Procedural incidents: relinquishing the legal action in the appeal proceedings or in the extraordinary legal remedies

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Abstract

The principle of law of the availability implicitly includes the possibility granted by the lawmaker to the parties to perform proceeding disposition acts. As regards relinquishing the legal action, the Civil Procedural Code applicable to date included, in art. 406, para. 5, an apparently irrelevant amendment; however, the jurisprudence shows this cannot go ignored, as the premises of party damage proved to be present. Therefore, this paper aims at sounding the alarm on the potential consequences of annulling previous Court Orders in case of relinquishing the legal actions during the appeal proceedings or in the extraordinary legal remedies, which, as proven by the jurisprudence in Court, may lead to important losses for the Party that is not at fault.

Keywords: *relinquishing legal action, disposition act, quashing, legal expenses, consent.*

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1. Introduction

The principle of law of the availability implicitly includes the possibility granted by the lawmaker to the parties to perform proceeding disposition acts.

Therefore, they are entitled to have full control of the trial subject, as well as of all the proceedings means available for defending their rights.

Thus, according to the provisions of articles 406-410 of the Civil Procedural Code, the Claimant can relinquish the legal actions or even the claimed right, at any time, and the Defendant can also acquiesce in the Claimant's demands or both parties can reach an understanding regarding the conclusion of a transaction whereby to extinguish the litigation between them.

As regards relinquishing the legal action, a unilateral proceeding disposition act requiring the existence of the legal capacity of exercise to stand trial[2], the Civil Procedural Code applicable to date included, in art. 406, para. 5, an apparently irrelevant amendment; however the jurisprudence shows this cannot go ignored, as the premises of party damage proved to be present.

The Claimants usually resort to relinquishing the legal action either when finding that their actions were prematurely formulated, or when they hold no sufficient evidence to win the case submitted for settlement with the court-of-law.

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[2] Ioan Leş, *Tratat de drept procesual civil*, vol. I, Universul Juridic, Bucharest, 2014, p.862.

The relinquishment of legal actions can be performed at any time, therefore both during the proceedings on the merits, and in appeal or in extraordinary legal remedies, personally or by the Agent based on the Special Power of Attorney.

Concurrently, similarly to the previous provisions in the matter[3], the provisions regarding the Defendant's right to request the payment of the legal expenses were kept, in the case when the latter so expressly expresses the will, when the relinquishment was done following the submission of the summons, as well as the need for the Defendant's agreement in the event the Claimant relinquishes the legal actions upon the first date when the Parties are legally summoned or subsequently thereto.

Additionally, the new provisions expressly set forth that should "the Defendant not be present upon the date when the Claimant states relinquishing the legal actions, the Court-of-Law shall grant the Defendant a deadline to take a stand regarding the motion to relinquish. The lack of answer by the granted deadline shall be interpreted as a tacit agreement to the relinquishment."[4]

The Court-of-Law shall acknowledge the relinquishment of legal actions through a decision subject to appeal. The appeal shall be tried by the hierarchically superior Court-of-Law to the one having acknowledged the relinquishment. Such decision shall be final only when the relinquishment occurs before a Section of the High Court of Cassation and Justice.

The appeal delay shall be the one provided for by the common law, namely, by article 485 of the Civil Procedural Code, that is: 30 days as of the decision notification.

Moreover, through article 407 of the current Civil Procedural Code, the lawmaker expressly mentioned that the relinquishment of legal actions by one of the Claimants shall not be binding for the other persons holding the same capacity, and that it would only have effects on the Parties regarding whom it was made, not affecting the incidental requests having an independent character.[5]

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[3] Art. 246 of the Civil Procedural Code of 1865 published in Brochure (Brosură) on July 26, 1993.

[4] Thus, and in application of the previous regulation, in the jurisprudence, it is considered that the absence of the legally summoned Defendant cannot prevent the Court-of-Law from acknowledging the disposition act of relinquishing the legal action, that such absence cannot be interpreted as a relinquishment opposition. (Court of Appeals of Bucharest, Civil Section IV, Court Order no. 3163/2011, in Mihaela Tăbârcă, *Drept procesual civil*, vol. I, 2nd edition, revised and added, Universul Juridic, Bucharest, 2008, p. 662).

[5] Such effects were previously found through a jurisprudence creation. Thus, the Court of Appeals of Cluj, the Civil Section, in the Court Order no. 859/2000 stated that the relinquishment of the legal action by one Party shall not prevent trying the case concerning the other Parties (in „Buletinul Jurisprudentei anului 2000", vol. I, p. 348). Concurrently, the C.S.J. (Supreme Court of Justice), the Civil Section, in the Court Order no. 445/2000 concludes that, in case of joint litigations, the relinquishment by one of the Claimants shall have no effect either on the other Claimants involved in the case who shall continue their legal actions, nor on the settlement of main motions to intervene as Party Plaintiff or of counterclaims (in „Buletinul Jurisprudentei anului 2000", p. 196).

2. Relinquishing the legal action in the appeal procedure or in extraordinary legal remedies

The main novelty and difference noticeable in the new procedural regulation touches however upon the legal action relinquishment in the appeal procedure or in extraordinary legal remedies.

Thus, according to the provisions of article 406 para. 5 of the Civil Procedural Code, "when the relinquishment of the legal action takes place during the appeal proceedings or in extraordinary legal remedies, the Court-of-Law shall acknowledge the relinquishment and it shall order and quash, in whole or in part, the decision or, as applicable, the decisions given in the case."

Therefore, notice that it is precisely this total or partial quashing of the appealed decision or of the ones given previously in the same case that the lawmaker considered to be a natural consequence of the relinquishment of legal action.

We consider that the probable reason for it was that of reinstating the Parties to their pre-contractual positions, thus, a retroactive effect related to triggering the legal proceedings. As a consequence of this retroactivity, unless the statute of limitations was invoked, the Claimant can start new legal actions for valuing the same right he/she/it has, and no claim of res judicata can be raised against such Claimant.[6]

Once it was submitted with the file, the Claimant can no longer withdraw the motion to relinquish the legal actions nor, as such, change the given statement to request that the litigation trial be continued.[7]

Therefore, as regards recovering the legal expenses incurred by the Defendant, as noticed, such can only be granted upon the latter's express request, depending on certain moments on the timeline. The first one of such moments regards the occurrence of the legal action relinquishment prior to the service of the summons, at which time, the relinquishment is done without the Defendant's agreement, and without the possibility of awarding any legal expenses, since the Defendant was not aware that the case was pending with a Court-of-Law.

In the event that the relinquishment takes place subsequently to the Defendant's being served with the summons, prior to the appearance before the Court upon the first term, the Court can acknowledge it without the Defendant's agreement, ordering, upon the latter's request that the Claimant be forced to pay legal expenses.

The last case highlighted by the lawmaker takes into account the submission of the legal action relinquishment upon the appearance before the Court upon the first term when the Parties were legally summoned or subsequently to such moment, in which case, the Defendant's express or tacit agreement on the relinquishment is

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[6] Dambovita County Court, Court Order no. 257/2012, in Viorel Mihai Ciobanu, Marian Nicolae, *Noul Cod de procedură civilă comentat şi adnotat*, 2nd edition revised and added, vol. I, Universul Juridic, Bucharest, 2016, p. 1126.

[7] Court of Appeals of Bucharest, the Civil Section IV, Court Order no. 2477/2001, in Mihaela Tăbârcă, *Drept procesual civil*, vol. I, 2nd edition revised and added, Universul Juridic, Bucharest, 2008, p. 662.

required, and the Claimant is bound to pay legal expenses should the Defendant request it. The exception from this rule can be found in the express case mentioned under article 924 of the Civil Procedural Code, according to which, in the divorce legal proceedings, the Claimant is given the "possibility to relinquish the legal action along the entire length of the proceedings, although the Defendant might oppose it. The Claimant's relinquishment shall have no effect on the Divorce Application made by the Defendant."

Therefore, according to the new regulation in article 406 para. 5 of the Civil Procedural Code, a difference must be made between relinquishing the summoning proceedings and relinquishing the exercise of the challenge methods.

If, for relinquishing the legal actions, the Defendant's agreement is required, when the relinquishment occurs subsequently to the Parties' having been legally summoned, relinquishing the exercise of the challenge methods can be rather regarded as an approval of the challenged decision, which is why the Defendant's agreement is not necessarily required.[8]

The reason why the lawmaker made this difference between relinquishing the legal actions regarding the summons, during the challenge method-related proceedings (which require the Defendant's agreement) and relinquishing the challenge methods altogether is based on the interpretation of the latter as being an approval of the challenged decision, which thus no longer requires the Defendant's agreement.

Therefore, the challenge method can be withdrawn at any time, in any way, without the mandatory prerequisite of the Defendant's consent. Thus, the Claimant is considered to acquiesce to the decision given by the Court-of-Law to which the Defendants actually also acquiesced by not challenging it using a different method.[9]

Nevertheless, the jurisprudence gives rise to much more complex hypotheses compared to what the lawmaker provided for upon drafting the law text, matters which must enjoy a clear and fair settlement, and which, depending on their frequency and complexity, can lead to law amendments or supplements over time.

Such a hypothesis is the one where, although the legal action relinquishment occurred during the appeal proceedings, the Court acknowledged the Defendant's agreement regarding the relinquishment, ordered that the decision made by the court of first instance be quashed, including regarding the legal expenses granted by the court of first instance in favour of the Defendant.[10]

Thus, in this case, the Claimant decided to relinquish the legal actions when appearing before the Appeals Court upon the first term. Having the Defendant's agreement, the Court acknowledged the legal action relinquishment formulated by the Claimant, quashed the challenged Court Order and forced the Claimant to pay to the Defendant the legal expenses incurred for the appeal.

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[8] Viorel Mihai Ciobanu, Marian Nicolae, *op. cit.*, 2016, p. 1123.

[9] Court of Appeals of Timisoara, the Civil Section, Court Order no. 752/2009 in Viorel Mihai Ciobanu, Marian Nicolae, *op. cit.*, 2016, p. 1124.

[10] Court of Appeals of Bucharest, Section VII for cases regarding labour conflicts and social security, Court Order no. 2157/2017 (unpublished).

Upon the communication of the drafted decision, it was however noticed that, by so doing, although this matter was never subjected to the Parties' discussion, the court of second instance completely quashed the decision given by the court of first instance, including regarding the legal expenses that the Claimant had been forced by the latter to pay to the Defendant for having been to high compared to the Attorney's workload.

Therefore, in such a case, the question rises regarding the challenge method which can be used by the Defendant against the decision given by the court of second instance. On the one hand, when relinquishing the legal action, according to article 406 para. 6 of the Civil Procedural Code, an appeal can be lodged, whereas, on the other hand, it can be drafted strictly related to the reason for relinquishment, and not regarding a matter which was not subject to the Parties' discussion upon the term, but that the court of second instance however gave an opinion in this case.

Or, it is true that given the provisions of both article 451 para. 2 of the Civil Procedural Code, and of the jurisprudence, the legal expenses, particularly the counter value of the attorney's fees, can be reduced by the Presiding Judge depending on how the Court appreciates the work performed by the Defence Attorney compared to the case complexity;[11] however, it seems incomprehensible to completely cancel them and, by so doing, to deprive the Defendant of an earned right, without the latter having been at fault in the proceedings and without raising the matter for discussion.

In the doctrine, an opinion was presented. According to this, since the Court of law "acknowledges" the legal action relinquishment, and it does not "order" anything, by formulating and lodging the appeal, the Parties could submit criticism regarding not the acknowledgment, but strictly the Court's breach of dealing with the relinquishment, in compliance or noncompliance with the provisions of article 406 of the Civil Procedural Code.[12]

However, in the presented case, this is no longer strictly related to a reason leading to acknowledging the legal action relinquishment in breach of the legal provisions, but to a quashing reason by breaching the civil proceeding rules, a manifest breach of the principle of contradiction.

We thus consider that the only possible way, at this time, until a similar case shall be clarified by law, would be to lodge a regular motion of appeal whereby to request that the appealed order be quashed (although this concerns strictly the matter of relinquishing the legal actions) and to submit the case for just settlement with the Court of Appeals, according to the provisions of article 497 of the Civil Procedural Code (in case the appeal is tried by the High Court of Cassation and Justice) or by the Court of Appeals, in the cases provided for under article 498 of the Civil Procedural Code

[11] Even the artificial entities benefiting of the services of an employed legal advisor can request to be represented by a Defence Attorney, thus having the possibility to request the legal expense recovery in any case. A person's right to defence is a constitutional right, regardless of whether the person is a natural or an artificial one, everyone having the possibility to be represented based on a Legal Assistance Agreement. (Court of Appeals of Bucharest, the Commercial Section, Court Order no. 808/2000, in Mihaela Tăbârcă, *op. cit.*, 2008, p. 661).

[12] Mihaela Tăbârcă*, op. cit.*, vol. I, 2008, p. 663.

It is obvious that the Court of law gave a decision by breaching the procedural rules set forth under article 14 para. 4, 5 and 6 of the Civil Procedural Code, incidentally to the quashing reason provided for under article 488 para. 1 item 5 of the Civil Procedural Code ("when, by the decision given, the Court breached the procedural rules whose failure to comply with entails the nullity"). The court of appeals thus wrongly enforced the provisions of article 451 para. 2 of the Civil Procedural Code, without raising the matter for the Parties' discussion, as it was bound to under article 14 para. 4, 5 and 6 of the Civil Procedural Code, manifestly breaching the principle of contradiction.

Consequently, although, when appearing before the court upon the first term, the Claimant did not request that the Court decrease the legal expenses representing the attorney's fees incurred by the defendant when trying the conflict in the court of first instance, the court of second instance, ex officio and without raising the matter for the Parties' discussion, proceeded, in motivating the appealed civil court order, to completely remove the legal expenses incurred by the Defendant during the first legal proceeding stage, concluding that they were lacking grounds.

The wrongly application of the provisions of article 451 para. 2 and the breach of article 453 para. 1 of the Civil Procedural Code concerning granting the legal expenses, namely cutting the attorney's fees when they were manifestly disproportional to the litigation complexity or value, while also considering the case-related circumstance, also led to the incidence of the quashing reason provided for under article 488 para. 1 item 8 of the Civil Procedural Code ("when the decision was given upon breaching or wrongfully applying the substantive laws").

Thus, the purpose envisaged by the lawmaker for establishing the Courts' right to appreciate and intervene on the legal expenses was that of avoiding any excess and abuse. Besides the fact that the Defendant can consider it to be argued as reasonable related to the case complexity, trial duration and workload during the proceedings before the court of first instance, the hypothesis that although the Claimant lost in the first trial, and he did not request that the provisions of article 451 para. 2 of the Civil Procedural Code be applied is added proof that the Claimant considered the fees to be reasonable.

Such fees, which were completely cut by the decision given on the legal action relinquishment was paid in full by the Defendant in the proceedings before the court of first instance, at which time the defendant could not have possibly known that the Claimant would lodge a motion for legal action relinquishment after a long time, particularly after lodging an appeal. Under such conditions it is unfair that the Defendant be forced to bear the costs out of their own pockets given that, according to the provisions of article 453 para. 1 of the Civil Procedural Code, "the Party losing the trial shall be bound, upon the request of the winning Party, to refund the legal expenses".

3. Conclusions

In conclusion, we notice that the law, in its current form, and given the clear introduction of para. 5 under art. 406 of the Civil Procedural Code is lacunary, since its interpretation corroborated with the provisions of para. 6 of the same article can create procedural obstacles for the parties at fault.

The lawmaker failed to envisage situations where the magistrate's fault can lead to damages for a Party in the trial and a clear way of settling and straightening them.

The Defendant in this case cannot defend the right by lodging an appeal possible according to article 406 para. 6 of the Civil Procedural Code, since no criticism can be raised strictly related to the procedure of acknowledging the legal action relinquishment.

On the other hand, the possibility of filing a challenge does not exist for quashing or revision, since the main conditions for stating them are not complied with.

Thus, at this time, the only possibility available to the Defendant to challenge a court order acknowledging the legal action relinquishment, where the Judge ordered more than requested, by breaching the principle of contradiction, is the appeal for the reasons of quashing listed under article 488 para. 1 of the Civil Procedural Code, although the appeal provided for under in article 406 para. 6 of the Civil Procedural Code does not regard such circumstances, but strictly the compliance with the procedural conditions of legal action relinquishment.

Consequently, we propose that, for the future, it may be envisaged to include a new paragraph whereby to also regulate cases similar to the presented one, which may no longer put defendants in the situation to lodge appeals based on reasons different than the ones allowed in the concerned case, and always susceptible of being rejected by the Court of appeal for not being framed within the law applicable to a given case situation.

Bibliography

1. Barbu, Mihail, *Noul Cod de procedura civila. Jurisprudenta rezumata*, C.H.Beck, Bucharest, 2014;
2. Ciobanu, Viorel Mihai, Nicolae Marian, *Noul Cod de procedura civila comentat and adnotat*, 2nd edition, revised and added, vol. I, Universul Juridic, Bucharest, 2016;
3. Leş, Ioan, *Tratat de drept procesual civil*, vol. I, Universul Juridic, Bucharest, 2014;
4. Tabarca, Mihaela, *Drept procesual civil*, vol. I, 2nd edition, revised and added, Universul Juridic, Bucharest, 2008.
5. The Civil Procedural Code, as republished in the Official Gazette, Part I no. 247 as on April 10, 2015;
6. The Civil Procedural Code as in 1865, published in the Brochure *(Brosura)* as on April 26, 1993;
7. Court of Appeals of Bucharest, Section VII for cases on labour conflicts and social security, Court Order no. 2157/2017 (unpublished).