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THE APPLICABILITY OF THE PRELIMINARY PROCEDURE IN THE FIELD OF ADMINISTRATIVE CONTRACTS

Liana-Teodora PASCARIU[1]

Abstract

The conciliation procedure, regulated by art. 720[1] of the former Civil Procedure Code, involved the invitation to conciliation of the adverse party by written notice of claim, invoking the legal basis and all documents supporting his claims. This article examines whether the entry into force of the new Code of Civil Procedure still finds applicability to administrative contracts, especially in the context of new laws in the field (the remedies in public procurement, for example, stipulated in the Law no.101/2016).

Keywords:

administrative contracts; preliminary procedure; civil procedure.

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Introduction

In the legislation introduced by the former Code of Civil Procedure, there was a departing from the legal regime of administrative law in the sense of assimilation of administrative contracts, in terms of the preliminary procedure, to commercial contracts, solution criticized in doctrine[2], but who had been enhanced by changes of administrative litigation law in 2007. The conciliation procedure was governed by art. 720[1] former Civil Procedure Code and presumed the convocation of other party in conciliation by written notice of claim, invoking the legal basis and all documents supporting his claims[3].

Content

Earlier, a similar procedure was regulated by Decree no. 81/1985, which repealed Law no. 5/1954 regarding the settlement of disputes by arbitration of State for the organizations of socialist property.

The provision was included in all art. 720[1], of which contents specified that the demand of the proceedings before the court will be introduced only after the applicant has tried resolving disagreement unit by direct conciliation with the other party under the law. In order to resolve the dispute through direct conciliation, unity complaining was required to meet with the other party, following that the result of the conciliation to be recorded in a document mentioning the mutual claims between the parties relating to the subject disagreement and the views of each party.

Conciliation procedure did not come in contradiction with the mediation introduced by Law no. 192/2006, the former Code of Civil Procedure indicating in art. 720[2] that the parties or their representatives may be assisted by experts or other specialists. The will of the legislator was partially similar to that considered the imposition of administrative appeal, namely to relieve the courts of a number of litigations that could be solved by an alternate route.

The essence of conciliation resides today in an attempt of amicable settlement of the dispute, in order to avoid the promotion of a legal action; this last way could be used when any non-contentious way has been exhausted. The doctrine shows that conciliation discourages sometimes the

[2] Dacian Cosmin Dragoş, Legea contenciosului administrativ. Comentarii şi explicaţii, All Beck Publishing, Bucureşti, 2005, pg. 226.

[3] The preliminary conciliation procedure was introduced after the changes to the Civil Procedure Code by O.U.G. no. 138/2000, and it has been stipulated in art. 720[1].

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abusive or unexpected requests, enabling each party to take note of the other claims[4].

The procedure was not deprived of criticism sometimes, imposed by the formalism of doctrine, given to the fact that the successive amendments to the former Code of Civil Procedure was pursued, among other things, to speed up court proceedings in commercial disputes. The inclusion in the former Code of Civil Procedure of the rules concerning trying amicable and extrajudicial disputes between traders was considered unnatural, given that the real intention of the parties to resolve disputes is often done by trying to negotiate the terms of an extrajudicial transactions[5].

A part of the doctrine has argued the abrogation of provisions relating to direct conciliation, considering that the result of this procedure does not lead to extra-judicial settlement of disputes between the parties but rather postpone the moment of satisfaction of creditor claims[6]. The main counter-arguments aimed at reconciling place of and recording its outcome, but the practice has revealed a strict approach to modality for an invitation to conciliation. In this sense was pronounced the Decision no. 842 of 28 February 2006 of the HCCJ, Commercial Division, which stipulates that "the defendant notification by the judicial executor does not fulfill the requirements of Art. 720[1] Code of Civil Procedure and failure to direct conciliation procedure has the effect of prematurely dismiss.

Conciliation procedure has been criticized as regards restriction of free access to justice, in violation of constitutional provisions of art. 21 para. (1) regarding the access to justice. Although the Constitutional Court stated that "according to Art. 126 par. (2) of the Constitution, republished, establishing the rules for the trial before courts is entirely a matter legislature, which may set in consideration of special situations, special rules of procedure. in this regard, the principle of free access to justice requires unrestricted opportunity to those interested to use them in the form and in the manner prescribed by law.

By establishing the preliminary procedure of conciliation, as in all cases where legislature has conditioned asserting one's right exercise it within a certain procedure has not been followed the goal of restricting access to justice, but solely the goal of establishing a climate of order,

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[4] Laura Cetean-Voiculescu, *Procedura de soluționare a litigiilor comerciale*, C.H.Beck Publishing, 2007, pag. 304.

[5] Bogdan Papandopol, *Considerații critice și clarificări pe marginea procedurii concilierii directe în litigiile comerciale patrimoniale*, in Dreptul, no. 8/2003, pg. 102-115.

[6] Anton Fuduli, *Propuneri de modificare a unor prevederi ale Codului de procedură civilă*, in Revista de drept comercial nr. 1/2003, pg. 107 and L. Chiriac, *Unele observații despre instituția concilierii în procesele și cererile în materie comercială*, in Revista de drept comercial no. 1/2003, pg. 166.

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indispensable for the constitutional right provided by art. 21 of Constitution, preventing abuses and ensuring protection of rights and legitimate interests of other parties[7].

In the previous years the practice found also an excessive formalism concerning the recording of the outcome of conciliation. The authors recommended a simplified form of conciliation[8] inspired from the offer-acceptance mechanism regulated bz art. 36 of the former Commercial Code of Romania, due to its flexibility and celerity, because in given trade matters bilateral acts could be completed in a single form of a document and the commercial liabilities could be proven by any evidence described in art. 46 from the former Commercial Code of Romania.

Another question was if the institution referred to in art. 720^1 has found its proper application in matters of administrative contracts. The original form of art. 2 from Law 554/2004, explaining terms and expressions treated as administrative acts the contracts concluded by public authorities which had following objects: enhancement of public property; execution of public works; public services and public procurement[9].

The doctrine[10] appreciated at that time that an excellent opportunity for the consecration of the phrase "administrative contract" that was commonly used in western state's jurisprudence, which was otherwise refused for many years by the Romanian legislature was wasted. With the amendment of Law no. 554/2004 by Law no. 262/2007 published in Official Gazette no. 510 of 30.07.2007, administrative contracts acquired express consecration in the same 2nd article, which completes the original wording with: *"may be provided by special laws and other administrative contracts subject to the jurisdiction of administrative courts"*.

Direct reconciliation of the proceedings in this matter is a deviation from the legal regime of unilateral administrative acts, since there are not applicable the rules on the appeals established forms of non-contentious appeals regulated by the Administrative Litigation Law. Instead the legislature treats from this point of view the administrative contracts as commercial contracts that have to pass through the commercial conciliation procedure that currently is not provided by in the new Code of Civil Procedure.

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[7] Decision no. 596 from 8th of November 2005 regarding the exception of unconstitutionality of the provisions of art. 720^1 para. (1) from Code of Civil Procedure.
[8] Bogdan Papandopol, *art. cit.,* p.105.
[9] OUG 60/2001 regarding public procurement legislation, at the aparition of Administrative Litigation Law from 2004.
[10] D.C. Dragoş*, Legea..* , p. 97.

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Etymologically, the term "conciliation" comes from the Latin for "conciliatio", which meant a reconciliation of the parties. The meaning established by art. 720[1] departs from the original sense of the term, which was kept mostly in connection with other methods of solving a dispute amiably, by such means as mediation or negotiation.

If mediation as a term is widely seen in Romania as a procedure in which the parts are placed face to face, and a third person is involved only to ensure a more efficient communication between the parties, in U.S.A. „meditation" was introduced as a law term in 1970 and was borrowed from the English language in the German language. Mediation is considered necessary to resolve a conflict and is done by third party neutral in order to find a solution acceptable to all parties. Mediation procedures are usually based on the principle of balancing the interests of the parties. According to this principle, conflicts can be resolved in a more efficient and "cheap" way when justice or power is in the second plan. This method was developed at the Harvard University and is known as the "Harvard model"[11].

Without denying the importance of mediation[12] among non-contentious means of conflict resolution[13], but meantime showing that at least in Romania, the main mean called first of all for solving legal conflict is the judicial system, it must be stressed that the provisions of art. 720[1] regarding conciliation, although abrogated, remained imperative for the administrative disputes concerning conciliation.

In France, the conciliation procedure is widely used, for example the French Code of Civil Procedure, consolidated on May 3rd, 2010[14] includes an entire chapter about the "prior attempt conciliation", which in art. 830-835 sets out the conditions under which the procedure of mediation is being conducted between the litigant parties, while the role of the mediator or of the conciliator is being held by a third party or even by a judge.

Reconciliation is an adversarial procedure, direct, which involves discussing the legal basis of the claims, expressing their views and the

[11] A recent study conducted within the top 126 companies of USA by the International Institute for Conflict Prevention and Resolution, published on 20th of April 2007 in New York, revealed that about 98% of the cases that occured at those companies were settled before going to court, it is obvious that these companies prefer to solve conflicts amiably. (Source: D. Z. Sustac, *Business Mediation - Medierea conflictelor de natură comercială*)

[12] Flavius Baias, Violeta Belegante, *Medierea – un alt fel de justiție*, în Revista de Drept Comercial, nr. 7-8/2002, pag. 67-97.

[13] For example, the Romanian legislator pays special attention to the application of mediation in criminal law. Articles 67-70 of the Law no. 192/2006 provide for special provisions on mediation in criminal cases, thereby increasing importance of mediation in this domain.

[14] www.legifrance.gouv.fr/affichCode.do.

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recording a document certifying the completion of formalities required by law. Conciliation is one duty of care, since attainment of the result prescribed by the law, namely to avoid a dispute, it presumes itself the applicant's lack of diligence in reaching an agreement[15]. The doctrine considers, however, that the applicant should submit a minimum of effort in trying to resolve the dispute, without limitation formal meeting proceedings. However, the doctrine considers that the plaintiff should submit a minimum of effort in trying to resolve the dispute, without limitation to the formal meeting proceedings[16].

Reconciliation is an adversarial procedure, direct, which involves the discussion of the legal basis of the claims, the expression of views and their recording in a document certifying the completion of formalities required by law. The duty of conciliation is a duty of diligence, since not achieving the of the result to ward off a trial, does not presume the applicant's lack of diligence in reaching an agreement.

Even if the provision of art. 720[1] of the former Civil Procedure Code regarding conciliation have been abrogated, the provision of art. 7 par. (6) of the Administrative Litigation Law which say that the prior complaint regarding administrative contract have the legal effects of a reconciliation procedure. The doctrine and the court rulings have appreciated that the judicial procedure must be interpreted according to its spirit and not to its letter, thus the communication of the claims between the parties is sufficient for fulfilling the mandatory conditions of filing an action in this domain.

Conclusion

So the essence of conciliation is trying to resolve peacefully the dispute, the parties choosing for the solution of filing a court action only when the request for amiable settlement of the dispute failed. Establishing this procedure has the goal to discourage the filing of abusive actions, enabling the alleged debtor to take notice of claims held against him, and the necessary time to prepare a proper defense.

The opinion embraced in recent case law is that while provisions of the former Code are no longer reflected in the new Code of Civil Procedure, the conciliation – as a preliminary administrative procedure - remain mandatory in the field of administrative contracts under the provisions of art. 7 paragraph. (1) of Law no. 554/2004. Since it does not exist detailed rules regarding deadlines and form, the simple correspondence between the

[15] Laura Cetean-Voiculescu, *op. cit.*, p. 274.
[16] Ibidem.

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parties is likely to prove the fulfillment of preliminary administrative procedure.

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3. Dacian Cosmin Dragoş, Legea contenciosului administrativ. Comentarii şi explicaţii, AllBeck Publishing, Bucureşti, 2005;
4. Anton Fuduli, *Propuneri de modificare a unor prevederi ale Codului de procedură civilă*, in Commercial Law Journal, no. 1/2003;
5. Bogdan Papandopol, *Consideraţii critice şi clarificări pe marginea procedurii concilierii directe în litigiile comerciale patrimoniale*, în Law Journal, no. 8/2003;
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