

Principle of Availability vs. Active Role of the Court. Brief Practical Considerations

Assistant professor **Cătălin LUNGĂNAȘU**¹

Abstract

The principle of availability outlines a specificity of civil proceedings that may seem to contradict the active role that the court must play in order to resolve the case fairly. The simultaneous application of these two defining rules for civil procedure in relation to the rights of defence and to a fair trial generates certain practical problems that we point out in this study, given that the court is bound to respect the limits of the judgment vested in it, but at the same time must resolve the dispute according to the applicable rules of law in order to deliver a legal and well-founded decision.

Keywords: the principle of availability, the active role of the court, the right of defence, elements of civil action.

JEL Classification: K33, K38, K40

1. Premise situation

Through this study we want to highlight some theoretical and practical problems that can be identified when applying the principle of availability of parties in civil proceedings in relation to other fundamental rules, such as the active role of the judge, the right to defense or the right to a fair trial.² The analysis starts from a practical situation in which these difficulties of interpreting procedural norms were partially outlined, followed by doctrinal benchmarks and possible solutions to what seems to be a conflict between the principle of availability and the active role of the judge in civil proceedings, including by reference to the directions of interpretation imposed by the jurisprudence of the European Court of Human Rights.

The practical case to which we refer concerns the following case: by the application for a summons, the applicant S.C.L. requested that the defendant S.V. be ordered to pay the sum of 2,000 lei, respectively to refund the price paid to the defendant by the applicant. In fact, from the evidence administered in the case, the Timișoara Court held that, according to tax invoice no. X of 22.03.2019, the defendant S.V., as judicial expert, established the amount of 2,000 lei as price for services representing "garage tabulation str. I. V. nr. X" to be provided for the buyer S.C.L. According to receipt no. X dated 22.03.2019, the applicant paid to the defendant the amount of 2,000 lei as "garage tabulation fee str. I. V. nr. X". According to the Notification registered under no. X/10.09.2020 communicated by BEJ C.I. on 15.09.2020, the applicant requested the defendant that within 10 days of service, either communicate to him the proof of registration of the garage or refund the amount paid as a fee.

The first instance dismissed the application for a summons, noting the provisions of Art. 1270 para. 1³, as well as Art. 1516 and Art. 1550⁴ para. 1 C. civ.^{5,6} It emerged from the material administered in question that a service contract was concluded between the parties, which is still in force today. However, since the applicant did not ask the court to order the termination of the contract

¹ Cătălin Lungănașu - Faculty of Law, West University of Timișoara; Judge at Timiș Court, Romania, catalin.lunganasu@e-uvv.ro.

² For a comparative analysis of the evolution of these rights see M. Cappelletti, "Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends", *Stanford Law Review*, vol. 25, no. 5, 1973, pp. 651–715. JSTOR, <https://doi.org/10.2307/1227903>; A. Rachovitsa, "The Principle of Systemic Integration in Human Rights Law," *International and Comparative Law Quarterly*, Cambridge University Press, 66 (2017), pp. 557–88, <http://dx.doi.org/10.1017/S0020589317000185>.

³ Timișoara District Court, Civil Section I, civil sentence nr. 1979/08.02.2022, *not published*.

⁴ Art. 1270 para. 1 C. civ. states: "The valid contract concluded shall have the force of law between the contracting parties".

⁵ Art. 1516 C. civ. provides as follows: "(1) The creditor is entitled to full, accurate and timely performance of the obligation. (2). Where, without justification, the debtor fails to perform and is in default, the creditor may, at his choice and without losing the right to damages, if he is entitled: 1. request or, as the case may be, enforce the obligation; 2. obtain, if the obligation is contractual, termination or termination of the contract or, as the case may be, reduction of its own correlative obligation; 3. to use, where appropriate, any other means provided by law for the realization of his right".

⁶ Art. 1550 para. 1 C. civ. provides that "Termination may be ordered by the court upon request or, as the case may be, unilaterally declared by the party entitled."

in the first place and did not prove the termination of the contract by any other means, the right provided by art. 1554 para. 1 final sentence C. civ.⁷ He is not born at this time. The interpretation according to which the termination of the contract is subsumed to the only head of claim brought cannot be accepted because they are two separate legal institutions, and Art. 1550 para. 1 C. civ. states that termination must be sought by the interested party.

Against this sentence, within the legal term, using the right conferred by the civil procedural law, the applicant S.C.L. appealed against this sentence. In support of the appeal, the appellant submitted that, from the evidence administered in the case file, the state of affairs was confirmed, namely that after the 6 months that it was established for the execution of the work, the defendant did not answer his telephone calls. The appellant considers that she is entitled to request and unilaterally declare termination (termination of the contract and reimbursement of the fee) because the work was not executed, the defendant systematically avoided it and until the statement of defence was filed he did not communicate anything related to the work.

By its civil decision⁸, the Timiș Tribunal dismissed the appeal filed by the appellant S.C.L. in contradiction with the respondent S.V. against the civil sentence handed down by the Timișoara District Court as unfounded and noted that the respondent had not claimed costs. In order to rule in this way, the General Court noted the incidence of the same substantive legal provisions referred to by the Timișoara District Court, reiterating that the interpretation according to which the termination of the contract is subsumed to the only head of main claim for reimbursement of the price paid cannot be accepted because they are two separate legal institutions, and art. 1550 para. 1 C. Civ. states that termination must be sought by the interested party.

Moreover, the Court of First Instance held that, in reality, the first instance should have rejected the appellant-applicant's application as premature, given that the claimed right had not yet arisen since its very cause, the retroactive termination of the legal act, had not been fulfilled, since the contract concluded between the parties was still valid. However, the provisions of Art. 481 C. proc. civ. preclude such a change in the decision of the court of first instance because it would have infringed the principle *non reformatio in pejus*.

The Court of First Instance held that restoring the parties to their previous situation in the form of restitution of benefits does not represent, nor can it be, a consequence of the performance of a legal act (that is to say, a contract), but precisely its non-existence *ab initio* (when the services were performed, although the creditor who received them was not entitled and must return them), or non-existence in the form of termination of the act for various reasons (termination, nullity, ineffectiveness, etc.). For these reasons, art. 1635 para. 1 C. civ.⁹ refers to various cases of non-existence of the obligation relationship or its retroactive invalidation because the return of benefits is required only because their legal basis either never existed (payment being made without right) or disappeared with retroactive effect (as in the case of annulment of the civil legal act). This is precisely the essence of the refund of any benefit.

For those reasons, the Court of First Instance could not adhere to the appellant's arguments because it would lead *ad absurdum* to a paradoxical situation with no legal basis: services performed in the performance of a contract should be returned, but nevertheless the same contract would remain valid and in existence. Obviously, such a construction cannot be validated as long as it simultaneously applies mutually exclusive hypotheses: either the civil legal act remains valid and produces further consequences, or it is abolished (*ex nunc* or *ex tunc*, as the case may be) and the issue of reimbursement of benefits becomes topical. It is quite clear that the refund of benefits is a measure incompatible with keeping intact the agreement of the parties since, in such a case, the rights and obligations arising from the legal relationship arising from the contract of the parties are fulfilled, not

⁷ Art. 1554 para. 1 C. civ.: "A contract terminated by termination shall be deemed never to have been concluded. Unless otherwise provided by law, each party shall in that case be bound to reimburse the other party for the benefits received."

⁸ Timiș Court, Civil Section I, Civil Decision nr. 1705/13.12.2022, *not published*.

⁹ Art. 1635 C. civ. provides that: "The return of benefits shall take place whenever someone is required by law to return property received without right or error or pursuant to a legal act subsequently abolished with retroactive effect or whose obligations have become impossible to perform by reason of an event of force majeure, fortuitous circumstances or any other event assimilated thereto."

those arising from the termination or termination of that relationship.

However, as the appellant neither proved the previous termination of the contract concluded with the respondent, nor did she seek such a measure from the court in the present case, in relation to the provisions of Art. 9 para. 2 and Art. 397 para. 1 C. proc. civ., the court is bound by and limited by the principle of availability of the parties if they have intended to bring the civil action. It is noted that not only did the applicant not also seek annulment or termination of the contract in the present case (on the basis of which it made the payment which it seeks), but considers that such a separate claim was not even necessary, even though that was precisely the cause of its claims. However, the Court of First Instance held that the interpretation advocated by the appellant had no logical-legal basis and, correspondingly, could not be adopted by the court.

The appellant S.C.L. appealed against the civil decision of the Timiș Court. which requested that the judgment be quashed in its entirety, with the consequence that the case should be retried on the merits and that its application should be granted, with costs. By its¹⁰ decision, the Timișoara Court of Appeal upheld the appeal, quashed the contested decision and referred the case back to the same court of appeal. In reaching that conclusion, the appellate court held that: the reason for dismissing the action was that the applicant had not requested the court to terminate the contract in the first place, nor had it proved that the contract had been terminated in any other way. The court did not accept the interpretation according to which the termination of the contract is subsumed by the only head of claim brought.

In its application for appeal, the applicant cited Art. 1550 para. 1 C. civ. which are to the effect that termination may be ordered by the court, upon application or, as the case may be, unilaterally declared by the entitled party. That last sentence was expressly emphasised by the appellant. Reading the judgment under appeal, the Court of Justice observed that the Court of First Instance had in no way concerned itself with the analysis of this ground of appeal. After rendering several texts relating to the termination, including that referred to by the appellant, the Tribunal repeated the paragraph of the judgment of the first instance, changing only the solution in the form of the legal cause of dismissal of the action, stating that the application was premature, since the legal act had not been abolished. Further, the appellate court explained why restitution of benefits was not possible if the agreement was kept intact, and finally to resume its conclusion that the appellant had not proved the previous termination of the contract with the respondent, nor had she sought such a measure in the present case, the court being bound by the principle of availability of the parties.

The failure to examine a ground of appeal is a criticism capable of falling within the provisions of Art. 488 para. 1 para. 6 C. proc. civ., being evident in the present case, after rendering the succession in time of the judicial documents of the parties, in relation to the reasoning issued by the first instance for dismissing the action.

With regard to the obligation for the court to examine the grounds of appeal raised by the appellant applicant, the Court underlined that the obligation to examine the grounds used by the parties in support of their applications and to examine their applications are guaranteed by the provisions of Art. 6, paragraph 1, sentence I of the European Convention on Human Rights, according to which: "everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, established by law, which shall decide on the violation of his civil rights and obligations (...)". In the conception of the European Court of Human Rights, between the guarantees of the right to a fair trial, within the meaning of art. Article 6, paragraph 1, of the Convention, also includes the obligation of the courts to effectively examine the claims and arguments put forward by the parties in the grounds of their claims.

The European Court of Human Rights stated – in paragraph no. 30 of the judgment of 28 April 2005 in *Albina v. Romania*¹¹ that "the right to a fair trial, guaranteed by art. Article 6.1 of the Convention includes, inter alia, the right of Parties to submit observations which they consider

¹⁰ Timișoara Court of Appeal, Civil Section I, Civil Decision nr. 115/09.05.2023, not published.

¹¹ Published in the Official Gazette of Romania, Part I, nr. 1049 of 25 November 2005.

relevant to their case¹². Since the Convention is not intended to guarantee theoretical or illusory rights, but concrete and effective rights (Artico v. Italy, judgment of 13 May 1980, Series A, No. 37, p. 16, paragraph 33), that right can be regarded as effective only if those observations are genuinely 'heard', that is to say, correctly examined by the court seised. In other words, art. Article 6 implies, in particular, that it is for the 'court' to carry out an effective examination of the means, arguments and evidence of the parties, at least in order to assess their relevance [(Perez v. France (GC), Application No 47.287/99, paragraph 80, ECDH 2004-I and Van der Hurk v. the Netherlands, judgment of 19 April 1994, series A, no. 288, p. 19, paragraph 59)]."

Also, in another judgment against Romania, namely in the judgment of 28 June 2005 in the case Virgil Ionescu v. Romania,¹³ in paragraph no. 44, the European Court of Human Rights reiterated that "whereas the Convention does not aim to guarantee theoretical or illusory rights, but concrete and effective rights (Artico v. Italy, judgment of 13 May 1980, series A nr. 37, p. 16, paragraph 33), the right to a fair trial can be regarded as effective only if the parties' requests and observations are genuinely 'heard', i.e., examined in accordance with the rules of procedure by the court seised. In other words, art. Article 6 imposes on the 'General Court' an obligation to carry out an effective examination of the pleas, arguments and requests for evidence of the parties, except for an assessment of relevance (Van de Hurk v. the Netherlands, judgment of 19 April 1994, Series A no. 288, p. 19, paragraph 59, and Dulaurs v. France, judgment of 21 March 2000, Application No. 34.553/1997, paragraph 33).

In these circumstances, the Court considered that the effective examination of the arguments and claims raised by the parties appears to be an essential obligation imposed on the Romanian courts. Consequently, the appellate court was required to consider the arguments put forward by both parties, both in support of and in rebutting the grounds of appeal. Omitting to examine the grounds of appeal raised by the applicant before the Timiș Tribunal, the court delivered its judgment in breach of the right to a fair trial. The Court recalls that, according to Art. 425, para. 1, letter b) C. proc. civ., the judgment shall contain "the reasons of fact and law which formed the conviction of the court, as well as those for which the claims of the parties were dismissed." However, the delivery of the judgment in violation of the party's right to a fair trial, respectively with the failure to analyse the grounds of illegality and groundlessness invoked, constitutes a violation of the aforementioned provisions. The Court of Appeal reviewed some of the parties' allegations, without showing in concrete terms the reasons why unilateral termination is not relevant in the present case, without analysing them in conjunction with the evidence administered, and the numerous substantive defences put forward.

Such a type of motivation is practically equivalent to the lack of motivation because it robs of content the very reason for which the party addresses a court seeking a coherent and substantiated application of the legal situation to the factual one. By doing so, regardless of the outcome of the case, the litigants will be able to understand whether and why they were right or wrong and will be able to correct their conduct in the future. In legal doctrine it has been shown that, in practice, there are situations when the solution contained in the operative part proves to be purely formal, in the absence of a motivation to support it, thus not allowing judicial control and often associated with the need to supplement the evidence in order to clarify and ascertain in the judgment the essential circumstances of the case. These situations are assimilated by case-law to a failure to investigate the merits and determine the solution of cassation with reference.

In particular, the Tribunal rejected the appeal application without revealing the reasons for validating the judgment of the first instance, by reference to all the grounds of appeal, limiting itself to stating that the solution given was a correct one. In the retrial, the tribunal will analyse, following the administration of evidence proposed by the parties, ordered by the court of its own motion or on the basis of those already administered by the court, the reality of the facts described by the applicant appellant in the light of the relevant legislation, and the claims relating to the costs requested including

¹² See for a comparative implication: D. Halberstam, "Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach." *Cambridge Yearbook of European Legal Studies* 23 (2021): pp. 128-58. doi:10.1017/cel.2021.12.

¹³ Published in the Official Gazette of Romania, Part I, nr. 396 of 8 May 2006.

in the appeal will be resolved by the tribunal together with the retrial after cassation with reference. Thus, the court will examine all the grounds of appeal invoked by the applicant and will motivate in fact and as the solution to be given to each of them, it will be investigated whether the applicant also considered the termination, whether judicial or unilateral, *it being obvious that under art. 22 C. proc. civ. governing the active role of the court, there is no need to make such a request in sacramental terms.*

In view of the above, the Court upheld the appellant's appeal, quashed the judgment and ordered that the case be referred back to the Timiș Court.

2. The principle of availability

One of the fundamental principles of civil proceedings that gives it a peculiarity in relation to other judicial proceedings (especially criminal proceedings) is represented by the parties' right of disposition, generically regulated by art. 9 C. proc. civ. According to para. 1 of the aforementioned legal text, "Civil proceedings may be initiated at the request of the interested party or, in specific cases provided for by law, at the request of another person, organization or of a public authority or institution or of public interest". While the first paragraph implicitly distinguishes between the formality of a procedure, on the one hand, and the availability, on the other, in terms of bringing the action giving rise to the legal relationship in dispute, the second paragraph expressly states that "the subject matter and limits of the proceedings are determined by the claims and defences of the parties", whereas the last paragraph mentions the right of the parties to carry out acts of disposition, including the termination of proceedings. In relation to these provisions, in the literature¹⁴ it was considered that, by virtue of the principle of availability, the parties can determine not only the existence of the trial, by initiating judicial proceedings and by being free to terminate the dispute before the court has ruled on the substance of the legal relationship submitted to judgment, but also the content of the proceedings, by setting out the procedural framework as regards the parties, subject matter and case, as well as the steps they might take. In essence, the same content was acknowledged to this principle in relation to the former procedural legislation Romanian¹⁵, respectively C. proc. civ. of 1865.

With regard to the subjective procedural framework, it was shown¹⁶ that it is the plaintiff who, in principle, determines whom to sue, but with some exceptions. In this regard, the provisions of Art. 78 para. 1 C. proc. civ. according to which, in cases expressly provided for by law or in non-contentious proceedings, the judge orders of his own motion the introduction of other persons, even if the parties object, which represents a visible limitation of the effects of the principle of availability. The quoted author considers, however, that paragraph 2 of Art. 78 C. proc. civ. appears to restrict the court's interference with the change in the procedural framework precisely 'in the name' of the principle of availability, since the court is obliged to discuss with the parties the necessity of bringing other persons into contentious matters, without being able to order such a measure of its own motion. Moreover, it is noted that if none of the litigants intends to request the introduction of the third party, and the judge considers that the case cannot be resolved in his absence, the court will reject the application without ruling on the merits.

In the literature¹⁷ it is mentioned that the court is obliged to rule on those requested by the litigants, without being able to exceed, as a rule, the procedural framework drawn by them through the applications and defenses formulated under the law. As a matter of principle, the court must rule only on what the parties have deduced from the judgment, without being granted the possibility of giving more than requested or of ruling on an unsolicited claim. It is recalled on this occasion that the victim of an unlawful and harmful act claims that the defendant be ordered to pay a sum of money by

¹⁴ D. N. Theohari, M. Eftimie in G. Boroi (coord.), *Noul Cod de procedură civilă. Comentariu pe articole*, vol. I, 2nd edition revised and added, Ed. Hamangiu, Bucharest, 2016, p. 36 et seq.

¹⁵ In this regard, see G. Boroi, *Codul de procedură civilă, comentat și adnotat*, vol. I, Ed. All Beck, Bucharest, 2001, p. 119.

¹⁶ Fl. Popa, *Reflecții asupra limitelor principiului disponibilității în procesul civil* in T. C. Briciu, P. Pop (coord.), *Le Nouveau Code de procédure civile roumain: vu de l'intérieur – vu de l'extérieur*, Ed. Hamangiu, Bucharest, 2021, p. 216.

¹⁷ G. Boroi, M. Stancu, *Drept procesual civil*, 5th edition, revised and added, Ed. Hamangiu, Bucharest, 2020, p. 18.

way of damages, and the court, having regard to the conclusions of the expert report on the extent of the damage, could not award a higher sum of money if the applicant has not increased the value of his claim. Also by way of example, the situation of restoring the contracting parties to their previous situation as a result of ordering judicial termination is mentioned, with the observation that this is a separate and independent claim before the court, and in the absence of such a head of claim, the principle of *restitutio in integrum* cannot be applied. As a consequence of granting the application for judicial termination, if the court were also to order the parties to be restored to their previous situation in the absence of an express request by the applicant, it would defeat both the principle of availability and the adversarial principle and the right of defence of the opposing party who would be unable to defend himself on claims other than those contained in the petition¹⁸.

Moreover, we note that a consequence of the principle of availability also extends to the rights of defence of the parties – in the specific case, of the defendant – given that art. 205 para. 1 C. proc. civ. defines a statement of defence as the procedural act by which the defendant defends himself, in fact and in law, against the application for a summons. As a result, the defendant will defend himself against the claims made against him by the plaintiff strictly in relation to the concrete content of the civil action thus initiated, within the limits set precisely by the holder of the application for a summons. It was judiciously observed¹⁹ that exceeding the limits of the principle of availability – provided that no exception allowed by law is identified²⁰ – it also leads to a violation of the rights of the defence and, correlatively, of the adversarial principle, since the court would rule on issues not requested by the applicant and unknown to the defendant in order to be able to properly prepare its defence. We consider that such a correlation of the stated principles is in the field of evidence, being clear that the parties have no possibility of anticipating a solution *plus petita* or *extra petita* that the court would order in the absence of requests made or debates in which the parties can take part.

Also, as a proper application of the principle of availability, we identify the norm contained in art. 397 para. 1 C. proc. civ., but in correlative form, this time from the perspective of the court against which the litigants' right of disposition manifests itself as a genuine procedural obligation. It should be borne in mind that the text of the law establishes the obligation of the court to rule on all applications submitted to judgment, meaning that it cannot grant more, nor anything else than requested, unless otherwise provided by law. Therefore, in the absence of an express and derogating rule, the rule is that, with regard to the court, we find two complementary obligations imposed by the duty to resolve cases and by the principle of availability: on the one hand, the solution must concern all the claims made in the case, as an expression of the principle regulated by art. 5 C. proc. civ. according to which, in essence, judges have the duty to hear any claim within the jurisdiction of the courts, according to law. On the other hand, the court must rule only on those applications, without being able to order more or anything. Thus, the limits within which the court has been vested must be fully reflected in the solution to be pronounced. This rule is also stated by the provisions of Art. 22 para. 6 C. proc. civ. which states that the judge must rule on all that has been requested, but without exceeding the limits of the investiture, unless otherwise provided by law. Failure to respect these limits is also grounds for exercising the extraordinary remedy of revision against the decision thus pronounced, according to art. 509 para. 1 pt. 1 C. proc. civ.

Consequently, it is observed that the principle of availability represents, from the perspective of the court, a genuine limitation of the possibility to intervene on the procedural legal relationship, in the absence of an express and derogatory legal provision. However, the stated principle seems to be somewhat at odds with the principle of the active role of the judge in finding out the truth, as we will explain in the next section.

¹⁸ High Court of Cassation and Justice, Civil Section II, Decision nr. 224/28.01.2015 *apud*. G. Boroi, M. Stancu, *op. cit.*, p. 19.

¹⁹ *Ibidem*.

²⁰ Such an exception to the principle of availability we identify in the content of art. 919 para. 2 and para. 3 C. proc. civ. which states that the court will also rule of its own motion on the exercise of parental authority, the home of the children after divorce and the parents' contribution to the costs of raising and educating minors, even if these were not requested in the application for divorce. The court will also rule *ex officio* on the name that the spouses will bear after the divorce.

3. The active role of the civil court

Starting from the provisions of art. 22 para. 2 sentence I C. proc. civ., it was mentioned²¹ that the essence of the active role of the judge in the activity of delivering justice is captured by the following judicial syllogism: establishing the factual situation on the basis of the evidence administered, applying the substantive rules incident to the respective factual situation and inferring legal effects, namely the delivery of a legal and well-founded decision. Thus, I consider that the court, in order to reach a legal and sound solution, must find out the judicial truth in question, meaning that it must be clarified on all the disputed aspects on which it is to have available, both in terms of the facts and the incidence of the corresponding legal provisions.

The problem that may arise in relation to the principle of availability mentioned above is given by the rules contained in Art. 22 para. 4 and para. 5 C. proc. civ. In this regard, we note that para. Article 4 of that article provides that "the judge shall give or restore the legal characterisation of the acts and facts brought to trial, even if the parties have given them a different name. In this case, the judge is obliged to question the exact legal characterization of the parties", while para. Article 5 states that: "however, the judge may not change the name or legal basis if the parties, by virtue of an express agreement on rights available to them according to law, have established the legal characterisation and the legal grounds on which they intended to limit the proceedings, if this does not infringe the rights or legitimate interests of others".

We consider the opinion correct²² according to which those two paragraphs must be interpreted in conjunction because the texts refer both to the right and to the obligation of the court to classify or restore the classification of legal acts and facts submitted to judgment, issues which concern not only procedural acts but also legal acts and facts as sources of substantive law. The qualification or requalification referred to in para. 4 and para. 5 of Art. 22 C. proc. civ. concerns the legal name and legal basis of the legal acts and facts relied on by the parties. *Ad absurdum*, if the court were bound by the legal classification proposed by the party and considered it to be erroneous, it would have to reject the application without being able to give a fair solution to the case²³. In this respect, by way of example it is mentioned²⁴ if the applicant seeks termination of a legal act referred to by the parties as a contract of sale, but the court considers, in the light of the terms of the contract, that the contract is maintenance. In such a situation, after questioning the parties' classification of the exact legal nature, the court will decide the case in the light of the new classification, applying the substantive rules incident to that type of contract, and not those erroneously indicated by the applicant.

In this aspect of the legal qualification or requalification of legal acts and facts submitted to judgment, specialized literature²⁵ states that the subject matter and cause of the application are the defining elements for the legal classification of the application. Moreover, it is done²⁶ distinction between *causa petendi*, namely the cause of civil action and *causa debendi*, respectively the cause of the application for a summons, its legal basis, with the caveat that indicating the basis of the applicant's claims does not amount to indicating by him the rules of law relevant to the present case, such an operation being the work of the judge according to the principle *of Iura novit curia*. From that perspective, it is shown²⁷ that the judge cannot change the facts which constitute the *causa petendi* of the action because only the party is in a position to know and claim them. Moreover, it cannot change the basis of the claim in the sense of the source of the right invoked (legal act or fact), but it will interpret the legal act submitted to the court in order to assess the legal classification.

²¹ G. Boroi, M. Stancu, *op. cit.*, p. 26.

²² See D. N. Theohari, M. Eftimie în G. Boroi (coord.), *op. cit.*, p. 67.

²³ A.-A. Chiş, Gh.-L. Zidaru, *Rolul judecătorului în procesul civil*, Ed. Universul Juridic, Bucharest, 2015, p. 72.

²⁴ D. N. Theohari, M. Eftimie în G. Boroi (coord.), *op. cit.*, p. 67.

²⁵ A. Tabacu, A. Draghici, *Disponibilitatea părţilor şi rolul judecătorului în procesul civil* în *Analele Universităţii Babeş-Bolyai Cluj-Napoca, Studia Jurisprudentia*, nr. 2/2010, p. 93.

²⁶ V. M. Ciobanu, T. C. Briciu, C. C. Dinu, *Drept procesual civil. Curs de bază pentru licenţă, seminare şi examene*, Ed. Naţional, Bucharest, 2018, p. 119, where it is stated that "if an asset is claimed from a person, the cause of action is the abusive possession of the property by that person and the will to cause this possession to cease, establishing a state corresponding to the claimed right, and the cause of the claim may be the contract, succession, etc."

²⁷ A. Tabacu, D. Draghici, *op. cit.*, p. 93 et seq.

Similarly, with regard to the subject matter of the civil action, the question arises whether the judge can intervene without violating the principle of availability, also taking into account the provisions of Art. 22 para. 1 C. proc. civ. according to which the judge decides the dispute in accordance with the rules of law applicable to him. However, since the object of the civil action is what the parties intend to submit to judgment, what they require judges to verify, assess, find, judge²⁸, in order to protect the subjective civil right or an interest that can only be achieved through legal action, it is clear that the problem of reconciling the principle of availability with the massive interference of the judge in the realm of civil action justified by the imperative of finding out the truth remains a sensitive one²⁹.

However, it is considered that the judge will not be able to change the facts and, implicitly, *causa debendi* – these elements configuring the immutability of the dispute from the perspective of the principle of availability. Thus, on the assumption that the cause of action refers to the legally qualified factual situation, it follows that the court is bound by the cause of action or procedural act of that nature (counterclaim, main intervention, etc.), and cannot amend it on the pretext of applying the principle of *iura novit curia*. Moreover, the latter principle presupposes the fact that the judge is not bound by the legal text indicated by the party, but must apply that text of law which corresponds to the facts legally qualified by the party, it is true that in so far as the evidence adduced in the case confirms the facts before the court³⁰. In this regard, it is stated that, in essence, the legal characterisation of the facts and the application of the legal text are two distinct operations which should not be confused. Thus, the plaintiff bases his claim on a particular factual situation which he then qualifies from a legal point of view so that it appears to be justified, whereas the defendant constructs a factual situation in such a way that the plaintiff's claim appears unfounded. Based on the evidence administered, the judge establishes the facts of the case – judicial truth – without being able to give it another legal qualification, and then applies the corresponding legal text to this situation regardless of any legal provisions invoked by the parties³¹.

Thus, we see that the active role of the judge falls within certain defining elements of the civil action, but neither annihilates the party's right of disposition nor collides with it. I consider it in this way, given that, first, in order to reach a legal and sound solution, the judge must know the judicial truth – as it emerges from the evidence adduced in the case – that is, to be fully clarified the state of affairs submitted to the judgment. Correlatively, also for the purpose of justly dissolving the litigious issue vested in him, the judge is required to apply the legal provisions incident to the legal relationship submitted to judgment under the principle of *iura novit curia*, without being bound by the possibly erroneous indication of the legal basis made by the parties. However, its active role ceases with regard to the extent of the facts before the court, since only the parties can know and draw the factual limits of the issues they intend to bring to the attention of the court, but also with regard to the cause of action and the cause of action. I consider the latter elements, in the logical-legal syllogism of the court, to have been analysed after clarification of the facts and prior to the application of the relevant legal rule, even though for the applicant they are, in reality, the trigger element of the trial.

As such, after the court has clarified the state of affairs and identified the basis of the claims made by the parties, it is necessary to establish its legal characterization, respectively what substantive legal relationship is submitted to the judgment, and then apply the corresponding legal provisions to finally pronounce the legal solution. However, from these elements, it can be seen that the active role of the judge is manifested strictly with regard to the investigation of the state of affairs – i.e., from an

²⁸ V. M. Ciobanu, *Tratat teoretic și practic de procedură civilă*, vol. I, Ed. Național, Bucharest, 1996, p. 262.

²⁹ Fl. Popa, *op. cit.*, p. 226.

³⁰ G. Boroi, M. Stancu, *op. cit.*, p. 19.

³¹ In line with the above, the quoted authors bring several telling examples, namely if the plaintiff wrongly based his claim on the institution of tort liability, the court will not be able to settle the case in the realm of contractual civil liability; if the annulment of a contract for fraud is requested, the court will not be able to declare that legal act null and void for another reason not invoked by the plaintiff; if it is sought to order the defendant to pay a sum of money on the basis of unjust enrichment, the court could not award that amount to the plaintiff as the price of a sale or as compensation for the tort causing the damage; if the plaintiff requests that the defendant be ordered to pay a sum of money that he would have lent him, the court cannot award that amount as the price of a sale; if the plaintiff requests that the defendant be ordered to surrender a property under a contract of sale, the court will not be able to grant the plaintiff's claim under a lease or succession, etc. – G. Boroi, M. Stancu, *op. cit.*, p. 20.

evidentiary point of view according to art. 254 para. 5 C. proc. civ. – identifying the legal relationship submitted to the court and applying the rules specific to it. However, the limits of the active role generated by the principle of availability are manifested in the sense that the parties determine not only the extent of the facts that is the subject of the dispute, but also the cause of the claims, the court being bound precisely by the cause of action and claim presented by the plaintiff (as mentioned above, if the plaintiff requests the repayment of a sum of money by way of loan, the court will not be able to reclassify the legal relationship as claims arising from a contract of sale). As a result, the legal relationship will be established by the court also depending on the application of the principle of availability in relation to the cause of the application for a summons, as well as the legal norms incident to that relationship thus determined. Moreover, it should be noted in this regard that Art. 22 para. 4 C. proc. civ. states that the correct requalification or qualification made by the judge concerns the legal acts and facts brought to trial, not the cause of the claims.

Moreover, in line with what I have also argued, attention has been drawn in the doctrine to the fact that the possibility of the judge to change, *ex officio*, the cause of the application should not be recognized, and considering that such a change would practically be made exclusively in favour of the applicant (it is difficult to believe that a judge who changed the case would subsequently reject the application; on the contrary, the change of case would be made precisely in order to grant the application), thus affecting the court's duty of impartiality and, implicitly, the defendant's right to a fair trial³².

4. Criticism of the case-law solution

The judgment delivered by the Timișoara Court of Appeal in the introductory part of this study may seem appealing, especially in light of the court's references to the provisions of the European Convention on Human Rights and to the case-law of the European court. However, I intend to express certain reservations about how, implicitly or explicitly, several fundamental principles of civil proceedings have been correlated, including the parties' right of disposition, the active role of the court, the rights of defence and to a fair trial.

From the recitals of its judgment on appeal, it may be noted that the reviewing court considered that the district court and the court of first instance had not played an active role in dealing specifically with the applicant's claim, confining itself to rigid application of substantive provisions. Without making a genuine analysis of the substantial legal relationship submitted to the court, we mention that, according to the provisions of the Civil Code, the restitution of benefits represents, in particular, the restoration of the parties to the situation prior to the legal act abolished with retroactive effect, an aspect not disputed by the Timișoara Court of Appeal. Moreover, *restitutio in integrum* is a consequence of the retroactive abolition of that legal act, such a circumstance constituting a *sine qua non precondition* for producing such an effect. Otherwise, as, moreover, the judgments of the courts of first instance and otherwise mention, would lead to the paradoxical situation in which the legal act remains in existence and produces its binding effect vis-à-vis the parties who would be required to perform the obligations arising from it, but at the same time the same parties would be entitled to claim restitution of what has already been executed. It is clear that such a circumstance outlines a meaningless hypothesis, the same act and under the same conditions cannot be considered both valid (producing legal effects) and, simultaneously, to be abolished, with the consequence that the same legal effects are removed by restoring the parties to their previous situation.

Starting from the substantive considerations mentioned above, from the perspective of procedural law, several issues emerge, such as those related to the application to the court and the limits within which the parties intend to debate the disputed issue. It can be seen from the above lines that the doctrine shares the view that the effects of the abolition of the legal act do not occur *ope legis*, but must be sought by formulating a separate head of claim. By way of example, I recall that the principle of availability in this manner is also applied by the legislature to a purely procedural question

³² G. Boroi, M. Stancu, *op. cit.*, p. 19.

involving the *restitutio in integrum* rule, namely in the case of the return of enforcement. In this regard, art. 723 C. proc. civ., in relation to the provisions of art. 720 times of art. 707 C. proc. civ., states that the abolition of the enforceable title or enforcement enables the person concerned to claim the return of enforcement by restoring the previous situation. In essence, the procedural rule makes concrete application of the principle of *restitutio in integrum* following the abolition of the enforceable title or of the enforcement procedure itself, but clearly by an express request made by the interested party. Moreover, we note that the admission of the objection to enforcement (§ 720 C. proc. civ.) or the finding of limitation of the right to obtain enforcement (§ 707 C. proc. civ.), although they may lead to the abolition of the entire enforcement procedure, do not automatically imply the restoration of the parties to their previous situation in the absence of an express request to that effect. As such, even in a purely procedural matter, the legislature continues to apply the principle of availability, establishing that the subsequent effect of the abolition of enforcement consisting in the return of enforcement does not occur de jure, but only at the express request of the interested party. Thus, what has been mentioned above with regard to the substantive legal effect of applying the principle of *restitutio in integrum* applies accordingly and procedurally in relation to the principle of availability, i.e., the court will not be able to order such a consequence of its own motion if it has not been extinguished by one of the litigants.

On the other hand, in the legal question raised above, the perspective is somewhat reversed since the party has requested only the application of the effects of the abolition of the substantive legal act, without, however, proving the preliminary and mandatory circumstance of the existence of such a previous termination and without asking the court — failing that such a condition is fulfilled — to adjudicate, first, termination of the contract so that the party may claim, as a consequence of that cause for annulment of the act, restoration to the previous situation. The following question of procedural law emerges which the doctrine identified above does not appear to have examined, namely whether the applicant seeking restoration to the previous situation must also expressly request the annulment of the legal act or a declaration of the prior incidence of such termination or, on the contrary, the court can and must assume that such a question of law is implicitly inferred to judgment since the application of effects is sought abolition of the legal act consisting in the refund of benefits. The answer that emerges from the recitals of the judgment delivered by the Timișoara Court of Appeal is in the sense that the courts should not require the parties such a manifestation of explicit will, "it being obvious that based on art. 22 C. proc. civ., which regulates the active role of the court, there is no need to make such a claim in sacramental terms." From the applicant's perspective, such an interpretation represents a strong application of free access to justice, given that, by discerning the real will of the holder of the civil action, the judge ends up evoking the substance of the claims, thus carrying out an effective verification of the substantive legal relationship submitted to the judgment.

On the other hand, however, with regard to the defendant I understand to express certain reservations starting from the principle of equality of parties in civil proceedings, according to art. 8 C. proc. civ. Thus, it must not be forgotten that the exercise of procedural rights must be equally and without discrimination granted to all litigants. It is precisely for these reasons that the court is required to show full impartiality and neutrality throughout its judicial activity, since any favoring of one of the parties leads, we believe, automatically, to affecting the procedural rights of the opposing party. As such, *ab initio*, as also pointed out in the above statement, the intervention of the court beyond the legal limits — that is, outside the hypotheses expressly provided for by the legislature — in order to assist the applicant in formulating a procedural approach that would have chances of success correspondingly entails the destruction of the defendant's rights of defence or putting him in a much more difficult situation for the protection of his own rights and interests. The most accessible example in such a situation is given by the situation in which the action promoted by the applicant is inadmissible and the defendant defends himself in this regard, being a circumstance which, as a rule, benefits him. However, changing the action following the intervention of the court in such a way that it is no longer inadmissible leads categorically to the advantage of the applicant and to the disadvantage of the defendant, and the obligation of impartiality is no longer respected by the court. Examples can also be identified in the opposite direction, when the court could favour the defendant

by suggesting private procedural exceptions that the defendant did not invoke, although only he would have this possibility, such as the exception of territorial lack of jurisdiction of private policy or the exception of the extinctive limitation of the substantive right of action. It is true that the applicant would be prejudiced in such situations if, for example, his substantive right of action were time-barred, but the defendant did not invoke that plea on his own motion. If, for the latter scenario, it is clear to us that the court cannot play an active role beyond the limits of the principle of availability because it would violate the parties' rights of defence and become biased, one wonders why the Timișoara Court of Appeal in the case described above did not apply the same principle to the applicant? We consider that neither free access to court nor the practice established by the European Court of Human Rights could justify violating the rights of defence and, implicitly, affecting the right to a fair trial that must be recognized to all litigants.

Moreover, I consider that the court cannot rule on unsolicited petitions (in the absence of express derogations which are not applicable in any case in the present case) because it would entail the annihilation of the rights of defence of the defendant who was neither aware of those claims against him and, consequently, did not defend himself against them. The principle stated by art. 9 para. 2 and Art. 397 para. 1 C. proc. civ. relating to the limits of bringing proceedings before the court is repeated at the appeal stage, art. 479 para. 3 C. proc. civ. expressly stating that the status of the parties, the cause or subject matter of the summons cannot be changed on appeal, nor can new claims be made. However, the decision of the present case appears to disregard those procedural limits, since the Court of Appeal complained that the Court of First Instance had failed to examine the grounds of appeal and in the light of such a clarification, namely that the applicant had claimed on appeal that the refund of the benefits was a consequence of the termination of the contract, without, however, such a petition having been made in the application.

It seems to me that the outcome of the case from which the entire analysis started contains an implicit application of the principle of the active role of the court exclusively from the applicant's perspective and only in view of his right to effective access to the judicial procedure, while ignoring the limits imposed by the principle of availability or by the obligation to guarantee the rights of defence for all litigants. Thus, even if the judge is required to find out the judicial truth and to pronounce a legal and sound solution to the legal relationship submitted to the court, his active role cannot go beyond that framework. The initiation of the dispute, the manner in which the procedural legal relationship is established, the determining cause of the action (both in fact and in law) and the extent of the state of affairs on which the court must decide will be determined by the parties and not by the judge. Even with regard to the classification of legal acts and facts, the concepts in the Code of Civil Procedure seem to be misunderstood in judicial practice as long as both the state of affairs triggering the legal conflict or on which it is molded and the legal institution under which the applicant intends to assert his rights remain within his discretion and disposition, and not the court. For example, the fact that the seller did not collect the price for the good sold entitles him to bring a claim against the debtor buyer. As a result, the facts lie in the non-payment of the price and the plaintiff's claim is based on the effects of the contract of sale. Even if the plaintiff erroneously identifies the substantive rule enabling him to claim payment of the price, the legal cause is understood from the claim made and will be properly applied by the court. In this respect, the active role of the court is highlighted. On the other hand, as in the present case, if the plaintiff has not also claimed interest or the contract is of another legal nature that the plaintiff does not intend to use, the court will not be able to substitute itself for the plaintiff's counsel to modify, assume or supplement the civil action in such a way that its claim is upheld, although he had asked for something else.

In the light of the above, contrary to what was held by the decision of the appellate court and even contrary to a possible appearance suggested by the title of the present study, we consider that there is neither contradiction nor even a conflict between the parties' right of disposition in civil proceedings and the active role of the judge in finding out the truth. Strictly to illustrate in this regard, I recall the hypothesis briefly presented above regarding the institution of return of enforcement, adapting to the situation in the case under consideration. Thus, if the prosecuted debtor makes a claim pursuant to Art. 723 C. proc. civ. seeking restoration of the parties to their previous situation, but has

not previously or concomitantly sought annulment of enforcement, where such effect has not occurred, the application is manifestly premature or, at least, unfounded. Such a solution is required provided that the cause that would trigger the right of the parties to be restored to their previous situation has not occurred, namely the forced execution or the enforcement title has not been annulled. I consider that, in such a situation, the court could not assume that the petitioner seeking the return of enforcement would also have sought annulment of the enforcement proceedings since it did not make a head of claim to that effect, the effect of the principle of availability being visible. Moreover, even if (hypothetically) the court tried to play an active role in this regard (which I consider having no legal support), it would still not know the cause of such a claim or the facts justifying it. As a result, the court is bound to rule strictly on what was requested, in the present case in the sense of rejecting the application for return of enforcement since the annulment of enforcement was neither sought nor ordered beforehand. However, I consider that the solution should have been the same in the present case in that the court could not be accused of not having implied an unformulated and, in fact, non-existent head of claim.

5. Conclusions

Although at first analysis they seem contradictory, I consider that, in reality, the principles of availability and of the active role that the judge must play in finding out the truth for the just settlement of the case are complementary³³. Bearing in mind that it is in the nature of civil proceedings for the parties to be granted the right of disposition at all procedural moments, from the commencement of the dispute and the shaping of the procedural framework, continuing with the manner in which the dispute is conducted and with the possibility of extinguishing it before the resolution on the merits, it is primarily for the judge to resolve the question of law before him in the manner set out by the parties, respectively within the limits thus sketched. The prerogative of the court to apply the law (*jurisdictio*) is fully manifested, but subsequent and conditional on the limits of the procedural framework, as it is usually established only by the parties in all aspects, namely the subject-matter, the case and the subjects of law improcessed. As such, the court's exclusive attribute of "saying" the right is limited, including in relation to the relative effect of the court decision, strictly to the litigious issue before it. However, in such circumstances, as is apparent from the opinions expressed above, I consider that the principles examined in this paper neither contradict nor affect each other as long as they are properly applied, according to their purpose and under the conditions imposed by the legislature. That is why the conflict between the principle of availability and the active role of the judge is only apparent and false. Moreover, through the case-law solution set out above, I have illustrated how such a collision of principles can arise when they (or at least one of them) are misinterpreted and applied excessively or excessively. Instead, if understood within their limits, the two principles work together to achieve the desirable final result, that of a legal and sound court decision.

Bibliography

1. Boroï, G., *Codul de procedură civilă, comentat și adnotat*, vol. I, Ed. All Beck, Bucharest, 2001.
2. Boroï, G., Stancu, M., *Drept procesual civil*, 5th edition, revised and added, Ed. Hamangiu, Bucharest, 2020.
3. Cappelletti, M., "Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends", *Stanford Law Review*, vol. 25, no. 5, 1973, pp. 651–715. JSTOR, <https://doi.org/10.2307/1227903>;
4. Chiș, A.-A., Zidaru, Gh.-L., *Rolul judecătorului în procesul civil*, Ed. Universul Juridic, Bucharest, 2015.
5. Ciobanu, V. M., Briciu, T. C., Dinu, C. C., *Drept procesual civil. Curs de bază pentru licență, seminare și examene*, Ed. Național, Bucharest, 2018.
6. Ciobanu, V. M., *Tratat teoretic și practic de procedură civilă*, vol. I, Ed. Național, Bucharest, 1996.

³³ Regarding the complementarity of the principles of availability and the active role that the judge must play in finding the truth in administrative litigation, see C.-S. Săraaru, *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, 2022, p. 203, 204.

7. Halberstam, D., "Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach", *Cambridge Yearbook of European Legal Studies* 23 (2021): pp. 128-58. doi:10.1017/cel.2021.12.
8. Popa, Fl., *Reflecții asupra limitelor principiului disponibilității în procesul civil* in Briciu, T. C., Pop, P. (coord.), *Le Nouveau Code de procédure civile roumain: vu de l'intérieur – vu de l'extérieur*, Ed. Hamangiu, Bucharest, 2021.
9. Rachovitsa, A., "The Principle of Systemic Integration in Human Rights Law," *International and Comparative Law Quarterly*, Cambridge University Press, 66 (2017), pp. 557–88, <http://dx.doi.org/10.1017/S0020589317000185>.
10. Săraru, C.-S., *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, 2022.
11. Tabacu, A., Draghici, A., *Disponibilitatea părților și rolul judecătorului în procesul civil* în *Analele Universității Babeș-Bolyai Cluj-Napoca*, *Studia Jurisprudentia*, nr. 2/2010.
12. Theohari, D. N. & Eftimie, M. in Boroi, G. (coord.), *Noul Cod de procedură civilă. Comentariu pe articole*, vol. I, 2nd edition revised and added, Ed. Hamangiu, Bucharest, 2016.
13. Timiș Court, Civil Section I, Civil Decision nr. 1705/13.12.2022, *not published*.
14. Timișoara Court of Appeal, Civil Section I, Civil Decision nr. 115/09.05.2023, *not published*.
15. Timișoara District Court, Civil Section I, civil sentence nr. 1979/08.02.2022, *not published*.