CERTAIN ASPECTS REGARDING THE PARTIES' AGREEMENT IN CIVIL PROCEDURE

Nicolae-Horia ȚIȚ [*]

Abstract

The article examines how the agreement of the parties' may be relevant at various stages of the procedure, during the civil process. The provisions of the Romanian Code of Civil Procedure are analyzed in relation to the Model European Rules of Civil Procedure developed by the European Law Institute and UNIDROIT. Specifically, two situations in which the agreement of the parties takes effect in the procedural plan are herein being analyzed: (i) the establishment of the legal qualification concerning the acts and facts brought before in court and (ii) the agreement that may intervene in connection with certain aspects of evidence (their request after the deadline provided by the law, the conventions on evidence). The relationship between the principle of the judge's role in finding the truth and the principle of availability is being examined. The limits within which the parties may dispose by way of their agreement in the analyzed situations and the way in which the judge must relate to this manifestation of the principle of availability are also being further examined. The analysis intends to highlight the components of these principles and the development of a concept which targets the cooperation of the parties during the civil process is being proposed, highlighting the role of lawyers in identifying and applying appropriate procedural means for the court to resolve the matters that concern, in fact, the dispute between the parties.

Keywords*: civil procedure, agreement, parties, legal characterization, evidence, judicial remedies*.

1. Introduction

The unfolding of the civil process is marked by an intertwinement of the principle of availability with that of the role of the judge in finding the truth. Article 9 C. pr. civ., under its marginal name „the disposition right of the parties" regulates several facets concerning availability in civil proceedings, starting with bringing an action before the court, continuing with establishing the object and limits of the process and ending with the inventory of "classic" procedural acts: waiving the judgment of the summons, the waiver of the alleged claim, the recognition of the claims made by the opposing party, the court settlement, the adherence to the court decision (waiver of the right to appeal), the waiver of the court decision's execution[1]. In addition to these ways of disposing by the initiation, continuation, completion of the process, respectively the execution of the court decision, art. 9 para. (3) final thesis C. pr. civ. provides that the parties may dispose of their rights „in any other manner permitted by law"; this provision implies, on the one hand, that the will of the parties may yield various effects during the civil proceedings, throughout various stages of the procedure, and on the other hand, that they may occur only to the extent that there are legal provisions allowing the parties to dispose in respect to certain procedural institutions.

The rule established by art. 9 C. pr. must be interpreted in relation to the provisions of art. 22 C. pr. civ., which regulates the principle of the judge's role in the civil process. It should be noted that its marginal name no longer uses the established phrase „active role", this being preserved, in the current legislation, only regarding the bailiff (art. 627 of the C. pr. civ.)[2]. However, this option concerning the marginal designation must not lead to the conclusion of a reduction in the judge's prerogatives during a trial; by analyzing the provisions of art. 22, especially of par. (2), (3) and (4), it follows that the judge has numerous prerogatives enabling him to examine the case in all respects, including putting before the parties for debate factual and legal matters that are not covered by their summons or statements of defense, adducing the evidence necessary to fully clarify the factual situation and to establish or, as the case may be, to restore the legal qualification of the acts and facts brought before the court. The role of the judge in finding out the truth is combined, in principle, with the availability of the parties, because the court is bound by the procedural framework established by them, the judge being required to rule on everything that is therein requested, without exceeding the investment limits expressly provided by the law [art. 22 para. (6) and art. 397 para. (1) C. pr. civ.]. The procedural framework established before the first court will be kept, of course, before the appellate court, compared to the limits of its devolution effect established by art. 478 para. (1) and (3) C. pr. civ.

The role of the judge can also be manifested through the steps taken by him to settle the dispute amicably, the court being able, for this purpose, to order the personal appearance of the parties, under the conditions of art. 227 para. (1) C. pr. civ. This prerogative of the court is also mentioned in Rule 10

[*] Lecturer, PhD, Faculty of Law, "Alexandru Ioan Cuza" University of Iași (e-mail: horia.tit@uaic.ro).

[1] See G. Boroi, M. Stancu, *Drept procesual civil*, 5th Edition, revised and supplemented, Hamangiu Publishing House, Bucharest, 2020, pp. 16-22.

[2] V. M. Ciobanu, *Comentariu sub art. 22 C. pr. civ.*, in V. M. Ciobanu, M. Nicolae, *Noul Cod de procedură civilă comentat și adnotat, Vol. I – art. 1-526*, Second Edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016, p. 91.

(1) of the Model European Rules of Civil Procedure[3]. Although the Romanian legislator has established this prerogative of the judge, it is not seconded by a regulation of an obligation for the parties to try to resolve the dispute amicably[4] or aiming at the role of the parties in this matter. The provisions of art. 10 C. pr. civ., that regulate the procedural obligations of the parties, refer only to the general obligation to contribute „to the smooth conduct of the process, thus seeking its completion", which does not necessarily imply the obligation to try the amicable settlement of the dispute or accessing certain procedural means in this regard.

The Model European Rules of Civil Procedure[5] contains provisions that shape, on the one hand, the principle of cooperation between the parties in the amicable settlement of the dispute, and, on the other hand, the role that they and their lawyers play in this regard. Rule 9 provides, in this regard, in the first paragraph that „parties must co-operate, in seeking to resolve their disputes consensually, both before and after proceedings begin". The cooperation of the parties is therefore seen as a procedural obligation between them, which can be transposed both in setting up a way to settle the dispute amicably and in reaching an agreement on various aspects of the procedure. In this regard, Rule 9 (4) provides that „when a consensual settlement as a whole cannot be reached, parties must take all reasonable opportunities to reduce the number of contested issues prior to adjudication". The role of the will of the parties is therefore important throughout the entire proceedings, as the parties may, through their cooperation, set up small transactions as to remove certain issues relating to the resolution of the case from the jurisdiction of the judge; In this way, the judge's attention can be focused on the issues that remain in dispute and the length of the proceedings can be significantly reduced.

Rule 9 (2) mentions the obligation of the parties' lawyers to identify possible alternative methods of resolving the dispute and to inform and encourage the parties about them, as well as to use these methods, when they are binding[6]. Rule 10 (2) also requires the court to inform the parties „about the availability of different types of settlement methods" and to recommend them „the use of specific consensual dispute resolution methods".

Starting from the Rule 9 (4) of the European Model Rules of Civil Procedure, which stipulates the obligation of the parties to reduce the issues to be resolved by the judge by their agreement of will, using in this respect all available procedural means, we will further analyze two procedural institutions which were novel elements at the time of the adoption of the current Code of Civil Procedure and which configure the role of the parties' agreement, displayed prior or during the judicial procedure, in relation to certain aspects of the trial: (**i**) the possibility conferred by art. 22 para. (5) for the parties to establish, by express agreement of will, the legal qualification and the legal reasons that the court shall consider when resolving the case; (**ii**) the role of the parties' agreement in the matter of evidence, respectively the possibility for the parties to agree on waiving the fulfillment of the limitation period stipulated for the right to propose evidence for one of the parties [art. 254 para. (2) § 5 C. pr. civ.] and the possibility to conclude a convention on the admissibility, object, or burden of proof (conventions on evidence - art. 256 C. pr. civ.).

2. The parties' agreement on the legal qualification of the acts and facts brought before the court

The regulation dedicated to the role of the judge in finding the truth in the civil process includes an important rule according to which the manner this principle operates is configured; representing a consecration of the Latin adage "*da mihi factum, dabo tibi ius*", the rule established by art. 22 para. (4) C. pr. civ. provides that the judge has the obligation to give or to restore, as the case may be, the qualification of the acts and facts brought to the court. This prerogative of the judge must be exercised by reference to the guarantees provided by art. 14 C. pr. civ. regarding the finding of the truth and it is applicable regardless of whether or not the parties have given a legal qualification to the factual situation described in their requests[7].

[3] These provide that „The court must facilitate settlement at any stage of the proceedings. Particularly, it must ensure that the parties consider settlement in the preparatory stage of proceedings and at case management conferences. If necessary, for furthering the settlement process, it may order the parties to appear before it in person."

[4] The Romanian law provides for relatively few situations in which the parties must initiate, prior to bringing an action before the court, a preliminary procedure meant to facilitate a possible amicable settlement of the dispute. Such a situation is provided by art. 1015 C. pr. civ., in the matter of the payment order. Also, according to art. 60^1 of Law no. 192/2006 on mediation and the organization of the mediator profession, there are a number of matters in which proof of participation in an information hearing on the benefits of mediation must be provided, but the lack of such evidence cannot lead to the rejection of the action as inadmissible.

[5] Model European Rules of Civil Procedure were produced by the European Law Institute and Unidroit and may be consulted on https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules (accessed on 20.03.2021).

[6] In Romanian legislation, according to art. 2 para. (1^3) of Law no. 192/2006 on mediation and the advantages of mediation, „the information procedure on the advantages of mediation may be performed by the judge, prosecutor, legal counsel, lawyer, notary, in which case it is attested in writing".

[7] Even if the plaintiff has the obligation to indicate within the writ of summons both the factual and the legal reasons, according to art. 194 lit. d) C. pr. civ., only the factual reasons constitute a mandatory element of the summons, provided by law under the sanction of nullity [art. 196 para. (1) C. pr. civ.], and in the procedure of regularization of the summons, it can be annulled solely for lacking the factual reasons, according to art. 200 para. (4) C. pr. civ., as amended by Law no. 310/2018. See, for details, N.-H. Țiț, R. Staciu, Legea 310/2018 pentru

The parties are required to state the factual grounds of their writ of summons, thereby setting out the cause of action brought before the court, and to prove the factual aspects to which they refer in support of their claims or defenses; also, the parties may propose a legal qualification of the acts and facts deduced to the court, of which, however, the court is not bound, the judge being the one who must establish the legal qualification, after putting it in the contradictory debate of the parties.

The provisions of art. 22 para. (5) C. pr. civ. establish an important derogation from this rule, allowing the parties, by express agreement of will, to impose on the judge a certain legal qualification, insofar as the dispute concerns rights that the parties may dispose of and if by this manner the rights or legitimate interests of third parties are not being infringed. These legal provisions represent a premiere in the Romanian legislative landscape, configuring a balance between the parties' right of disposition and the principle of the judge's role in finding the truth. The parties have the right to settle on the legal qualification of the acts and facts brought before the court, within the limits provided by law, the judge being compelled to resolve the dispute starting from such qualification, that he cannot amend.

The provision of the law uses the phrase „limitation of debates", which means that the express agreement of the parties in this regard has the effect of removing from the legal debates the legal issues on which they have expressly agreed upon, the purpose of such an agreement being to give within the jurisdiction of the judge exclusively those matters on which there is a conflict between the parties. For example, the parties may agree upon the legal nature of the act concluded between them but may disagree as to the execution of the obligations falling within the content of the legal relationship arising from such act; the parties may expressly agree on the legal nature of a condition, the dispute concerning whether or not such condition was fulfilled. Concluding an agreement by which the legal qualification of the acts and facts brought before the court is established has important implications regarding the development of the procedure. Compared to Rule (4) of the Model European Rules of Civil Procedure, the parties reduce the litigious issues that the judge has to resolve, which is likely to streamline the judicial activity and significantly reduce its duration. Specifically, Rule 26 (4) provides that „where parties are free to dispose of their rights, they may agree on the legal basis of the claim or on specific issues in the claim". Accordingly, the Romanian Code of Civil Procedure stipulates that the parties' agreement may concern the legal grounds of the request or the legal qualification of a certain factual aspect, matters which, once agreed by the parties, will no longer be the subject of judicial debates and, therefore, they will be found in the motivation of the decision as such.

This manifestation of procedural availability is allowed by law only if the parties' agreement of will concern rights that they may dispose of, aspect that is retained both by the provisions of art. 22 para. (5) C. pr. civ., as well as by Rule 26 (3). Romanian civil procedural law also knows, in addition to this limitation, the one related to the protection of the rights or legitimate interests of third parties, a limitation that neither the French procedural law nor the European Model Rules of Civil Procedure mention. The court to which such an agreement of will is presented must therefore examine, first of all, whether the subject-matter of the agreement concerns rights that the parties may dispose of, which implies that the judge is well acquainted with the elements of the legal relationship brought before the court, having as starting point the factual situation described by the parties in their requests; secondly, the judge must assess the potential effects that the settlement of the case made on the basis of the legal qualification given by the parties through their agreement of will could have on the rights or interests of third parties, related to the opposability of the court decision, under art. 435 para. (2) C. pr. civ. The role of the judge is, in this situation, oriented not to identify the correct legal qualification, but to verify the effects that the decision he would pronounce according to the legal qualification established by the agreement of the parties would have throughout the civil circuit. This position of the judge is a unique one in the Romanian civil procedural law, as the Romanian judge is being called not only to settle the actual dispute between the parties, but also to evaluate the consequences that the solution he would pronounce could generate in relation to the rights and the interests of others. The judge must therefore ask himself and assess whether the manner in which the parties agree to settle on the legal qualification of the acts and facts brought before the court is prone to have an indirect effect on a third party.

Article 22 para. (5) C. pr. civ. inflicts an express agreement of will in connection with the prerogative of the parties to establish the legal qualification of the acts and facts deduced in court; therefore, the mere non-challenge by the opposing party of a legal qualification cannot lead the court to the conclusion of the existence of such agreement and cannot exclude the judge's prerogative to put for debate a potential requalification. The manifestation of the parties' will must be clear and unequivocal, as expressing their agreement will not only give a certain legal qualification to a factual aspect present in the case, but also will impose that qualification on the judge. Being a regulation by way of exception [the rule is represented by the prerogative of the court in the sense of giving or restoring the legal qualification of the acts and facts brought to the court,

modificarea și completarea Legii nr. 134/2010 privind Codul de procedura, comentarii, explicații, jurisprudență relevantă, Hamangiu Publishing House, Bucharest, 2019, pp. 48-49.

according to art. 22 para. (4) C. pr. civ], it must be interpreted restrictively, and the judge must ensure that the express agreement of the parties exists and that their intention is to exclude a certain qualification from the debates. This is all the more so as the Romanian civil procedural law has not established a specific procedural vehicle, as is the joint application provided by Rule 57 of the European Model Rules of Civil Procedure[8].

The regulation of such a procedural means would have facilitated the application of the provisions consisting in art. 22 para. (5) C. pr. civ., all the more so as it is also present in the French legislation, at art. 57 of the Code of Civil Procedure (la requête conjointe). We consider that, *de lege ferenda*, an express regulation is required in this respect, as the submission of the joint request is likely to facilitate the establishment by the judge of the limits of the trial. Such request would clearly identify the issues upon which there is an agreement of the parties and the ones being disputed, the judge thus knowing, as of the time of his investiture, that the parties had concluded an agreement on the legal qualification.

3. The agreement of the parties in the matter of evidence

Another procedural institution in respect of which the agreement of the parties may have legal effects is that of evidence. In connection to this, we note that the parties may agree on two categories of issues: (**i**) waiving the fulfillment of the limitation period triggered as a result of exceeding the procedural moment until which evidence can be requested [art. 254 para. (2) § 5 C. pr. civ.] and (**ii**) the conventions on the admissibility, object, or burden of proof [art. 256 C. pr. civ.].

The first situation concerns a rule of an exclusively procedural nature, referring to the trial phase in which the means of proof can be proposed. The rule in this matter is that the evidence must be requested, under the sanction of extinguishment of such right, through the writ of summons or statement of defense [art. 254 para. (1) C. pr. civ.], thus in an early stage of the procedure, more precisely in the written phase. However, the extinguishment of the right does not operate if there is an express agreement of all parties regarding the proposal of the evidence during the judicial inquiry or even during the debates phase of the trial, according to art. 254 para. (2) § 5 C. pr. civ[9]. Such a manifestation of procedural availability concerns exclusively the moment when the evidence may be proposed, and not its admissibility; in other words, if an express agreement of will is conveyed pursuant to art. 254 para. (2) § 5 C. pr. civ., this will not automatically lead to the administration of the evidence, the court being still required to assess its admissibility, by reference to both the provisions of art. 255 para. (1) C. pr. civ. and the conditions of admissibility provided by law, as the case may be. The agreement of the parties removes, in this case, only the procedural sanction of extinguishment, without having consequences in the field of admissibility of evidence.

The second situation subject to analysis is that of concluding a convention on the admissibility, object, or burden of proof (art. 256 C. pr. civ.). In this situation, the agreement of the parties concerns issues with direct implications on the merits, as it implies a derogation from the rules prescribed by the legislator in this matter. Although the provisions of art. 256 C. pr. civ. Have no mention in this regard, we consider that the agreement of the parties must be an express one, as the mere silence of the opposing party cannot be deemed as enough to establish that such party agrees, for example, with the administration of a piece of evidence that the law does not permit[10]. For the situations in which the legislator intended for a tacit agreement to produce effects on the admissibility of the evidence, it expressly stated as such; this is the case, for example, in art. 309 para. (4) § 4 C. pr. civ., regarding the admissibility of the evidence with witnesses, if the reason for using such evidence is to prove the existence of a legal act for which the law requires the written form *ad probationem*, provided the agreement of the parties concerns rights they may dispose of.

The agreement of the parties may concern only the matters relating to the admissibility of the evidence, its subject-matter and the burden of proof; therefore, it is not allowed to derogate from the rules provided by law regarding evidence-taking, even if there is an agreement of the parties in this respect[11]. The potential cases in which the parties may derogate by their agreement of will from the rules concerning evidence-taking are expressly provided for by law and, therefore, are of strict interpretation; this is the case, for example, in art. 315 para. (2) C. pr. civ., regarding the express or tacit agreement of the parties to call as witnesses the persons indicated in art. 315 para. (1) § 1-3 C. pr. civ. An agreement of the parties expressed in other situations regarding evidence-taking may not produce legal effects; for example, a convention of the parties for the purpose of calling as a witness a person placed

[8] Rule 57 (1) provides that „a joint application is a statemen of claim in which parties jointly may submit to the court their agreement according to Rule 26, their respective claims and defenses, the issues on which they disagree, and which are to be determined by the court, and their respective arguments on those disputed issues".

[9] In respect to this regulation, it has been correctly stated in the doctrine that the limitation period for the right to propose evidence is a mixed one, its establishment being aimed to ensure swiftness of procedures and to impose procedural discipline on the parties, as well as to protect their private interest, which makes it possible to waive the effects of the extinguishment term by the parties express consent (see Gh.-L. Zidaru, P. Pop, *Drept procesual civil. Procedura în fața primei instanțe și în căile de atac*, Solomon Publishing House, Bucharest, 2020, pp. 161-162.

[10] V. Dănăilă, *Comentariu sub art. 256 C. pr. civ*., in G. Boroi (coord.), *Noul Cod de procedură civilă. Comentariu pe articole. Vol. I. Art. 1-455*, Hamangiu Publishing House, Bucharest, 2016, p. 681.

[11] See M. Fodor, *Comentariu sub art. 256 C. pr. civ*., in V. M. Ciobanu, M. Nicolae, *op. cit.*, pp. 869-870.

under court interdiction or who has previously been convicted of perjury, or an agreement concerning the taking of witnesses evidence before the appellate court. Also, an agreement regarding the probative force of the evidence is not admissible; for example, the parties could not agree that a commencement written proof should be given the probative force of a document under private signature.

Conventions regarding evidence should not be confused with the situation in which, in assessing the admissibility of evidence and its usefulness, the court considers that a fact is uncontested and no longer needs to be established. In case the parties conclude conventions on evidence, they shall enter into an express agreement by way of derogation from a certain aspect relating to the admissibility, object or burden of proof, following which the evidence will be taken and the court shall assess it, with a view to settle the merits of the cause. In the event of uncontested facts, the judge is the one who considers, in relation to the circumstances of the case, that a means of proof should no longer be taken, for the reason that the evidentiary fact claimed by one of the parties has not been challenged by the opposing party.

Article 256 C. pr. establishes three categories of limitations regarding the right of the parties to conclude a convention on evidence. The first one concerns the nature of the rights that fall within the content of the legal relationship brought to the court, respectively that the parties can dispose of such rights. This type of constraint, encountered also, in art. 22 para. (5) C. pr. civ., as showed above, takes into account the extension of the dispositive nature of the rules governing the legal relationship between the parties on certain procedural rules or which would have procedural implications, in case such legal relationship becomes litigious. The second type of limitation concerns the situations in which the conventions on evidence would restrict or even eliminate the possibility of proving legal acts and facts; the court may disregard such a convention and allow the evidence which, in the absence of an agreement of the parties, would have been admissible, if such agreement would have restricted or even eliminated the possibility of a party to prove an alleged fact. Finally, the third limitation concerns a general condition of any agreement, namely, to not contravene public order or morals; for example, a convention by which the parties establish that it is permitted to administer a material means of proof which had been obtained in breach of the law or of good morals could not produce legal effects in procedural terms [art. 341 para. (2) C. pr. civ.].

Therefore, the agreement of the parties may have effect in the realm of evidence in what concerns their proposal, by removing the extinguishment of rights that would occur if the evidence would not be requested through the writ of summons or the statement of defense, respectively on the admissibility, object or the burden of proof, by concluding a convention on these matters relating to evidence, before or during the trial. These manifestations of procedural availability may have important effects on the solution to be pronounced by the judge; however, the conclusion of such an agreement does not eliminate the active role of the court, the judge being able to order *ex officio* the taking of additional evidence, under the conditions of art. 254 para. (5) C. pr. civ., in order to establish the relevant factual elements in question, by way of an exact and thorough manner.

4. Conclusions

The provisions of the Code of Civil Procedure provide the possibility for the parties to conclude agreements on various aspects of the procedure, thus setting up a side of the principle of availability which allows the parties, even if they are in dispute on certain issues, to resort to conventions before or during the trial, allowing them to remove from the jurisdiction of the court matters on which there is no disagreement and to entrust the judge with the task of pronouncing a solution solely in relation to the disputed matters. The Model European Rules of Civil Procedure provide in Rule 9 (4) that in the event a transaction which does not resolve the dispute in full cannot be concluded, conventions on certain aspects of the procedure must be concluded whenever it is possible, given that such procedural manifestation of the parties may significantly lead to the settlement of the case within a reasonable period of time. According to the Romanian Code of Civil Procedure, the agreement of the parties is allowed in respect to the establishment of the legal qualification of the acts and facts brought to the court, as well as regarding certain aspects related to the evidence. In both cases, the agreement of the parties may generate procedural effects provided that it concerns rights which the parties may dispose of. The procedural effects of the legal nature regarding the rules governing the legal relationship of subjective rights are therefore being distinguished; if the parties may derogate from the rules laid down by law when entering into a contract, they may derogate as well from the rules laid down by law at the moment when they are in litigation, in respect to the qualification of acts and facts brought before the court, respectively as regards admissibility, the object or burden of proof.

It should be noted the importance of the involvement of lawyers in the identification and access by the parties they represent to these means by which certain aspects of the procedure can be agreed upon. Rule 9 (2) of the Model European Rules of Civil Procedure requires lawyers to inform their clients of these means, to encourage them to use them and to assist them in concluding the necessary conventions for this purpose. In addition, the court has an important role in facilitating a possible understanding of the parties and to inform them about the various procedural aspects in connection to which an agreement could intervene, as provided by art. 227 C. pr. civ. and Rule 10 of the European Model Rules of Civil Procedure.

However, the Romanian law does not provide for any specific procedural means by which the judicial cooperation of the parties can materialize. *De lege ferenda*, we appreciate that it would be useful to transpose into Romanian legislation a legislative solution such as the one provided by Rule 57 of the European Rules of Civil Procedure, namely that of a joint application.

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