PROCEDURE INCIDENTS CONCERNING THE COURT

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A proper administration the justice means jointly solve all related problems that arise during the trial. "The first impulse of the rudimentary soul is to make self-righteous. Only with important historical efforts could replace in the human soul the idea of the justice obtained through her own with the idea of justice entrusted to authorities. A civil action, in final analysis, then, is civilization's substitute for vengeance. (E. Couture, The nature of Judicial Process, Tulane Law Review, 25, 1.7.1950).

So, the court notified with a petition is competent to judge all the points of law, such as all the incidents regardind the composition and the constitution of the court (incompatibility, disclaimer by judge, challenge, the wrong composition of the court), regarding the proof (check scripts, procedure of false), regarding the solving the pleadings, the suspension of a trial, the lapse of a petition. This rule is the implementation of the principle accesorium sequitur principale.

According to the Romanian Explanatory Dictionary, the procedure incident means "an (unexpected) objection raised during a process".[1]

Also, broadly, procedure incident means any legal contest which is based on the main claim and which is likely to interrupt, to quash the trial or to alter the solution. In a limited way, the procedure incident is the one that does not modify the substance of the debate during the trial. [2]

Within this concept are included, at first, all those incidents that have a strictly procedural character and that refer to the competence of the court, to the evidences' administration, to the invalidity of the pleadings, to the suspension of the trial and to the obsolescence of the application etc.

These incidents are generally resolved by the court. However, there are some cases when the procedure incidents have to compulsory be delivered by another court; the request of delegating the court, according to art. 23 Civil Procedural Code is solved by the High Court of Cassation and Justice; the request of displacing is a matter for the superior hierarchical court if it is based on kinship or affinity reasons (art. 37, first paragraph Civil Procedural Code) or for the High Court of Cassation and Justice if it is based on legitimate suspicion or public security reasons (art. 39 second paragraph Civil Procedural Code).

If the court which was noticed with a summons request or with an appeal is not competent to resolve them, the question is to know which are the means and conditions for invoking the incompetence.

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[1] I.Oprea, C.G. Pamfil, R.Radu, V.Yăstroiu*, Noul Diciţonar Universal al limbii române*, Litera Internaţional Publishing House, second edition, Bucharest, 2007.

[2] G. Boroi, *Drept procesual civil*, Course Notes, Bucharest, 1993, p.90.

If the competence of the court is contested during the trial, so after referral to the court and before giving a decision, whether is about the trial or about an appeal, the procedural means by which is invoked the incompetence is the exception.[3]

The incompetence exception is invoked differently, if the competence rule that is said to be violated has mandatory or dispositive character, so if the competence could be invoked is absolute or relative. The absolute incompetence exception when violating the general, material and exclusively territorial competence may be invoked by any of the involved parties, by the court ex officio or by the representative of the Public Ministry, throughout the trial.

As a rule, the incompetence is invoked by the defendant, without the need to justify an own interest, the interest resulting from the mere fact that he was called to trial in front of a court that is not competent. But the incompetence could be invoked also by the complainant whenever it is public or when he has to face a reconventional request converting his quality of complainant into a defendant one.[4]

The relative incompetence exception for violating other territorial competence besides the exclusive one, may be invoked only by the defendant, the complainant could not invoke the violation of some dispositive norms concerning the competence; by the fact that he applied the request to a certain court, he accepted the competence of the respective court, according to art. 158 fifth paragraph Civil Procedural Code "if the incompetence is public, the party that filed the request to an incompetent court could not ask for the statement of its incompetence."

The incompetence exception is raised either orally, in front of the court or by an application.

The moment until which one party can invoke the incompetence depends on the nature of the violated rules. If the violated rules are public, the incompetence may be invoked in any stage of the trial or even in the appeal. If the violated norms are dispositive, the incompetence may be invoked by the defendant until the first day of hearing. The relative incompetence may be invoked before other exceptions and until approaching the litigation's fund, otherwise this right will no longer be available.

The court will prevail over its incompetence when it faces the violation of competence mandatory rules. The court must invoke its own incompetence not only because the public order rules oppose it, but because the parties, through ignorance and convenience, did not invoke the incompetence themselves. This prerogative belongs to all courts. The appeal court "may", but is not obliged to invoke the public order reasons, implicit the incompetence.

The prosecutor, as well as the court, may invoke himself the court's incompetence if it is about public. The situations when the incompetence is public are expressly and restrictedly stipulated in art. 159 Civil Procedural Code.

The moment until which the incompetence may be invoked ex officio is "in any state of the cause". Therefore, the court could also do this after closing the debates, during the deliberation or during the established time when the pronouncement was delayed. In such situations the cause must be instated and the parties must be cited for their hearing. For the court, when the incompetence is public, its invoking is not a simple option, but an obligation.

The incompetence exception is solved by the court with the main action, according to the principle: *the action's judge is the exception's judge.*[5] When the court rejects the incompetence request, a closing will be pronounced, a closing that may be the subject to an appeal. When the court admits the incompetence exception will pronounce a sentence, or a decision that will be the subject of an appeal

[3] V.M. Ciobanu, *Tratat teoretic şi practic de procedură civilă*, Volume I, Teoria generală, Național Publishing House, Bucharest 1996, p.442

[4] Ion Deleanu, *Tratat de procedură civilă*, Volume I, Servo – Sat Publishing House, Arad, 2001, p. 299.

[5] Ioan Leş- *Tratat de drept procesual civil*, All Beck Publishing House, Bucharest 2001, p. 217

within 5 days from the sentence pronunciation. Regardless of the court's solution, of admitting or rejecting, it must always be express and motivated.

The effects of the decision are different, as the court admits or rejects the incompetence exception. If rejecting, the court will hold the cause for resolution, passing judgment on the fund. If admitting, the court may decline its competence if another court or jurisdictional body is competent or it may reject the request as being inadmissible when the competence belongs to another authority with no jurisdictional activity.

„If the court declares itself incompetent, there can be made an appeal against the decision, within 5 days from the sentence pronunciation. The file will be sent to the competent court or to another competent body that has jurisdictional activity once the decision of declining the competence became indefeasible" art. 158 third paragraph Civil Procedural Code. Hence, the effects of the desinvestiture decision are produced when the decision is indefeasible and not when it is pronounced.

Towards the court to which the file is sent for resolution, the declining decision has no authority of a judged thing. The court thus invested could declare its incompetence. Therefore is born "a negative competence conflict" which follows its own way of solving. It should be pointed out the fact that, according to art. 160 Civil Procedural Code, the evidence administrated at the incompetent court "remain for the society", the court to which the file will be sent could ask for their recovery, but only "on reasonable grounds". According to art. 105 first paragraph Civil Procedural Code the procedural acts met by an incompetent judge are invalid.

The summons request interrupts the prescription even when it is expressed at an incompetent court and even if it is invalid for lack of forms (art. 1870 Civil Code).

Through competence conflict we understand the situation in which one or more judicial courts or other bodies that have jurisdictional activity consider themselves equally competent of solving a cause or equally incompetent and mutually decline their competence (art. 20 Civil Procedural Code).

The competence conflicts can be positive or negative.

The positive competence conflict arises when two or more courts, hearing the same cause, declare themselves competent to solve it.

The negative competence conflict arises when two or more courts declare themselves incompetent to solve a civil cause, mutually declaring their competence.

There is a competence conflict when it arises between courts and other bodies with jurisdictional activity.

According to art. 21 Civil Procedural Code "the court in front of which the competence conflict arose, will suspend ex officio any other procedure and will submit the file to another court to decide on the conflict". Therefore, appraising the court to decide on the competence conflict is an exclusive attribute of the court in front of which the conflict arose.[6]

The competence conflicts between the courts, either positive or negative, are solved with the competence regulator by the superior court common to the courts that are in conflict (art. 22 third paragraph Civil Procedural Code). The conflict arose between two courts with the district of the same Court House is judged by that Court House. When the two courts are not in the district of the same Court House, but belong to the same Court of Appeal, the competence conflict is judged by the respective Court of Appeal. If the courts between which the competence conflict arose are not in the district of the same Court of Appeal the competence to pronounce the competence regulator belongs to the High Court of Cassation and Justice. The competence conflict between a court and a Court House is solved by the Court of Appeal if the respective courts are in the district of the same Court of Appeal; if not, the competence regulator is given by the High Court of Cassation and Justice. The competence

[6] Ioan Leş, *Comentariile Codului de procedură civilă*, Volume I, All Beck Publishing House, Bucharest, 2001, p.85

conflict between two Court Houses located on the territory of the same Court of Appeal is solved by the respective Court. If the Court Houses are not in the district of the same Court of Appeal, the conflict is solved by the High Court of Cassation and Justice. The competence conflict arose between a court and a Court of Appeal, between a Court House and a Court of Appeal will be solved by High Court of Cassation and Justice. The eventual competence conflict arose between the High Court of Cassation and Justice and another court is solved by the Supreme Court; consequently the decision represent both a decliner but also a regulator of competence.

The competence conflict between a court and another body with jurisdictional activity, regardless of the latter's hierarchy, is always solved by the court hierarchically superior to the court in conflict. The rule is imperatively settled by the provisions of art. 22 fourth paragraph final thesis, Civil Procedural Code. This will give natural priority now that in the activity of administrating the justice acts, the courts are specialized bodies with plenitude of jurisdiction.

According to art 343 index 4 Civil Procedural Code, the competence conflict between a court and an arbitral tribunal is solved by the court hierarchically superior to the one that is in conflict.

The court that is competent to judge the competence conflict will decide, in closed session, without summoning the parties, the competent court. The decision on the conflict is named competence regulator.[7] The law opens the appeal against the competence regulator. The appeal period is of 5 days since the communication, except the decision of the High Court of Cassation and Justice which is indefeasible. The appeal against the competence regulator will be solved according to the principle of common law; the law does not set waiver norms. The appeal will be solved by summoning the parties and by respecting all the other conditions regarding the submission and communication of the appeal to the adversary party. Because we are talking about an act of administrating the justice, the court may give a certain priority to solving the cause.[8]

The irrevocable decision that statutes the competence conflict is compulsory for the designated court. It does not have the possibility to verify its own competence because we are in the presence of a court decision that ruled, with res judicata power, on the competence.[9]

In practice, in very exceptional situations, it may happen that a court is not able to function for a long period of time. The interruption of the course of justice is harmful both for its prestige and for the interests of the litigated parties. The imperative of restoring the course of justice correspond with the delegation institution which was introduced in the Civil Procedural Code in 1948, but so far it has no application.

Although very briefly regularized in art. 23, the institution could find application in cases of "exceptional circumstances" that prevent the court "to function a longer period of time".

A fist condition is *the exceptional circumstances* to occur. These circumstances are not defined by precise criteria, but they would have to make impossible for that court to function. That is why, in general, these circumstances are considered to be represented by natural calamities of certain scale and that have effects in a certain geographical area (earthquakes, floods etc.), state of war etc.

A second essential condition of the delegation is that the court is *prevented from functioning a longer period of time.* Therefore, even some natural disasters for which the period is relatively short, could not legitimate the delegation of another court.

The delegation request could be made by any party and it is solved by the High Court of Cassation and Justice. If admitting the request, the High Court of Cassation and Justice will designate another equal court to solve the case.

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[7] I. Gânfălean, Drept procesual civil, Risoprint Publishing House, Cluj – Napoca 2005, p.187
[8] Ioan Leş, Op. Cit., p. 87
[9] V.M. Ciobanu, Op. Cit., p. 447

Displacing the civil trial is a necessary institution for eliminating the suspicions which could arose regarding the independence or impartiality of a court. Through displacing, a case passes from a competent court to an equal court, in situations strictly defined by law.

The reasons for displacing are specifically provided by law, in art. 37 Civil Procedural Code. These are:

- When one of the parties has two relatives of affinities up to fourth degree among judges or judicial assistants of the court;
- Legitimate suspicion;
- Public safety.

The first reason for displacing must be invoked by the interested party, under penalty of incapacity, before the start of any debate. In this case, the displacing request "is submitted to the court immediately superior". By this, the lawmaker wanted to avoid those situations when, due to some local circumstances, the court would delay sending the displacement request to the court competent to solve it.

Concerning the second reason for displacement, art. 37 Civil Procedural Code prescribes that the suspicion is legitimate whenever it can be assumed that the impartiality of the judges could be prejudiced due to the circumstances of the cause, to the quality of the parties or to local enmity. The party that invokes the legitimate suspicion must prove the circumstances that determine her to appreciate that the court will not be objective. The fact that required evidence was wrongly dismissed or that the court pronounced an interlocutory decision that prefigures the outcome of the trial is not a sufficient ground for displacing the trial, any eventual trial errors may be corrected through the exercise of appeals.

The displacement application based on legitimate suspicion grounds will be submitted by the interested party at the High Court of Cassation and Justice which will decide about it.

The third reason for displacement is the public safety, those circumstances that create the assumption that the trial would cause public unrest. The displacement for this reason could be requested only by the prosecutor from the Prosecutor's Office under the High Court of Cassation and Justice. The application will be submitted at the High Court of Cassation and Justice.

Whatever the invoked reason is, the solving procedure is the same. The displacement application will be judged in closed session, by summoning the parties, the provisions of art. 85 Civil Procedural Code are applicable. The court's president could ask the file of the case and could order, without summoning the parties, the suspension of judging the case, communicating this measure to the court from which the displacement application comes from. The decision is made with no motivation and is not the subject to any appeal.

If the displacement application is admitted, the case is sent to be judged to another equal court. In the displacement decision will be indicated how the acts performed by the court before displacing will be preserved; otherwise these acts lose their validity and must be made again by the court to which the case was displaced.

The decision by which the displacement application is solved is a decree, the reason being that in the case of displacement, the created situation is the object of a distinctive trial, and by solving the case, the court definitively declines jurisdiction. However, today the High Court of Cassation and Justice decides by a closing.

It is possible that, until pronouncing the decision to suspend the trial, the court from which the displacement was required and obtained, to pronounce itself on the fund. In this situation, the respective decision will be considered as void so that the court to which the case was displaced will give a sentence as there is no other fund decision pronounced in the same case.

The court noticed for the displacement of the case may dismiss the application. In this case, the court noticed for solving the main case will continue the trial according to the usual rules. If the case was suspended, it will be redocketed.

For the decision that is about to be pronounced to be given in objectivity conditions, the judge should not be interested in the case that he judges and should not find himself in the situation to rule twice on the same case or to control his own decision. Sometimes the same problem arises for prosecutors, clerks and assistants-magistrates. In order to ensure these conditions, the procedural law regulated the incompatibility, abstention and challenge.

In a general or absolute way, the incompatibility of the judge consists in his impossibility to concomitantly fulfill other functions or services. The judge position is incompatible with any other public or private position, excepting the didactic positions within the higher education. Also, the judge can not exercise a political mandate, regardless of the way in which he obtained the mandate. The judge can not be call into requisition for other public services than the military one.

In a limited or relative way, regarding a specific trial, the incompatibility is the situation expressly stipulated by the law when a judge can not be involved in another trial. These situations are stipulate in art. 24 Civil Procedural Code, namely:

(1) The judge who handed down a decision in a case can not attend the trial of the same case in an appeal trial or in the case of retrial after cassation.

(2) Also, it can not be a part of the trial the one was a witness, expert or arbitrator in the same case.

Incompatible can be only the judge, and no other participant in the civil trial. Moreover, the stipulations of art. 36 Civil Procedural Code leave no doubt about the fact that the incompatibility does not concern the prosecutors, assistants-magistrates and clerks.

The incompatibility cases are of strict interpretation, they can not be extended by analogy. Therefore, the incompatibility is regulated by mandatory rules of judicial organization whose violation brings absolute nullity. During the trial, the incompatibility exception can be invoked by any interested party, prosecutor or ex officio court. After the pronunciation of the fund decision, the interested party, the prosecutor may invoke the incompatibility through appeal or, if necessary, through recourse. At recourse the party may invoke the incompatibility until the first term. The admission or rejection of the incompatibility exception is made by a closing. If rejecting, is in for appeal or, if necessary, for recourse.

There is no incompatibility when solving the extrordianry ways of withdrawal (the contestation in annulment and the review), when solving a new recourse in the same case (if there is no decision on the fund) and if retrial after cassation with abstention. It was decided that there is no incompatibility when the judge is noticed again with the same case, but not after the cassation with reference.

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