

CONTESTATION FOR ANNULMENT COMMON IN THE REGULATION OF THE NEW CODE OF CIVIL PROCEDURE

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Abstract:

Contestation for annulment whatever its form, is an extraordinary means of appeal that is exercised according to art.503-508 of the new code of civil procedure, only for the reasons and under the conditions laid down by the legislator.

Contestation for annulment allows the party that is interested to challenge a final judgment given in violation of procedural rules. The paper addresses theoretical issues, of the common appeal for annulment, being analyzed aspects aimed at the parties, the object, the exercise period and settlement procedure, of this remedy available to the interested party.

Keywords: *appeal, annulment, remedy, court, judgment*

JEL classification: K00, K10

1. Prior notions

In order to remedy any errors that may be found in a judgment, the Romanian legislator has regulated the institution of appeals through which one can get a judgment's annulment or alteration. Currently, the civil Procedure Code that entered into force on 15 February 2013, covers the following remedy methods: appeal (art.466-482), recourse (art.483-502), the appeal for annulment (art.503-508) and review (art.509-513). To be specified is that the appeal in the interest of the law is also regulated by the new code, but is no longer included in the category of appeals as in the old code, but is provided separately in Section III, Provisions for ensuring an uniform judicial practice, art.514 -518.

Initially the Civil Procedure Code of the 1865 does not regulate the appeal for annulment as remedy, this legal institution being introduced into the Code by Law No. 18 of 2 February 1948.

This extraordinary means of appeal is regulated by the New Civil Procedure Code (hereinafter NCPC) in art.503-508². As outlined in the provisions which regulate it, the appeal for annulment is an extraordinary means of appeal, of withdrawal, non-suspensive of enforcement, exercised against the final decisions of the courts on the grounds expressly and limitedly prescribed by law by which is required from the court which gave the judgment that is under appeal, to cancel the its own judgment and to proceed to a fresh determination the case.

C.P.C. just like the old code, regulates two types of annulment appeal: the ordinary or common law appeal for annulment [art.503 par. (1)], and contestation in special cancellation [art.503 par. (2)].

In the following, we will address the theoretical issues, of the ordinary appeal for annulment.

2. The Parties, the reasons and conditions for the admissibility of the ordinary appeal for annulment

The appeal for annulment whatever its form, may be exercised by any of the parties which participated in the settlement of the dispute which was judged, are satisfied legal requirements. Therefore, the appeal for annulment may be brought, as appropriate, by the

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plaintiff or defendant, recurrent or respondent The appeal for annulment may be introduced by the prosecutor as provided in Article 92. (4) din N.C.P.C.

As pointed out, the common law appeal for annulment, is governed by art.503 par. (1) which provides only one reason under which this remedy may be exercised.

Thus, the mentioned article provides that a final judgment can be challenged by appeal for annulment when the appellant was not legally summoned, nor was present at the time when the trial took place¹.

From the actual drafting of the text of law, it appears that the legislator set two conditions for the admissibility of the appeal, which are cumulative. In this regard, it is necessary that both the summoning procedure has not been fulfilled with the party exercising the appeal as well as that the party has not been present at the time when the trial took place.

It can be seen that the legislature refers to the day the trial took place, without further clarification.

We appreciate that the legislator has considered only the irregularity of the citation procedure for the day when the case is settled, since irregularities targeting previous periods of trial, are covered if not invoked as provided by law (Boroi, Rădulescu, 1996).

The conditions provided by art.503 par. (1) are cumulative. Therefore, if the party was not legally summoned, but was present at the time when the trial took place in person or through a representative, the condition imposed by the article enunciated, is not satisfied and consequently, the appeal is not admissible.

Regarding the irregularity of the citation procedure, of the provisions of Article 160 of the NCPC it appears that it concerns infringements of the provisions regarding the preparation, handing of the citation, its receipt in a shorter period than that provided by Article 159 and not receiving the citation (Leş, 2001).

The reason, based on which can be exercised ordinary contestation for annulment may be used only in cases where the law provides that the settlement of the dispute is made only by summoning the parties, this issue shown in the wording of art.503 par. (1).

Therefore, when by law it is stipulated that the matter shall be solved without summoning the parties, or citation is optional the analyzed reason can not be invoked².

For the admissibility of the appeal for annulment the legislator establishes some essential particular conditions. A first condition is provided by art.503 par. (1) and aimed at the final decisions (The old provisions referred to the final decisions).

According to art.634 of N.C.P.C. are final judgment:

- a) decisions which are not subject to appeal or recourse;
- b) judgments given in the first instance, without appeal right, not challenged with recourse;
- c) judgments given in the first instance which have not been subject to appeal;
- d) judgments given on appeal, without the right to appeal as well as those with recourse that are not challenged;
- e) judgments given on recourse, even if, by this, it has been resolved the background of the case;
- f) any other decision which, by law, can not be appealed;

According to the provisions of para. (2) art.634, the mentioned decisions, become final at the date of expiry of the legal period for exercising the call or appeal or where appropriate, from the date of delivery of the decision. From the actual drafting of the text provided by art.503 par. (1) it appears that it may be object of the appeal for annulment regardless of its form, only final judgments. If this requirement is not met, the attack method of the appeal for annulment shall be rejected as inadmissible.

¹ Art.317 in par. (1) of the old Code of Civil Procedure governed situation where the party summoning procedure for the day of the trial of the cause was not performed according to the requirements of the law;

² According to Article 998 para. (2) NCPC, the presidential ordinance, may be given without summoning the parties;

Another condition is stipulated by Art.504 para. (1) of NCPC imposing the requirement that the reason provided by art.503 par. (1) can not be invoked appeal or recourse route. This means that the party can not resort to the attack method of the appeal for annulment, if it has access to appeal or, if necessary, on recourse. Thus, in the event that criticism regarding unlawful citation could have been invoked with appeal method or recourse and the party did not, the appeal for annulment is not admissible since it does not meet the criteria imposed by the legislator.

In the doctrine it is shown that "it does not matter if the party actually exercised the ordinary method of or recourse, but is necessary to be noted that they could have been exercised" (Tabacu, 2013).

The solution is logical and clear from the provisions of Art.504 para. (1) and can thus be met two conditions: a) the party exercised the appeal or recourse, but has not raised the lack of citation; b) the party, was entitled to exercise the appeal or recourse, but has not used this right. In any of these cases the appeal for annulment is not admissible.

But Article 504 para. (2) creates an exception to the rule. The appeal may be accepted in the event that the reason was raised by the notice of appeal, but the court rejected it because he needed checks actually incompatible to the recourse or if the recourse through no fault of the party, was dismissed without being investigated. It can be seen that the text mentioned refers only to the recourse and not the appeal (Spinei, 2013).

Regarding the first situation, it must be noted that the provisions of Art.504 para. (2) are applicable only to the extent that there are necessary checks to be made that are actually incompatible with the recourse (Ciobanu, 1997, Stoienescu, Zilberstein, 1981). Therefore, as emphasized in the literature, if it is possible to check the facts based on the documents in the file, or of new documents that can be used in an appeal under art.492, the interested party must assert the irregularity regarding the citation, by the path of recourse, the appeal for annulment not being admissible.

A second hypothesis finds its application where the appeal was rejected without being in fact investigated and are not thereby caused by the fault of the party.

To note is that the new regulation refers to the situation where the appeal was rejected without being in fact investigated, but it is established the condition that the rejection is not to be due to the fault of the party, since otherwise, the method of the appeal for annulment is inadmissible.

By introducing the condition that the dismissal of the appeal is not to be determined by the party's fault, it has narrowed the scope of application of the appeal for annulment. The old regulations provided the possibility for the exercise of the remedy of appeal for annulment, even if failure to process the merits of recourse was due to the fault of the party. The new rules on the matter of appeal for annulment of common law even if more restrictive, are likely to reinforce the vigilance of the parties to respect the rules of procedural law, as otherwise, they bear the negative consequences resulting from an improper procedural activity.

It is not allowable nor appeal brought against the decision of the recourse if the recourse has been exercised under the convention of the parties. The solution emerges from the provisions of art.459 par. (2) of NCPC final part which states that in this situation the path of appeal it can invoke only infringement or misapplication of rules of substantive law.

It should be mentioned that a decision against which the appeal for annulment was exercised, can not be challenged on the same side with a new challenge even if the second application is invoked for other reasons (art.504 alin.(3)). This provision is applicable only to the special appeal for annulment.

3. The competent court

As a remedy for withdrawal the appeal for annulment whatever its form, is introduced to the court whose decision is appealed, matter contained in art.505 par. (1) of NCPC

Compared to the previous applicable regulations, N.C.P.C. make a substantive change in the matter of incompatibility of the judge, stating in art. 41alin. (1) that the judge who issued an interlocutory order or decision by which to solve the case, can not judge the same reason in the appeal for annulment.

We consider that the solution adopted by the legislator is welcome and serves to eliminate subjectivism in the outcome of the appeal.

4. The term for exercising

The period for exercising the appeal for annulment whatever its form, is governed by art.506 of NCPC Unlike the previous regulation provided by art.319 par. (2), which set different terms as the contested judgment was enforceable or not, the new provisions do not make this distinction, and provide that the appeal may be brought within 15 days from the notification of the decision, but not later than one year after the judgment has become final.

It should be noted that the legislator has established two terms of which one of 15 days, calculated on the free days from the date of judgment, and a deadline of one year, which shall run from the date the judgment became final. It follows that the interested party must exercise method of appeal for annulment within the period of 15 days, calculated from the date of judgment.

The one-year deadline is a deadline by which the party concerned may bring the appeal for annulment.

Therefore, even if the time the applicant was familiar with the decision is after the expiry of one year the appeal for annulment can not be exercised, the interested parties should make every effort to pursue the method within that period. If the period of 15 days of the decision was reached, the appeal for annulment shall be rejected as late introduced, even if made in a period of one year from the date on which the judgment became final. Appeal for annulment must be justified according to art.506 paragraph 2 of the NCPC within the period of 15 days provided for its formulation, under penalty of nullity.

5. Suspension of the judgment under appeal

The way by which it can be obtained the suspension of enforcement of the decision attacked by appeal for annulment, is provided by 507 of N.C.P.C. which takes the provision under the art.319 (1) of the old Code, according to which the court may order the suspension of the decision whose cancellation is required, on condition of deposit of bail.

The provisions of art.484 N.C.P.C. regarding the suspension of enforcement of the decisions subject to appeal are applicable, also on matters of appeal for annulment. The amount of bail to be paid shall be determined according to Art. 718 para. (2) and (3) of N.C.P.C. and proof of payment of bail is attached to the application for suspension of execution of judgment, made by the interested party.

From the provisions of art.718 par. (2) N.C.P.C. it is shown that the bail deposit is a condition for the admissibility of the application for suspension, leading to the conclusion that its failure to submit the amount determined by the court draws rejection.

6. The settlement procedure

The settlement procedure, of the appeal for annulment of common law, is governed by art.508 of NCPC the legislator provides that the settlement of the contestation is made urgently and with priority, being applicable its own procedural provisions of the trial ended with the judgment under appeal.

The law establishes the obligation of deposit of the statement of defense at least 5 days before the first hearing so that the opposing party can become familiar, on its content and proceed accordingly.

Since the meeting is not communicated, the appellant can take note of it in the case file. It should be noted that the provisions of art.508 par. (2) are in correlation with the provisions of paragraph 206. (2) of NCPC which stipulates that the meeting shall be communicated to the applicant only in the event that the law does not provide otherwise.

Therefore, the appellant can study the meeting after its submission to the case, and in order to be aware of its content, he will have to check whether or not the opposing party filed the meeting to the complaint filed and to take measures it deems appropriate.

We believe that the appellant may request a copy of the meeting, since the legislator does not forbid it, but states only that this is not communicated. Moreover, the provisions of Article 29 para. (5) OUGnr.80 / 2013, it appears that the parties may request documents from the documents in the file¹.

In the case the reason for the annulment appeal is well founded, the legislator governs in par. (3) of art.508 the possibility that a court has to cancel the judgment under appeal and to hear the case at the same hearing, being provided for two situations:

a) if possible, the court will issue a single decision that will set aside the judgment under appeal and will hear the case;

b) when the resolution of the case at the same time is not possible, the court will decide aside the judgment, and will determine a deadline in order to resolve the case through a new decision, in which the annulling judgment can not be appealed separately, but only with the decision to hear the case;

According to of art.508 in par. (4) N.C.P.C. the judgment given in the appeal for annulment is subject to the same remedies as the judgment under appeal.

7. Conclusions

The appeal for annulment is an extraordinary remedy and is a remedy for the correction of any errors contained in a judgment which can be exercised only in cases and under the conditions provided by law.

This legal remedy was maintained also by the New Code of Civil Procedure which introduced some new rules and has clarified certain aspects of the exercise conditions.

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¹ Published in the Official Gazette of June 29, 2013 nr.392;