РОЗДІЛ 13
ЗАРУБІЖНИЙ ДОСВІД

DOI https://doi.org/10.32782/2524-0374/2021-10/168

RATIFICATION OF CIVIL PROCEDURE ACTS CREATED BY A CONTRACTUAL REPRESENTATIVE WITHOUT AUTHORITY: TO BE OR NOT TO BE??

Belei E., PhD in Law,
Associate Professor at the Department of Procedural Law
SUM

National Courts in the judicial practice that they develop every day, and the one that we, the litigants, want to be constant and predictable create a lot of different situations that generate interesting and useful discussions between magistrates, lawyers and law professors. We will try to report further on the conclusions of such a dispute.

In particular, it is about performing a procedural action by the contractual representative without authority and about an ingenious, but worthy of attention, suggestion to apply art.370 of the Civil Procedure Code[1] as procedural norms, according to which, *if a person concludes a legal act on behalf of another person with no powers of representation or powers of attorney in excess, the legal act shall produce effects for the represented person only if he subsequently ratifies it. In this case, the legal act can be ratified both directly and through conclusive actions. Until ratification, the legal act is an inefficient legal act in relation to the represented person.*

We strongly object to making hasty decisions without ensuring consistency of fundamental arguments and without assessing the impact on the fairness of any civil proceeding.

Therefore, we would like to reiterate what seems simple and obvious: nevertheless, there are some differences between the civil regulations and civil procedural rules of similar institutions of law, sometimes these differences are quite big.

Let's start from the saying of the civil law – ***everything which is not forbidden is allowed*** and note that the civil procedural law is guided by another saying – ***everything which is allowed is possible***.

Thus, representation in civil law – as a substantive law – is subject to clear but rather extensive rules. However, it seems indisputable that it refers to **civil** legal rights and obligations (not civil procedural), generated, modified or terminated by **civil legal acts** (not procedural actions) concluded between individuals and legal entities. The subjects of the civil legal relations – the natural and legal persons – are from the legal point of view on equal positions.

On the contrary, the subjects of legal relations are the litigants who, on the one hand, interact with the Court, on the other hand, are in connection with the consideration and settlement of a civil case. It should be noted that the subjects of legal relations are not on an equal footing, the Court is a body of a public authority, which in an impartial manner must ensure the equality of the parties to the legal nature relationship that has become controversial.[2]

Both the litigants and the Court exercise procedural-civil legal rights and obligations that appear, are modified or terminated after performing civil procedural legal acts. We find that our legislator avoids defining what is generically called procedural acts in doctrine.

In Romanian literature, a procedural act means both a legal operation and a document stating this operation[3].

Indeed, if we had tried to separate the legal act, *lato sensu*, from the procedural act, *stricto sensu*, we could have identified the similarity in their content, in the idea that both are a manifestation of the will of the subjects of legal relationship in order to exercise their rights and obligations. However, at the same time, we cannot avoid the difference between them, i.e. the object, or, the legal acts refer to the **material** rights and obligations, and the procedural acts refer to the **procedural** rights and obligations of the parties.[4]

Therefore, civil legal representation is an institution of the procedure. Not incidentally, the contractual representatives are usually professionals.

The Code of Civil Procedure of the Republic of Moldova[5] (hereinafter CPC) provides quite clearly:

1. who can be a contractual representative in the civil process;[6]

2. how to expand the powers of a contractual representative in civil proceedings;[7]

In this sense, in a civil lawsuit, no one else but a lawyer, trainee lawyer, a "*relative-lawyer*" according to art. 75 (1/1) CPC or an employee of a legal person will be able to claim to be a contractual representative. And this is after rather a rigorous documentary confirmation of such a quality and of the powers given by the represented person.

Therefore, in the civil procedure, the separation of general and special powers is imperative, not only from a theoretical point of view.

Although art. 81 CPC seems simple and clear, still causes a kind of discomfort for litigants, which is why we are looking for the ways to overcome it.

Let's try to disassemble it to understand better.

---

[1] Civil Code of the Republic of Moldova. Nr.1107 of June 06, 2002. Republished in: Monitorul Oficial of the Republic of Moldova, on March 01, 2019 , nr. 66-75.
The legal act (civil n.a.) concluded by one person (representative) on behalf of another person (represented) within the limits of the power screates, modifies or terminates the civil rights and obligations of the representative (art. 362 (2) Civil Code), and the powers of the representative results from the law, from the legal act or from the circumstances in which it acts (art. 362 (1) Civil Code).

[2] The court shall organize the process so that there will be equal, sufficient and adequate possibilities to use all procedural means to support the position on the factual and legal circumstances, so that neither party is in a disadvantageous position in relation to others.

[3] Tăbârcă M. Drept procesual civil/ Civil procedural law. Vol I. București: Global Lex, 2004, pag.255.

[4] Belei E., Coban I., ș.a. Drept procesual civil/ Civil procedural law. General part. Chișinău. Editura Lexon, 2016, pag.396-397.

[5] Civil Code of the Republic of Moldova. Nr.225 of May 30, 2003. Republished in: Monitorul Oficial of the Republic of Moldova, on June 21, 2013, nr.130-134.

[6] Art. 75 CPC clearly states: for a natural person – lawyer, lawyer, spouse, parents, children, brothers, sisters, grandparents, grandchildren if they are licensed in law; for a legal entity – lawyer, trainee lawyer, employee of the legal entity.

[7] Lawyer, trainee lawyer – mandate;
«*relative-Lawyer*» – a notarized power of attorney;
Employee of the legal entity – power of attorney;

The power of attorney in a Court grants the representative the right to exercise on behalf of the represented all procedural acts, this means the majority[8] of the general procedural rights, provided by art. 56 CPC.

The representative, who is not a participant in the process within the meaning of art.55 CPC, does not exercise his own procedural rights, being bound by the permission of the represented person to undertake something.

The exceptions listed in full in Article 81 of the CPC are in most[9] cases the special rights of the parties, the implementation of which imposes an increased responsibility on them, or, the consideration of the case in all cases depends on how and when the special rights are exercised.

That is why the legislator strongly requires that **the powers to exercise a special right be explicitly mentioned, under penalty of nullity, in the mandate or power of attorney.**

Technically speaking, most general rights need not be expressly stated in the documents certifying the status of contractual representative, and the special rights of the represented subject also become special powers of the representative only if they are expressly provided in the mandate or power of attorney of the representative.

It is about the right:

1. to sign the application and submit it to the Court,
2. to resort to arbitration for the settlement of the dispute,
3. to waive all or part of the claims in the action,
4. to increase or decrease the amount of these claims,
5. to modify the basis or subject of the action,
6. to recognize it,
7. to resort to mediation,
8. to conclude transactions,
9. to bring a counterclaim,
10. to transmit powers of attorney to another person,
11. to appeal the judge's decision,
12. to change the execution mode ,
13. to postpone or reschedule its execution,
14. to present a writ of execution for pursuit,
15. to receive goods or money on the basis of a Court decision.

All these special powers allow the contractual representative to interact with the Court, not to conclude legal acts. Only in 3 cases the conclusion of legal acts within the meaning of the civil law are either the grounds or the consequences of the exercise of the procedural acts.

Thus:

• the power *"to resort to arbitration"* according to Law no. 23/2008[10] means the use of the right of the party to conclude an arbitration agreement with the adverse party or a compromise by which they agree to remit all or a part of the disputes, which have arisen or which would arise between them as a result of a contractual or non-contractual legal relationship to be settled in arbitration. Upon expiration of the validity of such a power of attorney, the application will be removed from the list according to art. 267 letter l / 1) CPC[11];

• the power *"to resort to mediation"* according to Law no. 135/2015[12] means the use of the right of the party to sign the mediation contract and to participate in the mediation process under the conditions of art. 33 paragraph (6) of the respective law. Upon expiration of the validity of such a power of attorney, the process will be suspended according to art. 260 paragraph (1) letter f) CPC;

• the power *"to conclude transactions"* means the right of the party to terminate the process through a conciliation transaction, i.e. to sign a contract by which, in agreement with the other party, they agree to prevent a process that may begin, to terminate a process started or to resolve the difficulties that appear in the process of execution of a Court decision (art. 1917 Civil Code). Upon expiration of the validity of such a power of attorney, the process will cease to function according to art. 265 letter f) CPC[13];

These special powers give the representative the opportunity to interact directly with the counterparty. But the results of this interaction, no matter how they are called – arbitration agreement, mediation contract or transaction – must necessarily be assessed in terms of legality by the Court with which legal acts cannot be concluded. Aceste împuternciri speciale oferă reprezentantului posibilitatea să interacționeze și cu partea adversă în mod expres. Însă rezultatele acestei interacțiuni, indiferent de faptul cum se numesc ele – convenție de arbitraj, contract de mediere sau tranzacție – trebuie în mod obligatoriu să fie apreciate din punct de vedere al legalității de către instanța de judecată cu care nu se pot încheia acte juridice.

Suppose that, although in the absence of a special power of attorney to recognize the action (in the mandate this power of attorney is not written), the defendant's representative in the reference he signs does so. Să ne închipuim că reprezentantul pârâtului în lipsa împuternicirii speciale de a recunoaște acțiunea (în mandat această împuternicire nu este scrisă) totuși în referința pe care o semnează face acest lucru.

Naturally, the Court must check whether or not there is a special power of attorney to recognize the action.În mod firesc, instanța trebuie să verifice dacă există sau nu împuternicirea specială de a recunoaște acțiunea.

Suppose that the judge's vigilance, and not his excessive formalism, determined him to check carefully whether there is a special power of attorney to recognize the action.

Since the procedural law clearly specifies the sanction of nullity, this means that the recognition of the action cannot be made by the representative, so the Court must reject the petition of the defendant's representative and continue the examination of the case.

Of course, the direct defendant can communicate to the Court about the recognition of the action either by a document sent through the representative or by his personal presence at the Court hearing. And this doesn't mean the ratification of the act made by the lawyer without a special power of attorney. This means the personal exercise of the procedural action. Major procedural risks cannot be identified in this case, since according to art.60 CPC the defendant is entitled to recognize the action throughout the entire examination of the case.

If, a lawyer whose mandate lacks the special power to appeal the judge's decision, still exercises this right in the name and interest of the losing party, things get a little complicated, but not fatal.

We remind that an application for appeal in quite a simple form (only a disagreement declaration with the provisions of a Court decision) is submitted within 30 days from the date of its pronouncement (art. 362 paragraph (1) CPC). This application for appeal must anyway be signed accordingly.

---

[8] The pseudo-argument that since a representative in civil law can be any person, so in court it should be the same, makes no sence at present, perhaps remaining slightly nostalgic after the civil procedural regulations until 2010 when the Civil Procedure Code was amended by Law no. 102 of May 28, 2010, published in Monitorul Oficial of the Republic of Moldova nr. 135-137, on August 03, 2010.
The phrase "majority" refers to the fact that in art.56 CPC the right "to attack judicial acts" is a general one, and in art. 81 The CCP's power "to attack the decision" is a special right.

[9] *On the contrary,* the special power to attack the decision is the general right of the participants in the trial.

[10] Law on arbitration. Nr.23 of February 22, 2008. În: Monitorul Oficial al Republicii Moldova, 20.05.2008, nr.88-89.

[11] *The court removes the application from the list if:* 1[1]) the parties requested the examination of the case by the arbitration court, in accordance with the law;

[12] Law on mediation. Nr.137 of July 03, 2015. In Monitorul Oficial of the Republic of Moldova, August 21, 2015, nr.224-233.

[13] The court orders the termination of the process if: d) the parties have concluded a transaction, confirmed by the court; f) initiation of mediation under the conditions of the Law on Mediation. Art. 21 paragraph (2) of Law no. 137 / 2015 stipulates the initiation of mediation under the conditions of this law that constitutes the ground for suspending the civil process or the arbitration procedure from the date of signing the mediation contract. The court orders the termination of the trial if:
d) the parties have concluded a transaction, confirmed by the court;

Art. **365 (3)** CPC expressly stipulates that *The application for appeal shall be signed by the appellant or his representative. In the latter case, the document, legalized in the established manner, shall be attached to the application, certifying the powers of attorney of the representative if such a power of attorney is missing in the file.*

What are the procedural consequences of violating this provision??

We regret to note a serious dissonance between the express provisions of the procedural law and the constant but erroneous practice of the Courts of appeal.

Following the logical thread not only of the current procedural rules, but also of their essence, the Court of appeal must not respond to such application for appeal, as art. 368 paragraph (1) CPC clearly provides: ***If the application for appeal does not meet the conditions provided in art.364*** *and* ***365*** *and if the application is submitted without paying a state fee,* ***the Court of appeal****, within 10 days from the date of distribution of the file,****shall order,*** *by a decision, without notifying the participants of the proceeding,* ***not to respond to such application****, but give the applicant a deadline for resolving the shortcomings.*

Unfortunately, but it is a fact, our Courts of appeal consider that in such situations an appeal was filed by a person who is not entitled to declare an appeal (Article 369, paragraph (1), letter d) CCP).

We consider this reaction of the Courts of appeal to be unreasonably harsh, especially since it is not supported by any essential legal argument.

That is, the lawyer who does not have the special power of attorney expressly mentioned in the mandate does not have the right to file an appeal.

Thus, a person who has not been prosecuted by the Court of First Instance, but who believes that his right has been violated by the Court decision, has no right to file an appeal.

The legal situation of these procedural subjects is quite different. The lawyer exercises procedural rights that do not belong to him, since the party empowering him gives him the opportunity to exercise his procedural rights. The lawyer only has a power of attorney. Not incidentally, art. 75 paragraph (4) CPC provides that the *Procedural acts performed by the representative within the limits of his powers are binding on the represented person insofar as they would have been performed by himself. The fault of the representative is equivalent to the fault of the party.*

There is an obvious difference between the situations when a person cannot be an appellant and when a representative of a real appellant does not have powers of attorney.

When a third party not at all involved in examining the merits of a civil case, signs a mandate expressly authorizing a lawyer to declare an appeal, there appears a situation where there is an authority, but there are no rights.

Here, the procedural solution correctly ordered by the Court of appeal shall be the restitution of the application for appeal (art.369 paragraph (1) letter d) CPC).

Returning to the possibility of ratification of the appeal signed by a lawyer without a special power of attorney, we find that this procedural "remediation" can take place, but it will have a different effect. Namely: the appellant, through what might be called the ratification of a wrongful procedural act exercised by his lawyer, can personally exercise the right to appeal against a court decision. This means, at the minimum, addressing to the Court of appeal, at least by mailing a written and signed document, from which the Court of appeal can unequivocally understand that the appellant does not agree with the judgment, as neither his lawyer agreed. And the Court of appeal is already obliged to react to the procedural act exercised by the appellant, signaling some formal shortcomings (art.365 CPC) or some essential errors in the exercise of his right. Therefore, the Court of appeal must anyway assess how the appellant exercised his right at a certain point in time. This does not exclude the appellant's right to granting expressly his representative the special power of appeal, and this does not either mean the *post-factum* correction of any omissions.

Why would a procedural subject be entitled to ratify certain documents already made by his contractual representative in his interests, for example, in our case, of an application for appeal ??? We believe that only to facilitate the access to justice and abusively exercise the right to a defense. Why didn't the appellant empower his representative with the right to appeal the decision instead of him??? There may be several assumptions, but, based on the the principle of availability, they do not matter. And it is due to this principle that we can reasonably assume that the person simply does not want to make an appeal, that is why he does not authorize anyone in this regard. And the Competent court cannot consider that the appeal was legally exercised if it is not convinced of the true will of the subject of law. The conclusive actions in the civil procedure are missing, since the law explicitly provides for the consequences of the facts of the parties, either of their actions or inactions.

Let us not forget that the appeal filed without the power of attorney favors the appellant, and discourages the respondent, as the possibility of ratification of the act also favors the appellant and further discourages the respondent. A clear procedural imbalance arises, and we ask ourselves: how can the respondent who won a lawsuit be defended in such a situation? And this in the context of national stringency to enhance the security of legal relationship.

It is necessary to provide the respondent, as the opposing party, who has a procedural interest opposed to the appellant, the same chances of defense. The fair balance that the legislator must ensure through procedural rules is based on the principle of *"equality of arms",* and the reasonable and avoidable nature of limitation of rights and procedural exceptions. How can a respondent be protected from an appeal filed without a special power of attorney, subsequently ratified by the appellant himself ??? Does he have the right to fight with legitimate weapons in order to maintain his judgment which already has some clear limits of the power of the thing judged ???

If the appellant tries to *"ratify"* the procedural act made in his interest after the expiration of the term of appeal, this allows the Court of appeal to qualify, in accordance with the law, this procedural act as a late application for appeal. Actually, the only reason for *the post-factum* ratification of a civil procedure act, which must meet some form, content and term requirements, is to justify the violation of these requirements. In our case, the most necessary justification is for the delay.

If addressing of the appeal is almost impeccable – there is only the lawyer's signature on the application for appeal without an express written power of attorney, we consider that the Court of appeal should not respond to this application for appeal, as it is expressly provided by art. 368 paragraph (1) and art. 365 paragraph (3) CPC, but give a deadline for resolving this shortcoming. It is vital to change the unfair practice of the Courts of appeal in the Republic of Moldova. And in such a situation the temptation to substitute the procedural rigors by applying the rules of substantive law shall also disappearl.

We believe that it is in the power of the Courts of appeal to do so under legitimate conditions, as long as the Courts of appeal "disregard" in a good sense paragraph (5) of art.170 CPC. It is about the legal impediment to appeal against the decision of restitution of the request for summons for the reason provided under letter *e)* ***the application*** *is not signed or* ***is signed by a person not authorized to sign it*** *or is signed without indicating the position of the signatory*.

Interpreting the law *too literally*, this decision cannot be challenged in appeal, or, paragraph (5) of the respective article does not provide it: *The decision by which the court restores the application under paragraph (1) letters a), b), c) and g) can*

be appealed. However, the Courts of appeal examine and even admit applications for appeal against such decisions. Beyond the reasons that justify this obvious exceeding of the legal framework, we consider it necessary that the legislator modifies the respective procedural norm. There would be two solutions: either to allow appealing against all decisions of restitution, including those signed without express authority, or to exclude this ground for restitution and place it among the grounds for not responding to the summons. In the last hypothesis, the legislator of the Republic of Moldova would abandon extremely rigorous procedural norms and would regulate in a balanced way the order of litigation with the possibility of correcting it. Moreover, if the Courts of appeal are at least legally entitled to do so, the reverse consistency, i.e. the adoption of the same rules for the courts of first instance, would be a good solution, which would reconcile practice with qualitative laws and increase the predictability of both.

However, for the plenary and multiaspectual research of the subject, we must note that in the legislation of other states there are regulations that allow a different way ratification of the act created without authority, which we consider deserves the attention of the Moldovan legislator.

For example, art. 87 paragraph (2) of the Romanian Code of Civil Procedure stipulates that *the Lawyer who represented or assisted a party in the trial may take, even without authority, any actions to protect the rights subject to a term and which could be lost by not exercising them in time and it may also bring any appeal against the decision made. In such cases, all procedural documents shall be drawn up only in front of the party. The appeal can only be sustained on the basis of a new power of attorney.*

Or art. 89 of the German Code of Civil Procedure provides that *If a person acts on behalf of a party as a negotiorum gestor (a person acting on behalf of another without being expressly authorized to do so) or as a lawyer , without filing a power of attorney before the court, he may be admitted to the proceedings on a preliminary basis without providing a guarantee for costs and damages. The final decision can be pronounced only after the expiration of the period of submission of the authorization (confirmation of authorities). If the confirmation of the powers of attorney has not been submitted until the decision is pronounced, the person preliminarily admitted to the dispute shall be required to compensate the costs incurred by the opponent as a result of admission to the trial; in addition, he will compensate for the damage suffered by the latter as a result of that admission.*

In the Republic of Moldova art. 370 of the Civil Code[14] cannot be applied to initiation or even substantiation of a judicial practice of ratification of the procedural act exercised by the contractual representative without the power of attorney for several reasons:

1. subjects of civil procedure relationship do not occur between the trial participants, but between each participant in the trial and the court as a mandatory subject;

2. trial participants do not conclude legal acts with the court, but exercise procedural acts permitted by law that must be confirmed by the court;

3. the effects of the civil procedure acts are reflected not only on the represented subject, but also on the adverse party, that is why the phrase *the legal act produces effects for the represented only if it subsequently ratifies it* is unusable in the administration of justice;

4. conclusive actions are not allowed by the civil procedural norms, or, the law clearly establishes what the participants can do, when they can exercise the respective actions and what are the form and content requirements for them;

5. the procedural action exercised without authority will be null for both the represented and the opposing party, so it cannot produce any effect on the pending process;

6. the court is vested with the prerogative to verify the existence and validity of the special authority of the contractual representative in order not to admit the improper exercise of rights by one of the parties and the procedural imbalance in relation to the other party.

---

[14] Romanian Code of Civil Procedure of July 1, 2010, Published in MONITORUL OFICIAL nr. 247 on April 10, 2015.http://legislatie.just.ro/Public/DetaliiDocument/140271
If a person **concludes a legal act** on behalf of another person without having powers of representation or having the powers of attorney in excess, the legal act **produces effect for the represented person** only if he subsequently ratifies it. In this case, the legal act can be ratified both expressly and by **conclusive actions**. Until ratification, the legal act is an **inefficient** legal act in relation to the represented person.