

CONSIDERATIONS ON THE JUDICIARY PROCEDURES OF CONFLICT RESOLUTION

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ABSTRACT: *As a result of the economic and social life development, which triggers an ever larger number of litigations in all the fields, and which have to be solved at an ever faster pace, at the level of the European Union, it is incumbent to find the simplest and quickest judiciary procedures, the European Union member states having to adopt them.*

The practice showed that the judiciary procedure through which the creditors became to have their rights acknowledged and ask for the pursuance and execution of their debts is, many times, discouraging, it is much more expensive and it takes an extremely long time.

The demand for payment is meant, on the one hand, to place the creditor in a much more comfortable position, as compared to his rights, and, on the other hand, to reduce, to a considerable extent, the length of valorization of an uncontested, liquid and enforceable debt, consisting in paying an amount of currency.

KEYWORDS: *special procedure, demand for payment, uncontested debt, liquid debt, enforceable debt, petition for annulment.*

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In its beginning, the demand for payment procedure was regulated by the Government's Ordinance no. 5/2001¹, subsequently going through more modifications. The demand for payment procedure is a special procedure by which the creditor who has an uncontested, liquid and enforceable debt may obtain for the defendant to fulfill the duty provided.

Until the implementation of the new Law of Civil Procedure, when the Government's Ordinance no. 5/2001 and the Government's Emergency Ordinance no. 119/2007, as it is stipulated in the project of the Law on the implementation of the law

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¹ Government's Ordinance no. 5/2001 regarding the demand for payment was published in Romania's Official Journal, Part I no. 422 of 30 July 2001, was approved by Law no. 295/2002, and modified including by Law no. 195/2004 published in the Official Journal, Part I no. 470 of 26 May 2004.

will be abrogated, is to be replaced by the regulations in the 6th Book, the two procedures established by the ordinances mentioned, are applicable and we consider that they are not to be considered alternative to the common law procedure of solving the conflicts, especially in the commercial matter, regarding the contracts between the professionals.

On the achievement of the Ordinance project they had as reporting sources the similar regulations in France (L'injonction de payer – procedure regulated by art.1405 – 1425 of the French New Law of Civil Procedure) and Germany (Mahnverfahren, procedure provided in the 7th Book of the German Law of Civil Procedure).

There are similar regulations in Italy (Procedimento di ingiunzione), Austria (Mandatsverfahren), Portugal (Injuncao), Brazil (Acao monitoria), Northern and African countries. In France the procedure was established ever since 1937, being subsequently reformed, having as a result the current ones mentioned in the New Law of Civil Procedure. The French doctrine revealed the fact that the establishing demand for payment (at first, recovery method of the reduced amount debts) was performed on the request of the chambers of commerce, which brought into question the extremely harmful effects on the debt produced by the non-existence of a procedure of the type of the already applicable ones both in Germany and in Italy.

The Italian doctrine deals with the demand for payment as a „summary judgment”, characterized, both by a mainly unilateral feature and a summary analysis of the case „summaria cognitio”, the so-called „feeling of the case” to which is referred to by the Romanian legal literature. One of the reason for establishing the procedure was the fact that, before its being published, Italy met what the Italian doctrine means by the formula „la cantelarizzazione del proceso civile” that is the lawyers’ preference to appeal to provisory measures, to avoid the major inconvenience of the ordinary procedure, as a result, going through a considerable delay between the date of the court composition being established and the date of solving the introductory petition².

In France, the mechanism of the procedure is relatively simple. The creditor of an amount of currency refers the judge a petition with the evidentiary writs of his credit enclosed to it. The judge examines these writs, without summoning the parties to the court and without organizing opposing debates.

In case the judge finds the petition unjustified, he pronounces a judgment by which he warns the debtor to pay the creditor an amount of currency, representing capital and interest, whose worth is stipulated by himself within the limits of the petition.

The judgment is notified to the debtor. The debtor has a 30 days’ delay to make a contestation. If within this delay the contestation is not made, the judgment shall be vested, on the creditor’s request, with an enforceable force, thus the creditor possessing an enforceable power which enables him to proceed to the court enforcement of the debtor’s possessions.

In the event of making a contestation, the court clerk shall summon the creditor and the debtor to a court hearing, hearing during which the court shall decide on the

² For a more detailed study regarding the special procedures and the demand for payment procedure, see Fl. Măgureanu, G. Măgureanu, Law of Civil Procedure. Course for the Master Program. Business Law, 2nd edition, Universul Juridic Publishing House, Bucharest, 2009, p. 193 and the next.

admissibility of the contestation and on the truthfulness of the credit, in which case, the judgment shall replace the initial demand for payment decision.

In Germany, the mechanism of the demand for payment procedure is provided in the art. 688 – 697 of the Law of Civil Procedure.

Thus, in the event of a credit whose object is the payment of a defined amount of currency, they shall deliver on the creditor's request, a conclusion for the debtor's summons.

It is not admissible for claims whose annual interests exceed 12% of the interest practiced by the German Bank, when the credit valorization is dependent on a creditor's counter-service and when the summons notification should be made by publicity.

The competence for solving is uniquely incumbent to the court in whose jurisdiction resides the creditor, petition having to bear the applicant's written signature.

It is admitted to address complaint against the overruling of the petition for the conclusion delivery.

The contents of the summons conclusion is rigorously regulated; it has to provide, among other things, except for the elements of the introductory petition, the mention that the court did not examine the credit validity, informing the debtor on his liability to pay the amount indebted and the corresponding interest, together with the court costs, within a 2 weeks' delay since the summons receipt, in the event the credit is considered valid or to inform the instance whether he intends to contest the credit, partially or totally, the mention that they shall deliver with an enforceable power, if the debtor shall not make a contestation.

The court shall notify the summons conclusion to the debtor and shall inform the creditor on it, and the debtor shall file a contestation against the credit to the same court, as long as the enforceable power was not delivered, a delayed filed contestation being assimilated to the incoming contestation.

After the contestation is registered, the court sends the file for free to the court appointed by the summons conclusion, or to the court appointed by the parties' agreement, causing the contentious procedure to occur.

At the communitarian level the Recommendation of the 12th May 1995 and the Directive 2000/35/EC which provides that the secondary legislation be adopted so as to prevent the persistence in nonpayment of the commercial debts, an extremely harmful phenomenon, with extremely harmful effects on the economic development and the private capital.

They desperately needed to provide special derogatory rules, governed by the celeritate principle, with a mainly non-contentious character, in the first stage of this procedure, that of informing the court, followed, in case, by a contentious stage, in the event of the debtor's performing a petition for annulment.

The Romanian legislator receives these aspects and, on the background of the actual growth of the persistence in nonpayment phenomenon, stipulates the simplified demand for payment procedure. This instrument should prove its efficiency, to enable the creditors to satisfy their credits within a „reasonable” delay in the meaning of this notion according to art. 6 of the ECHR.

According to the current procedural provisions, the Law of Civil Procedure regulates special procedures by which they provide rules which are derogatory from the

procedural common law in certain matters. These procedures or special procedural rules are also provided in certain laws, as we state that they adopted ordinances or laws focusing on the regulation of such special procedures.

By these special rules they aim at establishing a suitable procedural framework for judging certain litigations and the defense, in this manner, of certain social interests and values.

The existence of a large number of such special procedures or derogatory rules which determine some difficulties in the commercial suitcase imposes several general considerations on the relation between the common law that is the law of civil procedure and the special jurisdictions.

A first conclusion, as resulting from all the special laws, is the fact that the main characteristic of these specialized procedures is that they are meant to be completed with the common law dispositions.

As a result, the basic principles of the civil suitcase remain applicable to all the categories of judiciary litigations, even the ones solved by other bodies with jurisdictional attributions, as they are the most general and essential procedural rules which determine the whole structure of our civil suitcase and at the same time they provide the most specific features of the whole system of procedural institutions.

As compared to that, the special procedures compose a system of norms which regard only some specific aspects of the suitcase, not being characterized by its detailed regulation. Providing only norms derogatory from the common law, they are different from one special procedure to another, which shows the variety of these norms established from the necessity of stipulating these special private rules, with a very different object.

In Romania, through the regulations determined by Law 295/2002 for the approval of the Government's Ordinance no. 5/2001 regarding the demand for payment procedure, they aimed at replacing the common law procedure regarding the recovery of the uncontested, liquid and enforceable debts, through a more simplified procedure³.

The necessity of regulating the demand for payment procedure results both from the practice in the field in our country especially in the last years, but also from the experience of some European states (as we have already showed, Germany, France, the Scandinavian countries etc.) where statistically, it was proven that such normative regulations simplify or reduce at almost 60 – 80% of the court litigations regarding the enforcement of the debts consisting in paying amounts of currency provided by writs held by debtors⁴.

As the assessments in many European countries show and especially the reform of the European Court of Human Rights, the justice goes through a volume crisis of celeritate and efficiency. And out of this reason, to a sufficient extent, the citizens' expectations, being considered in general, in Europe, too complicated, slow and costly, turning, not once into, injustice⁵.

³ Fl. Măgureanu, *The Demand for Payment as a Means of Debt Recovery*, Commercial Law Magazine, no. 7-8/2002, p. 117-125.

⁴ For more details regarding the demand for payment, see: Fl. Măgureanu, *Law of Civil Procedure*, 7th edition, ALL-BECK Publishing House, Bucharest, 2004, p. 515 and the next.

⁵ M. Voicu, *The Demand for Payment Procedure in the Commercial Matter*, în „Commercial Law Magazine”, no.12/2001, pg. 45 and the next.

Presently, in order to obtain a court judgment, as a rule, they exceed that „reasonable” delay defined by the European Convention for Human Rights. Therefore, the central objective of the legislative and institutional reform is the modernization of the court system, at the same time with the establishment of out-of-court bodies which are to take over some litigations and special procedures (the mediation procedure, the pre-conciliation, the demand for payment etc.)⁶.

The celeritate and efficiency crisis became pregnant especially in the commercial justice. The negative effects of this poor state of the commercial justice are more noticeable in the Central and Eastern Europe, where the lack in celerity of the commercial suitcase, the low training of the judiciary staff and the poor logistics, and, especially, the deep inflation, which „determines” a high rate of the monetary fall, it fully affects the inefficiency of the justice and the lack of confidence in it.

In our country, the last years’ evolution of the legal relations determined from obligations shows a high blocking level, in the vast majority of cases, in favor of the debtors. Especially in the case of the obligations which consist in paying amounts of currency, the bad payers were protected by the difficult long-lasting procedure where the creditors could pursue them. In the commercial matter, we could say that really renown were “the canons” by which, in a non-academic language, were characterized the financial operations, based on which the debtors prolonged, on very long delays, the currency obligations they had to fulfill, or even succeeded in the „performance” of never paying.

The practice showed that the court procedure through which the creditors came to have their rights acknowledged and to be able to ask for the pursuit and execution of their debts is many times discouraging. This fact because of the length of the suitcases, the large number of the attack procedures with the possibility of cassations with a reference, even many times according to the current regulations, the overrated court costs, which, even if they are legally recoverable by the court costs, have often the same chance as the principal debtor. Furthermore, in lack of express stipulations, the creditors have also difficulties regarding the debts updating, the consecrated procedures being, in general, in their disfavor. By countless exceptions which may be called forth, the debtors do not have any other purpose than time prolongation. Or, in a market economy under an initial developing phase, the American capitalism rule „Time is currency” has only the negative counterpart „lost time is lost currency” (wasted time implies lost currency) which cannot be admitted⁷.

Another important blockage represents, until now, by the common law procedure, the burden of proof. The creditor’s active role encumbers him the obligation to prove his claims, running the risk of not choosing the most convincing formula for it and not having

⁶ For more details regarding the common law procedure, see: I. Stoenescu, S. Zilberstein, *Law of Civil Procedure. General Theory*, E.D.P., Bucharest, 1983, p. 454 and the next.; V.M. Ciobanu, *Theoretic and Practical Treaty on the Civil Procedure*, vol. II, Național Publishing House, Bucharest, 1997, p. 7-283; I. Leș, *Treaty on the Law of Civil Procedure*, 4th edition, C.H.Beck Publishing House, Bucharest, 2008, p. 413 and the next; I. Deleanu, *Treaty of Civil Procedure*, vol. II, Europa Nova Publishing House, Bucharest, 1997, p. 5 and the next; Fl. Măgureanu, *Law of Civil Procedure*, 12th edition, Universul Juridic Publishing House, Bucharest, 2010, p. 383 and the next; M. Tăbărcă, *Law of Civil Procedure*, Vol. I, Glocal Lex Publishing House, Bucharest, 2004, p. 284 and the next.

⁷ Ș. Nicolae, *The Demand for Payment Procedure in the Perspective of the Government’s Ordinance no. 5/2001 and the Modifications Brought to It by the Law no.295/2002*, in „Law” no. 9/2002, p. 3 and the next.

the opportunity to favor the debtor. Many times suffice it for the debtor to induce the judge a doubt regarding the creditor's claims, in order to take profit from the difficulty of the creditor in proving his bad faith. The overthrow of the burden of proof gets the debtor out of his defensive position and obliges him to have an active attitude, through which he may overturn the appearance of the creditor's claims, being forced to act not to be met with the enforceable security. This vision is determined by the dynamics of the legal relations in the matter of obligations and the amplitude of the financial blockages which imposed a new strategy which is much more frequently used in the entire Europe. We could call it „the creditor's dictatorship” and it is the very truth. The emergency and the proceedings simplification grant a new dynamics to the creditor – debtor relations in the matter of obligations whose object is the currency amount payment. Further considering the fact that the stamp tax is minimal, we have the full picture of the characteristics which determined the opinion that the new regulation reforms the system.

Even if by the amendments brought to the Law of Procedure they tried and succeeded in some cases the acceleration of the court proceedings, especially in the commercial cases, by eliminating the attack procedure of the appeal, the common law procedure regarding the resolution of litigations is still rather slow.

However, the procedure which the creditor had to go through until he was granted the enforceable security remains quite long-lasting also because of the great number of possibilities the debtor could use to postpone the payment of the debt he owed.

This new regulation became imperative also because of the fact that in the civil and commercial matters, many of pending suitcases and which aim at performing debts, go through the common law procedure although not all its phases and stages are necessary.

From the practice after the emergence of the Ordinance no. 5/2001, unfortunately, it proved that the admission of the cases according to this ordinance is quite uncertain, because the courts prefer to refer the cases to the common law procedure.

On the whole, the demand for payment represents the procedure foregoing the submission of the summoning petition, so that every time it is about petitions which may be the object of this procedure before submitting the summoning request according to the common law, the creditor may at first appeal to the demand for payment procedure.

To a large extent, the demand for payment procedure is similar the notaries' procedure of the enforceable securities and to the President's ordinance. As the latter one, it aims at preventing a harm produced by delay and it does not affect the basis of the legal relation between the parties. However, it lacks the character of early measure. We believe that it was not that the legislator's intention. As we have already showed, the demand for payment procedure is meant, on the one hand, to place the creditor in a much more comfortable position, as compared to his rights, and on the other hand, to reduce, to a considerable extent, the time of valorization of an uncontested, liquid and enforceable debt, consisting in the payment of a currency amount.

Special aspects are provided by the demand for payment procedure with the procedure foregoing the direct conciliation and the arbitral procedure.

The majority opinion of the doctrine, which we support⁸, is that the creditor who follows this procedure does not have to appeal to the direct conciliation. On supporting this opinion, we refer to the special character of the procedural norms provided by the Government's Ordinance no. 5/2001.

It is true that „aprecialia generalibus derogant” and that the special norm is completed by the general norms, however, as long as the reason of the special procedure is that of granting the creditor the possibility to obtain the enforceable security within the shortest time possible, to support the effect in this special procedure of the petition for the foregoing direct conciliation, regulated by art. 720¹ Law of Civil Procedure for the suitcases and the patrimonial commercial petitions would not be justified, because this would lead to an invalidity of the goal aimed at by the legislator by editing these derogatory rules.

The practice also established the fact that the non-fulfillment of the procedure foregoing the direct conciliation, in the patrimonial commercial litigations which is solved through special procedure of the demand for payment, does not represent non-admission proceedings of the request for the demand for payment delivery.

By corroborating the special provisions of the Government's Ordinance no. 5/2001 modified, with art. 720¹ align.1 and align. 5, referred to art. 109 align. 2 of the Law of Civil Procedure, it proves that, in the commercial matter, in the event the court rejected totally or partially the request for the demand for payment delivery, the creditor has no longer the obligation of trying to solve the litigation by direct conciliation with the other party before submitting a summoning petition to the competent court according to the common law, hereto enclosing the evidence of fulfilling the demand for payment procedure, procedure which is mainly aimed at determining the debtor to pay his debt.

As far as the incidence of the demand for payment procedure with the arbitral procedure, we consider that the special dispositions of the demand for payment procedure provide the exclusive competence of the common law courts. Special and derogatory norms are of strict interpretation and application.

A special procedure, as that of the demand for payment procedure, is completed by the general procedural rules and with any special procedural rules in the commercial matter, however, we consider that not with absolutely any special procedures (such as, for instance, the established rules regarding the arbitration), but with the rules for solving the commercial petitions by the common law courts.

Thus, if the creditor's petition would be admitted, the debtor shall submit a petition for annulment, according to art. 8 of the Government's Ordinance no. 5/2001 (modified), petition which is not limited to the motives of petition for annulment in the matter of arbitration, strictly provided by art. 364 letter a – i Law of Civil Procedure.

Furthermore, a much more simplified judiciary procedure for solving the litigations between the economic agents is also represented by the procedure provided by

⁸ Fl. Măgureanu, *the quoted work*. p. 119; B. Papandopol, *New Aspects regarding the Demand for Payment Procedure, from the Perspective of the Modifications Emerged regarding this Debt Covering Method*, in „Law” no. 3/2003, p. 90 and the next; G. Boroï, D. Boroï, *Considerations regarding the Demand for Payment Procedure*, in „Judiciary Mail” no. 4/2002, p. 1 and the next; M. Stancu, *The Demand for Payment Procedure*, in „Pandectele Române” no. 3/2002, pg.261.

Government's Emergency Ordinance no. 119/2007⁹, enacted with a view to fulfilling Romania's obligation, as a European Union member state, to implement the domestic Law with the communitarian norms, established by the Directive 2000/35/EC of the European Parliament and the Council regarding the prevention of the delay in postponing the payments in the commercial transactions is in force in the member states.

Since there are numerous similarities between the two procedures, we shall only refer to the similarities and the differences between them.

Regarding these similarities, both the Government's Ordinance no. 5/2001 and the Government's Emergency Ordinance no. 119/2007 are special procedures derogatory from the common law procedure; they are applicable for the uncontested, liquid and enforceable debts and are of the competence of the court judging the case both for the first instance judgment and for the judgment of the petition for annulment.

Regarding the differences, the dispositions of the Government's Ordinance no. 5/2001 have a larger applicability scope, being applicable to the civil law legal relations as well, respectively the uncontested, liquid and enforceable debts which represent liabilities for payment of currency amounts, provided by a contract certified by a writ or determined according a state, regulation or another writ, attributed to the parties through signature or another procedure admitted by the law and which certify rights and obligations regarding the enforcement of certain services, works and other performances. The Government's Ordinance no. 119/2007 takes into consideration the measures for preventing the delay in fulfilling the liabilities for payment provided only by the commercial contracts (the contracts between the professionals in the meaning of the New Civil Law), not being included in the applicability scope of this emergency ordinance: the debts subscribed to the credal mass. Consequently, a trader is entitled to appeal to the court regarding an action legally based on the dispositions of the two ordinances, while the creditor of a civil action is entitled to base his petition only on the provisions of the Government's Ordinance no. 5/2001.

Regarding the object of the parties' convention, the Government's Ordinance no. 5/2001 focuses on the voluntary fulfillment and the court enforcement of the uncontested, liquid and enforceable debts which represent liabilities for payment of currency amounts, provided by the contract certified by a writ or determined according a status, regulation or other writ, encumbered by the parties by signature or in another manner admitted by the law and which certify rights and obligations regarding the fulfillment of certain services, works or any other performances, while the Government's Emergency Ordinance no. 119/2007, focuses on the uncontested, liquid and enforceable debts which represent liabilities for payment of currency amounts which are provided by the contracts concluded between the professionals. The Emergency Ordinance mentioned defines the contract concluded between the professionals as the contract concluded between the professionals, either between them and the contracting authority, whose object is to provide goods or services in exchange of a price consisting in a currency amount.

⁹ Government's Emergency Ordinance no. 119/2007 regarding the measures for preventing the delay in performing the payment liabilities provided by the commercial contracts, was published in Official Journal, Part I no.738 of 31st October 2007. It was modified, including through the Emergency Ordinance no. 79/2011, published in the Official Journal, Part I no. 696 of 30th September 2011.

Another difference between the two normative acts represents the difference regarding the evidence. While the Government's Ordinance no. 5/2001 provided that they admit the procedure in the case of contested debts by a writ or determined according a status, regulation or another writ, encumbered by the parties by signature or another procedure admitted by the law, while in the case of the Government's Emergency Ordinance no. 119/2006 the disposition which limits the evidentiary possibilities being no longer in force, fact which represents an advantage for the professionals.

Finally, if the application of the Government's Ordinance no. 5/2001 raised numerous discussions regarding the necessity of going through the foregoing procedure according to the provisions art. 720¹, the Law of Civil Procedure, regarding the foregoing conciliation, the Government's Emergency Ordinance no. 119/2007 expressly provided at art. 5 align. (2) that „in the case of the litigations regarding the liabilities for payment provided by contracts stipulated in the current emergency ordinance, it is not necessary to previously go through the direct conciliation stage provided at art. 720¹ of the Law of Civil Procedure”.

We consider that these simplified procedures as the alternative procedures to the state justice are meant to fulfill the celeritate principle of solving the civil and commercial actions and that they have to be applied to other categories of litigations as well, if the law does not expressly prohibit them.

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