

# PRIORITY RULES IN SOLVING LEGAL PROCEDURAL EXCEPTIONS FROM THE SAME CATEGORY, ACCORDING TO THE NEW CIVIL PROCEDURE CODE

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**Abstract:** *Procedural exceptions concern the most diverse irregularities which appear during the lawsuit; therefore they have a different object and character (proper lawsuit exceptions, content exceptions, absolute exceptions, relative exceptions), and the way they are solved produces various effects upon the lawsuit (dilatatory exceptions, diriment exceptions). In the following, we shall analyze the situation of concomitantly invoking the procedural exceptions belonging to different categories as well as from the same category.*

**Key words:** *proper procedural exceptions, content exceptions, order.*

## 1. Introduction

The quality of the justice process depends on its accuracy and coherence, on the exactitude and rigour with which each trial phase is carried out, as well as on the close and harmonious relation between the elements that form it.

We must mention that there are a lot of legislations that, by insisting on the principle of procedural economy, regulate this issue and – more than that – decide in the sense that all incidents whose causes exist simultaneously must be invoked at once, according to the “de plano” rejection (France: NCPC - art. 74; Spain: La Ley de Enjuiciamiento Civil – art.416, 417; Bolivia: Código de Procedimiento Civil – art. 337; Columbia: Código de Procedimiento Civil – art. 100, 140, 143; Venezuela: Código de Procedimiento Civil

– art. 348; Panama: Código Judicial – art.702).

It will be difficult to establish priority rules when, in the same lawsuit, exceptions from the same category are raised, be they proper exception or content exception.

Thus, one shall notice that all content exceptions have the same character – absolute – and the same effect – diriment. What criteria should we take into consideration in establishing the solving order, when there are two or more content exceptions concomitantly raised?

It is a common fact to raise more proper procedural exceptions simultaneously. In what order shall the court solve them?

Thus many difficulties in practice and various commentaries in the doctrine emerge. Well-known theoreticians analyzed one of the most interesting issues that appeared in legal practice. They

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expressed their opinion concerning the order of solving the exceptions concomitantly raised before the Court. [1-7].

The old civil procedure code did not contain any regulation for such situations that occurred frequently in the judicial practice. At present, art. 248 par. 2 from the New civil procedure code stipulates: "If more exceptions have been raised simultaneously, the court shall determine the settlement order depending on the produced effects".

Therefore, the New code offers the criterion of "effect" produced by exceptions in order to determine the settlement order of those raised simultaneously.

In general, the approval of procedural exceptions can have as effect: the request cancellation, trial postponement, assembly/joining of files, action dismissal without the investigation of the grounds on the merits.

However, the criterion does not seem to be enough in the case in which procedural exceptions from the same category are raised and which have the same effect, namely that of request cancellation or action dismissal (for example, except for lack of interest and the exception of the case law, etc.)

## **2. Priority rules regarding procedural exceptions from different categories**

Art. 248 par. 1 from the New civil procedure code provides: "The court shall decide first on procedural exceptions, as well as on the substantive ones which render useless totally or partly the use of evidence or the substantive investigation of the case, as appropriate." The text includes a fundamental rule, namely that the exceptions that render the substantive investigation of the case useless are solved first. "The essential and common feature"

of all categories of procedural exceptions "is that they do not challenge the law substance" [4].

Therefore, the law is very clear concerning the settlement order, when a procedural exception "occurs simultaneously" with a substantive law exception.

However, with regard to what is of interest to us, the text does not bring any clarifications: "...it shall decide first on procedural exceptions, as well as on the substantive ones...".

The "as well as" formulation prevents us from believing that the legislator indicated the settlement of proper procedural exceptions before the substantive ones.

Analyzing, for example, the provisions of art. 74 from the French Civil Procedure Code, we notice that the French legislator established imperatively that the procedural exceptions are raised and – therefore – are solved before the "inadmissibility exceptions" (which correspond practically to the substantive exceptions from our procedural legislation). In the French civil trial, the procedural exceptions can be only invoked *in limine litis*, even if they are of public order, in contrast with the inadmissibility exceptions that can be invoked in any trial phase.

We wonder if a priority rule between the two categories of exceptions, namely proper procedural exceptions and substantive exceptions, is useful and valid.

We shall try to find a criterion for establishing the settlement order, starting from the object of these exceptions.

Thus, the proper procedural exceptions refer to the formal trial conditions. In their turn, these can be classified as follows: exceptions concerning the trial court (objection to jurisdiction, exception of wrong court formation or establishment, incompatibility exception), exceptions

concerning the nullity of procedural steps (exception of writ of summons nullity, exception of illegal summons, etc.), exceptions concerning the procedural delays (delay exception), exceptions concerning the parties from the trial (exception of the lack of proof of representative quality), exceptions concerning the judgement (exception of *litis pendens*, exception of connection, exception of obsolescence, exception of abusive exercise of procedural law).

The substantive exceptions refer to lack of right to action: exceptions concerning the parties (exception of the lack of procedural quality, exception of the lack of procedural capacity, exception of the lack of interest), exceptions concerning the judgement (exception of the lack of prior procedure, exception of the case law, exception of extinctive prescription).

The first condition for ensuring the quality of the justice act consists in complying with the formal trial conditions. This is why we consider that in principle *the procedural exceptions must be solved first when compared to the substantive ones*.

Only after its jurisdiction is attested, was legally formed and established as well as correctly vested, the trial court is entitled to decide concerning the fulfilment of conditions on the exercise of the right to action.

The more so as the substantive exceptions have a peremptory effect, determining through their admission the rejection of the action, this “severe” solution must be delivered in the conditions of a correct trial in relation with the norms of court organization, proper jurisdiction or procedure [8].

As no rule must be generalized, we can wonder if there is a substantive exception imposed – at least at a theoretical level – to be solved before a procedural exception.

Seeing the above-presented classification, we consider that the procedural exceptions concerning the court, those concerning the nullity of the writ it summons, as well as the delay exception, are solved first as compared to the substantive exceptions.

An interesting issue is that of the exception of the lack of proof of representative quality (procedural exception) analysed in comparison with the exception of the lack of procedural quality (substantive exception).

Although between them there is a close relation, the two institutions are autonomous and play a different role in the civil trial.

Thus, it can happen that the party has procedural quality but its representative does not justify the representative quality according to the law, which shall entail request cancellation (art. 82 of the New civil procedure code).

However, it is possible that if the representative justifies their representative quality but the party in whose name it exercises the procedural rights does not have procedural quality, then the request shall be rejected.

Which one of the two above-mentioned exceptions is more important at the settlement? Obviously the procedural exception of the lack of proof of representative quality.

Only if they proved the representative quality, the representative shall be entitled to exercise the procedural rights of the party it represents and – therefore – discuss in relation to its procedural quality or that of the opposite party [8].

Therefore, the rule is also confirmed in this case.

We shall focus also on the category of the so-called “exceptions concerning the trial”, in which we introduced both proper procedural exceptions (*litis pendens*, connection, obsolescence) and substantive

exceptions (case law, prescription of the right to action).

How would it be possible to approach the exception of *litis pendens* simultaneously with the exception of the case law?

Let's suppose that the parties litigated once, obtaining a final court order. Subsequently, the party that was dissatisfied with the solution submits almost simultaneously, pending with the court, two other claims having the same object, the same case, against the opposite party from the first trial.

The defendant shall be able to invoke in claim no. 3 the exception of *litis pendens* compared to claim no. 2, as well as the case law of the decision given for claim no. 1. How shall the court proceed in such a situation?

In order to avoid a triple judgement in the same case and the delivery of three contradictory decisions, the court should first solve the exception of *litis pendens*; if it is grounded, one case file shall be formed and the case law shall be solved within it [8].

For similar arguments, we consider that the exception of *litis pendens* must be first compared to the exception of extinctive prescription.

Therefore, in these situations we also comply with the rule according to which the proper procedural exceptions are solved first as compared to the substantive ones.

However, if the exception of connection is invoked simultaneously with that of the case law, the situation is no longer the same.

The exception of connection has a particular legal regime, "being situated on the intermediary field between absolute and relative exceptions" [4]; it is a procedural exception, dilatory, which – if admitted – results in the reunion of two different cases but which have a strong relation.

Conversely, the exception of the case law is a substantive, absolute and peremptory exception.

Is it essential that the exception of the case law concerns only one of the two connected cases; if this substantive exception is grounded, that case must be dismissed.

The connection is useful and leads to a good justice administration, in the perspective of the substantive judgement of the two cases because "the strong object and case relation" targets the substantive law relations between the parties.

As a result, in the situation in which one of the cases could be rejected because there is a case law, what would be the purpose of its prior connection? The judgement of the other case would be thus delayed, which would not be "affected" by the case law.

Taking into account these aspects, in our opinion, the exception of the case law must be solved first as compared to the exception of connection. Only if the court establishes that there is no case law, the exception of connection must be discussed.

For the same reasons, we consider that also the exception of extinctive prescription shall have to be solved first as compared to the exception of connection.

Also, in the legal literature [8], it was argued that between the exception of connection and the exception of the lack of prior procedure, the lack of prior procedure must be investigated first because its admission leads to the request dismissal, hence there shall be no more files to connect.

In conclusion, we believe that the rule according to which the proper procedural exceptions must be solved before the substantive ones remain valid, but it must not be generalized.

As we noticed, there can also be "exceptions" from the rule: the exception of the case law and the exception of

prescription must be solved, in our opinion, before the exception of connection.

### **3. The category of proper procedural exceptions**

One of the most debated situations is that in which the exception of stamp duties with regard to the plaintiff's petition competes with other procedural exceptions such as the lack of jurisdiction exception, the belated exercise of the means of defence or that of unmotivated appeal.

In the juridical literature, some authors think that the exceptions regarding the investment of the Court must be solved first. If the plaintiff's petition does not abide by all the conditions of viability (stamp, parties, object and cause), the judge shall not solve other procedural incidents.

Thus, in order to verify one's jurisdiction and to solve an eventual lack of jurisdiction exception, the Court must establish in the first place if it was invested according to the legal requirements. [3, 5]

This way, the above-mentioned specialists consider that the exception of non-stamping has priority over other exceptions.

For example, it was argued that the exception of non-stamping must be prior to that of delay in exercising the appeal or to the non-motivation of the appeal.

The main argument which had been invoked, established that stamp duties must be paid first, under the disposition of cancelling the petition, the legal disposition having an imperative nature.

The Supreme Court has ruled regarding this opinion, but also some recent juridical practice follows this opinion. For example, the Supreme Court explained in Decision No. 214/1971: "before receiving, drafting or releasing the taxed act or before performing the service".

Thus, the opposite opinion was formed, according to which the exception of lack of jurisdiction must be prior to that of not paying the stamp-duties. This opinion is followed by an argument which cannot be neglected: in order to establish if the stamp duty was correctly paid, the Court must establish first if it is competent to solve the petition; it is unusual for a Court to establish the stamp duties for a petition which is in the jurisdiction of another court. [1]

At present, following the amendment brought to the New civil procedure code through Law no. 138/2014, the above-mentioned controversy was ended. The legislator gave priority to the objection to jurisdiction, as it results from the provisions of art. 200 from the New civil procedure code (concerning the verification and regulation of the writ of summons): "The panel to which the case was allocated verifies immediately if the writ of summons falls within its jurisdiction ..."

We consider that the solution chosen by the legislator is the natural and correct one. Moreover, we consider that the establishing of stamp-duty has very important implications for a law-suit, since, when ruling on it, the judge rules practically upon the object of the plaintiff's petition and he qualifies the action as juridical.

Therefore, it is essential that the appreciation should be made by the court which is competent to judge the petition.

Therefore, we consider that we must follow the criterion of the priority of the protected value.

What is more important in accomplishing in optimal conditions the act of justice: to ensure that the court "issues acts", "performs services" that were first taxed or to ensure that most of the procedural acts are carried out by a competent court?

In accordance with the same idea, that of priority given to the exception of lack of jurisdiction before that of regarding the annulment of the plaintiff's petition, another author noticed that: "It is ... absolutely illogical – and inadmissible – for a court without jurisdiction to verify the legality of a procedural act, be it even a plaintiff's petition." [2]

Another situation which appeared in practice is that of concomitantly invoking the lack of jurisdiction exception and that regarding the inappropriate composition or assembly of a court. It is commonly appreciated that the lack of jurisdiction exception must be solved first, since its acceptance makes it useless to solve the exception of the faulty composition or assembly of a court.

#### **4. The Category of Content Exception**

Firstly, we shall present a situation which was already debated in the doctrine and juridical practice: the concomitant raising of both the exception of the authority of *res judicata* and the exception of extinctive prescription.

In a referential article on this matter, the author pleads, with very convincing arguments shared by other specialists, for priority in solving the exception of the authority of *res judicata* over the exception of extinctive prescription. Thus, we can notice that, even though both exceptions have the same nature and they produce the same effect, the exception of the authority of *res judicata* is in an "indissoluble connection with the principles regarding the administration of justice", and the "prestige of justice cannot be defended without the procedural means that confer efficiency to the whole activity developed by the courts, avoiding thus the possibility of pronouncing contradictory juridical decisions". In exchange, "the exception of prescription of the right to legal action may

be kept by the court only if it has the jurisdiction to solve the cause. That is why, in order to decide upon the prescription, the court must proceed to some verifications, to administer the proofs, in order to establish, for example, the lapse of time of the prescription term" [3].

Presently, the New civil code changed the legal regime of extinctive prescription, in the sense that this is a private order institution.

Thus, the prescription can be only appealed in court by filing a complaint or during the first trial hearing for which the parties are legally summoned, at the latest; the competent jurisdiction body cannot apply the prescription *ex officio* (art. 1512, art. 1513 from the Civil code).

This is an additional argument for solving the case law with priority, which is an absolute, public order exception (art. 432 from the New civil procedure code).

Similarly, the prior solving of the exception of the authority of *res judicata* before the exception of lack of legal standing or the exception of lack of interest must be justified.

These two exceptions may be examined by the court only if "the court has jurisdiction in solving the cause"; if we deal with the authority of *res judicata*, it means that another court has already ruled upon issues such as legal standing of the parties or their interest in filing the claim, which means that their discussion cannot be reiterated.

The question is whether the exception of the prescription of the right to action can be compared to the exceptions of the lack of legal standing and lack of interest.

It is true that extinctive prescription has a highly pedagogical function, which is very mobilizing for the subjects of law; this institution contributes to the consolidation of juridical reports and to the removal of difficulties in administering justice.

However, since the Civil code qualifies the prescription as being of private order, we consider that the absolute substantive exceptions should be solved with priority, given the importance (and implicitly, the “public order” regime) granted by the legislator.

Furthermore, in the doctrine it is commonly recognized that the content exceptions have some points in common with the content defence.

We notice that, as a difference between the authority of *res judicata* and the prescription of the right to legal action, the legal standing of the parties and their interest in filing a legal claim are strictly connected to the subjective right assigned to the judgement. *We appreciate that, the closer the examination of a procedural exception is to the material law, supposing that there is even a palpable evidence of it, the higher the rank of the mentioned exception in the solution order, when it is concomitantly invoked with other procedural exceptions.*

This is another reason for the prior solving of the exception of the authority of *res judicata* over other content exceptions.

If the lack of legal standing of the parties and the lack of interest are concomitantly raised, it is normal to start with the legal standing of the plaintiff, as a party that initiated the civil law-suit.

Also raised was the problem of priority in solving the exception of lack of legal standing and the exception of inadmissibility of the claim, both being content exceptions.

The difference between the two exceptions is regarded as “deriving from the general or special nature of a certain condition in exercising the right to legal action”.

Thus, the legal standing is a general condition which is obligatory in filing a legal action. But, “the condition regarding the subsidiary nature of the judgement on

the merits of the claim is a special demand ... that is added to the four general conditions of issuing a legal claim, and it is also added to the condition regarding the legal standing”.

But as the court ascertains the existence of the legal standing, overruling the exception, it may examine “the specific conditions regarding the admissibility of the legal action”. [7]

As a principle, the non-fulfilment of the general conditions regarding the existence of an act renders useless the examination of the special conditions regarding the existence of the same act.

## **5. The Practical Importance of Solving the Procedural Exceptions in a Particular Order**

The practical importance of solving the procedural exceptions that are concomitantly raised may be analysed according to several aspects.

Thus, the way the court solves the first exceptions, determines the sequel of the judgement and the examination of the other exceptions or – on the contrary – cessation of the law suit:

a) If the first exception is overruled, irrespective of its object or nature, the court shall rule a cessation on this subject, and the judgement shall continue, the other exceptions, raised at the same procedural moment, being examined and solved;

b) If the admission of the exception that came first in the solving order is imposed, we shall distinguish a dilatory or a diriment exception.

Thus, if the exception which must be solved first is a dilatory one (e.g. the exception of incompatibility), than it shall be admitted by cessation, and the lawsuit shall continue after the reconstruction of the procedural act or after the replacement of the judge.

If the diriment exception is admitted, then the court shall issue a decision or a sentence.

The peremptory effect consists in the annulment of the petition or in overruling the petition, regarding the object of the exception. In this case, the other exceptions cannot be taken into consideration, no matter their effect upon the petition. The court cannot examine other procedural exceptions, since the petition must be annulled or overruled, as the diriment effect requires.

In the juridical doctrine, it was appreciated that the court shall not admit two or more exceptions in motivating the final decision.

This aspect is very important since the authority of *res judicata* is appreciated regarding the content of the decision and its dispositions.

This problem appears for the decision that overruled the petition after the admission of a content exception. In general, the finding of such aspects is based upon irreversible and irreparable facts. For instance, an action which was prescribed at a certain moment shall remain so, as time passes.

By admitting a diriment exception, the petition shall acknowledge a transient failure; after the accomplishment of the

legal standing the plaintiff may file another petition regarding the same juridical issue.

## References

1. Bacaci, A.: *Procedural Exceptions in Civil Law-Suit*. Cluj-Napoca. Dacia Publishing House, 1983, p. 33.
2. Deleanu, I.: *Notes upon some issues concerning the civil law-suit*. In: *Law*, No. 12/1991.
3. Leş, I.: *Note to decision*, No. 1198/1981, of the Court of Sibiu.
4. Leş, I.: *Comments of the Civil Procedure Code*, vol. I. Bucureşti. All Beck Publishing House, 2001, p. 380.
5. Suci, A.: *Procedural exceptions in the New Civil Procedure Code*, Universul Juridic Publishing House, 2013.
6. Tăbârcă, M.: *Note to Decision 429/1996 of the Court Bucharest*. In: *Law*, No. 2/1997, p.127-128.
7. Tăbârcă, M.: *An aspect of the order in solving the exceptions raised in front of civil court*. In: *Law*, No.2/1998, p.63-64.
8. Tăbârcă, M.: *The settlement order of Procedural exceptions invoked simultaneously before the court in the civil trial*. In: *Dreptul*, no. 11/2003.