COUNTERCLAIM IN THE CIVIL PROCEDURAL LAW – COMPARATIVE LAW ISSUES

Ph.D. student **Ioana-Andra PLEȘA**[1]

Abstract

This study analyses the issue of the counterclaim in the Romanian civil procedural law and in some other European states, namely Spain, France and Belgium. The main objective of the study is to find similarities and differences of this incidental claim in the legislation of several European states. For this purpose, we analysed the Codes of Civil Procedure for each state in a comparative regard. Also, the purely legislative matters were correlated with juridical opinions in order to have a complex analysis. The counterclaim is an incidental claim of heightened importance, it is a reaffirmation of the principle of equality of the parties, both plaintiff and defendant, in the civil action. Taking into account that the doctrine gives to counterclaim the character of a real civil action, and that the practice confirms this aspect by the importance given to this request, its importance is undeniable, despite the stipulation brought by the New Code of Civil Procedure according to which the counterclaim is not mandatory in all cases. We consider that given the increased importance of the counterclaim, it should be mandatory in all cases and not optional, since its absence admits the interpretation that the main plaintiff agrees with the points raised by the defendant by his contestation (through counterclaim).

Keywords: *counterclaim, plaintiff, defendant, principle of the parties in the civil action.*

JEL Classification: K33, K41

1. Preliminary issues

The counterclaim is an ancillary claim that gives the defendant the possibility to obtain an advantage other than the mere dismissal of the claim of his adversary. Furthermore, it serves to reconfirm the importance of the principle of availability in the civil procedural law. Through consecration of the principle of availability as a fundamental principle of civil procedural law, it is established the rule according to which the parties may dispose of their rights in any stipulated situation by law.

Article 209 paragraphs (1) - (7) of the New Code of Civil Procedure regulates the term and conditions of the counterclaim.

Thus, if the defendant has, in relation to plaintiff's plea, claims arising from the same legal relationship or closely related to it, he may formulate a counterclaim. If the pleas formulated through counterclaim regard other people than the plaintiff, they may be sued as defendants.

In the legal literature, the counterclaim is defined as being the procedural act by which the defendant seeks the use of a personal right against the plaintiff[2].

Furthermore, "the counterclaim appears as a legal faculty against the defendant who has the right to choose between capitalizing his claims through an incident action or a counterclaim"[3].

In the doctrine, the counterclaim receives the characteristic of a true civil action[4]. The civil action is a legal institution of major importance, which is reflected throughout the civil procedural law. All civil procedural institutions are governed by it. The civil action may be defined as all procedural means by which can be achieved the judicial protection of subjective rights and of legal situations protected by law[5].

---

[1] Ioana-Andra Pleșa - „Lucian Blaga" University of Sibiu, plesaioanaandra@yahoo.com .

[2] G. Boroi, M. Stancu, *Drept procesual civil*, Hamangiu, Bucharest, 2015, p. 354.

[3] Ioan Leș, *Tratat de drept procesual civil. Vol. I. Principii și instituții generale. Judecata în fața primei instanțe,* Universul Juridic, Bucharest, 2014, p. 641.

[4] Ioan Leș, *op.cit.*; I. Stoenescu, S. Zilberstein, *Tratat de drept procesual civil*, Didactic and Pedagogical Publishing House, Bucharest, 1977, p. 468.

[5] V. M. Ciobanu, Gabriel Boroi, *Drept procesual civil,* C.H. Beck, Bucharest, 2009, p. 15.

المنارة للاستشارات

www.manaraa.com

The civil action is not just a tool of protection of alleged civil rights, but also a way to defence in trial. This feature may, by analogy, be attributed to the counterclaim.

According to literature, the counterclaim has the nature of "true summons"[6], noting that through counterclaim only pleas that are related to the application for summons, to the original application, may be formulated. This characteristic comes to reconfirm the incidental nature of the counterclaim, being a request in a process already begun.

If by counterclaim it shall not be invoked claims that originate from the same legal relationship, this specific counterclaim will be dismissed as inadmissible.

2. General conditions of counterclaim in the Romanian Code of Civil Procedure

The counterclaim must meet the conditions for the application for summons. Under the new regulations the application for summons, and therefore the counterclaim, must contain the following elements[7]: for individuals the surname and first names, address or residence; for corporate entities it must be mentioned their denomination and the address of their head office. The application shall also include the personal identification number or, where applicable, the registration code, the registration number in the trade register or registration in the register of legal entities and the bank account of both plaintiff and defendant, if the parties were awarded these identification elements according to the law, as far as they are known by the applicant.

If the applicant lives abroad, his chosen residence in Romania shall also be mentioned, in order to receive all communications on the process. This requirement is mandatory, because any person who makes an application must identify himself / herself by presenting his / her identification attributes.

The application for summons, and therefore the counterclaim, also includes the first and last name of the person who is party to the proceedings, and in case of representation by a lawyer, the name, surname and professional office.

The proof of representation is imperative, being made in the manner prescribed by article 151 NCCP.

The application for summons, and therefore the counterclaim, also includes the object of the request and its value, as the plaintiff considers when it is monetised, and the calculation by which he came to determine that value, indicating the appropriate documents.

An innovative aspect brought by the New Code of Civil Procedure refers to the fact that when the plaintiff wants to demonstrate his application or any of the complaints by questioning the defendant, he will ask the presence of the defendant in person, if the defendant is a natural person. If the law requires that the defendant will respond in writing to this interrogation, then his response will be attached to the summons.

Not least, Article 194 letter (e) stipulates as part of the request for summons the signature. This element is extremely important, because in this way the request takes shape being assumed by the person who introduced it. Thus, the defendant becomes its author, and by its admission he will receive the title of plaintiff. The absence of this element qualifies the application for summons as nonexistent. This penalty also applies to counterclaim[8].

Under penalty of forfeiture, the counterclaim is filed once with the contestation or, if the defendant is not obliged to contestation, no later than the first hearing.

The counterclaim shall be communicated to the plaintiff and, where appropriate, to persons under paragraph (2) in order to formulate contestation. The provisions of Article 201 shall apply accordingly.

When the plaintiff has amended the application for summons, the counterclaim shall be filed no later than the date given to the defendant for this purpose. Provisions of paragraph (5) are applicable.

---

[6] G. Boroi, M. Stancu, *op.cit.*, p. 354.
[7] See Article 194 New Code Of Civil Procedure.
[8] Ioan Leş, *op.cit.*, p. 607.

المنارة للاستشارات
www.manaraa.com

The doctrine reinforces the principle that the plaintiff may not make a counterclaim to the counterclaim of the first defendant[9].

3. Counterclaim in the Spanish Code of Civil Procedure

Article 406 of the Spanish Code of Civil Procedure regulates the content and form of the counterclaim, namely the inadmissibility of the counterclaim that has no connection with the application for summons and the default counterclaim.

The defendant may contest the application through counterclaim by formulating requests. The counterclaim shall be admitted only if there are connections between the defendant's claims and the claims covered by the main claim.

According to paragraph (2) of Article 406, the counterclaim shall not be admitted when the court declines its material or objective jurisdiction or when the action which is brought must be dealt with in proceedings of a different type or nature. Paragraph (3) of the same Article stipulates that in the counterclaim it should be clearly required the specific judicial protection by which the respect of the main plaintiff and other parties is to be obtained. In no case shall a counterclaim be formulated if the defendant agrees to those raised in the request for summons.

Article 407 regulates the recipients of the counterclaim and the answer to counterclaim. The counterclaim may also be introduced against subjects who have not applied for summons, as long as they can be considered as the voluntary or necessary joint litigants of the plaintiff. They may file an answer to the counterclaim within 10 days from the date on which notice of the counterclaim is served.

According to Article 408[10] if the sued person alleges in his defence facts that could lead to absolute nullity of the plaintiff's pleas, the plaintiff may request the Court Clerk to contest the nullity solution within the same time limit as for the appeal to counterclaim.

In terms of conducting and deciding on the pleas contained in the defence and the counterclaim, Article 409 provides that the plaintiff's pleas as formulated in the defence and the counterclaim shall be conducted and decided upon at the same time and in the same manner as the pleas contained in the main claim.

4. Counterclaim in the French Code of Civil Procedure

In the French legislation, the joint application is regulated. It is similar but not identical to the counterclaim from the Romanian legislation.

Article 57 of the French Code of Civil Procedure stipulates that the joint application is the act by which, after passing through the first steps of the written stage, the parties submit to a judge their respective pleas, the points on which they disagree.

This application must fulfil certain aspects in lack of which it shall be rejected. For individuals it must be mentioned the surname, first names, profession, address, nationality, date and place of birth of both parties. For corporate entities it must be mentioned their form of organization, denomination, the address of their head office and the body which legally represents them. In this application it must be also mentioned the competent jurisdiction. The joint application must be dated and signed by the parties and it must contain the conclusions.

Unlike the counterclaim regulated in our legislation, in the French legislation, any party may submit this joint application.

5. Counterclaim in the Belgian Code of Civil Procedure

According to Article 706[11] of the Belgian Code of Civil Procedure, a *joint application* may be introduced to the court of first instance, specialized courts in labour disputes, commercial court,

[9] See I. Stoenescu, S. Zilberstein, *op.cit.*, p. 460

[10] Paragraph (2) of Article 408 as modified by *Ley 13/2009*. Law of the reform of procedural legislation for the implementation of the new Judicial Office. Oficina judicial («B.O.E.» 4 nov.). *Vigencia: 4 mayo 2010.*

المنارة للاستشارات

www.manaraa.com

the judge of the peace and police court. The application must be signed and dated by the parties, under penalty of nullity.

The jointly application is submitted or addressed to the Registry by registered letter.

If the parties or one party claims in his application or if the judge considers it necessary, it may be fixed a date for hearing within 15 days from the date of application of the joint application.

6. Conclusions

The counterclaim is a reaffirmation of the principle of equality of the parties in the civil action. If the summons has in response the contestation, this one has in response the counterclaim.

The two parties, the plaintiff and the defendant, expose their claims and invoke defences right from the written part of the civil trial, which gives a good knowledge issue in fact and law by the judge.

Taking into account that the doctrine offers to counterclaim the character of a real civil action, its importance is undeniable. Moreover, a counterclaim determines time and cost savings, because it represents an application introduced in a process already pending[12].

Referral to court in the civil action is one of the most important institutions of civil procedure law and the law in general, because in the absence of a complaint to the civil court, the civil conflict could not be brought before the court and could not be subject to a fair judgment according to law and in accordance with fundamental principles. Such individuals would be restricted in exercising their rights, or could be put in the situation of execution of some obligations imposed abusively.

Referral to court in civil matters is a small part of the civil procedural law, but which has great importance in resolving a civil case because it is the triggering factor of carrying the entire civil action.

Referral to court, as provided by the law, is the way that triggers the civil action, it is a condition *sine qua non* in the initiation of proceedings.

The importance of the theme lies in the fact that the judgment is one of the most important institutions of civil procedural law. Namely, it aggregates a set of principles and legal norms, which search to ensure justice and transposition of legal theories into practice in order to protect the rights and the fulfilment of duties of individuals and legal persons. It also seeks rehabilitation of the legal order that was violated by ignoring civil subjective rights.

According to paragraph (1) of Article 192 New Code of Civil Procedure, any person may address the competent court of justice by an application for summons as to defend his legitimate rights and interests.

For proper settlement of the case, the law provides the application for contestation and the counterclaim. This stipulation of the law is essential in a state with modern legislation.

The counterclaim is of heightened importance, it is a reaffirmation of the principle of equality of the parties in the civil action. If the application for summons has in response the contestation, the latter receives in response the counterclaim.

Taking into account that the doctrine gives to counterclaim the character of a real civil action, its importance is undeniable. Also, by the choice of an incidental mean, reflected trough the introduction of the counterclaim, it is ensured the avoidance of delivering some conflicting decisions.

***De lege ferenda**, given the increased importance of the counterclaim, it should be mandatory in all cases and not optional, since its absence admits the interpretation that the main plaintiff agrees with the points raised by the defendant by his contestation.*

[11] Art. 706. <L 2006-07-10/39, art. 11, 078; En vigueur : 01-01-2013 (voir L 2012-12-31/01, art. 16) >

[12] Ioan Leş, *op.cit.*, p. 641.

المنارة للاستشارات
www.manaraa.com

Bibliography

I. Juridical literature

1. G. Boroi, M. Stancu, *Drept procesual civil*, Hamangiu, Bucharest, 2015.
2. V. M. Ciobanu, Gabriel Boroi, *Drept procesual civil,* C.H. Beck, Bucharest, 2009.
3. Ioan Leş, *Tratat de drept procesual civil. Vol. I. Principii şi instituţii generale. Judecata în faţa primei instanţe,* Universul Juridic, Bucharest, 2014.
4. I. Stoenescu, S. Zilberstein, *Tratat de drept procesual civil*, Didactic and Pedagogical Publishing House, Bucharest, 1977.

II. Legislation

1. Belgian Code of Civil Procedure.
2. French Code of Civil Procedure.
3. Romanian New Code of Civil Procedure.
4. Spanish Code of Civil Procedure.

المنارة للاستشارات

www.manaraa.com

Copyright of Perspectives of Business Law Journal is the property of Society of Juridical & Administrative Sciences (Societatea de Stiinte Juridice si Administrative) and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.

المنارة للاستشارات

www.manaraa.com