

# REGULATIONS OF THE NEW CODE OF CIVIL PROCEDURE ON SOLVING DISPUTES WITH CELERITY

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## Abstract

The large number of disputes and the celerity in achieving commercial transactions and trading activities, the need for simplified and faster judicial proceedings to solve conflicts among professionals have determined the amendment of the former Code of civil procedure and the implementation of regulations which could lead to the adoption of the celerity principle.

The common law judicial procedure is, even in the regulation of the new Code of civil procedure, pretty cumbersome, it takes much time and has become increasingly costly due to the numerous fees, bails or lawyers' charges.

Our paper aims to contribute to the in-depth knowledge and improvement of the legislation on the speedy dispute resolution through special, simplified procedures which could assist the truth, restore the lawful order and increase the trustworthiness of law enforcing bodies.

**Keywords:** celerity, disputes, predictable term, judicial procedures

## CONTENTS

Professional ventures, not only in Romania, but all through the European Union, mainly small-and medium-sized enterprises, still face administrative and financial difficulties stemming from long payment terms and delays in making payments, which can generate the impossibility to pay and, consequently, insolvency. These situations which threaten the existence of companies and lead to the loss of numerous job have represented for the European Council, ever since 1995 a major concern for the regulation of much simplified judicial procedures, applying to those who repeatedly fail to pay their commercial debts, a highly harmful phenomenon, with particularly serious consequences on economic development and the capital.

There has been a deep need to set special procedures<sup>1</sup>, governed by the celerity principle, with a predominantly non administrative character in the first stage of this procedure, that of notifying the court, possibly followed by an administrative stage if the debtor resorts to cancellation.

As proven by assessments from numerous European countries but also by the reform of the European Court of Human Rights, justice is facing a celerity and efficiency crisis. For this precise reason, justice is unable to answer citizens' needs, in Europe being generally considered too complicated, slow and expensive and often turning into injustice<sup>2</sup>.

Currently, in order to obtain a decision of the court, the "reasonable" term defined by the European Convention of Human Rights is exceeded. That is why the central objective of the legislative and institutional reform is to update the legal system with the setup of extrajudicial organisms capable of taking over disputes and certain special procedures (the procedures of mediation, prior conciliation, demand for payment etc.).

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<sup>1</sup> For an in-depth study of special procedures, also see: Fl. Măgureanu, G. Măgureanu, *Drept procesual civil. Curs pentru materat. Dreptul afacerilor*, 2nd edition, Ed. Universul Juridic, București, 2009.

<sup>2</sup> M. Voicu, *Procedura somației de plată în materie comercială*, în „Revista de drept comercial”, nr.12/2001, p. 45 and the next.

Definitely, the efficiency of justice is also given by the speed with which the rights and obligations set through court decisions or other enforcing titles are established and implemented, thus restoring rightful order when this has been breached.

Lack of celerity in the resolution of files has often been invoked and supported before the European Court of Human Rights in many of the cases it judged. Romania was charged because a trial lasted significantly longer than it would have under the circumstances of celerity<sup>3</sup>. The causes of such delays have always been the judicial procedures which prove to be cumbersome, abounding in excessive formalism, much too expensive and lasting an unjustifiably long period.

Romania has a very large number of the total complaints addressed to the Court. Together with 3 other states, Russia, Turkey and Ukraine, they count up to over 50% of the total number of complaints pending before the Court. In 2011 there were 4,349 complaints against Romania, most of them referring to unjustified delays in trials; thus, the sum total that Romania has to pay is approximately Euro 12 million<sup>4</sup>.

The need of celerity is not a new topic. It has preoccupied many law practitioners and theoreticians, even prior to the European Convention of Human Rights, because there have been a constant concern of the legal doctrine and practice for speedy resolution of files.

The closer the decision to the moment when the plaintiff resorted to the court for the resolution of its file, the more correct it will be, since it spares the plaintiff's stress and uncertainty experienced until obtaining the final decision, and all the more useful, since for the plaintiff it is essential that its claim be solved as soon as possible, and for society the restoration of rightful order occur as soon as possible, but not to the detriment of the quality of the said decision.

### **I. Analysis on general regulations of the new Code of civil procedure**

The entry into force of the new Code of civil procedure<sup>5</sup> mainly aimed to accelerate trial resolution, to simplify procedures and increase the celerity of dispute resolution, with a direct impact on the execution of court decisions and other enforcing titles. Regulating the right to a fair trial within the best and predictable term, the new Code set at art. 6 paragr. (1) the right of every person who resorts to justice in order to benefit from the trial of its case in a fair manner, within the best term, by an independent and impartial court set by the law, a regulation which can be found with similar terms in art. 6 of the European Convention of Human Rights. In order to achieve this goal, the court needs to have all the measures permitted by the law and ensure the celerity of trials and of forced execution.

The speedy case resolution involves a fast operative judgment, within a reasonable and predictable term<sup>6</sup>.

It is regulated also by the Constitution<sup>7</sup>, which, under art. 21 point (3) stipulates that "the parties are entitled to case resolution within a reasonable term". Similarly, Law no. 304/2004 for judicial organization<sup>8</sup> stipulates at art. 10: "All the persons are entitled to a fair trial and to case resolution within a reasonable

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<sup>3</sup> See, for instance: the decision of the European Court of Human Rights in the file *Abramiuc vs. Romania*, when the Court decided that the excessive extension of the file resolution was due to the lack of celerity of the judicial procedures (CEDO, *Abramiuc vs. Romania*, application no. 37411/02, decision of February 24th, 2009, [www.echr.coe.int](http://www.echr.coe.int)); *Sandor-Kocsis vs. Romania*, in which the Court accepts the application relying on the grounds referring to the excessively long duration of the procedure and failure to execute the decision of May 6th, 2003 of the Court of Târgu Mureș, in breach of the provisions of art. 6 paragr. 1 of the European Convention of Human Rights and sentences Romania to the payment of money to the plaintiff, due to the excessively long term of the procedure, <http://jurisprudencedo.com>.

<sup>4</sup> <http://adevarul.ro/news/eveniment/audio-razvan-horatiu-radu-condamnarile-romaniei-cedo>.

<sup>5</sup> Republished in the Official Gazette, Part I, no. 545 of August 3rd, 2012, amended including through Law no. 72/2013, published in the Official Gazette, Part I, no. 182 of April 2nd, 2013.

<sup>6</sup> Fl. Măgureanu, *Drept procesual civil*, vol. I, Ed. Universul Juridic, București, 2013, p. 49 and the next one; M. Tăbărcă, *Drept procesual civil*, vol. II, Ed. Universul Juridic, București, 2013, p. 19 and the next.

<sup>7</sup> Published in the Official Gazette, Part I, no. 767 of October 31st, 2003.

<sup>8</sup> Republished in the Official Gazette, Part I, no. 827 of September 13th, 2005 and amended including through Emergency Order no. 74/2013, published in the Official Gazette, Part I, no. 389 of June 29th, 2013.

term, by an impartial and independent court set up under the law", as well as art. 6 point 1 of the European Convention of Human Rights<sup>9</sup>.

Usually, the Code of civil procedure does not expressly indicate the celerity principle, but it contains a series of regulations which aim at the implementation of this principle.

For instance:

- the regulation on the provisions of the Code of civil procedure referring to the principle of the judge's active role determines him to use all the measures permitted by the law and ensure the speedy organization of the trial [art. 6 paragr. (1) C. civ. proc.]. Repeatedly failing to comply with the legal provisions referring to the speedy case resolution or repeated delays of works for reasons which are attributable to the magistrate is a disciplinary breach and can be sanctioned according to the provisions of art. 99 paragr. (1) letter h) of Law no. 303/2004 on the status of judges and prosecutors<sup>10</sup>;

- in order to diminish the period when summons and other procedural activities are communicated to the parties and to other participants in civil trials, the communication can be carried out by the registry of the court and by telefax, electronic mail or other means ensuring the transmission of the act and the acknowledgment of the receipt thereof, if the party specified to the court the appropriate data to this end [art. 154

paragr. (6)];

- **the court decides on compensations for any material or moral damage caused by the delay, by forcing payment onto the entity which, willingly or in default, caused the delay of the trial or forced execution (art. 189);**

- an estimate of the case resolution. The question is whether the judge can estimate the trial duration right from the onset and the criteria influencing this duration;

Art. 238 paragr. (1) C. civ. proc. implements the judge's obligation, at the first hearing for which the parties are lawfully summoned, to decide on the hearing thereof and, considering the parties' opinions and circumstances of the file, to make an estimate of the trial duration, in order to ensure the resolution thereof within the best and predictable term. The duration thus estimated shall be written down in the minutes of the session.

What happens if the aspects of the file resolution are more complex and the judge realizes that the term cannot be complied with?

Paragr. (2) of art. 238 established that, for solid grounds, after hearing the parties, the judge may reconsider the duration set previously.

In order to determine the judge to comply with the term thus estimated, the new Code of civil procedure regulated the institution of the contestation on trial delays<sup>11</sup>. Therefore, according to the provisions of art. 522 paragr. (1), any party, as well as the prosecutor attending the trial, may submit a contestation which invokes the breach of the right to case resolution within the best and predictable term and the removal of any obstacles which led to the failure of compliance with the estimated term, unless the term has not been reconsidered as mentioned above.

The law has also established the cases for submitting a contestation:

- when the law stipulates a term for the completion of a file, for granting or motivating a decision, but this term elapsed without any results;

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<sup>9</sup> The Convention was ratified through Law no. 30/1994, published in the Official Gazette, Part I, no. 135 of May 31st, 1994, entered into force on June 20th, 1994 by submittal of the ratification instruments to the general Secretariat of the European Council. In the meaning of the Convention there are also the provisions of art. 14 of the International pact on civil and political rights, ratified by Romania through Decree no. 212/1974.

Also see the Decision of January 18th, 1989 of the European Court of Human Rights on the scope of art. 6 point 1 of the Convention, given in file LORENIUS/VS/SWEDEN, in V. M. Ciobanu, *Tratat teoretic și practic de procedură civilă*, vol. I, Ed. Național, București, 1996, p. 150.

<sup>10</sup> Republished in the Official Gazette, part I no.826 of September 13th, 2005, also amended through Emergency Ordinance no. 48/2013, published in the Official Gazette, Part I no. 303 of May 28th, 2013.

<sup>11</sup> Also see: V.M. Ciobanu, N. Marian et al., *Noul Cod de procedură civilă comentat și adnotat*, vol. I, Ed. Universul Juridic, București, 2013, p. 1223 and the next.

- when the court established a term during which a participant in the trial had to complete an element of the procedure, and the term elapsed but the court failed to implement the measures stipulated by the law against the entity who failed to execute its obligation;

- when a person or authority which is not a party has been made to communicate to the court, within a certain term, a written document or data or other information resulting from its registers and which were necessary for the case resolution, and this term elapsed but the court failed to implement the measures stipulated by the law against the entity who failed to execute its obligation;

- when the court failed to execute its obligation to solve the file within the best and predictable term by failing to take the measures stipulated by the law or by failure by office, when the law imposes it, of a procedural element necessary to solve the case, although the time elapsed since the last procedural action would have been enough to allow taking the said measure or fulfilling the said action.

In order to comply with the celerity principle, the contestation does not suspend the case resolution, since the contestation is solved immediately or within 5 days at the most, without the parties being summoned. We think that it is necessary to amend the regulation at art. 524 paragr. (3) C. civ. proc. which stipulates that the contestation can be solved by the panel in charge with solving the case, since the judge can be accused of subjectivism in analyzing the circumstances leading to the delays in the case resolution.

When solving the contestation, the court has two possibilities:

- a) to rule that the contestation is grounded, in which case the panel gives a decision which cannot be challenged, whereby it takes the measures necessary to remove the situation which led to the delay of the trial, and the court has the obligation to communicate to the objector one copy of the decision for information purposes;

- b) to rule that the contestation is ungrounded, to reject it, in which case the objector has the opportunity to complain within 3 days as of the communication, which does not suspend the judgment. The complaint is submitted to the court which formulated the decision, but will be solved by the hierarchically superior court. If the trial is pending before the High Court of Cassation and Justice, the complaint is solved by another panel of the same section.

The complaint will be solved within 10 days as of the reception of the file from the court where it has been submitted, without summoning the parties, through a decision which is not subject to any appeal. The decision must be motivated within 5 days as of the issuance thereof.

We are of the opinion that the structure of the panel which has to solve the complaint and which consists of 3 judges is exaggerated, just like the appeal judgment, the complaint being closer to the appeal.

The court which solves the complaint will not be allowed to provide any guidance or clarifications of de facto or de jure issues which could anticipate the case resolution or impact the judge's freedom to decide, according to the law, on the solution which needs to be given in the trial. However, it can decide that the court judging the trial should go through the procedural action or take the necessary legal measures, indicating which these are and establishing, when applicable, a term for their fulfillment, if the complaint is deemed grounded.

The Code of civil procedure stipulated at art. 526 paragr. (1) the sanction for the ill-willed objector (the clearly ungrounded nature of the contestation or of the complaint, or the pursuit of purposes other than justice), who can be made to pay a judicial fee between RON 500 to RON 2.000 and to pay, upon the request of the interested party, damages in order to repair the effects caused by submitting the contestation or the complaint, if any effects have been caused and its worth can be set.

Other regulations whereby the new Code of civil procedure aims to fulfill this principle refer to:

- **failure to comply with the term for the use of a trial right, which leads to the loss of the right, the procedure act being carried out beyond the term affected by nullity** [art. 185 paragr. (1)], which determines the party to make all efforts to perform the trial actions and activities within the term stipulated by the law;

- the parties' opportunity to select the procedure for the administration of evidence through an attorney at law, in which case the judge, on the first hearing when the parties are lawfully summoned, informs them, if they are represented or assisted by an attorney, that they can agree that the evidence be presented by the

parties' attorneys, also estimating the term of such administration, the legal regulations on the estimate of the trial term being also applicable in these cases. An exception are the disputes on the marital status and ability of persons, family relations and any other rights for which the law does not allow for any transaction;

- analysis of the trial in order to prepare the debate by the judge, in the meeting room, unless otherwise stipulated by the law. In the situations when the debate in public session would impact morality, public order, minors' interests, parties' private lives or justice interests, when the court may decide that they occur in part or in full without the presence of the public.

The trial analysis in order to prepare the debate aims to solve with celerity aspects referring to: the resolution of exceptions invoking or which the court may raise by office; the analysis of the intervention requests formulated by parties or third parties, under the law; the analysis of each claim and defense, based on the summons, the notification, the notification reply and the parties' explanations, if applicable; in order to see which claims are accepted and which are contested; in order to decide, under the law, upon request, on measures to provide evidence or acknowledge a situation, in case these measures had not been taken; in order to be informed on the plaintiff's renunciation, the defendant's acceptance or the parties' transaction; in order to accept the evidence requested by the parties which it deems conclusive, as well as the evidence which, by office, is necessary for the judgment of the trial and which it will present under the law; in order to decide on any other applications which can be formulated on the first hearing when the parties are summoned; it will decide that the parties proved the checks carried out with the publicity registers stipulated by the Civil Code or special laws and it will also conduct any other procedural action necessary to solve the case, including checks in registers stipulated by special laws.

In all these cases, in the meeting room or the board room, there will be only the parties, their representatives assisting minors, the parties' defense, witnesses, experts, interpreters, as well as any other persons whom the court, for solid grounds, accepts as audience to the trial.

Since the investigation occurs without any summons and only if the presence of the parties or of those mentioned is necessary, the numerous terms that could be requested during the procedure stipulated by the previous Code of civil procedure are removed.

- appointment by the court, upon the request of the interested party, of a special curator, in emergency situations, if the natural person lacking the capacity to exert civil rights or whose capacity is restricted does not have a legal representative, until one is appointed. Thus, trial suspension is avoided until the appointment of the legal representative, a suspension which can sometimes last for a significant period and the checks that need to be carried out by the authorities, for the protection of these categories of persons. The special curator has all the rights and obligations stipulated by the law for the legal representative [art. 58 paragr. (1)].

The special curator will also be appointed by the court in case of conflicts of interests between the legal representative and the represented entity or when a legal entity such as associations, companies or other entities without legal personality, if established under the law, summoned to be part of the trial, does not have a representative.

The court can appoint a special curator from among the attorneys designated to this end by the bar for each court of law.

- priority resolution of requests on: relocation [art. 144 paragr. (1)]; providing evidence [art. 359 paragr. (1)]; the emergency acknowledgment of a situation [art. 364 paragr. (1)]; acknowledgment of the obsolescence condition [art. 420 paragr. (1)]; clarification of the decision and removal of any contradictory provisions [art. 443 paragraph (2)] as well as completion of the decision [art. 444 paragr. (2)]; appeal for cancellation [art. 508 paragr. (1)]; settlement by the court of impediments occurring during the arbitration procedure [art. 547 paragr. (2)]; if the debtor is no longer entitled to the term of payment [(art. 674 paragr. (2))]; in case of a contestation upon execution [art. 716 paragr. (3)]; upon the settlement of the debtor's request in case of payments with special observations [art. 720 paragr. (2)]; upon the resolution of the request on return of the forced execution [art. 723 paragr. (3)]; in the cases on the enforcement of decisions referring to children, if the child definitely refuses to leave the debtor or manifests aversion towards the creditor [art. 912 paragr. (1)]; in case of insurance measures and others.

- the judge's obligation to consider, for the establishment of procedural terms, the urgent nature of certain files [art. 180 paragr. (3)].

**II. The establishment of much simplified judicial procedures** by removing excessive formalism, in files where the conditions imposed by the law are complied with. We hereby mention two of them:

a) the procedure of money order<sup>12</sup> regulated by art. 1013-1024 C. civ. proc., if some terms mainly referring to the debt are complied with.

At the 1995 recommendation of the European Council on terms of payment for commercial transactions<sup>13</sup>, Directive 2000/35/EC of June 29th, 2000 of the European Parliament and Council was issued on the prevention of delays in payments in the case of commercial transactions<sup>14</sup>.

The above-mentioned directive set the implementation of secondary legislation meant to remove the repeated failure to pay commercial debts, by adopting special derogating rules governed by the celerity principle.

When drafting the new Code of civil procedure referring to the above-mentioned aspects, consideration was given to similar regulations from France (L'injonction de payer – a procedure regulated by art. 1405-1425 of the New French Code of civil procedure) and Germany (Mahnverfahren, a procedure contained in the 7th Book of the German Code of civil procedure)<sup>15</sup>. Similar regulations are found in Italy (Procedimento di ingiunzione), Austria (Mandatsverfahren), Portugal (Injuncao), Brazil (Acao monitoria), Nordic and African countries.

According to the provisions of art. 1.013 paragr. (1) C. civ. proc., the debt must refer to the obligation to pay amounts resulting from a civil contract, including those closed between a professional and a contracting authority and which is proven through a written document or determined under a statute, regulation or some other document, assumed by the parties under signature or otherwise as stipulated by the law. The scope of this procedure does not include the debts registered in the statement of assets within an insolvency procedure [art. 1013 paragr. (2) C. civ. proc.].

Celerity results even more clearly from the provisions of art. 1022 paragr. (1) C. civ. proc., which specify that, if the debtor does not challenge the debt through a notification, the money order will be issued within 45 days at the most as of the enforcement of the application, but the calculation of this term rules out the period necessary to communicate the procedural actions and the delay caused by the creditor, including as a result of any modification or completion of the application.

b) the procedure referring to low worth applications, which has an alternative character, since the plaintiff may choose between this special procedure and the common law procedure.

The procedure referring to the low worth applications is applied when the amount, without considering any interests, legal charges and other accessory incomes, does not exceed RON 10,000 on the date the court is notified.

An exception to this situation refers to actions of fiscal, customs, administrative nature; in respect of the liability of the state for acts or omissions in exerting public authority; the marital status or capacity of natural persons; patrimonial rights deriving from family relations; inheritance; insolvency; preventive concordance, procedures on the liquidation of insolvent companies and other legal entities or other similar procedures; social insurance; labor law; the rental of goods, except for actions referring to debts which focus on the payment of amounts; arbitration; negative influences on the right of private life or other rights referring to personality.

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<sup>12</sup> For a thorough analysis of this procedure, see also: M. Tăbărcă, *Drept procesual civil*, vol. II, Ed. Universul Juridic, București, 2013, p. 779 and the next. In order to analyze the regulation before the entering into force of the new Code of Civil procedure, see also Fl. Măgureanu, G. Măgureanu, *op. cit.*, p. 193 and the next.

<sup>13</sup> JO L 127, 10.06.1995, p. 19.

<sup>14</sup> Published in The Official Journal of the European Union, no. L 200/35 of August 8th, 2000,

<sup>15</sup> See also George Măgureanu, *Consideration on the judiciary procedures of conflict resolution*, Magazine Curentul Juridic, Târgu Mureș, no. 4/2011, p. 123-135.

The procedure is drafted and takes place in the council room, removing the formalism caused by the summoning of the parties, the delays in common law cases, the parties being summoned only if the court deems it necessary or upon the request of a party. In this latter situation, the court may refuse the request of the party if it thinks that, considering the circumstances of the file, no verbal debate is necessary.

The principle of celerity or that of the reasonable term is also strengthened by other regulatory documents. Thus, art. 271 of the labor Code stipulates: "Any applications referring to the settlement of labor conflicts are judged with priority". "Judgment terms cannot exceed 15 days". "The procedure of party summoning is deemed lawful if it occurs at least 24 hours prior to the judgment term", while art. 273 of the same regulatory document mentions that "The administration of evidence complies with the emergency regime, the court being rightfully entitled to remove the benefit of the accepted evidence from the party which unreasonably tergiversates to present it".

To conclude, we can claim that, through the amendments to the Code of civil procedure, judgment acceleration was attempted and finally succeeded in certain files, particularly in the commercial field, by removing the appeal means of the remedy at law.

However, the common law procedure which a creditor has to undergo until it obtains the enforcing title still remains pretty cumbersome and long, all these also due to the large number of alternatives the debtor can resort to in order to delay the payment of its outstanding debts.

The new regulations have also been successful because, in civil and commercial fields, many trials pending to the courts which refer to outstanding debts go through the common law procedure, although not all its stages are necessary.

On the whole, the money order is a procedure which precedes the submitting of summons. Therefore, whenever there are applications which can make the object of a procedure prior to submitting the summons under the common law, the creditor may first go through the order procedure and, if its application is rejected or partly accepted, it may address the court using the common law procedure.

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