

REFLECTIONS ON TERMINATION OF THE QUALITY OF BEING A PARTY BY INCIDENCE OF THE SANCTION OF OBSOLESCENCE, IN THE LIGHT OF THE PROVISIONS OF THE NEW CODE OF CIVIL PROCEDURE

Cristinel MURZEA¹

Abstract: *This study is designed to carry out an analysis on the subject of termination of being a party in a civil lawsuit, showing that this can occur either naturally or as a result of developments in the material or procedural plan regarding civil relations, either voluntarily or involuntarily. The status of being a party may be lost as a result of the incidence of obsolescence sanction. The author, developing this hypothesis, shows that this civil penalty, regulated by article 248 paragraph (1) of the Code of Civil Procedure and nearly identical to its counterpart - art. 410 - the new Code of Civil Procedure, which strikes the indifference of the authors' request or appeal and any reform or withdrawal requests, which he leaves aside for a period of 6 months determines the lack of efficiency of all the pleadings made by that court, meaning that, in practice, the process goes in the state of being surprised by the obsolescence decision.*

Key words: *the new (Romanian) Civil Procedure Code; civil lawsuit; obsolescence sanction.*

1. Introduction

The termination of the quality of being a party in the civil lawsuit may occur in a natural way in most of the cases when we talk about situations of force majeure or as a result of some developments in the field of material or procedural legal relations.

In this study we will develop the subject of the termination of the quality of being a party in the civil lawsuit which may also occur as an incidence of procedural sanctions which may lead to the

termination of the trial and, less often, only the termination of the procedural quality of being a party by one of the parties of the civil lawsuit. We will consider the obsolescence and we will develop this matter as follows:

Obsolescence is the penalty to be applied to the party showing disinterest in the development of the case before the court of first instance or during appeal proceedings, in the course of one year in civil cases and six months in commercial cases.

¹ Centre "Advanced Research on Mechatronics", *Transilvania* University of Braşov.

The object of obsolescence is specified in article 248 paragraph (1) of the Civil Procedure Code in force (correspondent to article 410 paragraph 1 from the New Civil procedure Code) and refers to any request for summons, complaint, appeal, revision and any request for reforming or revocation becomes obsolete in law, even against persons lacking full capacity if due to the fault of one of the parties it remained obsolete for a year”.

The condition of obsolescence of the case must result from the fault of the party and it becomes obvious that there should not be such fault when the procedure actions had to be accomplished ex officio (article 248 paragraph 1 Civil Procedure Code in force, correspondent to article 410 paragraph 1 from the New Civil Procedure Code) and also when, in the absence of the party's fault, the request did not reach the competent Court in order to be heard, or a date for the hearing could not be set.

The period of obsolescence is susceptible of interruption and suspension. Interruption occurs with specific effect, the start of running a new term as a result of a pleading made to the trial by the party justifying the interest (article 249 p1 Code of Civil Procedure in force, corresponding Articles 411 and 412 p1 of the new Code of Civil Procedure. It is regulated by law and suspension of the course of obsolescence, with known effect, that is not calculating the period of time when suspension was in force. At the center of this regulation there is the provision for the suspension for the period of obsolescence where the hearing is suspended as provided by art. 244 (Code of Civil Procedure in effect), i.e. when the unraveling of the case hangs in whole or in part by the existence of a right that belongs to another hearing and in other cases provided by law where the suspension is caused by lack of persistence of the party in litigation.

Besides this law, art. 244 p (3) of the Code of Civil Procedure in force, establishes the reason for the suspension the force majeure, when the party was prevented by circumstances to continue in the trial beyond its will.

The obsolescence can be assessed ex officio or on the request of the interested party. Following the invocation of obsolescence the presiding judge will convene an emergency summons of the parties and the court shall order that the clerk should prepare a report on the issue of obsolescence. If the court finds that the obsolescence has not operated, it reaches a conclusion in this respect which can only be appealed at first instance and the trial continues. But, if the court concludes that the obsolescence occurred, it shall issue a decision that can be appealed within 5 days. Under this decision the specific consequences of obsolescence occur prescribed by art. 245 p(1) Code of Civil Procedure, in that "the obsolescence results in all pleadings made in the court shall not take effect." Basically, since all pleadings made before that court are without effect, the case is terminated in its existing stage, together with all relevant provisions accomplished in the case. Termination of the civil trial will not be reflected on the subjective right or on the right to action. The settlement of the case places the parties in the situation preceding the application.

However, we would like to note that the law is not consistent in terms that all pleadings made during the obsolete application, documents made available by the parties and waiver of trial, the law and transactions, are ineffective. However, if a new application is submitted, the parties may use the evidence administered during the trial of the obsolete application (Article 254, p 2 in force correspondent of Article 416 of the New Code of Civil Procedure), which means that administered evidence is

not viciated by inefficiency by the penalty of obsolescence, since the parties can use them only if a new application for summons is submitted.

The possibility of introducing a new application in the proceedings where the obsolescence of the initial application occurred, allows us to notice that obsolescence is repeatable. If we refer to the situation of the parties, we notice that they do not terminate their quality of parties after the application of obsolescence as a sanction, having the possibility to appeal the decision of assessment of the obsolescence within 5 days and moreover, in the same case they may submit new writ of summons where their procedural position recurs. In this case we wonder whether the decision of assessment of the obsolescence is still considered to have the authority of res judicata. The court decision finding the existence of obsolescence in a given case prevents that in that case there should be submitted through application exception or ex officio, a new request for the court to declare obsolescence.

Regarding the first question we have focused our attention on, the fact that almost all prestigious [1] authors consider that through obsolescence, the civil lawsuit is terminated. As far as we are concerned, we have noticed that the civil procedural law regulates nowhere the fact that through obsolescence the case is terminated, but we referred to the provision of the Code of Civil Procedure, article 254 paragraph (1) which stipulates that all actions of procedure before the Court where obsolescence occurred „do not come into effect” and we have added that in this respect the legislator has not been consistent since it has allowed „the recovery of evidence”.

We find it arguable the “proclamation” of deprivation of effects of procedural actions submitted in Court where obsolescence

has also been ruled in other respects. So, it is almost generally accepted that the sanction of obsolescence does not affect the subjective material right before the court or the right to action [2]. It is natural to be so since the penalty of obsolescence “condemns” the parties for their indifference / neglect in the civil trial, so it takes into account the procedural development and does not refer to individual rights of civil parties under the aspect of relationships of substantive law. But the right to action may be lost if covered by the time lapse effect, which is reflected indirectly on the subjective right [3].

By retroactively making ineffective all the actions carried out before the Court where obsolescence occurred, the parties are faced with the situation existing before the opening of the trial. As article art.254 paragraph (1) Civil Procedure Code points out, the facts carried out before “that Court” becoming ineffective, it results that the acts performed by parties outside the Court are not aimed at such as a summons performed previous to the introductory application in court [4]. Even though, as we have already mentioned, according to article 248 paragraph (1) Civil Procedure Code, obsolescence embraces a wide range of issues, such as a request for summons and trials going through several appeals. Surprisingly, even though the above mentioned article states that obsolescence may also operate at the stage of appeal, through article 252 paragraph (3) Civil Procedure Code it is stipulated that the obsolescence of the request for summons cannot be raised for the first time before an appellate court. In order to clarify the situation, we must make two remarks: first that judgment on appeal may be struck by the penalty of obsolescence and second, that if the request or the exception invoking the for obsolescence of the request for summons has not been raised before the first instance court it cannot be

raised for the first time before the appellate court. Summarizing the above, the hearing of the appeal can become obsolete, but the obsolete request for summons cannot be raised for the first time on appeal. Thus, if the interested party has not claimed the defect of obsolescence before the first instance court, this will be covered. Such a covering of the vice of obsolescence requires therefore that the interested party should not raise it before the first instance court and could no longer raise it during the case because it cannot raise it for the first time on appeal. Thus, we can say that obsolescence is the only penalty to be covered by the negligence or indifference of the interested party entitled to raise it.

The fact that obsolescence strikes as inefficient all court pleadings carried out in the court where obsolescence was assessed makes us wonder about what acts are in question that is, for how long. Is it about acts committed after the expiry of obsolescence, or those committed after obsolescence was established by a court order? It is obvious that the latter falls under the effect of the penalty of obsolescence and all the court pleadings carried out in the respective court are ineffective. In respect of acts done after the deadline, we can consider them as being struck by obsolescence if we accept the view that, after the expiry of obsolescence, the court adjudicating the case is virtually in recess.

Also, we say, we must consider the effect of obsolescence to be applied retroactively to "all" pleadings before the court, through "all" understanding all those made prior to the judgment for the determination of obsolescence or after it.

The obsolescence applies in relation to all parties of the trial even towards the incapacitated when they are in a state of *liticonsorte*, due to the principles of indivisibility of obsolescence the request for an assessment of obsolescence

benefitting in the same manner as the act of termination of obsolescence drawn by a single party.

As rightly pointed out by the authors, the judgment stating the appeal as obsolete is final because if it were not so an appeal to appeal might be submitted, which the legislature certainly did not want to regulate. As a result, through the obsolete appeal, the judgment under appeal is final and acquires the force of *res judicata*.

We must remember that the dominant view in the field is that the sanction of obsolescence terminates the trial in the precise stage where it occurred and the parties are placed in a position they were before the beginning of the trial.

Regarding the situation of parties to the trial where the sanction of obsolescence has been applied, we believe that the view that all prestigious authors have agreed on, in the sense that obsolescence does not affect the subjective right inferred to justice or the right to action must be argued because we allow ourselves to formulate reservations. We have already mentioned on another occasion, that it is natural for the sanction of obsolescence not to affect the civil subjective right inferred to justice because it occurs inside the procedural space, making ineffective the procedural actions performed before the court which ruled the obsolescence. Therefore, in a direct way, the parties to the trial do not terminate their quality of parties, especially if they have the quality of party also in relation to the civil material right inferred to justice. As holders of the civil material subjective right, the parties to a civil relation may dispose of their right, eventually by concluding a valid transaction. But, if they take such an action related to their subjective rights already involved in the civil trial affected by the sanction of obsolescence, we wonder whether the transaction is ineffective, like all the juridical actions performed in that

trial. If parties to the civil trial are also parties to the judicial civil relationships regarding material rights and as holders of the subjective material rights they conclude transactions, we cannot say that these transactions are not subject to the sanction of obsolescence just because they belong to the civil subjective rights.

However, since the transaction is completed by the parties to the trial, it means that their subjective rights and their affirmed claims are the object of that civil lawsuit. And, whether civil relations occurred in the area of material law, the transaction of the parties becomes necessary in respect to the trial, „dictating the termination of the trial through the decision of the expedient”.

It becomes hard, we may say, to draw the transaction out of the effect of obsolescence, on the grounds that it regards the subjective rights of the parties. This solution would contravene to art. 254 p (1) Code of Civil Procedure relating to all pleadings, without distinction, concluded before the obsolete court. To avoid collision with this text we should appreciate that the transaction is not a procedural step which it cannot be claimed.

The question arises when, during a trial struck by the sanction of obsolescence, the party also carries out other ruling actions such as giving up the trial and giving up the right. In the presentation above, we have mentioned that the renouncement of the trial is only available to the plaintiff, requiring the consent of the defendant if the stage of debates on the merits has been reached and that it is assessed by the court through a final decision.

If renouncement of the trial were carried out before a Court where the action has become obsolete and the rule that all procedural actions carried out before that court are no longer effective was applied, it results that the Court will not longer be

able to institute the plaintiff's waiver to action and will not close that file. Although at this moment, we would be tempted to remember that article 254 paragraph (1) Civil Procedure Code provides that „*all procedural actions...do not take effect*” or, renouncement of the trial is still a procedural action, if the party waives the alleged right through action, may do so before the court of first instance or through appeal and the consent of the other parties would be irrelevant, and the court gives a judgment dismissing the action of the party which has waived the right .

But what if the waiver is claimed before a court where obsolescence has been found? We should choose between the two possible opinions. In one of the opinions, we should consider that waiving the right is an obsolete procedural action and, as a result, ineffective, so the court will not dismiss the decision through judgment without appeal. In another opinion, the waiver claim is considered valid, the action is devoid of purpose that is the substance of those rights, the court being practically forced to dismiss it. We should remember that obsolescence that terminates the trial at that stage allows the trial to resume.

In our opinion, this possibility of formulating a new action in the obsolete trial leads us to the finding that the termination of the trial through the penalty of obsolescence is questionable and that it gives rise to a number of issues related to the reevaluation of evidence which we need to examine. The possibility of introducing a new action in a case deemed settled by obsolescence is deducted from regulation Art. 254 p(2) Code of Civil Procedure which provides the possibility of using evidence already administered and where we find the words „when a new writ of summons is issued”.

This hypothesis is supported by prestigious authors such as Ioan Leş and Ion Deleanu. Apart from the fact that by

obsolescence – as we have already said – the trial has not been completely terminated, the right to action that legitimates the new civil action has not been affected. Allow ourselves to remark that the party using the right to action and started a new civil lawsuit, which has been left inactive and the sanction of obsolescence occurred, so the case was settled, and that party is aware that the case may be reactivated by opening a new civil lawsuit, in other words using a civil action that we can call „backup” or „second hand”. And we wonder slightly ironically what if the trial started through a backup action will become obsolete, will we still be able to use another civil action which can be sarcastically called „backup of the backup”?

2. Conclusions

Finishing the game of images that we have allowed ourselves to use, we come back to the framework in which our discussion takes place, remembering that we have a closed case through the effect of obsolescence, but one of the parties formulates a new writ of summons, thus taking advantage of the fact that the right to action has not been affected by obsolescence. However, we cannot avoid the question of knowing what sense to bestow on to the right to action, because, as Professor Ion Deleanu wrote „*it has become – it seems – commonplace the statement that through prescription only the material right to action is terminated (...) Do we need a dualistic view on the right of action? As far as we are concerned, we believe not...*”[2].

We will not reconsider here the arguments of the above-mentioned author, but we will come back to the subject that we are analysing. We do believe that the possibility of initiating a new writ of summons may be explained through the contention that obsolescence cannot affect the right to action considered as a procedural manner.

But we must consider that the mere running of the deadline for obsolescence does not have legal effects. These effects are only produced by the decision through which obsolescence is ruled. Only on these grounds will all juridical actions carried out during the obsolete trial cease to have effects. Yet these legal acts do not compromise the rights of the parties to the action, whether you look at the material or procedural sense. Therefore it may be explained in this manner why the party may make a new application for summons in the obsolete trial, that, which if closed can be „rekindled”.

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