

EXERCISE WITH BAD FAITH OF SUBJECTIVE CIVIL RIGHTS

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Abstract

The abuse of rights is qualified as civil offence and it may not be different from that of aquilian responsibility, the purpose of its sanction is to protect the victim and not to punish the author.

In the Romanian legal doctrine, the abuse of rights was defined as “the exercise of a civil subjective right by breaching the principles of its exercise.”

The Constitutional Court held that the person exercising in bad faith and abusively his/her subjective or procedural rights is punishable by appropriate penalties, such as: dismissal of his/her legal action, obligation to bear the costs, application of certain court fines, etc.

Keywords: *good faith, bad faith, abuse of right, aquilian responsibility, public order, morals.*

Introduction

According to article 57 from the Constitution of Romania, the Romanian citizens, the foreign citizens and the stateless persons shall exercise their constitutional rights and freedoms in good faith, without breaking the others' rights and freedoms.

According to article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms the abuse of rights is prohibited so that no provision of the Convention shall be construed as authorizing a State, a group or an individual to conduct an activity or to perform an act in order to destroy the rights or freedoms set forth in this Convention, or of a broader limitation of these rights and freedoms than those provided by this Convention.¹

The restrictions brought to the respective rights and freedoms can only be applied for the purpose for which they were provided.

The Civil Code stipulates in article 14 the good faith so that any natural or legal person must exercise his/her rights and perform his/her civic obligations in good faith, according to the public order and morals.

Good faith is presumed until proven guilty.

Where there is good faith, there cannot be abuse of rights, but in case the right is exercised in bad faith, by its distortion from the economic and social purpose as it is documented, by the violation of another person's rights, he/she can no longer benefit from the protection of law.

Such regulations are also to be found in other special laws such as the stipulations of article 136¹ of law no. 31/1990 on companies which contains an express provision in the matter, namely: “The shareholders must exercise their rights in good faith, respecting the rights and the legitimate interests of the company and of the other shareholders.”

Abuse of rights in the Civil Code

The French Court of Cassation held that there is an abuse of rights when “the attitude contrary to the general interest of the company, proven by the prohibition to perform an essential operation for it and for the sole purpose of favouring their own interests at the expense of all the other partners' interests.”²

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¹ The Convention for the Protection of Human Rights and Fundamental Freedoms. Rome 04.11.1950, ratified by Romanian by Law no. 30/1994 published in the Official Gazette no. 135/31.05.1994.

² Decision no.158/2009 of Court of Appeal Timișoara, Civil department.

Constitutional Court held that the person exercising in bad faith and abusively his/her subjective or procedural rights is punishable by appropriate penalties, such as: dismissal of his/her legal action, obligation to bear the costs, application of certain court fines, etc.³

In the Romanian legal doctrine, the abuse of rights was defined as “the exercise of a subjective civil right with the breach of the principles of its exercise.”

The abuse of rights is qualified as civil offence and may not be different from that of aquilian responsibility, the purpose of its sanction is to protect the victim and not to punish the author.⁴

The legal characteristics of the abuse of rights are the following:

- exercising the subjective civil right;
- disregarding the economic and social purpose for which the subjective right is recognized;
- exercising the subjective right in bad faith;
- exercising the subjective right by exceeding its limits.

The abuse of rights can be punished by:

- the rejection of the plaintiff’s claim to the court of law when it finds that he/she has abusively exercised a subjective right. Such a regulation is stipulated in article 29, paragraph 5 of Law no. 47/1992: “If the exception is inadmissible, being contrary to the law stipulations, the Court rejects by a reasoned resolution the referral request to the Constitutional Court.”⁵

- the removal of the defendant’s defence by the Court of law when he/she exercises the respective right abusively;

- when the abuse of law is materialized in an act that causes damages, the Court of law gives rise to the author’s liability to the injured person in one of his/her rights by obliging him/her to repair the damage with recovery of damages. Thus, there are the stipulations of article 1353 of the Civil Code which provide that the person who causes a damage through the proper exercise of his/her rights is not obliged to repair it, unless that right is exercised abusively. Therefore, it is established, as general principle, that the person who caused a prejudice to another person by exercising his/her rights is not obliged to repair it unless the rights were exercised abusively.⁶

The Civil Code regulates in article 15 the abuse of rights and stipulates that no right can be exercised in order to harm or to injure another person excessively or unreasonably, contrary to good faith.

The exercise of civil rights with the violation of this “good faith” principle represents “*abuse of rights*” and it is punishable as such.

The holder’s civil liability is involved in the case of committing an abuse only if the right is exercised with the intent of causing material or moral damage to another person.

If one cannot remember the author’s guilt as the intention to cause damage to another person, the author is responsible in the situation in which the subjective right is exercised excessively and unreasonably, contrary to good faith, and if damage is caused to another person. In the case of the abuse of rights as well, in order to be able to have civil liability, it is necessary to meet the general conditions as in the civil aquilian responsibility, namely: the existence of the illegal act, materialized in exercising abusively the right; the material or moral damage caused by exercising the right, the causal link between the illegal act and the author’s damage and guilt.⁷

³ Decision no. 161/2002 of the Constitutional Court published in the Official Gazette no. 448/26.06.2002.

⁴ Marilena Uliescu. – New Civil code, 3rd edition, revised and added – Bucharest, Universul Juridic, 2011.

⁵ Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished in the Official Gazette no. 807/03.12.2010.

⁶ Article 1349 of the Civil Code. Aquilian responsibility

Everyone has the duty to respect the rules of conduct which the law or local custom requires and not to bring prejudice through his/her actions or inactions to the legitimate interests of other persons.

The one who, having discernment, violates this duty, is responsible for all the damage caused, being obliged to fully compensate it.

⁷ Christina Vlădescu – The abuse of rights in the regulation of the New Civil Code, 2011. www.juridice.ro.

The new Civil Code also speaks about the abuse of rights in the regulation of article 193 paragraph 2 on the effects of the legal personality, so that no one can plead against a good faith person the quality of law subject of a legal person, if by this one tries to conceal a fraud, an abuse of rights or public order attack.

According to the stipulations of article 630 of the Civil Code, if the owner causes, by exercising his/her right, inconvenience higher than the normal one in the neighbourly relations, the Court may, on grounds of fairness, oblige him/her to pay compensation for the benefit of the injured person, as well as to restore the previous situation when possible.

If the injury caused were minor in relation to the need or usefulness of carrying out the prejudicial activity by the owner, the Court may approve the conduct of that activity. But the injured person will be entitled to compensation.

If the damage is imminent or very likely, the court may approve, by way of presidential ordinance, the necessary measures to prevent the damage.

According to article 2496 of the Civil Code, the right of retention cannot be exercised if the ownership of the property comes from a wrongful or illegal act or if the property is not susceptible of legal prosecution.

The right of retention cannot be invoked by the owner of bad faith except in the cases specifically stipulated by law.

The Civil Code does not establish the way in which the abuse of rights can be sanctioned, the person who is guilty of abuse of rights may be ordered by the Court, on the grounds of the general principles of civil liability, to compensate for the damage as the judge considers it appropriate in the specific circumstances of the case tried.

The Court of law has to establish concretely, according to the particularities of each case, the removal of the effects caused by exercising the abusive right, the compensation for the material or moral damage caused or granting recovery of damages.

The abuse of rights in exercising procedural rights

The exercise in good faith of certain rights is also regulated by the new Code of civil procedure⁸ in article 12 which stipulates that the procedural rights must be exercised in good faith, according to the purpose for which they were acknowledged by the law without violating the procedural rights of another party. The party exercising the procedural rights abusively is responsible for the material and moral damage caused. The party may be required, according to the law, to pay a legal fine as well.

The party that does not fulfil his/her procedural rights in good faith is also liable for the material and moral damage caused.

According to article 12 of the new Code of civil procedure, the person who is guilty of abusively exercising a right, shall be required, according to the law, to pay a legal fine.

The Code of procedure in force stipulates in article 723 that the procedural rights must be exercised in good faith and according to the purpose for which they were acknowledged by the law.

The party who uses these rights abusively is liable for the damage caused.

The Code of civil procedure sanctions the exercise of the procedural rights in bad faith, so that the party who uses these rights abusively has the obligation to be liable for the damage caused.

The Code of civil procedure does not show which are the criteria for determining the abuse of rights, the mere rejection of the subpoena form does not mean, *eo ipso*, that the plaintiff has acted abusively so that he/she may be held liable for invoking certain unjustified claims. As such, it was considered that only the judicial approach, initiated in bad faith or out of a serious error that makes it

⁸ New Civil Procedure Code Law no.134/2010 published in the official Gazette no. 485/15.07.2010.

close to fraud, with the intent to cause damage, moral or material, may be considered abuse of rights.⁹

The provisions of article 723 Code of civil procedure do not entitle the Court to invoke *ex officio* the abuse of procedural law, but rather, according to paragraph (2) thereof, it results that only the adversary, injured by the abuse of procedural rights, may claim the abuse of rights, and not the Court which does not act as the passive subject of this abuse, but as guarantor of obeying the procedural rights.

Due to the fact that the stipulations of paragraph (2) article 723 show which is the penalty for the abuse of rights, namely the obligation to compensate for the “damage caused,” the conclusion that can be drawn is that only the adversary, injured by the abuse of the procedural rights, may invoke the abuse of rights, not the Court, which does not act as the passive subject of the abuse or as party in the proceedings, but as guarantor of obeying the procedural rights, as provided by article 129 of the Code of civil procedure.

The only sanction applicable to the abuse of rights is that of the damages offered to the injured party, as provided by the stipulations from paragraph (2) article 723 of the Code of civil procedure. No other legal provision authorizes the rejection of an application solely because during the trial his/her titular has used abusively his/her legal rights, diverting them from their purpose legally acknowledged. In order to sanction such procedural conduct, the judge can use the stipulations from article 108¹ paragraph (1) letter a) or paragraph (2) letter b) Code of Civil Procedure and the legal fine penalty, as well as the stipulations of article 155¹ paragraph (1) Code of Civil Procedure stipulating the sanction of proceedings suspension.¹⁰

According to article 28 paragraph 3 of the Code of Civil Procedure, for the same grounds of recusal a new petition against the same judge cannot be made.

The formulation, again, of the request for recusal takes the form of abuse of procedural law, whose sanction is, in the light of article 723 Code of Civil Procedure not only granting of compensation but also, as a way to compensate in kind, depriving the pleading of the effects sought by the party who did it abusively. However, the inadmissibility of the request for recusal and, therefore, the abuse of rights, is directly found, even by the judge before whom the procedural act was committed, and not by a higher court or by another panel of judges, the purpose of article 28 paragraph (3) Code of Civil Procedure being to prevent delays in resolving cases by making requests for abusive recusal. This goal is achieved only if the inadmissibility of the request for recusal and, implicitly, the abuse of rights, is found directly, by the very judge before whom the procedure act was committed, otherwise the party that wants to block the trial will reach its aim. On the other hand, the provisions of article 30 paragraphs (1) and (2) Code of Civil Procedure consider the hearing of certain requests for recusal admissible in principle, whose trial on the merits involves assessing the merits of the recusal grounds, and article 28 paragraph (3) establishes the inadmissibility of a request for recusal of the same judge for the same reasons. It results that the inadmissibility of a request for recusal is a separate issue which has to be solved by the Court summoned by the request for recusal, under the common law jurisdiction.¹¹

Conclusion

The repeated formulation, within the insolvency proceedings, of certain requests for referral to the Constitutional Court and for the suspension of trial, by the debtor and by those creditors who are either shareholders or former directors of the debtor, takes the form of abuse of procedural law, whose sanction is, in the light of article 723 Code of Civil Procedure, in addition to compensation,

⁹ Marilena Uliescu. – New Civil Code, 3rd ed. revised and added – Bucharest, Universul Juridic, 2011.

¹⁰ Decision no. 548/2006 of Bucharest Court of Appeal, Fifth Department of Trade.

¹¹ Completion of 12 December 2006 seventh Department of Trade Bucharest Court of Law.

the depriving of the pleading act of the effects sought by the party who has done them abusively, as a means of redress in kind.

The abuse of rights is found directly, by the very judge before whom the procedure act was committed, and not by a higher court or by the constitutional litigation one. Therefore, the syndic judge, noting that the new request takes the form of abuse of rights, will reject, as inadmissible, the requests for referral to the Constitutional Court and for the suspension of the trial.

The Constitutional Court ruled in several decisions on the abuse of rights, and we mention in this respect, Decision no.161/2002 which states that no Government Ordinance no.5/2001 facilitates the abuse of rights, and the person exercising in bad faith and abusively his/her subjective or procedural rights is punishable by appropriate penalties, such as: dismissal of his/her trial action, obligation to bear the costs, application of court fines and other.¹²

Under article 51 of Law no.47/1992 on the organization and functioning of the Constitutional Court, when it finds that the objection in law of unconstitutionality was unfounded and that it was raised in bad faith to delay the resolution of the trial, the Court may punish the party who invoked the objection in law with a fine of 10,000-100,000 lei.

The Constitutional Court had the possibility to sanction the abuse of rights, thus through Decision no.81/2001 the Court notes that the Constitutional Court Decision no.26 of 23 February 1999, on the plea of unconstitutionality of the provisions from article 239, paragraph 1 of the Criminal Code, is *res judicata*, the object, the case and the parties being the same both in the previous objection in law and in the objection in law referred to in this decision. Thus, taking into account the provisions of article 145 paragraph (2) of the Constitution and those of article 25 paragraph (3) of Law no.47/1992, republished, according to which the final decisions of the Constitutional Court are binding, the party that invoked the objection in law can not reiterate it anymore, whereas the first decision comes into the power of *res judicata* and, therefore, the exception is inadmissible.

The author of the objection in law knew the content of the Constitutional Court decision, which is published in Romania's Official Gazette, Part I, and, moreover, it is filed at the Court, but in bad faith raised again the same objection in law in order to obtain the case trial suspension. The bad faith of the person who raised the objection in law also results from the random invoking of certain texts of the Constitution and of the Universal Declaration of Human Rights or of the provisions of article 284¹ of the Criminal Procedure Code, which have no relevance in the case. In this situation, the Court finds that the provisions of article 51 of Law no.47/1992, republished, are incidental pleas in the case, according to which, "When the Constitutional Court finds that the objection of unconstitutionality is unfounded and that it was raised in bad faith to delay the settlement of the case, it may penalize the party who invoked the objection in law with a 10,000 to 100,000 lei fine."¹³

The Constitutional Court has also found that the Court should have rejected itself the writ of summons to the Constitutional Court.

Article 51 of Law no. 47/1992 was repealed by Law no. 232/2004.

To avoid the writ of summons in bad faith to the Constitutional Court which decides on the objections in law raised before the courts or on the commercial arbitration on the unconstitutionality of a law or ordinance or of a provision of a law or of an ordinance in force, which is related to the settlement of the case at any stage of the dispute and whatever its subject, was repealed by Law no. 177/2010, a stipulation which suspended the trial of the dispute until the settlement of the objection of unconstitutionality, thus causing undue prolongation of the trial.

In conclusion, the exercise of a right is considered abusive when the right is used to achieve its purpose, but with the intent to harm another person or contrary to good faith.¹⁴

¹² Decision no.161/2002 of the Constitutional Court, published in the Official Gazette no.448/26.06.2002.

¹³ Decision no.81/2001 of the Constitutional Court, published in the Official Gazette no.176/2001, CDH 2001, p. 646.

¹⁴ Marilena Uliescu. – New Civil Code, 3rd ed. revised and added – Bucharest, Universul Juridic, 2011.

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