of lawsuits and high work load of judges.

However, assuming that the holders file these complaints only in good faith, this procedure would be used only exceptionally and would definitely conduct to shorter trials and better ruling. Otherwise, a large number of such complaints and appeals will weaken and suffocate the legal system, delaying even more the trials.

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