"LUCIAN BLAGA" UNIVERSITY OF SIBIU
DOCTORAL SCHOOL
LAW

SUMMARY
DOCTORAL THESIS
FILING APPLICATION NOTICES IN CIVIL LAWSUITS

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FILING APPLICATION NOTICES IN CIVIL LAWSUITS

SUMMARY

DOCTORAL THESIS

Keywords: civil action, counterclaim, statement of defence, writ of summons.

1. Motivation of choosing the theme

For the proper achievement of justice pure existence of judicial standards is not enough, they must be enforced, similarly as the application of the fundamental legal principles is mandatory.

From the very first forms of society, legal matters, in spite of missing actual rules, were governed by custom rules that were well set in the collective conscience.

One of the most important, if not *the* most important theme of the civil law is the legal institution of referring a civil matter to the Court of Justice.

The International Covenant on Civil and Political Rights, adopted by United Nations General Assembly on 16th December 1966, mentions in its article 14: "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". This principle is also put in practice by the legal provisions enabling to settle in court legal disputes issued from violations of civil legal relations.

In this sense provisions of article 6 paragraph 1 of the European Convention on Human Rights are extremely important: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”[1]

Article 21 (3) of the Romanian Constitution, republished, mentions that the parties are entitled to a fair trial and the settlement of cases within a reasonable time.

Free access to justice is a guiding principle to civil law, being ranked in the doctrine as an “expression of a fundamental right”. [2]

Any constraint on free access to justice is against constitutional provisions and contrary to law principles established in international documents. [3]

In addition, article 10 of Law no. 304/2004 on organisation of the judiciary, republished, provides that everyone is entitled to a fair trial and settling of the cases within a reasonable time by an independent and impartial tribunal established by law. In the NCPC [New Code of Civil Procedure] the phrase “reasonable time” is replaced with “optimum and predictable time”, but the spirit of the law is the same.

NCPC’s article 6 rules as guiding principle of the civil law “The right to a fair trial within an optimum and predictable time”.

According to NCPC’s article 6 paragraph (1) ‘In a suit at law, everyone shall be entitled to a fair and public hearing, within an optimum and predictable time, by a competent, independent and impartial tribunal established by law. For that purpose, the court should order all the measures enabled by law and ensure lawsuit proceedings at once.’

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[1]See I. Leș, op. cit. p. 57; C. Turianu, *Jurisprudence Contributions to clarifying the content of provisions of article 6 paragraph 1 sentence 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, relating to the demand of settling lawsuits ‘within a reasonable time’*, *Law* no. 9/2000, pp. 158-160

[2]I. Deleanu, *Right to Trial within a Reasonable Time*, P.R. no. 9/2007, p.18

[3]G. Antoniu, *Article 6 of the European Convention on Human Rights. Implications on the Romanian Law*, S.D.R. no. 3/1993, pp. 257-270

Free access to justice is an essential principle of organising modern judicial proceedings, being recognised by international literature, with various meanings for the trial law, but also for the constitutional law. This principle is also recognised by article 8 of the Universal Declaration of Human Rights: “Anybody has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law”. [4]

The above aspects reveal the overwhelming legal importance of the institution of “referring a civil matter to the Court of Justice”, which is the materialisation of the principle of free access to justice. The major importance of this legal institution is evidenced by its thorough study in both the national and the international doctrine.

Moreover, an increased concern can be noticed to achieve the target of harmonising the Romanian legislation to the European legislation.

Hence the question: “What happens if the right of free access to justice is abusively exercised?” The answer is given by the NCPC, being extensively studied in the specialised papers. In the event a natural person or legal entity malevolently takes a case to court without any grounds for the legal case sent for trial, the competent court can order the party to pay a civil fine as provided by NCPC’s article 12 paragraph (2) and article 187 paragraph (1) item 1 point a).

In most trial laws free access to justice cannot have an absolute character. In this sense, ordering the losing party to pay courts fees, according to article 453 paragraph (1) NCPC, or the party having lodged an unjustified action, respectively, is punishable.[5]

2. Purpose and objectives of the thesis

[4] I. Leș, *New Code of Civil Procedure. Comment per articles, 2nd edition*, C. H. Beck Publisher, Bucharest, 2015, p.13

[5] I. Leș, *op.cit.*, p.18

The purpose of this thesis is to go deeper into the legislative and doctrine notions of the legal trial institution called "referring a civil matter to the Court of Justice".

The purpose of civil law is to settle in accordance to the provisions of the civil trial legislation any lawsuit that may occur between private individuals or legal entities, court cases generated by damage brought to a civil legal relation. Following the regulated stages, an independent and impartial court will issue a judgment intended to re-establish the "rule of law".

The object of the civil law consists of those legal relations occurring between participants to a trial within the course of settling civil cases, also called civil lawsuits.

Transforming the social relations into legal relations would not be possible without the specific regulation of the same, therefore legal relations result by enforcing law on social relations.

Disputes issued from such legal relations cannot be settled unless the case is brought to court.

In the civil law, unlike the criminal law, given that the tribunal cannot be notified *ex officio*, the only way to safeguard a damaged legal relation is to notify the court of justice by the person whose interests or rights have been prejudiced.

As any legal relation, a civil lawsuit relation generates mutual rights and obligations for all the participants in a lawsuit.

Therefore, all the civil rights established for the participants in a lawsuit as well as any related obligations that are imposed to them spring from the civil lawsuit relation.

Rights and obligations occurring in a civil lawsuit also result from the applicable regulation.

Civil law is mainly intended to impose justice in civil cases, made concrete in the issuance of a judgment by an independent and impartial court, following enforcement of applicable regulations.

The target of the science of the civil law is also to discover possible legal shortcomings and to formulate *de lege ferenda* proposals, intended to regulate aspects that had not been previously regulated and invoked, in the event that new legal circumstances may occur, imperatively requiring new regulations, all of them being intended to keep up with the dynamics of the contemporary society.

Our society is constantly evolving and, even from ancient times, law has been tightly connected to the evolution of the society. Currently, civil law is going through historic times, marked by the adopting of the NCPC as a supplement to the shortcomings existent in the former body of laws, being a code in line with the European legal and legislative standards.

In terms of its main scope of research, this thesis intends to approach the legal institution of "referring a matter to the Court of Justice" and all the legal institutions it incorporates:

Conditions of exerting a civil action in a civil trial are those requirements that matter most during a civil action and in the course of the trial, so they are analysed as such in the first part of the thesis.

Conditions of exerting the civil action are provided by New Civil Code's article 32. According to paragraph (1) of article 32 "Any petition can be formulated and sustained provided its author has a capacity to stand trial according to law; is a party to a lawsuit; lodges a claim; justifies an interest". These aspects shall be analysed in detail throughout this work.

One of the objectives of this research is represented by the detailed study of the writ of summons, analysing the elements it must contain.

Analysing the statement of defence as an act of protecting the defendant is also a major objective of the thesis.

Another target of the research is the comparative approach of the legal institution of referring a civil matter to the Court of Justice, considering the Romanian legislation and other countries' legislation.

In this sense the study of the legislation regulating the trial rules applicable to the legal institution of "referring a civil matter to the Court of Justice" in Romania, as compared to the legislation of civil proceedings before trial courts in some European countries (France, Italy, Portugal, Italy, Belgium).

A comparative study of the Romanian law and the law of some other countries in the matter of referring a civil case to the Court of Justice is intended to discover any shortcomings existing in the national legislation that should be regulated.

Another target of my research has been the interpretation of novelty in the approached theme by reference to theories outlined in the doctrine.

In an approach that was not intended to be exhaustive, a detailed assessment has been conducted on all the legal institutions forming the legal institution of "referring a civil matter to the Court of Justice", emphasizing similarities and differences occurred naturally between the Romanian civil body of laws and the laws of other European countries. Analysis and synthesis have been used as methods of research.

Along its historical evolution, the activity of enforcing justice has evolved from ideal to real, easy to transpose into practice by simple law compliance.

Civil trial, more precisely a lawsuit is a way of solving civil disputes occurred following violation of subjective civil interests and rights, namely following prjudice brought to a civil legal relation.

The legal institution of referring a civil matter to the Court of Justice is the triggering factor of the entire civil procedure.

A *sine qua non* condition for a fair settlement of civil lawsuits is to be based on the main source of righteousness, i.e. the law, regardless of the shape it assumes.

Observing and applying the law is an essential measure of the development of a democratic country. As Hegel put it, [It is only after man has created multiple needs and when acquiring them mixes with their satisfaction, laws can be created].

Therefore, the higher the degree of development of a state, the higher the place of law within the hierarchy of social values, and it becomes applicable in its letter as well as in its spirit. In this sense we think that the guiding principle of the legal institution of "referring a civil matter to the Court of Justice" is the principle of legality. By observing the principle of legality, all the rest of the principles of the civil law naturally derive from it. Article 7 paragraph (1) of the New Code of Civil Procedure regulates the principle of legality as the "Civil lawsuit developing according to law".

Legality is a principle generally recognised in the democratic countries. The Romanian Constitution does not dedicate a special text to it, but the principle of legality should be considered as bearing constitutional value.[6]

3. Theoretical significance and applicative value of the work

As for the scientific results of the research and their relevance as compared to the previous studies, they practically reside in approaches made to the theme "Referring a a civil lawsuit to the Court of Justice", from the perspective of amendments brought to the New Civil Code, as well as of studying the legislation in the field as compared to the legislation of other European countries.

We think that the legal institution of "referring a civil matter to the Court of Justice", is one of the most important institutions of civil law and law in general, as in the absence of referring a civil case in court, a civil conflict would not be brought in court and a fair judgment could not be issued for it according

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[6] *Idem*

to law; otherwise any person answerable to the law would be restricted in exerting their rights, or could be put in the situation of executing abusive impositions.

Referring to the court of justice in a civil lawsuit has a special importance, being the triggering factor for the entire civil lawsuit.

The institution of referring a civil matter to the Court of Justice, in the form provided by law, is the method by which a civil lawsuit is triggered, referring a case to court being a *sine qua non* condition in the start of proceedings.

The importance of the theme consists in the fact that trial, as legal institution, gathers a multitude of legal principles and standards that start with the action of referring a case to court having as finality the enforcing of justice, transposing legal theories into practice with a view to protect the rights and meet the obligations of individuals and legal entities, as well as to reinstitute the legal order violated by incompliance with subjective civil rights.

In respect of doctrine theories on whether civil law belongs to public or private law, we adhere to the idea according to which civil law belongs to the public law branch. Even if the interested person has a right to start the proceedings, even if the parties can establish the trial framework, and put an end to the lawsuit, the limits of such rights are imposed in an absolute manner by law, and the Court, as a representative of the power of justice, sees that rules of public order are observed during the entire course of the trial, by virtue of its active role. All these aspects reconfirm the theory according to which civil law is a part of the public law branch.

As for the nullity of procedural documents we think it is important to underline the fact that absolute nullity cannot be subject to renunciation, unlike relative nullity, which can at any time be subject to renunciation.

NCPC's article 175 regulates conditional nullity, the procedural document being null and void if by failure to comply with the legal provision the party was

harmed in a way that cannot be suppressed unless the document becomes null and void.

In cases of nullity specifically mentioned by law, harm is presumed, the interested party being entitled to bring contrary evidence.

NCPC's article 176 regulates unconditional nullity, such nullity not being conditional on the existence of any harm in case of violation of legal provisions related to: capacity to stand trial; representation in court; competence of the tribunal; composing or constituting the members of the court; making the court session public; other legal requirements outside the procedural document, unless otherwise provided by law.

We think that the Romanian civil law should include the provisions of article 32 paragraph 1) of the French Code of Civil Procedure, which mentions that an individual appealing to justice in a dilatory manner, i.e. failing to comply with the trial hearing, or in an abusive manner, can be ordered to pay a fine of maximum 3,000 Euros, without prejudicing the claimed interests. The invoked aspect is beneficial as failure to stick to the deadlines is also subject to fines, determining the parties to exercise their rights within the legally imposed deadlines.

It would be not without interest that the NCPC take over one of the Portuguese Code of Civil Procedure's proceedings according to which theoretical definition mentioned by law for the notions of judicial personality and legal personality with the mention that the one having judicial personality also has a legal personality. Pursuant to the general law principle that "Ignorance of the law excuses no one", law should be more explicit and accessible to any person answerable to the law, regardless of their education.

Another conclusion of the research is that there are three major pawns in settling a dispute brought to court by lodging an introductory application, namely: the law, the court and the parties. Studying the importance of the procedural documents brought by the parties (initial applications, appeals etc.)

we think it can be said that even the ruling of an independent and impartial court of justice, made concrete in a judgment, is an instrument at the parties' hand, as the court cannot, for example, grant more than it was asked from it for the remedy to a prejudice, therefore in a civil case the court can order only upon what was asked by the parties.

In terms of doctrine controversies on parties to trial, we adhere to the opinion existing in the doctrine according to which the term of "quality" has multiple meanings, not only legal. In terms of material law, quality designates the parties' position in a legal relation (owner, bailor etc). In terms of trial, quality is the manner of participation of the parties in a trial (for themselves or as a representative). Another meaning of the term is the right of an individual or a legal entity to participate in the legal activity (legal standing).[7]

We adopt the opinion of the doctrine[8] according to which the notion of party to trial does not have a single meaning and cannot be defined just by the phrase "legal standing", but this condition of exerting the civil action also refers to the manner of the parties' participation in a trial, either on their own behalf, or as a representative.

As for the provisions of NCPC's article 178 paragraph (5) on nullities:

The doctrine almost unanimously adopts the idea according to which this text of law takes into account only relative nullities. In this sense are invoked various arguments: the topographical situation of the text according to standards related to the legal regime of relative nullities; for absolute nullities NCPC's article 178 (1) establishes a different regime. Even the typing of the first paragraph of the commented text pleads for such a solution, establishing a legal regime different from that conferred to relative nullities.

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[7] I. Leş, *Treaty of Civil law. Volume I. General principles and institutions. Trial in the court of first instance*. Universul juridic Publisher, Bucharest 2014, p.261; I. Leş, *New Code of Civil Procedure. Comments on articles,* 2nd edition, C.H.Beck Publisher, Bucharest, 2015, p.64

[8] See I. Leş, *New Code of Civil Procedure. Comments on articles*, 2nd edition, C.H.Beck Publisher, Bucharest, 2015, p.64

We adhere to the opinion according to which the text of law previously invoked is not applicable in case of a single (absolute) nullity ground, meaning that in such an event the procedural error could be invoked under the circumstances of article 178 paragraph (1) NCPC.

As for the legal regulatory institution we think that a 10-day delay to complete the shortcomings of a writ of summons can lead to an ungrounded delay of the case.

For example, the Code of Civil Procedure of the Republic of Moldova does not allow the petitioner a delay for amendments, as the Romanian regulation does, instead amendments should be made at once. A delay has an exceptional nature, being made only when the immediate elimination of shortcomings is not possible; then the petition shall be noted in an entry record of documents, and the petitioner shall be granted a deadline to lodge the petition as provided by article 166 Code of Civil Procedure of the Republic of Moldova.

As for the amendment of the petition, we stick to the opinion according to which deprivation of the plaintiff's right to amend his or her writ of summons and to submit new evidence shall operate only in the event of amending the writ of summons targeted by provisions of article 204 paragraph (1) NCPC, where it is mentioned that the plaintiff can change his or her application and submit new evidence, under penalty of losing their rights, only up to the first hearing deadline.

In such case, the court can order postponement of the hearing and send the amended application for the defendant to submit a statement of defence, which under the penalty of loss of rights shall be lodged with at least 10 days before the appointed hearing, and assessed by the plaintiff on the case file.

The solution of enforcing loss of rights in case the plaintiff fails to amend his or her petition on the first legally summoned hearing is extremely pertinent, as otherwise this "uncertainty" would lead to unwanted procrastination.

We think that the loss of rights penalty is not possible in case of article 204 paragraph (2) as the law clearly mentions that a deadline is not necessary, but verbal statements of defence shall be mentioned at the end of the session verbal statements made in court where: material errors of the application are remedied, when the plaintiff increases or decreases the subject of the application, the equivalent value for the application subject that was lost or disappeared during the trial is required, or when a declaratory application is replaced by an application for a right or the other way round when the application is admissible.

In support of this opinion there is a guiding decision from the Jury of the Supreme Court, ruling that “such application can be lodged during the entire course of the trial up to the end of debates on the subject matter, without the defendant’s consent being needed.”

In terms of counterclaim we assess it as being of major importance, being the materialisation and reassertion of the principle of parties’ equality in a civil lawsuit. If the writ of summons is replied to by a statement of defence, the latter is replied to by a counterclaim, and this ensures the trial balance.

The two parties – petitioner and defendant – expose their claims and invoke defence even from the submitting of written evidence phase in a civil trial, which confers good knowledge of the facts as of right and law by the judge.

Considering that the doctrine awards the counterclaim a character of civil action, its importance is undeniable.

Furthermore, the incidental method, materialised in lodging a counterclaim, ensures the avoidance of contradictory rulings.

Such aspects are developed in the chapter dedicated to the counterclaim.

In assessing the matter of the stamp duties, we consider it necessary to take into account both the benefits and the disadvantages thereof.

As for the judicial stamp fee, its existence has generated a series of rhetoric questions both within practitioners and theoreticians in the legal field, namely are stamp duties a violation to the principle of free access to justice?

We consider that the existence of a stamp duty does not represent any restriction of the principle of free access to justice, however it represents a money conditioning of the persons answerable to the law.

We consider that judicial stamp fee should be if not eliminated, then at least significantly reduced. For example in the Spanish Code of Civil Procedure, lodging an application in court is not conditional upon payment of a stamp duty, which is a beneficial aspect, as access to justice should be free and available to everyone, not being conditional on money.

A plausible argument supporting the requirement for a stamp duty is that frequently invoked by the doctrine, namely that payment of such duty would discourage those who use their right to trial only to bring their adversary in court.

As provided by law and practice, stamp duty is established proportionally to the amount of the disputed claim, and at the end of the trial the paid tax can be recovered from the losing party.

Although a party winning the lawsuit will have the possibility to recover the tax initially paid, we consider that such party is still conditioned by money, not being able to dispose of their rights for free, a precarious financial situation making it impossible for the applicant to address a court of justice free of charge.

We consider appropriate the clarification offered by the constitutional court according to which free access to law is equal to a free service provided by the courts of law, however this does not exclude any facilities offered, or even exemption from paying a stamp duty to disadvantaged persons, especially in the event the current legislation grants exemptions from the judicial stamp fee.

The constitutional court has mentioned that any exemption from payment of the judicial stamp fee mentioned by article 29 paragraph (1) of O.U.G. no. 80/2013 is of an objective nature, being set in continuation of the matter subject to trial, not the quality or material situation of the parties. Instituting exceptions from the general rule of paying judicial stamp fees based upon special circumstances shall not be discrimination or prejudice brought to the constitutional principle of equality of rights and no restriction to the free access to justice.

If the person answerable to the law does not possess the financial means of "crediting" a lawsuit up to the recovery of costs from the losing party, can we say that justice is free?

We consider that in the matter of judicial stamp fees, a distinct regulation should be introduced for social cases, for people who do not earn an income, persons answerable to the law that have the money to pay the stamp duties provided by law.

Even if the law is the same for any citizen regardless of their financial situation, by failing to take into account the money condition of persons answerable to the law in the matter of stamp duties a situation of discrimination and financial conditioning could be reached in the opportunity to exercise one's right to trial.

There are much more economically developed European countries where submitting an application is not conditional upon payment of any stamp duty, an example therefore being Spain.

We consider that stamp duty should be substantially reduced in order to consolidate the principle of free access to justice, and for underprivileged social categories there should be no stamp duty.

By assessing the regulation of the legal institution of "referring a civil matter to the Court of Justice" we can draw the conclusion that in spite of small shortcomings, Romanian civil legislation is typical for a modern and democratic

country, the requirements of adapting the national legislation to the European legislation being therefore met.

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