The Right of Litigant Parties to Information Regarding Reasons, Defences and Claims in the Exercise of the Principle of Adversariality in the Civil Process. The Perspective of French Law

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Abstract

This article aims to identify the concrete content of three rights deriving from the principle of adversariality in the civil litigation, i.e. the right to know, the right to information and the right to understand and, consequently, to establish a logical correlation between them. Next, the article aims to establish the concrete content of the right to know together with the requirements that the right to information must meet, with the analysis of the temporality of this right. We used as methodological pillars the bibliographic research, the comparative method using French doctrine and regulation, the inductive method to highlight the existence of the triplet right to know – right to information – right to understanding within the construction of the principle of adversariality and to extract the conditions associated with the right to information. The article tends to highlight the need to be aware of the importance of the right to information regarding reasons, defences and claims in the civil process, often disregarded in practice. It warns the participants in the civil process, be they parties or the Court, that the basis of the right to an effective adversarial litigation is necessarily the right to information and that its requirements must be met.

Keywords: *the principle of adversariality, the right to know, the right to information, the right to understand, temporality.*

JEL Classification*:* K15, K41

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1. Preliminary considerations

Starting from the decision of the ECHR *Nideröst-Huber v. Switzerland*[2], in the national doctrine[3] it was shown that, in order to respect the fundamental principles of the fair process, 'national law must:

a) allow the serving of writs that are likely to influence the judge's decision;

b) provide for the possibility of the parties to discuss the observations submitted to the Court, even if they are considered to be simple summaries of previous documents;

c) ensure compliance with these essential conditions for a fair trial even at the expense of the speed of the civil trial';

d) use a certain terminology for the matters debated matters prior to the debates on the merits and debates on the merits.

2. Premise of summoning

The principle of adversariality is defined[4] as the principle according to which a party is required to serve to his procedural opponent the pieces and conclusions of a case in order to be able to prepare his defence, to know the arguments and to be able to respond in an informed manner.

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[2] CEDO, *Nideröst-Huber c. Elveţia*, the decision of 18.02.1997, on site http://hudoc.coe.int.

[3] Loredana Cristina Larionescu, George Trantea, „Notele scrise şi principiul contradictorialităţii", *Curierul Judiciar*, 12/2009, p. 695.

[4] Catherine Puigelier, *Dictionnaire juridique*, ed. 1, Ed. Larcier, Bruxelles, 2015, p. 776.

The possibility of contradictory debates is only possible if all interested persons are **able to participate** within the procedure[5]. So, the **defendant** must first of all be informed of the **existence** of a **litigation** directed against him[6]. That is precisely why, art. 14 para. (1) of the Romanian Civil Procedure Code expressly states that 'the court cannot rule on a claim only after summoning or appearing the parties, unless the law provides otherwise'. From this norm it follows that it is **enough** for the party to be **summoned** (n.a. legally) for the adversarial nature of the procedure to be respected[7]. In the same way, art. 14 of the French Civil Procedure Code provides that 'no party can be judged without being heard or cited[8]' and art. 3 paragraph (1) of the Portuguese Civil Procedure Code: 'The Court cannot resolve the conflict of interest that the action involves […] without the other being duly called to oppose'. Nothing more natural.

From the previously mentioned norm of our law results the rule of **contradictory debates** in concrete between the parties. However, if the party is legally summoned but does not appear, there is **not**, in fact, a **contradictory debate** between the parties; however, the principle of adversariality is respected because the premise-condition of the legal citation has been fulfilled.

But the mere citation is not enough for the defendant to be respected the right to adversarial proceedings. For this, he must, then, **know** the claims and the means of proof that the plaintiff relies on through the summons, **inform** himself about them and **understand** concretely the claims and implicitly the cause of the claim, including the legal basis and the concrete claims exhibited.

In the next section we will analyze the correlation between the right to know, the right to information and the right to understand, and in Section III we will examine the right to information.

3. The relationship between the right to know, the right to information and the right to understanding

a. Right to know. The right to know and the right to discuss are rights subject to the principle of adversariality.

The right to **know** implies, in advance, the satisfaction of the right to **information** and, consequently, the right to **understanding**.

From a substantive point of view, in relation to art. 14 para. (2) of the Romanian Civil Procedure Code the right to know is inherent in the principle of **adversariality** and implies that the party finds out the factual and legal **grounds** on which the procedural adversary bases its **claims** and **defences** and the means of **evidence** that its adversary intends to rely on, a circumstance that allows it to organise its defence

It can be easily observed that the right to know is a **right of both parties**; it varies from one procedure to another[9] and requires a **high level of depth**.

Of course, in proceedings that are settled without summoning the parties, this right is sacrificed together with the principle of adversariality.

b. Right to information. In order to give legal effectiveness to the right to know, it is necessary to exercise the right to information beforehand. The requirement of mandatory prior information[10] regarding claims, defences and evidence must therefore be met. In this sense, art. 14 para. (2) of the Romanian Civil Procedure Code states: '*The parties must make known to each other and in a timely manner, directly or through the court, as the case may be, the factual and legal reasons on which they base their claims and defences, as well as the means of evidence they agree to use, so that each of them can organise their defence*'. Similarly, art. 15 of the French Civil Procedure Code (the source of our code in this matter) provides that the parties must make known to each other

[5] Lionel Miniato, *Le principe du contradictoire en droit processuel*, L.G.D.J., Paris, 2008, p. 173.
[6] Yves Strickler, Alexey Varnek, *Procédure civile*, 13e édition Ed. Bruylant, Bruxelles, 2023, p. 245.
[7] Lionel Ascensi, *Du principe de la contradiction*, L.G.D.J., 2006, Paris, p. 78, regarding the similar situation in French law. Art. 14 of the French Civil Procedure Code provides that no one can be judgedwithout being summoned or without appearing.
[8] French Civil Procedure Code can be consulted on the following site https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT0000 06070716/, site accessed last time on 2.06.2024.
[9] Lionel Ascensi, *op. cit.*, p. 73.
[10] Lionel Miniato, *op. cit.*, p. 185.

in a timely manner the factual grounds on which they file their claims, the evidence and the legal grounds they invoke so that each organise the defence.

c. Right to Understand. In order to be able to usefully discuss the information (to counter the pieces of the file, the assertions or reasoning of the opponent), it is necessary that the party receiving it can **understand** it[11]. So, the right to know includes the right to understand.

This right presupposes the **intelligibility** of the information, respectively the possibility to go beyond the words and ro **assimilate** the information.

One of the factors that affect and sometimes actually hinders the intelligibility of information is the **legal language** itself. This is a frequent cause of **communication incomprehensibility**[12].

The specialized language of the legal profession is suggestively called 'legalese' in the American doctrine, it is not recommended precisely in relation to the inherent difficulties of understanding by the majority of the population[13]. It is a language inaccessible to people lacking legal training and practice[14], which involves the use of **technical terms** without their being **defined**[15]. If, by its very nature, it is **impossible** to ask for the **full intelligibility** of a document or speech by a party, at least the effect of **greater transparency** of legal language, and especially of judicial language, finds **significant justification in the necessity of the principle adversariality**[16].

Fortunately, this gap between 'expressed' and 'understood', inherent in all communication, but widened when it occurs between specialists and laymen, is **compensated** by a **second effect of the principle of adversariality**, which is **legal assistance**[17].

Unlike the right to know which requires a high level of depth, the level of accessibility of the case does not necessarily have to be high. It will depend on a case-by-case basis depending on the **technicality** of the case and other specific elements. Therefore, the right to information can lend itself, depending on the context, to a **surface understanding** in technical files where the input of a specialist/expert is indispensable to the disclosure of technical problems.

Therefore, in a first phase, a purely **intuitive accessibility is sufficient**; as the file evolves and the producing, if it is the case of an expert report, the level of accessibility will increase, reaching a **basal** level because the **technical** problems are **not** removed, but receive a possible **technical solution**. So, it is not necessary for the parties to have an in-depth level of accessibility at the time of the debates. This level will depend on the penetration power and pedagogical skills of the expert, on the level of understanding of the parties and their eventual specialization, on the existence of expert advisers to the parties.

Another prerequisite for the agreement is the translation of the documents into the recipient's language[18].

4. Right to information

4.1. Substantiality of the right

i. General characterisation of the right to information. Specific to this type of information is that the initiative (information) does not belong to the Court or the opposing party, but rather to the targeted party. It is implicit in the regulation. In this equation, the Court has or, as the case may be, can only have[19] the role of 'mediator' in the sense that it carries out the procedure of communicating

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[11] Marie-Anne Frison-Roche, *Généralités sur le principe du contradictoire. Étude de droit processuel*, L.G.D.J., Lextenso éditions, Paris, 2014, coll. "Anthologie du Droit", p. 169.

[12] Liviu-Alexandru Viorel, *Ajutorul public judiciar în materia taxelor judiciare de timbru – garanție a dreptului de access la o instanță*, Universul Juridic, Bucharest, 2024, p. 906.

[13] The idea is mentioned on the following site *http://www.merriam-webster.com*, accessed on 7.06.2024.

[14] Liviu-Alexandru Viorel, *op. cit.*, p. 906.

[15] Peter Tiersma, (2006). „Some Myths About Legal Language", *Law, Culture and the Humanities*, *2*(1), 2006, p. 29-50. https://doi.org/10.1191/1743872106lw035oa.

[16] Marie-Anne Frison-Roche, *op. cit.*, p. 170.

[17] Ibid, p. 170.

[18] Ibid, p. 169, 170.

[19] It has, to the extent of communication 'through the court' and can have to the extent of 'direct' communication within the meaning

the summons request, the documents, respectively, the material means of evidence to the defendant. From this point, it is the responsibility of the defendant to inform himself, respectively to take knowledge of the elements revealed by the plaintiff.

Of course, the **defendant's failure** to **inform** himself under the conditions of fulfilling the plaintiff's obligation to provide the necessary information is **imputable** to the former and, thus, cannot be considered a **violation** of the **adversarial principle**.

It is about **prior information**, in the **initial** phase of the process, indispensable for **knowing** and **understanding** the claims and means of proof opposed by the plaintiff, an indispensable **premise** for the exercise of the principle of adversariality.

Only after the information is understood, it can be contested by the interested party and then by the judge[20].

ii. The obligation to make known the factual and legal reasons and the means of proof. Article 15 of the French Code of Civil Procedure states that the duty to communicate exists 'so that [each party] can organise its defence'. From this perspective, the obligation to provide information has as a corollary the right to present arguments, documents or evidence, in response to the elements thus transmitted[21].

So, the obligation deriving from art. 14 para. (2) of the Romanian Civil Procedure Code represents the premise for the exercise of the right to know and therefore for the exercise of the right to information.

The previously mentioned provision is rational, it is of obvious legal sense and requires organisation.

Beyond the cacophony that perhaps could have been avoided, the phrase 'to make known' has an **abstract** character not indicating, in concrete terms, the ways in which the notification can be made.

With regard to provisions of art. 14 para. (2) of the Romanian Civil Procedure Code judiciously showed that '*[...] is not a simple programmatic statement, but a solution of principle, which guides the interpretation of the rules relating to the regularisation of the summons request and the written preliminary procedure – of course, and of those related to ensuring adversariality during the trial*[22]'.

iii. Conditions of right to information. In order for the principle of adversariality to be respected, the cumulative fulfilment of the following conditions is necessary:

a) the information must be clear and precise so as to allow the defendant to understand the essence of the claims and the ways in which the alleged facts are to be proven. The information does not comply with the requirements evoked when, from the analysis of the statement of claim, it cannot be established whether the plaintiff is grafted on tortious or contractual civil liability, or in the case of a request that does not have an expressly indicated object and from which it is not clear what the plaintiff specifically requests. Of course, the hypothesis of the type indicated should be filtered and therefore settled within the procedure of verification and regularisation of the request; however, there is a possibility that either the mentioned procedure is not incidental to the procedure in question, or that these elements escape control in this procedure and the request ends up being communicated with the mentioned 'infirmities'.

b) The information should be provided **concretely** (and not abstractly) in order to allow a professional in the field to **anticipate** the means of defence and evidence.

c) The information should be provided **in full**[23], *i.e.* to cover all the essential elements of the

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of art. 14 para. (2) of the Romanian Civil Procedure Code.

[20] Marie-Anne Frison-Roche, *op. cit.,* p. 169.

[21] Serge Guinchard, Frédérique Ferrand, Cécile Chainais, *Procédure civile. Hypercourse. Cours & Travaux dirigés*, 4e édition, Dalloz, Paris, 2015*,* p. 365.

[22] Gheorghe-Liviu Zidaru, *Unele aspecte privind regularizarea cererii de chemare în judecată şi noua reglementare a taxelor judiciare de timbru*, pct. 2.2, § 4, published on www.juridice.ro, on 22 November 2013, accessed on 29.01.2024.

[23] From this perspective, the doctrine states that the principle of adversariality requires the implementation of certain means, namely the production and full communication of the documents of the case at the request of a party, so that this party can take note of them and respond (Serge Guinchard, Frédérique Ferrand, Cécile Chainais, *op. cit.,* p. 365). From this point of view, it combines 2 elements

case and the parts of the file, and not only partially or sequentially, with regard to certain elements. This requirement derives from the need for the **adversarial debate** to be '**complete**[24]'. The information is not effective to the extent that the defendant is exclusively notified of the statement of claim, not of the supporting documents attached to it. In this case, the information is partial, exclusively with regard to the chosen claims, not with regard to the evidence submitted and requested to be administered in the case by the plaintiff.

d) The information should be **effective**, that is, it should achieve the objective envisaged by the legislator. The **qualitative** element of information is targeted. Well, it could not be about an effective adversarial approach to the extent that the summons request would be drawn up by referring to the Romanian substantive law, and the court would rule by referring to the foreign substantive law, without the request to be modified accordingly by the party or without having communicated to the defendant the content of the foreign law and any certificates regarding it.

e) The information should be **continuous**, *i.e.* the party should be able to inform himself during the entire process about the **newly invoked elements**, respectively, about the new means of evidence used by the plaintiff. If (a.n) during the final pleading, the party makes new statements relative to the factual record, in order to respect the right to defence by combating oral factual arguments [art. 13 para. (3) second sentence of the Romanian Civil Procedure Code], the Court will have to, at the request of the interested party, grant a useful term for the preparation of the defence[25]. The request is also justified by compliance with the adversarial principle [art. 14 para. (3) second thesis of the Romanian Civil Procedure Code], which otherwise would not be effective.

After the prior information of the defendant takes place, he has the duty to submit a statement of defence, subject to the hypothesis in which (the statement of defence) is optional and he chooses not to submit it. At this point, the plaintiff is informed correlatively about the defences and means of defence that the defendant intends to use. And this information must have the characteristics indicated above.

4.2. Temporality

i. Common considerations. The right to know is systematically accompanied by its temporal accessory in procedural law.

Therefore, it is necessary not so much to recognise a right to know, but in particular, a right to know **usefully exercisable**, *i.e.* under conditions that allow the interested party to exercise his right to discuss 'wisely[26]'.

What is necessary is the **effectiveness** of the right to know, and this effectiveness is assessed in relation to the communication of the parts of the file in a **timely manner**[27].

ii. Temporal consecutiveness of the right to know and of the right to discuss. From a temporal point of view, it is natural that the right to know should be satisfied before the right to discuss.

If the satisfaction of this right is concurrent or later, adversariality suffers; thus, depending on the unknown elements, we will find ourselves in the presence of an **ineffective** or purely **formal**,

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of definition: (i) one is material: it involves the communication of any document that contains a new element whose knowledge is useful to the party in question (art. 132 of the Romanian Civil Procedure Code: '*The party that makes reference to a document undertakes to communicate it spontaneously to any other party'* and (ii) the other is temporal: the communication of this document must take place within a sufficient time interval, taking into account the nature of the document and the moment of the judgment, the production to a registered person outside the deadline being useless and seen as a sign of the violation of the duty to respect the loyalty of the process (Serge Guinchard, Frédérique Ferrand, Cécile Chainais, *op. cit.,* p. 365).

[24] The doctrine states that, in order to ensure a 'complete' adversarial debate, art. 14 para. (3) of the Romanian Civil Procedure Code provided that 'the parties have the obligation to expose the factual situation to which their claims and defences refer in a fair and complete way […]' - see Ion Deleanu, Valentin Mitea, Sergiu Deleanu (coord.), *Noul Cod de procedura civila. Comentarii pe articole*, vol. I, Universul Juridic, Bucharest, 2013, p. 223.

[25] Alexandru Dimitriu, in Alexandru-Șerban Rățoi, Gheorghe Piperea, Cătălin Antonache, Petre Piperea, Alexandru Dimitriu, Irina Sorescu, Mirela Piperea (coord.), *Codul de procedură civilă: comentarii și explicații,* C. H. Beck, Bucharest, 2019, p. 32.

[26] Lionel Ascensi, *op. cit.,* p. 76.

[27] Ibid, p. 76.

sterile contradiction.

Therefore, the debates cannot take place effectively without the parties having had the opportunity to know in depth the elements subject to the debates.

iii. Measuring 'timely manner'. The timely manner is measured (a) either by the judicial concretisation of the phrase in the specific situation (b) or by a predetermined measurement unit.

a) The judicial concretisation of the phrase 'in due time' in the specific situation. Most of the time, however, temporality is expressed by the phrase '**in due time**', a circumstance likely to raise problems from an **applicative** perspective.

The communication of some parts of the file in such a way as not to allow the recipient to concretely prepare his defence in relation to the concrete circumstances of the case, may give rise to a violation of the principle of adversariality[28].

b) Default unit of measurement. Sometimes temporality could be assessed concretely, in general terms, assuming, in the subtext, that it would be **reasonable** for the party to become **aware** of a procedural document and accordingly **prepare** its defence, including by drafting a procedural document in a certain normatively **predetermined time**. For this hypothesis, the legislator concretises the 'in due time' by expressly consecrating it in temporal units, frequently in **days**.

In common civil procedural law, the defendant has 25 days from the receipt of the summons to file a statement of defence, and the plaintiff has the opportunity to be informed and submit, if necessary, an answer and response within 10 days from the communication of such[29]. However, so that these terms are **not tied** together in the case of **urgent** procedures, the terms can be reduced by the court based on the concrete facts of the case[30]. An **unreasonably large restriction** could bring back into question a possible violation of the adversarial principle.

5. Conclusions

The analysis carried out reveals the existence of the right to know subject to the principle of adversariality which has as premises the right to information and, respectively, the right to understand.

In order for the right to information to be ensured, it is necessary for the information to be **clear** and **precise**, the information to be **concrete**, **complete**, **effective** and **continuous**.

Contradiction can only be effective if the right to know **precedes the right to discuss**.

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[28] For this situation in French law, see the practice of the French Court of Cassation and the French Council of State from Lionel Ascensi, *op. cit.,* p. 74.

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