BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

THE UNIFICATION OF THE CASE-LAW WITHIN THE CIVIL PROCEDURE SYSTEM OF ROMANIA / Laura Cristina Carcia

Laura Cristina Carcia
PhD student
Faculty of Law
University of Bucharest
Bulevardul Mihail Kogălniceanu 36-46,
București 050107, Romania;
as well as judge at Tribunalul Ilfov
Strada Știrbei Vodă 24,
Buftea 070000, Romania
laura.carcia@gmail.com
ORCID: 0000-0003-3205-8621

Abstract: *The present article contains the main legal practice unification mechanisms, as regulated by the Romanian legislator in accordance with the current Civil Procedure Code, as well as those partaking to the Supreme Court jurisprudence in conjuncture with the lower courts by granting a uniform settlement on the legal issues comprised by the litigations referred to. The presentation starts off with the referral in the interest of the law, a traditional instrument within the national civil procedure legal sphere of activity, it continues with the notification of the Supreme Court for settling certain legal matters, a novelty at national level and of whose practical utility has already been recognised, and it ends by making reference to the second appeal, as an extraordinary means of challenge, with a relatively reduced efficiency, at present, in settling the different interpretations of the legal norms.*

Key words: *Divergent jurisprudence; referral in the interest of the law; notification of the High Court of Cassation and Justice in order to render a preliminary decision for the settlement of legal matters; second appeal, Civil law, Romanian law*

Submitted : 15 March 2021
Accepted : 07 October 2021
Published : 30 December 2021

Suggested citation:
Carcia, L. C. (2021). The Unification of the Case-law within the Civil Procedure System of Romania. *Bratislava Law Review*, 5(2), 87-100. https://doi.org/10.46282/blr.2021.5.2.227.

1. GENERAL NOTIONS

The unity of the jurisprudence has come to represent the objective of any legal system, including that practiced in Romania. Considerable efforts have been made by the national legislator and its practitioners to reach clarity and foreseeable character in implementing the law. A foreseeable act of justice confers to the legislator the trust needed in the legal system, the certainty that his/her endeavours have been analysed on an unbiased basis and in accordance with the adherent legal norms, as well as that of the final rulings of the notified matters brought before the court by the citizen, without the possibility of ever being appealed.

The coming into force of the new Civil Procedure Code[1] has led to the implementation of three main methods for the achievement of the jurisprudence unity,

[1] The Civil Procedure Code was adopted as the Act No. 134/2010, published in the Official Gazette No. 485, dated July 15th 2010, and reprinted in the Official Gazette No. 247, dated April 10th 2015, with the amendments brought forth via the Government Emergency Ordinance No. 1/2016, printed in the Official Gazette No. 85, dated February 4th 2016, via the Government Emergency Ordinance No. 95/ 2016, printed in the Official

more exactly, the second appeal, the referral in the interest of the law, and the notification of the High Court of Cassation and Justice to render a preliminary decision for the settlement of certain legal matters.

Two of these mechanisms are included under a specific title specially designed for the legal provisions needed to assure uniform legal practices (Title III from the IInd Book), respectively, the referral in the interest of the law and the notification of the High Court of Cassation and Justice for rendering a preliminary decision, and the third mechanism, the second appeal, being regulated under extraordinary means of challenge (Section 1, Chapter III, Title II, IInd Book).

As a result of the intervening amendments, if it was previously appreciated that the decisions ruled under a referral in the interest of the law came to represent "the main method by means of which the Supreme Court fulfils its constitutional attributes of assuring the uniform interpretation and application of the law" (Andreescu, 2009). Currently, based on the new civil procedure concept, this fulfilment of such an attribute is divided between the second appeal, the referral in the interest of the law and the notification of the High Court of Cassation and Justice in order to render a preliminary decision for the settlement of certain legal matters.

The novelty element of the new civil procedure regulation is represented by the legal commitment to notify the High Court of Cassation and Justice for rendering a preliminary decision for the settlement of certain legal matters, a mechanism which intervenes at an incipient stage of the emergence of the non-uniform legal practices, as compared to the referral in the interest of the law, which is applicable in case of the existence of a "consolidated" non-uniform practice.

2. THE REFERRAL IN THE INTEREST OF LAW

The referral in the interest of the law, regulated by the provisions of Art. 514 – 518, is recognised by the legislator as representing a specific mechanism needed to ensure the unity in interpretation and law applicability by all courts, should different settlements be granted for the same legal matter. The declared purpose of such a procedural instrument is to channel a correct method of interpreting a legal text that is susceptible to multiple interpretations.

This mechanism has a long history within the Romanian civil procedure system, being regulated for the first time by the Law regarding the High Court of Cassation and Justice of 1861 (Ciobanu, 1997, pp. 457–458). During its lengthy applicability, this regulation faced numerous amendments, at present being clearly limited by the legislator, with the competent court having to settle the ruling on the request in the interest of the law, the subjects of the right to notice, the admissibility conditions of this procedural mechanism, the actual trial, but also the settlement method for the notice.

Regarding the competent court settling the notice of referral in the interest of the law, this will be represented by the Supreme Court, more exactly, the High Court of Cassation and Justice, by a panel comprising, in accordance with Art. 516 Line (1) of the Code, the President, or should he/she be absent, one of the Vice-Presidents of the court, the division presidents, as well as 20 judges, of which 14 judges partaking to the

Gazette No. 1009, dated December 15th 2016, Law No. 17/ 2017, reprinted in the Official Gazette No. 196, dated March 21st 2017, and via Law No. 310/ 2018, published in the Official Gazette No. 1074, dated December 18th 2018.

division(s) within which the legal matter comes under jurisdiction and that was ruled differently by the court houses, and other 2 judges adherent to the other divisions.[2]

Therefore, within all cases, the panel is comprised of 25 judges, presided over by the President of the High Court of Cassation and Justice, and should the latter be absent, by one of the Vice-Presidents of the court.

The Subjects of the right to notice the Supreme Court are found within the legal provisions of Art. 514 of the Code, being represented by the prosecutor general partaking to the Public Prosecutor's Office, attached to the High Court of Cassation and Justice, either *ex officio* or at the request of the Justice Minister, the Ruling Council of the High Court of Cassation and Justice, the ruling councils of other circuit courts of appeal, as well as the Ombudsman.

The recital of the people authorised as subjects of the right to notice is limited, and not exemplary, and as such, other persons or entities do not have the possibility to petition the Supreme Court for the uniform putting into practice and interpretation of the law via this procedural mechanism. On the other hand, other persons or entities can inform the authorities listed by the legislator regarding the existence of certain legal matters settled differently by the courts via final judgments, with the subjects of the notice for the referral in the interest of the law having the possibility of analysing whether the notification of the Supreme Court be imposed or not (see Carcia, 2020, p. 303).

The notification of the Supreme Court is done by the subjects via a written request, having as object the ruling by the High Court of an adjudication, compulsory in its character, for the legal matter brought before the court, aspect which was at the receiving end of different interpretations by the Romanian court houses, interpretations resulted from final court decisions.

Such a notice can be formulated at any time, without a time constraint (see Ciobanu, 2018, p. 524; Pop and Grosu, 2011), by any of the indicated subjects, if the admissibility conditions are fulfilled, as subject to the preliminary analyses by the Supreme Court.

From the content of Art. 515 of the Code, the admissibility conditions for a referral in the interest of the law can be implied, more exactly: it should make reference to a legal matter, that respective legal matter must have been settled differently by the courts of law via final rulings, and those court rulings must be attached to the request.[3] To be mentioned that these conditions are cumulative, being necessary that all such be fulfilled in order for the Supreme Court's notification to be admissible for the settlement in the interest of the law.

The syntagma "legal matter" has never been defined by the legislator, and as such the task of explaining its' meaning has befallen with the legal practice and doctrine. Generally, it was appreciated that a legal matter must be real, authentic and must target a legal norm which is unclear, imprecise, doubtful, susceptible to multiple interpretations or not correlated with other legal provisions.[4] The same approach was adopted by the

[2] According to the law, and metaphorically speaking, this panel was named „Micul Plen" (The Low Court) (M. Nicolae, 2014).

[3] The same requirements are also stipulated by the Supreme Court, the competent panel must hear the referral in the interest of the law, by making reference to the content of the ruled decisions. For example: Decree No. 19, dated October 5th 2015, published in the Official Gazette No. 11, dated January 7th 2016; Decree No. 21, dated June 24th 2019, published in the Official Gazette. No. 872, dated October 29th 2019; Decree No. 22, dated June 24th 2019, published in the Official Gazette No. 853, dated October 22nd 2019.

[4] The authors show how the referral in the interest of the law has a limited domain "more exactly, only in cases in which the unclear, confusing (doubtful), incomplete (with omissions) or contradictory legal provisions receive a different interpretation from the court houses" (see Ciobanu, Boroi, and Nicolae, 2001, p. 21).

DOI: 10.46282/blr.2021.5.2.227

Supreme Court, which, during the analysis of the admissibility conditions adherent to the referral in the interest of the law, verifies if the legal texts subject to interpretation, have a clear and unequivocal character, if the aspect confronts itself with a regulatory ambiguity in order to consider whether the legal matter subject to examination is susceptible of being settled differently by the courts.[5]

Furthermore, the legal matter must be genuine[6] and current, a feature that is lost in case the divergence had been settled by intervention on the part of the legislator[7] or when the Supreme Court itself has given adjudication over that respective legal matter, via a prior decision ruled also during the proceedings of a referral in the interest of the law.

The legal matter must form the object of the litigations for which the final court decisions were ruled, regardless of whether that respective problem is of material, substantive or procedural law (Les, 2011).

As it is normally the case, within the referral in the interest of the law procedure, the legislator opted to subject for analysis before the Supreme Court only those court rulings that are final, due to the fact that only in such cases can it be observed whether or not the legal matter was given a different judging. To the extent to which the decision is not final, the interested party has the possibility of making use of the appeal or second appeal as means of challenge, for the legal matter to be resolved by the judicial review court, case in which, in accordance with the solution ruled, it might not lead to the non-uniform practice (Tăbârcă, 2011, pp. 135–136).

Equally, the procedural method of referral in the interest of the law cannot be used when the diversity of adopted solutions within a certain domain is not determined by the occurrence of certain distinctive points of view, here meaning by means of the attached court rulings, for the putting into practice of the law texts that govern that respective field, but by the assessment of the courts of law deduced from the entire legal provisions, by reporting it to the circumstances of each case.[8]

The norms referencing the proceedings are stipulated by Art. 516 Line (5)-(1) of the Code and they have their sights set on the preliminary drafting of a report by three judge members of the panel, as nominated by its President. The report must comprise different settlements granted for the legal matter and the arguments on which these are based on, the relevant jurisprudence of the Constitutional Court, the European Court of Human Rights, or the Court of Justice of the European Union, if the case, the relevant doctrine, as well as the opinion of the consulted specialists. Once the report has been completed, the nominated judges will draft and motivate the settlement project proposed to be granted for the referral in the interest of the law.

The request is settled by the Supreme Court within a term of at most three months from the notice date, without summoning the parties. Regarding the referral in the interest of the law, the competent panel will rule on the decision, which will be published in the Official Gazette of Romania, Part I.

[5] For example, Decree No. 30 dated November 16th 2009, ruled by the High Court of Cassation and Justice, United Divisions, available on www.scj.ro.

[6] Via Decision No. 10 dated May 25th 2015, published in the Official Gazette No. 595, dated August 6th 2015, the Supreme Court argued that "only those imprecise, imperfect and omissions rendered types of legal texts, in other words, those texts that can be interpreted, can constitute the object of a referral in the interest of the law initiated under the purpose of ruling a principle settlement for a controversial legal matter".

[7] See Decree No. 12, dated March 16th 2009, issued by the High Court of Cassation and Justice, United Divisions, available on www.scj.ro.

[8] As such, see Decree No. IV, dated January 15th, 2007, issued by the High Court of Cassation and Justice, United Divisions, on www.scj.ro.

By means of decision, the High Court admits the request for the referral in the interest of the law, or rejects it as being inadmissible. Should the request be admitted, the Supreme Court will grant an adjudication for that respective notified legal matter, indicating its correct interpretation in accordance with the law.

The decision to admit the request will be ruled only in the interest of the law and will not impact the examined court settlements and or those situations regarding the parties as components to those rulings [Art. 517 Line (2) of the Code]. This presupposes that the analysed court decisions cannot be reformulated during the appeal or second appeal, taking into consideration that these are final in their nature (Tăbârcă, 2019, p. 92). Therefore, these will maintain the authority of res judicata and their enforceability (Les, 2011).

The adjudication granted for the legal matters is compulsory for all courts starting with the publication date of the decision in the interest of the law within the Official Gazette of Romania, Part I. This settlement will also be applied for ongoing litigations and not just those which were presented before the courts after the publication of the decision in the Official Gazette, with the interpretation given by the courts to the legal texts not being contrary to those ruled by the Supreme Court (Carcia, 2020; Drăguşin, 2015; Tăbârcă, 2011).

3. THE NOTIFICATION OF THE HIGH COURT OF CASSATION AND JUSTICE IN ORDER TO RENDER A PRELIMINARY DECISION FOR THE SETTLEMENT OF CERTAIN LEGAL MATTERS

Via this new procedural unification mechanism of the divergent judicial practices, as regulated by the legal provisions of Art. 519 – 521 of the Code, a panel nominated with settling the matter following a careful examination, solicits, under the situations and conditions foreseen by the legislator, the assistance of the Supreme Court for the settlement under a compulsory character of a notified legal matter, adjudication that is necessary for the settlement of the merits for that particular case.

Based on the provisions of Art. 519 Civil Procedure Code, referencing the object of the notice, the admissibility conditions of the notification procedure of the High Court of Cassation and Justice can be highlighted in order for a preliminary decision to be rendered for the settlement of certain legal matters, conditions which are different from those applicable for the referral in the interest of the law, to be more exact: the existence of a legal matter, the interpretation of the legal matter which is to influence the settlement of merits of the case, the legal matter must be new, the High Court did not previously rule a settlement in connection to this legal matter, the matter does not form the object of a referral in the interest of the law and, finally, the panel which formulates the notice must rule as a result of final examination.[9]

As a requirement of making reference to the existence of a legal matter, as foreseen by the legislator for the admissibility of the referral in the interest of the law, the legal matter is connected to a legal norm interpretation problem, a norm susceptible to various interpretations. Moreover, the legal matter must be difficult, genuine, real, must be connected to the litigation brought before the court for ruling and must not be hypothetical (see M. Nicolae, 2014, pp. 59–60). To the extent to which the legal matter does not create the premises or did not generate different and contradictory

[9] These conditions have also been recognized according to the law by the doctrine (M. Nicolae, 2014), but also by the Supreme Court via Decree No. 1, dated November 18th 2013, published in the Official Gazette No. 43, dated January 20th 2014.

DOI: 10.46282/blr.2021.5.2.227

interpretations during the court practices nor a divergent jurisprudence, then, it cannot be considered a real and difficult legal problem.[10]

Not every legal aspect that occurs during the proceedings of the cause can lead to the notification of the High Court of Cassation and Justice by means of a prior inquiry, but only those aspects that directly influence the settlement of the merits.

Furthermore, the legal aspect subject to settlement must be new, presenting a novelty feature that can result either from the existence of a normative deed recently effective, or from the occurrence of certain litigations based on a previous normative deed, but which was not brought forth before the courts for judgment.[11]

In order to address a prior inquiry to the attention of the Supreme Court, it is necessary that, beforehand, the High Court did not rule over the litigated legal matter via another preliminary judgment or decision in the interest of the law or a consequent case decision, and moreover, that respective legal matter must not form the object of a referral in the interest of the law found on the dockets for settlement.[12]

The condition that the subjects of the right to notice must submit for judging as a result of final examination, implicitly comprises the courts that withhold the procedural legitimacy in triggering the notification mechanism for the High Court of Cassation and Justice in order to rule a prior decision for the settlement of certain legal matters. As such, the subjects of the right to notice can be represented by tribunals, the court of appeals, and the High Court of Cassation and Justice, under the condition that the litigation referring to the legal matter under trial to not be in its last procedural stage. This mechanism is not made available to the parties of the pending litigation, who do not have the possibility of notifying the High Court of Cassation and Justice via a prior inquiry, but these can request the panel that was nominated with settling the legal matter to notify the Supreme Court in order to rule a preliminary decision.

The notification of the Supreme Court is done by means of a procedural deed, court decision, which must contain the reasons that help support the admissibility of the notice, as well as the point of view of the panel in charge of ruling over the parties. The notification deed is not subject to any means of challenge and the litigated proceeding which generated the notification of the Supreme Court is thereby suspended.

The High Court of Cassation and Justice's Object of the Notification is represented by the legal matter of whose settlement is requested via this procedural mechanism, an aspect which has a determining character for the settlement of the merits.

The High Court of Cassation and Justice has the competency to settle the notice in order to rule a preliminary decision for the settlement of certain legal matters, via the formulation of the Court as stipulated according to the legal provisions of Art. 520 Line (6) and (8) from the Code, respectively the notification will be ruled over by a panel comprising the president of that adherent High Court of Cassation and Justice division, the legal division under jurisdiction to solve the requested legal matter or by a judge nominated by such and 12 judges partaking to that respective court division.

[10] The High Court of Cassation and Justice, The Panel for settling certain legal matters, Decree No. 35, dated June 4th, 2018, published in the Official Gazette No. 810, dated September 21st 2018.

[11] Regarding the analysis of this novelty requirement, see, The High Court of Cassation and Justice, The Panel for settling certain legal matters, Decree No. 1, dated February 17th, 2014, published in the Official Gazette No. 260, dated April 9th 2014; Decree No. 4, dated January 14th 2019, published in the Official Gazette No. 132, dated February 19th 2019; Decree No. 46, dated October 14th 2019, published in the Official Gazette No. 900, dated November 7th 2019 etc.

[12] To verify the existence of a request - referral in the interest of the law that is on the dockets regarding the same legal matter, the panel can consult the Internet page of the High Court www.scj.ro.

As with the High Court of Cassation and Justice notification mechanism for the ruling of a preliminary decision for the settlement of certain legal matters, the trial proceeding guidelines are partially similar to those bestowed on to the legislator for the referral in the interest of the law, consisting of the prior drafting of a report with the same content as with the other analysed procedural mechanism, the trial being conducted without the summoning of the parties, within 3 months from the referral date, via an admission or rejection decision issued for the notice. In comparison to the trial of the referral in the interest of the law, the difference is given by the necessity to communicate the report to the attention of the parties, in their quality as components to the litigation for which the notice was formulated, parties who have the possibility of expressing their point of view in writing regarding the content of the report.

The decision to admit the notice will comprise the settlement ruled for that litigated legal matter, a ruling which is compulsory for the court that requested its settlement starting with its sentencing, and for other courts, authorities, legislators etc. It will be compulsory starting with the publication date of that preliminary decision within the Official Gazette of Romania, Part I.[13]

The ruling granted by the Supreme Court will also apply to those litigations on the dockets and not just to those submitted before courts after the publication of the decision within the Official Gazette, with the interpretation given by the courts to the legal texts non-contradicting those ruled by the Supreme Court.

4. A BRIEF SUMMARY OVER THE SECOND APPEAL AS A MEANS OF UNIFYING THE LEGAL PRACTICES

The second appeal is an extraordinary means of challenge, regulated by the legal provisions of Arts. 483-502 of the Code, which sees to subject before the competent courts, in accordance with the law, the conformity analysis of the challenged decision with the applicable judicial rules [Art. 483 Line (3) Civil Procedure Code].

This present means of challenge does not fall under the exclusive competency of the Supreme Court, but also of those tribunals and courts of appeal that can use them against certain court decisions partaking to cases strictly determined by the legislator. From the perspective of the multitude of national courts that can settle this extraordinary means of challenge, the capability of the second appeal of contributing to the unification of the judicial practices is limited.

However, the uniform jurisprudence approach method by means of the second appeal is done through its compulsory nature partaking to the legal matters settled by the second appeal court.

Furthermore, in accordance with the legal provisions of Art. 501 Line (10) of the Code, in case the second appeal is admitted, and the challenged decision is cassated quashed, annulled, with the consequence of forwarding the request for a retrial, the decisions of the second appellate court over the settled legal matters are compulsory for the court that decides on the merits.

The legal norm obliges the retrial court to apply that method of settlement corresponding to the legal matters as given by the second appeal court; the non-

[13] In law, it has been shown that establishing different times is justified by the fact that the court of reference already knows the invoked arguments in assisting or fighting back the legal matter ruled by the Supreme Court, while the other courts must take into consideration the settlement only from the date of learning of the facts of the preliminary decision (Tăbârcă, 2019).

DOI: 10.46282/blr.2021.5.2.227

compliance with those ruled during the procedure of the second appeal can lead to a breach of the *res judicata* authority partaking to the cassation decision (A. Nicolae, 2010).

5. ELEMENTS OF COMPARATIVE LAW

The main source of inspiration for the Romanian legislator for the new civil procedure regulation on the case-law unification mechanisms at national level was represented by the French law, and what follows will come to represent a comparative analysis between the two legal frameworks.

As such, within the legal provisions of the French Law, it is stipulated that the referral in the interests of the law, as regulated by Art. 17 Law No. 67523, dated July 3rd 1967, adherent to the Court of Cassation,[14] and exercised by the general prosecutor attached to the High Court of Cassation and Justice, as having knowledge of a civil section decision as being contrary to the law, regulations or procedural forms, a decision which was not challenged by the parties as according to the legal timeframe or which was executed. The request for the referral in the interests of the law will be formulated by the general prosecutor following the appeal expiry term allotted to the parties or after the execution of that decision.

Such procedural norms referring to the referral in the interests of the law are stipulated by Art. 6391 of the French Civil Procedure Code. Therefore, and for starters, the lawmaker notes that the referral in the interests of the law will be exercised against a decision which gained the *res judicata* authority. In what follows, the disposition given by Law dated 1967 is resumed, referring to the moment in which such a means can be exercised, under the remark that the term cannot surpass five years from the decision ruling date. Regarding the enunciation of such a referral, the parties are notified via the Public Ministry attached to the court that settled the challenged decision and by the registry partaking to that respective court which settled the decision, via registered mail with acknowledgement of receipt.

The request for the referral in the interests of the law must be motivated and directed against the considerations or the settlement part of the challenged judgement, document which will be attached if solicited. The request for the referral in the interests of the law will be submitted with the registry of the Court of Cassation, will be communicated to the attention of the parties, which have the possibility of formulating written observations within two months from the communication date.

The judgement under procedure according to the referral in the interests of the law will continue to produce effects for and between the parties, even if, via the decision in the interest of the law ruled by the Court of Cassation, that respective judgement is either totally or partially quashed (Art. 639-2 of the Code).

That being said, even if, in case of a cassation procedure, the parties cannot make use of the decision in the interests of the law to elude the dispositions of the quashed judgement [Art. 17 Line (2) of the Law dated 1967], a situation similar to that acknowledged on a Romanian level for the effects of the decision in the interest of the law. However, as different from the French legal framework, where the Court of Cassation can rule on a cassation settlement of the decision that makes up the object of the notice in the interests of the law, the High Court of Romania cannot overrule the final decisions that generated the non-unform practices and which were attached to the notice, but settles the way the legal issue is interpreted within the meaning of those

[14] Version consolidated on April 25th, 2021, and available on www.legifrance.gouv.fr.

respective decisions, matter that was at the receiving end of different settlements within the practice of the courts of law.

Furthermore, the other Romanian procedural means of unifying the legal practices can be found within the French legislation, called "the referral for the opinion of the Court of Cassation" (*la saisine pour avis de la Cour de Cassation*) and regulated by Art. 1031110317 of the French Civil Procedure Code and by Art. L. 44114414 and Art. R. 4411 of the Judiciary Organisation Code.

The objective of requesting the opinion of the Court is to allow the Court of Cassation to make a speedy decision, before all the requirements for notifying it according to its jurisdictional role are to be fulfilled with regards to a delicate and new legal matter, which could generate different interpretations for the courts of first instance (Bachellier, Buk Lament, and Jobard-Bachellier, 2018, p. 31).

The procedure of requesting such an opinion within the French legal framework was considered by the doctrine, appealing and useful in giving quick solutions to certain legal technicality problems, susceptible of generating unnecessary mistakes by the first instance courts, however, drawing attention that this procedure should be used only to differentiate real legal matters (Bachellier et al., 2018).

In essence, the French regulation allows the judge to request the opinion of the Court of Cassation, via a decision which is not susceptible to appeal, only when it needs to decide on a new legal matter, which represents a serious difficulty, and which can be found within a significant number of litigations (Art. L 4411 of the Judiciary Organisation Code). The novelty of the legal issue is analysed from a double perspective, more exactly, the existence of a new legal norm and that the legal matter not have been previously settled by the Court of Cassation.[15]

Before the request being communicated to the attention of the Court of Cassation, under the sanction of inadmissibility, the judge must notify the parties and the Public Ministry, allotting a certain timeframe for any written observations to be submitted in connection to the request and the legal issue that forms the object of the opinion.[16] After those respective observations have been submitted or after the term set by the judge in this meaning has expired, the latter can address a request for opinion to the Court of Cassation, suspending the litigation on the dockets for settlement (Art. 10311of the French Civil Procedure Code). As such, the procedure becomes facultative and not compulsory, and the holder of the notice, in the lack of an express conditioning of the lawmaker, can be represented, here inclusively, by the judge of the first instance courts, who awards decisions that can be challenged via the means stipulated by the French law (Canivet, 2003, p. 156).

The request will be settled by a competent chamber, part of the Court of Cassation. In case the legal issue comes within the competency umbrella of several legal divisions, the panel will be a mixed one, and in case the matter makes reference to a principle legal issue, the settlement will be done by the plenary panel adherent to the same Court, with the panel being presided over by the President of the Court of Cassation or,

[15] See J. Buffet, overview dated March 29th, 2000, found on www.courdecassation.fr.

[16] Literature deals also with the legal practice of making reference to the rejection of the request as being inadmissible, as a follow up of the non-fulfilment of the notification obligation of the parties and of the Public Ministry, with a consequence of non-complying with the contradictoriality principle (Callé and Dargent, 2018, p. 927), and the meaning of regulating such a sanction and within the Romanian law, for the non-compliance of the referencing court with the obligation to have the parties contradictorily discuss the notice submission (see Varga, 2020).

DOI: 10.46282/blr.2021.5.2.227

should the former be missing, by the dean of the Presidents of the Chambers (Art. L. 4412 of the Judiciary Organisation Code).[17]

The Court of Cassation will rule within a three months' term, starting with the request and file reception date (Art. 10313 of the Civil Procedure Code),[18] via an opinion that is not mandatory for the court that formulated the notice (Art. L 4413 of the Judiciary Organisation Code). Within the content of the opinion, the remark can be inserted, referencing the necessity to publish such within the Official Journal of the French Republic,[19] but within all cases, such opinion is to be communicated to the referring court, to the parties, the Public Ministry, the president of the court of appeals and to the general prosecutor (Art. 10316, 10317 of the Civil Procedure Code).

For the case-law partaking to the Court of Cassation, the request to award an opinion is to be rejected when the legal issue targeted the interpretation of a European Union law, or whether to establish the compatibility between a national disposition and the legal provisions of the European Convention on Human Rights or when targeting a legal issue already settled by the Court of Cassation[20] or within the legal practice.[21] In the latter cases, the novelty requirement of the legal issue has not been fulfilled. Furthermore, should the noticed legal issue be found in other litigations that are under the second appeal procedure before the Court of Cassation, then, the release of an opinion will not be imposed.[22] The same rejection of the notice was also given when the legal issue did not represent a serious difficulty.[23]

From the previous exposure of the French procedure, the existence of certain similarities with the Romanian procedure regarding the notification of the High Court for rendering a preliminary decision must be noted.

First of all, for both legislative frameworks, the procedure is facultative and not mandatory, and the competency to settle the notice falls with the Supreme Court.

Within the meaning of both regulations, the compliance with the adversarial principle represents a necessity, by bringing to the attention of the parties of the possible notification of the Supreme Court for settling a legal matter, and without the opinions of the parties hindering the judge from continuing with the procedure. To the extent to which the notification of the Supreme Court is decided upon, the ruling of the litigation is suspended within both legislative frameworks, not subjecting the notice document to any means of challenge.

The Supreme Court rules over the request/notification by a panel specifically established by the lawmaker, within three months from the notice date, via a decision/opinion through which the notice can be admitted or rejected on the grounds of being inadmissible, or to appreciate that an opinion for that respective matter is not necessary.

[17] The method of establishing such judging panels for the aforementioned cases is set in Art. R. 4411 of the Judiciary Organization Code.

[18] The period of time needed to issue an opinion was considered a major advantage for diminishing the appeals with which the Court of Cassation is being notified (Canivet, 2003).

[19] Until 2020, a single opinion was published in the Official Journal, with the Court of Cassation thus avoiding such a measure, so as not to reinforce a compulsory character of the opinion, see J. Buffet, exposure dated March 29th, 2020, found on www.courdecassation.fr.

[20] See: Cass., avis, 9 October 1992, D. 1993. Somn. 188, obs. Julien; Cass. Avis, 16 December 2002, no. 00-20.008 P (Callé and Dargent, 2018).

[21] Cass., avis, 24 January 1994, no 09-30.019 P (Callé and Dargent, 2018).

[22] Cass., avis, 22 October 2012, no 12-00.012 P: R. 2012. 392 and 463 (Callé and Dargent, 2018).

[23] Cass., avis, 24 January 1994, no 09-30.018 P (Callé and Dargent, 2018).

The notice for the opinion and the preliminary decision exclusively make reference to a legal issue which is new, precise, difficult and determined. Even if the difficulty of the legal matter was not expressly stipulated by the Romanian legislator, as compared to the French one, it was retained within the jurisprudence of the Supreme Court.[24]

The opinion and the preliminary decision indicate the interpretation method partaking to a legal norm, when within its broad meaning, is susceptible to distinct interpretations, without the possibility of the notified court to give indications to the referral court on the settlement of that respective litigation.

On the other hand, the distinctions between the two procedures are visible and make reference to the holder of the notice, which at Romanian level represents a judging panel of the court, court of appeal or the High Court that settles the proceedings after careful examination, while within the French legislation, the judge of the first instance court, meaning the judge that renders decisions susceptible to ordinary means of challenge, is allowed to exercise the rights and ability to notify the Court of Cassation; for the admissibility conditions, the French lawmaker expressly stipulates the degree of difficulty of the legal issue and the necessity that the respective legal matter is to give rise to numerous litigations; the possibility of publishing the opinion with the Official Journal, as compared to the existence of the obligation to publish the preliminary decision within the Official Gazette of Romania.

The essential difference between the French regulation and the Romanian one is represented by the lack of the mandatory feature of the opinion issued by the Court of Cassation regarding the settlement method of the legal matter that formed the object of the notice for the referral court and consequently, for the other national courts as well. However, even when such a compulsory feature is lacking therein, within the French doctrine it has been shown, on the one hand, that it is difficult to imagine how a judge, who has requested the help of the Court of Cassation, and who has thus admitted the inability to resolve the legal matter, not to comply with the communicated opinion, as a result of his own notice; and also, for the other national courts it was appreciated that it is far more easier to follow the recommendation of the Court of Cassation, thus eliminating the incidental shortcomings generated by the similar litigations brought before the courts for settlement (Bachellier et al., 2018).

The lack of the compulsory feature of the opinion also denotes the non-existence of a considerable number of notices sent by the courts of first instance (in the year 2019, 15 opinions have been ruled; in 2018, 12 opinions),[25] as comparable to the existing situation in Romania, where, reported to the compulsory feature of the settlement by the High Court and of the fact that the referral court awards a decision not subject to challenge, the number of preliminary referrals is much higher (Bachellier et al., 2018).

6. CONCLUSION

The mechanisms for the analysed judicial practices represent useful instruments, found at the disposal of the courts to ensure a consistent interpretation and applicability of the legal norms. With their help, the legal provisions become clear and predictable not only for the law courts, but for the legislators as well.

[24] The High Court of Cassation and Justice, The Panel for settling certain legal matters, Decree No. 35, dated June 4th, 2018, published in the Official Gazette No. 810, dated September 21st 2018..
[25] Data available on www.courdecassation.fr.

DOI: 10.46282/blr.2021.5.2.227

The unification of the case-law in Romania has registered a surprising dynamic, the role previously recognised, in this regard, especially to the referral in the interest of the law has been consolidated by the new Supreme Court notification mechanism in order to rule on a preliminary decision for the settlement of certain legal matters. This new procedural instrument has the objective of preventing the occurrence of a divergent judicial practice, granting the Supreme Court the possibility of directing the law courts in connection to the interpretation of the legal norms.

Although questionably used at the beginning both, by the courts as well as by the Supreme Court,[26] later on, this mechanism has proven its usefulness, seeing that in time, the courts have started to use it more often, and with its help, the Supreme Court can give the necessary instructions for the uniform settlement of legal matters that are susceptible to multiple meanings.[27]

Only to the extent, to which the non-uniform jurisprudence is determined to be consolidated, the intervention on part of the High Court is done via the referral in the interest of the law and has a purpose to terminate the persistent divergence connected to the notified legal matters.

However, the regulation of such mechanisms can be perfected, imposing the lawmaker to analyse the possibility of indicating a procedural instrument via which the panel, part of the Supreme Court, in charge of settling certain legal matters, by means of assessing that the notice is not admissible due to the fact that it imposes the referral in the interests of the law, can notify, directly, the competent panel (see Anghel, 2015), or at least to fulfil the obligation of notifying the Supreme Court Ruling Council on the need to exercise a referral in the interests of the law (Carcia, 2020).

Furthermore, imposed is the legal and explicit commitment of applying the preliminary decision and of the decision in the interests of the law also for those litigations on the dockets when such mandatory decisions are ruled, by also taking into consideration the divergent opinions expressed both within the doctrine and within the legal practice (M. Nicolae, 2014).

Regarding the second appeal, the desire to unify the legal practices at national level cannot be achieved by having a multitude of law courts settling this type of procedure as a means of challenge but by concentrating majority of such procedures under the jurisdiction of the Supreme Court, which amongst other aspects has a constitutional role in watching over the uniform implementation and interpretation of the law by all such courts.

BIBLIOGRAPHY:

Andreescu, M. (2009). Aspecte privind constitutionalitatea recursului in interesul legii si a deciziilor pronuntate in aceasta procedura (Aspects regarding the constitutional character of the referral in the interest of the law and of the decisions ruled according to this proc. Retrieved from https://www.juridice.ro/90021/aspecte-privind-constitutionalitatea-recursului-in-interesul-legii-si-a-deciziilor-pronuntate-in-aceasta-procedura.html.

Anghel, R. (2015). Unificarea Practicii Judiciare - Deziderate, Mecanisme, Perspective. *Curierul Judiciar*, (1).

[26] In 2013, for civil matters, only one notice was formulated, in 2014 – 13 notices, in 2015 – 27 notices, data available on www.scj.ro.

[27] In 2019, for civil matters, 52 preliminary decisions have been issued; in 2018 – 72 preliminary decisions have been issued; in 2017 – 71 preliminary decisions have been issued – data available on www.scj.ro.

Bachellier, X., Buk Lament, J., and Jobard-Bachellier, M.-N. (2018). *La technique de cassation Pourvois et arrêts en matière civile*. Paris: Dalloz.
Callé, P., and Dargent, L. (2018). *Code de procédure civile annoté (édition 2019)*. Paris: Dalloz.
Canivet, G. (2003). La Cour de cassation et les divergences de jurisprudence. In P. Ancel and M.-C. Rivier (Eds.), *Les divergences de jurisprudence*. Saint Étienne: Publications de l'Université de Saint Étienne.
Carcia, L. C. (2020). Privire comparativă între recursul în interesul legii şi sesizarea Înaltei Curţi de Casaţie şi Justiţie în vederea pronunţării unei hotărâri prealabile pentru dezlegarea unor chestiuni de drept. In *European Judicial Studies and Research, the International Conference of Bachelors of Laws, 12th Edition*. Timisoara: Faculty of Law, West University of Timişoara, European Center for Legal Studies and Research.
Ciobanu, V. M. (1997). *Theoretical and practical Treaty of Civil Procedure, vol. II.* Bucharest: National Publishing House.
Ciobanu, V. M. (2018). *Drept procesual civil - Editia a II-a revazuta si adaugita de Tr. C. Briciu si C. C. Dinu*. Bucharest: National Publishing House.
Ciobanu, V. M., Boroi, G., and Nicolae, M. (2001). Amendments brought forth to the Civil Procedure Code via de Government Emergency Ordinance No. 138/2000 (II). *Carte de Lege*, (2).
Drăguşin, C. (2015). The court decision ruled by invoking a decision settled within the referral in the interest of the law before the publishing of its motivation. *Revista Română Scrisul de Execuţie*, (3).
Les, I. (2011). The referral in the interest of the law in regulating the new Civil Procedure Code. *Pandectele Române*, (8).
Nicolae, A. (2010). The power of the res judicata during the same trial. *Romanian Private Law Magazine*, (3).
Nicolae, M. (2014). The referral in the interest of the law and the preliminary settlement of a new legal matter by the High Court of Cassation and Justice in compliance with the new Civil Procedure Code. *Law Book*, (2).
Pop, P., and Grosu, D. (2011). Mijloace procedurale prevazute pentru unificarea practicii instantelor judecatoresti in lumina prevederilor Noului Cod de procedura civila. *Romanian Private Law Magazine*, (3).
Tăbârcă, M. (2011). *Law No. 202/2010 regarding certain measures to accelerate trial settlements*. Bucharest: Universul Juridic Publishing House.
Tăbârcă, M. (2019). *Civil Procedural Law, 2nd Edition, vol. I, II, III, supplement containing remarks on Law no. 310/2018*. Bucharest: Editura Solomon.
Varga, I. V. (2020). Etapele procedurii întrebării preliminare adresate Înaltei Curţi de Casaţie şi Justiţie. *Universul Juridic*.

DOI: 10.46282/blr.2021.5.2.227