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DEFENSES IN THE CIVIL LAWSUIT: A SHORT COMPARISON OF REGULATIONS FROM ROMANIA AND FRANCE

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Abstract

Any person who is a party to a lawsuit acts or reacts: the claimant raises claims and the defendant counters them.

Under this litigation context, the Romanian NCPC expresses - for the first time in our procedural legislation - the modern concept according to which defense is a way of expressing the civil action and makes a fundamental classification of the defenses in justice ("substantive" and "procedural"). The action includes two categories of procedural means: those for the protection of the subjective right claimed by one of the parties and those for providing the defense of the lawsuit parties .

In France, this concept, which reflects the diversity of civil action and of the means of defense, has been regulated for over four decades. This is precisely why we intended to make a comparison with the French judicial system, which can be beneficial on several plans, because legislative reforms are often preceded by comparative studies.

Such a comparison improves the critical knowledge of our law: Romanian lawyers can better perceive what is latent, constant, which has been insufficiently explored in the own law. Foreign jurisprudence may also provide new assessment elements to the Romanian legislator either to apply common rules to several states or to construe the national law.

Keywords: *Private Law, defense, defendant, civil lawsuit*

1. Introduction

The comparison method is increasingly being used in the legal field as a previous stage for reforms and in order to harmonize national rights.[1]

The critical knowledge of the law is the essential function of the comparison. Legists renew their analyses, better perceiving permanent, long-lasting things and

[1] Laithier; Y-M., *Droit comparé*, Dalloz, Paris, 2009, p.14-24.

things which are insufficiently explored in one's national law. "The person comparing reveals the unperceived realities from the analyzed system."[2]

In this way he may improve the national law by borrowing or imitating rules from the foreign right which seem more adapted to social and economic realities. Moreover, foreign law may grant the legislator new methods of assessment to apply rules valid for many states or to interpret and complete the national law system.

Moreover, in the context of the European integration, people are attempting to find a base of rules to build a common legal culture: the assessment of certain legal systems implies better social security, decreases the costs of right diversity, enables exchanges. Therefore, the compared method may contribute to the harmonization of the national law systems.

It has been discovered that doctrine best enables the delivery of certain legal and lawful models. This is what determined the elaboration of the present study: we hope that this comparison between the regulation of a more mature legislator and a larger and more insightful doctrine (in terms of defense mechanisms) will contribute to a more efficient application of the Romanian law and in terms of distance, to its development/transformation.

2. Regulation of defense mechanisms in the French law

Firstly, the French Civil Procedure Code regulates the defence through the directory principles of the civil lawsuit (art.18-20).

Secondly, according to art. 30 from *Code de procédure civile*, „(1) The action is the right of the claimant to be listened to, based on his civil action, so as the judge may declare the claim grounded or ungrounded. (2) In terms of the opponent, the action is the right to discuss the grounds of the claim."

Based on this regulation and on the already classic mentality regarding the right to act, French authors[3] explain "the defense in court" as a right to act in terms of the defendant.[4] The action is also seen as the defendant's prerogative to discuss the grounds of the plaintiff's claim; this distinct view of the right to act is what we call "defense".

S. Guinchard[5] demonstrates that the "defense mechanisms" include all the procedures which enable the defendant to react against the appeal initiated against him by the plaintiff. In the same way, J. Héron[6] considers that defenses are the

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[2] Muir Watt, H., *"La fonction subversive du droit comparé",* RIDC 2000, p.503-518, *apud* Laithier; Y-M., op.cit, p.15.

[3] Couchez, G., Lagarde, X., *Procédure civile*, Ed. Dalloz - Sirey, Paris, 2014; Guinchard, S., Ferrand, F., Chainais, C., *Procédure civile,* Dalloz, Paris, 2011; Cornu, G., Foyer, J., *Procédure civile*, P.U.F., Paris, 1996; Cadiet, L., *Droit judiciaire privé*, Litec, Paris; Héron, J., *Droit judiciaire privé*, Montchrestien, Paris, 1991; Vincent, J., Guinchard, S., *Procédure civile,* Dalloz, Paris, 1996.

[4] Couchez, G., Lagarde, X., op.cit, p.163.

[5] Guinchard, S., Ferrand, F., Chainais, C., op.cit., p.72.

[6] Héron, J., op.cit, p.80.

follow-up of the court summoning so there is certain symmetry between them; however defenses are not entitled to total autonomy: we cannot conclude a defense without an application; the application is what suscitates the defense. Therefore, the defense depends on the court summoning.

In G. Cornu's[7] opinion, defense is largely the contradiction of the application; it's the act whereby the defendant, refusing to meet the plaintiff's claim, suggests the judge his own means to "eliminate" the application, more or less on a final basis.

Code de procédure civile is dedicated to the trilogy of defense mechanisms, defining each of them. Therefore, Title V of Book I, entitled "Defense Mechanisms" includes three chapters:

- chapter I: Defense of the matter on trial (art. 71-72);
- chapter II: Procedure exceptions (art. 73-121);
- chapter III: Fin de non recevoir (art. 122-126).

French theoreticians largely accept this legal classification, considering that the basic criterion of the "division" is the *nature* of defense mechanisms. Based on the legal definitions, authors such as L.Cadiet, G. Couchez, J.Cornu, J.Foyer, J.Héron, J. Vincent, S. Guinchard explain the content, features and legal regime of the mentioned institutions.

a) According to art. 71, "*defense of the matter on trial*" is any mechanism "which tends to reject the opponent's claim as ungrounded, after examining the matter on trial of the right". Therefore, with the help of the defense of the matter on trial, the defendant directly opposes to the plaintiff's claim and renders it ungrounded. As such, the defendant accepts the game on the plaintiff's field and follows the rejection of the application as ungrounded, after examining the matter on trial.

Taking in consideration its fundamental character, the legist determined that the defense of the matter on trial may be presented anytime, not only before the first instance, but also before the court of appeal, before closing the debates. For example, the law states that statement of forgery which implies contesting written evidence represents a defense of the matter on trial and not a procedure exception, because it can be claimed in any state of the cause.[8] Moreover, the mechanism resulted from the nullity of the legal document on which the claimant bases his action (for example a sale promissory) is a defense of the matter on trial and may be directly suggested in the appeal.[9] However, in terms of invoking a direct defense of the matter on trial before the Court of Cassation, one must consider the

[7] Cornu, G., Foyer, J, op.cit., p.368.

[8] See : Cour de cassation, 1ère Chambre civile 9 décembre 2015, pourvoi n°14-28216, BICC n°841 du 1er mai 2016: https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000031608106.

[9] See: Cour de cassation, Chambre civile 3, 16 mars 2010, N° de pourvoi: 09-13187: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000021998714.

restriction of invoking new mechanisms before this court (provided by art. 619 *Code de procédure civile*).

b) Art. 73 *Code de procédure civile* provides the following: "*Procedure exceptions* are any mechanisms which tend to declare the procedure irregular or closed or to cancel its performance." The procedure exceptions temporarily transfer the field of the legal game; without directly answering the claim, the defendant opposes by demonstrating that the application was delivered to an noncompetent judge, that there is a similar process pending etc. A matter exterior and preliminary to the litigation is submitted to trial, whose resolution must mandatorily precede the debate of the matter on trial. Regularly there is a temporary obstacle in the performance of the trial: after regulating the procedure, the litigation matter may be debated.[10]

Art. 73-121 are dedicated to procedure exceptions. Art. 74 sets the legal regime for the procedure exceptions so that art. 75-121 *Code de procédure civile* may explicitly refer to four categories of procedure exceptions:

- incapacity exception – art. 75-99;
- lis pedens and connectedness exception – art. 100-107;
- dilatory exceptions - art. 108-111;
- nullity exceptions – art. 112-122.

Regarding the legal regime, this is more severe than the regime of the defense of the matter on trial: "Under the sanction of inadmissibility, exceptions must be simultaneously built before any defense of the matter on trial or before the fin de non recevoir…" Obviously, the purpose of the legist is to avoid the rightful abuse occurred by invoking these exceptions only for the purpose of tergiversating the trial.

Therefore, the invocation of procedure exceptions is submitted to two requirements: simultaneity (invoked all at once) and anteriority. Not meeting these requirements is sanctioned with the inadmissibility of the exception, even if the rules which support the procedure exception are of public order. However, we consider that the mechanism resulted from this inadmissibility may be built even firstly before the court of appeal as any fin de non recevoir.[11]

There are however derogations from this severe regime. For example, the nullity exception may be invoked during the meeting of the procedure acts, the connectedness exception may be invoked in any state of the case (if the party did not have a dilatory intention)[12], etc.

In terms of the four categories of procedure exceptions, is the list restrictive? The dominant opinion is that the large definition from art. 73 demonstrates that the legist regards a term which exceeds the list made through art. 75-121 CPC[13].

[10] Couchez, G., Lagarde, X., *op.cit*, p.183; Guinchard, S., Ferrand, F., Chainais, C., *op.cit.,* p.73

[11] Guinchard, S., Ferrand, F., Chainais, C., *op.cit.,* p.74.

[12] See : art.103, 111, 112, 118 CPC

[13] Guinchard, S., Ferrand, F., Chainais, C., *op.cit.,* p.74.

Moreover, J. Héron[14] notices that procedure exceptions which are related to art. 75-121 CPC are not really connected: they have different content and their legal regime is their only connection. As a matter of fact, the law also included in the category of the procedure exceptions: the rule of "the criminal taking the responsibility of the civil", the superannuation of the process[15], etc.

c) According to art. 122: "*fin de non recevoir* is any mechanism which tends to declare the action inadmissible, without examining the matter on trial, for lacks of the right to act, such as: the lack of quality, the lack of interest, prescription, imperative term, the matter on trial."

Through the "*fin de non recevoir*" the existence of the cause to action is under discussion and not only a procedure problem; however, the judge is required not to state on the merits. In fact, the inadmissibility stated by the judge stops the examination on the merits.

Therefore, the "*fin de non recevoir*" has a mixed nature: it is closed to the defence on the merits because it tends to be a final obstacle of the action in justice, in comparison to the exception of procedure which, as a rule, represents a temporary obstacle of the claim. On the other hand, it is closed to the civil procedure exceptions because it focuses on the paralyzing of the action without analysing on the merits the litigious matters[16].

Regarding the *fin de non recevoir*, J. Héron defines it as being „the manner which tends to the refusal, without the examination on the merits of a claim or a defence, because the party does not fulfil the conditions required in order to subject to the judgement that procedural act"[17]. The fin de non recevoir is an anticipated obstacle for the examination of a procedural act, sanctioning the lack of the complainant to sustain it. Therefore, contrary to the defence on the merits, the fin de non recevoir is not defined by its constitutive elements, but through its effect. Consequently, a procedural defence does not exist, through its "nature" as refusal to comply: the determination of the refusals to comply depends exclusively on its legislator's will, unfortunately, on the one of the interpreter needing to replace the lack of the first.

For example, if we analyse the dispositions of art. 56 and art. 57 *Code de procédure civile*, we conclude that the lack of mentions in certain procedural acts is appealed – in one case – through an exception of procedure, and in the other case – similar one - through a fin de non recevoir. The difference is explained only through the will of the legislator.

Also, Héron observed that certain matters which belong to the substantial law are qualified, in an artificial manner, as fin de non recevoir. Sometimes the legislator isolates an element of the merits and asserts the judge to examine it in

[14] Héron, J., op.cit., p.93

[15] Guinchard, S., Ferrand, F., Chainais, C., *op.cit.,* p.74.

[16] Couchez, G., Lagarde, X., *op.cit*, p.185; Guinchard, S., Ferrand, F., Chainais, C., *op.cit.,* p.75.

[17] Héron, J., op.cit., p.88.

advance. It is the legislator will that the merits have the regime of a fin de non recevoir[18]. For example, art. 244 *Code civil* foresees that the reconciliation of the spouses after the deeds invoked as reasons to divorce stops their subsequent use for the dissolution of the marriage, and the judge will admit the claim as irreceivable („Le juge déclare alors la demande irrecevable…"). The problem of the guilt and the conciliation is part of the substantial law, but the examination in advance of a conciliation will disengage the judge to examine the „promiscuity of a marriage"[19].

Most frequently, the identification of the fin de non recevoir is made with the words used by the legislator: „receivable or „irreceivable". One should remember that, however, the fin de non recevoir must be received even if the inadmissibility does not result from an express disposition, according to art.124 *Code de procédure civile*.

It is considered, in the doctrine and jurisprudence, that the enumeration in art. 122 has not a limitative character. For instance, it was stated in the judicial practice that it is considered as being the fin de non recevoir the mean deduced from the existence of a conciliation case or mandatory mediation and prior to the court apprehension[20].

It is appreciated that the notion is applied to the defendant, as well; for example, his procedural exception may be inadmissible because he invoked it after the defences on the merits[21].

Also, the notion of "fin de non recevoir" is seen as an extension of the interdiction of the party to self-contradict in somebody else detriment – inspired by the institution of *estoppel,* as well by the rule "*Nemo auditur propriam turpitudinem allegans*"[22]. There are presented the situations when one of the parties suddenly changes the procedural position in order to mislead the opponent regarding his intentions. In the French doctrine it was highlighted that in arbitrary matter, through a refusal to comply, the attitude of "lying in wait" is sanctioned, abstaining at first from invoking a procedural irregularity in order to use it more advantageously subsequently[23]. Thus, for the procedural contradictions, it is

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[18] Some of J. Héron observations and commentaries have been commented, detalied and systematized in a study of professor Guy Block , *Les fins de non recevoir en procedure civile*, Ed. Bruyant, 2002;

[19] Héron, J., op.cit., p.91.

[20]See: Cour de cassation, chambre civ.2, 16 décembre 2010, N° de pourvoi: 09-71575; Cour de cassation, chambre civile 1, 8 avril 2009, N° de pourvoi: 08-10866 : www.legifrance.gouv.fr

[21] Guinchard, S., Ferrand, F., Chainais, C., *op.cit.,* p.75.

[22] For a detailed study, a se vedea: A.C. Ciurea, „Despre teoria *estoppel* sau noi instrumente de filtrare a acțiunilor în justiție" [About the *estoppel* theory or new instruments for filtering civil actions brought before the court], *Revista română de drept privat nr.4/2012*, Ed. Universul Juridic, p.53.

[23]X. Delpech, *Procédure arbitrale: la Cour de cassation définit la notion d'estoppel,* published at : www.dalloz-actualite.fr, 2010; X. Delpech, *Procédure arbitrale: application de la théorie de l'estoppel*, published at : www.dalloz-actualite.fr, 2010.

inclined to the institution of a mechanism to block the action, as an inadmissibility or a fin de non recevoir. The fin de non recevoir does not need to be expressly provided by a law text, it has to be supported by a law text, being resulted from a law principle – the one of procedural loyalty, for instance – which has the vocation to irrigate all the judiciary procedures.

Regarding the judiciary regime, art. 123 *Code de procédure civile* indicates: "The fin de non recevoir may be invoked in any stage of the case, with the possibility of the judge to sentence to recovery to damages the one that abstained, with dilatory intention, to invoke them earlier".

Therefore, the fin de non recevoir do not have a supple and liberal regime, can be invoked in any stage of the case and the interested party does not need to prove the existence of the damage[24]. However, in order to diminish the risk of dilatory labours, the judge must invoke ex officio certain refusals to comply, which have a character of public order (lack of interest, lack of standing the trial, res judicata) or which results from the failure to observe the terms within the mean of appeal that must be exercises (art. 125 *Code de procédure civile*). On the other hand, the refusal to comply deduced from the limitation of time cannot be invoked ex officio, by the judge (art. 2247 Civil code).

Art.126 *Code de procédure civile* allows inadmissibility to be covered / alienated / eliminated if the situation which generated it may be regulated. For example, the claim made by a person without a standing the trial is declared as inadmissible, if, within a legal term, the person who may stand the trial intervenes in the trial (becomes a part).

3. Regulation of defence means in the Romanian New Civil Procedure Code (NCPC).

Firstly, we notice that the New Romanian Civil Procedure Code raises "The defence right" (art.13) at the level of a fundamental principle of civil trial – a deserved place in any system of modern, democratic law.

Then, in the Title intended to "Civil action" it is provided that: "Civil action is the assembly of the procedural means provided by the law for the protection of the subjective right pretended by one of the party or any other legal situation, as well as in order to provide the defence of parties in the trial" (art.29 NPCC)

We notice that the action comprises two categories of procedural means: the ones for *protection of the subjective right pretended by one of the parties* and the ones to *provide the defence of the parties in the trial. Therefore,* the legislator expresses the conception according to which *the defence is a mean of manifestation of civil action.*

Then, art.31 NCPC provides a fundamental classification of the "defences in justice", which may be: *on the merits* and *procedural.* The legislator, however, does

[24] Couchez, G., Lagarde, X., *op.cit*, p.185; Guinchard, S., Ferrand, F., Chainais, C., *op.cit.,* p.77.

not explain, in any manner, which the difference between them might be, after which criteria we may differentiate them, it does not exemplify.

In doctrine[25] there were highlighted the features and the effects of the two categories of defences. *On the merits defences* are those through which the subjective right is contested by the opponent part, the existence of the legal relationship is denied; they have as purpose the rejection of the action as proofless or ungrounded, either the defendant succeeds to prove that the actual situation is different from the one presented by the plaintiff, or he succeeds to rebut the legal basis of the opponent part. *The procedural defences* represent the means of defence through which the defendant, without refuting the fund of the plaintiff's claims, follows to obtain the delay of the judgement, remaking of certain documents, the annulment of the sue petition or its disposing as inadmissible.

Then, within the section named "The inquiry of the trial", our Code dedicates art. 245 – 248 to "Procedural exceptions". NPCC defines, for the first time in our legislation, *the procedurals exception* (art. 245): "The procedural exception is the mean through which, under the law, the interested party, the prosecutor or the court invokes, without putting into discussion the law merits, the procedural irregularities *regarding the composition of the panel or the court formation,* court competence or at the judgement procedure *lacks referring to the cause of action* following, as the case may be, the declining of the competence, the delay of the judgement, remaining of some documents or their annulment, rejection or superannuation of the claim."

The Romanian code differentiates, expressly, only between two categories of exceptions, according to the *imperative or dispositive character of the breached norm: absolute and relative exceptions (art. 246). The absolute exceptions are* those through which the breaching of some public order norms is invoked (general noncompetence, material and territorial noncompetence, lack of standing under the law, res judicata, judge incompatibility, etc.); *relative exceptions* are through which it is invoked the breaching of some norms which protect mainly the parties interest (territorial incompetence, some cases of challenge, etc.).

Reported to the two categories, the legislator establishes the *legal regime* of the defences used in litigation (art. 247 NPCC):

- *Absolute exceptions:* may be invoked *by the party* or *by the court* in *any stage of the trial,* if the law does not provide otherwise; may be brought *against the recourse court,* only if, for the solution, it is not necessary the administering of other proofs besides the new documents;
- *Relative exceptions:* may be invoked by *the party which justifies an interest, at least at the first term of judgement after coming the procedural irregularities,* in the stage of trial proceedings and *before putting submissions on the merits.*

[25] M. Tăbârcă, *Drept procesual civil* [Civil Procedural Law], Editura Universul Juridic, vol.II, p.248; G. Boroi, M. Stancu, *Drept procesual civil* [Civil Procedural Law], Ed. Hamangiu, 2015, p.393; I. Leş, *Noul Cod de procedură civilă. Comentariu pe articole* [The New Civil Procedural Code. Comments of the articles], 2011, Ed. CH BecK, p.54, etc.

It must be highlighted that, based on the definition given by the law, in doctrine[26] and jurisprudence other classifications have appeared for the trial exceptions. Thus, according to *their object*, the exceptions may be:

- *Proper procedure exception:* through which there are invoked *irregularities regarding the formal frame of the judgement* (panel composition or court formation, court competence, performing the judgement procedure);
- *Exceptions on the merits:* through there are invoked *lacks of the cause of action* (lack of interest, lack of stand trial, state of limitation, res judicata, etc.)

According to the *effect* produced as a result of admission of exception:

- *Dilatory exceptions (*sometimes *declinator)*: the ones which produce only a delay of the judgement (the exception of invalidity of procedure actions – when these may be remade, litispendence exception, joinder exception, noncompetence exception, etc.);
- *Unanswering exceptions (nullifying):* the ones which have as effect the rejection of the action and the extinction of the trial (exception of state of limitation, exception of res judicata, exception of lack of standing the trial, superannuation exception etc).

Moreover, the Romanian legislator regulates the procedure of solving the procedural exceptions, making an implicit application of *principle of concentrating the procedural means:* the parties are obliged to invoke all the defence means and all the procedural exceptions *as soon as they know them;* contrary, they will be liable for the damages made to the other party (art.247 alin.3, art.189-191 NCPC).

If the court cannot decide immediately on the exception, it will postpone the judgement, establishing a *short term* for solving the exception.

The court will decide, *firstly,* on the procedural exceptions which make *useless*, completely or partially, *producing the proofs or trial proceedings of the case.* The exceptions *will be connected with the producing of proofs* and with the merits of the case only if for their judgement it is necessary to produce the same proofs as for the completion of the trial proceedings or for solution on the merits.

In the case there were *simultaneously invoked several exceptions,* the court will determine the order for the solving according to the effects they produce; in principle, the proper procedure exception must be solved with priority than the exceptions on the merits[27].

Also, NPCC establishes the type and the regime of the decision through which a procedural exception is being solved: "The conclusion through which the exception was denied, as well as the ones through which, after admitting the

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[26] M. Tăbârcă, *op.cit.,* vol.II, p.251-254; G. Boroi, M. Stancu, *op.cit.,* p.394-399; I. Leş, *op.cit*, p. 380-382, etc.

[27] For a detailed analysis of this problem, see: M. Tăbârcă, *op.cit.,* vol.II, p.269-282; M.Tăbârcă, *Un aspect al ordinii de soluționare a excepțiilor ridicate concomitent în fața instanței civile* [Aspect regarding the order to settle exceptions invoked at the same time before the civil court], în „Dreptul" nr.2/1998, p.63-65, etc.

exception, the court still remains endowed, may be attacked only on the merits, if it is not otherwise indicated by the law."

4. Conclusions

We underline, first of all, that the Romanian legislator adopted the modern conception – existing for a long time within the French Code – according to which the defence is a component of civil action, seen as a complex assembly of procedural means.

Then, NPCC divided the defence means in two main categories – defence of the merits and procedural defences – in a text very laconic (art.31). There is not offered any criterion to select them, without any exemplification.

In comparison, *Code de procédure civile* dedicates the trilogy of the defence means: on the merits defences, procedural exceptions and the fin de non recevoir. In the French doctrine, some authors[28] doubt the reliability of the three-party "division" and propose the regrouping in on merits defences and procedural defences (procedure exceptions and fin de non recevoir); it was noticed that the last one is larger and that these procedural defences may be treated within the "procedural incidents".

The French legislator includes the procedure exceptions, as well as the fin de non recevoir in the category of defences. As a matter of fact, the most legislations and legal doctrines include "exceptions" in the category of defence means. This association was made starting from the effect of their admission (postponing the judgement, suspension, claim annulment, refusal, etc.) and to the fact they are invoked – by the defendant (due to their effect on the action).

Actually, the procedural exceptions may be used as defence means, but their main function is to stop the jurisdictional activity performance in inappropriate conditions, illegal, which might intervene on the quality of the justice act. The procedural exceptions are more than defence means. *Their main procedural function* is to signalize the appearance of an incident which stops the fulfilment of the trial purpose. The defendant may "take advantage" of the omissions or existing irregularities, transforming them in "defence means"; procedural exceptions have as *derived function* the defendant's defence, when they lead to a delay of the judgement or to a quick solution through the claim annulment or rejection.

In these conditions, we agree the choice of the Romanian legislator of not assimilate, strictly, the procedural exceptions with the defences: in our Code, the procedural exceptions are treated in the section about "Trial proceedings".

On the other hand, we appreciate as being useful, in Romania too, the legislator action in differentiating the material right defences from the proceeding ones, reported to the features of the two means, their effects on the trial and the legal regime.

[28] For example: Héron, J., op.cit, p.81.

This intervention would be efficient for the law practitioners, much more the notion of "exception" is associated to some institutions of *civil procedural right,* as well as to some institutions of *substantial rights* (see the New Romanian Civil Code: art.369, art.1094, art.1247, art.1319, art.1448, art.2296, etc.). Nowadays, in doctrine[29], it is made – between the *exceptions of material rights and procedural exceptions* – a distinction under several aspects*:* according to the object and the purpose of the two categories of means of defence, the moment of their invoking, the quality of various defence means, the people and the bodies of right to invoke different means of defence or procedural incidents, the order in which the court shall examine them, the procedural acts through which the court shall decide on the defence means of the parties, etc. But, not always, this differentiation reflects correctly in jurisprudence.

Regarding the classification of exceptions, we notice that (beside the absolute and relative ones), the Romanian legislator distinguishes between "procedure exceptions" and "exception on the merits", NPCC keeping this objectionable terminology, which may raise some confusions (with "defences on the merits") hard to remove from the practicians thinking and language.

Benefic is, however, the delimitation which is made between the two categories (art. 245 NPCC), by reporting to their "object": the procedural exception is the one through which there are invoked procedural irregularities regarding the panel composition or formation, court competence and the judgement procedure, and the exception on the merits is the one through which lacks regarding the cause of action are invoked.

Therefore, in Romania, the denial of the existence of cause of action is made by invoking *exceptions on the merits;* this terminology existed in the former Civil Procedure Code (art. 137). Reading the current text (art.248 para.1), we conclude that there are *exceptions on the merits* on which the court has to decide *before examining on the merits.* The collocation "on the merits" shows that those exceptions "belong" on the merits to the lawsuit. It may be about an "on the merits" which has to be analysed "before the examination on the merits"?! Making a logical and systematic interpretation of the law, analysing the doctrine and jurisprudence, we negatively answer: it is about an unfortunate terminology which leads to the confusion of procedural exceptions, through which the existence of the cause of action is denied, with the exceptions of material right.

On the other hand, in France, *Code de procédure civile* dedicated as an instrument for the denial of the cause of action "refusal to comply" (*la fin de non-recevoir*), defined in art. 122 and explained above, in our paper.

We notice that, in art. 245-248 NPCC, the Romanian legislator does not indicate, does not enumerate or exemplify "the exceptions on the merits". Of

[29] A. Suciu, *Excepţiile procesuale în Noul Cod de procedură civilă* [The procedural exceptions in the New Civil Procedure Code], Ed. Universul juridic, 2012, p.28-31; M. Tăbârcă, op.cit., vol.II, p.248, etc.

course, we may associate them with the lack of cause of action, pursuant to art. 32-40 NPCC. But, this does not eliminate *the problem of identifying the exceptions on the merits,* wondering if there are more such exceptions, besides the deduced ones in art.32 NPCC.

Thus as we have indicated, this matter is debated in France as well, in the conditions the art. 124 shows that "refusal to comply must be received ... even if the inadmissibility does not result from an express disposition".

For us, traditionally, there are included in this category: the exception of lack of interest, exception of standing a trial, exception of res judicata, exception of statute of limitation. These exceptions refer to the general conditions for the right to action; they are accepted in the judiciary doctrine and practice, per se, although – in comparison to the art. 122 *Code de procédure civile* – our legislator does not foresee them, not even for exemplification in a text with general applicability. Therefore, for us the difficulties to identify them are bigger than the ones of the French jurists. The different situations appeared in practice, connected to the special conditions of cause of action, are not correctly identified and generate questions (such as: "But is there such an exception?! The opponent or the judge has just invented it?" from the ones who consider that the first court exceptions are limited to the studied ones, as usually, during faculty / law school.

In conclusion, we appreciate as being useful, in Romania as well, the existence of a law text which shall allow the more accurate differentiation of the merits defences from the procedural ones, reported to the legal regime and their proceeding effect.

Then, it will be welcomed for us too, the introduction of a text which should allow the identification, in principle, of the exceptions which refer to the inexistence of the cause to action. A limitative enumeration is not, however, indicated because – anytime – through special laws the legislator may "super - condition" the existence of the statute to limitations, in certain matters.

Also, does it keep the practical importance to the question: if, in the absence of a law text, *the judge or the parties may create "on the merits" / "refusal to comply" exceptions?*

Another problem which bring interest is that of *the regulation of first court exceptions*: Is there such a possibility? If there is, how may it be accomplished? And in this matter, a minimum legal clarification and the unification of the legal practice may be useful.

More, the usage of a modern and appropriate terminology is imposed, according to the importance the institution of "proceeding exceptions" has within the civil case.

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