

CLASSIFIED DOCUMENTS IN CIVIL LAWSUITS

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Abstract

The purpose of this study is to approach classified documents from a very specific perspective: that of using them as evidence during a civil lawsuit. In this sense, we provide the definition of classified documents, give details about the way in which classification operations are performed, as well as the conditions that have to be met so that these documents could become declassified in case parties wanted to have access to the documents submitted to the case file. Moreover, we deal with the issue of submitting classified documents to court, with the way in which these documents could be accessed, considering the right to a fair trial.

Keywords: *classified documents, civil lawsuit, the right to have access to evidence, the right to have access to court*

1. Introduction*

With Book II, Chapter II, Section 2, Subsection 3 of the Romanian Civil Procedure Code (RCPC)¹, the legislator regulated the legal status of documents in terms of their use as evidence in civil proceedings. We recall in this connection that, according to the provisions listed in art. 250 RCPC, the burden of proof as far as a legal document or fact is concerned lies with the documents, witnesses, presumptions, testimony of one of the parties, given on its own initiative or obtained either by interrogation or expertise, the material objects, the investigation made or any other means provided for by law.

A document is defined by the provisions of art. 265 RCPC as any piece of writing or other record that contains information about a legal document or fact, regardless of its physical support or the preservation and storage means.

In a civil lawsuit, parties may use both authentic documents and documents under private signature, as well as electronic documents, for each of these categories being necessary to comply with the terms expressly provided for by the legislator. The documents can be electronically processed, and, in this situation, when the details of a legal document are electronically processed, the evidentiary instrument of this document is the document that reproduces these details, provided that it is comprehensible and incorporates sufficiently serious guarantees so that its contents, as well as the identity of the person who has produced it, could prove to be of good faith².

Regarding the proposal and management of documentary evidence, based on the provisions of art. 249 RCPC, according to which the party who makes a

claim during the civil lawsuit must prove it, except for the cases stipulated by law, parties are required to submit all the documents they intend to use in order to resolve the dispute taken to court once they file the petition form, the statement of defense or the counterclaim, as appropriate, under penalty of preclusion.

Nevertheless, there are situations where parties, to the extent they are not state authorities or public institutions, are not in possession of the documents that are necessary to resolve the disputes. In this case, the provisions of art. 298 RCPC are to be followed, whereby, at the request of a party or ex officio, the court shall order that the given documents are to be made available by the public authorities or institutions holding them. The public authority or institution holding the documents has the right to refuse submitting the document when national defense, public security or diplomatic relations are at stake.

In other words, the public authority or institution holding the document could, for instance, refuse to send the document when it is classified, this right of refusal not being unconditional. Under these circumstances, we have to ask ourselves whether the right to a fair trial, provided for by art. 6 RCPC, as well as the principle of equality of arms, regulated by art. 8 RCPC, are observed in civil lawsuits.

In order to understand the legal status of this category of documents, we need to define this type of document. Additionally, by briefly analyzing how the information becomes classified or not, a more comprehensive perspective on this topic will be provided.

According to art. 15 of Law no. 182 of 2002 on the Protection of Classified Information³, classified information is information, data, documents of interest to national security⁴, which, due to the levels of

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¹ Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.

² Boroi Gabriel, Stancu Mirela – *Drept procesual civil* (Civil Procedural Law), Hamangiu Publishing House, 2015, p.438.

³ Law no. 182 of 2002 on the protection of classified information, as amended, was published in the Official Gazette of Romania no. 248 of April 12, 2002.

⁴ According to art. 1 of Law no. 51/1991 on the national security of Romania, republished in the Official Gazette of Romania no. 190 of March 18, 2014, Romania's national security means the state of legality, social, economic and political stability and balance, necessary for the

importance and consequences that would occur as a result of unauthorized disclosure or dissemination, shall be protected⁵.

The categories of classification to which classified information may belong are state secrets and restricted secrets. The information classified as state secret comprises that information concerning national security, which, if disclosed, could compromise national security and defense, whereas the information classified as restricted secret comprises information which, if disclosed, is likely to cause harm to a legal entity of public or private law. Also, within the class of information classified as state secret information, information can be divided into special classification levels, according to the damage that might occur through disclosure: NATO top secret information, NATO secret information and NATO confidential information.

An important aspect is the fact that, in principle, the two classes of classified information are governed by different regulations: the legal status of the class of information classified as state secret is provided for by Government Decision no. 585 of 2002⁶, whereas the restricted secret information is protected by the provisions of Government Decision no. 781 of 2002⁷. We used the phrase 'in principle' to refer to the legal regime to be applied to the two classes of classification

because, within certain limits, the provisions of Government Decision no. 585/2002 are also to be observed in order to protect restricted classified information⁸.

We would like to point out that classified information should not be confused with trade secrets, the reason for restricting access to classified information pertaining to the protection of information related to national security and defense and not to the protection of certain secrets in relevant industrial areas, which has to do with the freedom of trade and industry, as it is enshrined in the provisions of art. 135 para. (2) a) of the Constitution of Romania⁹.

In this context, it might prove useful to specify that trade secret¹⁰ is defined as information which, wholly or partly, is not generally known or easily accessible to people dealing usually with this kind of information and which acquires commercial value because of the fact that it is secret, for which the legitimate holder took reasonable steps under the circumstances, to be kept under secrecy; trade secret protection operates as long as the previously mentioned conditions are cumulatively met¹¹.

Romanian national state to exist and develop as a sovereign, unitary, independent, indivisible state, to maintain the rule of law, and necessary for the Romanian citizens to unrestrainedly exercise their rights, freedoms and fundamental duties, according to democratic principles and norms enshrined in the Constitution of Romania.

⁵ According to art. 17 of Law no. 182/2002, "The category of state secret information comprises information representing or relating to: a) the national defense system and its basic elements, military operations, manufacturing technologies, armament and combat characteristics used exclusively within the national defense system elements; b) plans and military devices, personnel and missions of the forces engaged; c) the state cipher and other encrypting elements established by the competent public authorities and the activities related to their implementation and use; d) the organization of the protection and defense systems for the objectives, sectors, as well as the special and military computer networks, including their security mechanisms; e) data, schemes and programs relating to communication systems, as well as the special and military computer networks, including their security mechanisms; f) the intelligence activity carried out by public authorities established by law for national defense and security; g) means, methods, techniques and equipment, as well as the specific information sources used by public authorities that carry out intelligence activities; h) maps, topographical plans, thermograms and air flight records performed at scales larger than 1: 20,000, which exhibit the elements of content or the objectives classified as state secrets. i) studies, geological surveys and gravimetric analysis with density higher than one point per square kilometer, which assess national reserves of radioactive, disperse, precious and rare metals and ores, as well as data and information related to the material reserves that are the competence of the National Administration of State Reserves; j) systems and plans to supply electricity, heat, water and other utilities necessary for the operation of the objectives classified as state secrets; k) scientific activities, technological and economic activities and investments related to national security or national defense or which have special importance for the economic, technical and scientific interests of Romania; l) scientific research in nuclear technologies, besides the fundamental ones, as well as the programs for the protection and security of the nuclear materials and installations; m) issuing, printing banknotes and minting coins, the mockups of the monetary issues of National Bank of Romania and security features of banknotes and coins for detecting counterfeits, not for advertising, as well as printing securities such as government securities, treasury and government bonds; n) external relations and activities of the Romanian state, which by law are not meant for publicity, as well as intelligence belonging to other States or international organizations, to which, through treaties or international agreements, the Romanian government has committed itself to protect."

⁶ Government Decision no. 585 of June 13, 2002 approving National Standards for Protection of Classified Information in Romania, was published in the Official Gazette of Romania no. 485 of July 5, 2002.

⁷ Government Decision no. 781/2002 for the Protection of Restricted Information was published in the Official Gazette of Romania no. 575 of August 5, 2002.

⁸ According to art. 1 of Government Decision no. 781/2002 "The national standards for the protection of classified information in Romania, approved by Government Decision no. 585/2002 shall apply accordingly to the restricted classified information regarding:

a) classification, declassification and minimum protection measures; b) the general rules of evidence, preparation, storage, processing, copying, handling, transport, transfer and destruction; c) the obligations and responsibilities of the heads of public authorities and institutions, business entities, as well as other legal entities; d) the access of foreign citizens, of Romanian citizens who have another citizenship and of stateless persons to classified information and to places where activities unfold, objects are exposed and activities are performed related to this type of information; e) control over safeguards."

⁹ The Constitution of Romania of November 21, 1991, republished, was published in the Official Gazette of Romania no. 767 of October 31, 2003.

¹⁰ To analyze the concept of "trade secret", see Răzvan Dincă, *Protecția secretului comercial în dreptul privat* (Trade Secret Protection in Private Law), Volume 10, Universul Juridic Publishing House, 2009.

¹¹ See Law no. 11/1991 regarding unfair competition, published in the Official Gazette of Romania, no. 24 of January 30, 1991, as amended and supplemented.

2. Classification and declassification of documents¹²

When labeling a piece of information as classified, the originator must take into account a number of objective and subjective criteria resulting from the way the legislator intended to regulate this area. In this regard, all authorities / institutions that draft or work with classified information are obliged to draw up guidelines for classification on which proper and uniform classification could be carried out.

Besides the previously mentioned guidelines, public authorities and institutions are obliged to draw up their own lists comprising the categories of state secret information in their fields, lists that are approved and updated by Government decision. Moreover, the units holding restricted secret information are required to draw up lists comprising these categories of information, lists which shall contain information relating to that unit's activity and which, while not constituting state secrets, within the meaning of the law, should be only known by the persons who need it to perform their official duties.

In this respect, for instance, when drafting a document, the originator is obliged to consult the guidelines and the lists of state secret information, or the list of restricted secret information, respectively, in order to assign the appropriate class and level of secrecy to the document, as these are the tools which basically provide objective criteria for the originator to classify or not the information included in that document.

Nevertheless, the originator might draw up a document containing data and information from different classes of classification, or data and information from the same class of secrecy but with different classification levels, or data and information taken from both classified and unclassified documents. Usually, if the document reproduces information belonging to different classes of secrecy, the resulting document will bear the highest level of secrecy. But, at the same time, without violating any legal provision in force, in this situation, classification may also be performed considering the content criterion, which is subjective. Thus, if the information is not reproduced exactly, but it is processed or partially reproduced, the resulting information may or may not be classified, according to its actual content. The originator is the one who assesses the features to be assigned to the document, as the legislator allows him/her to assign the

appropriate level of secrecy according to the content of that document.

Consequently, in practice the following situations may arise:

- a) the originator¹³ consults the classification guidelines and the lists of classified information, he/she finds that the information contained in the drafted document falls within one of the categories included in the list, he/she considers that it is mandatory to protect information due to its content and he/she assigns the document a class and a level of secrecy;
- b) the originator consults the guidelines and the lists of classified information, he/she finds that the information contained in the drafted document falls within one of the categories included in the lists, however, he/she considers that, by referring to the content of the document, there is no need to protect it and no level of secrecy is assigned to that document;
- c) the originator consults the guidelines and the lists of classified information, he/she finds that the information contained in the drafted document doesn't fall within any of the categories mentioned in the lists of classified information, but in relation to its content, it is mandatory to protect information, and thus that document is submitted for classification.

Another aspect should be outlined here: if the document has several annexes, they will be classified or not, depending on their content, but as long as the document will be treated as a whole, annexes cannot be separated in terms of their content and the document will benefit from protection measures relating to the annex / document bearing the highest level of secrecy. It is also necessary to mention in this context that each originator is required to establish the periods of classification, depending on the importance of information and the consequences that might arise in case of unauthorized disclosure or dissemination.

As far as declassifying information is concerned, according to provisions in art. 20 of Government Decision no. 585/2002, this operation is authorized when the classification period has expired, disclosure shall not endanger national security, defense, public order or the interests of public or private persons holding the information or the classified character of the respective information and when that information

¹² For more details see *Chapter II - Classification and declassification of information. Minimum safeguards specific for secrecy classes and levels*, in Government Decision no. 585/2002.

¹³ According to art. 19 of Law no. 182/2002, "The individuals occupying one of the following offices are empowered to assign documents one of the classification levels, during their drafting: a) for NATO top secret information: 1. the President of Romania; 2. the President of the Senate and the President of the Chamber of Deputies; 3. the members of the Supreme Council of National Defense; 4. the Prime Minister; 5. Government members and the Secretary General of the Government; 6. the Governor of the National Bank of Romania; 7. directors of the national intelligence services; 8. the Director of the Protection and Guard Service; 9. the Director of the Special Telecommunications Service; 10. the Secretary General of the Senate and the Secretary General of the Chamber of Deputies; 11. the President of the National Institute of Statistics; 12. the Director of the National Administration of State Reserves; 13. other authorities empowered by the President or the Prime Minister; b) for NATO secret information – those empowered referred to in subparagraph a), as well as officials with the rank of secretary of state, according to their material competences; c) NATO confidential - those empowered referred to in subparagraphs a) and b), as well as senior officials with the rank of subsecretary of state, secretary general or director general, according to their material competences."

was classified by a person who was not empowered by law.

Declassification can be done by the originators, who must obtain the prior approval of institutions that coordinate and control the safeguards for the protection of classified information, according to their material competences. Thus, it is inferred that the originator has the option to declassify information whenever he/she considers that disclosure or dissemination would not cause damage to national security, national defense, public order or the interests of public or private persons holding the information.

3. Using classified documents in civil lawsuits

As shown in the first section, the parties have the duty to submit all the documents they intend to use in order to resolve the dispute, and, in case the documents are held by public authorities or institutions, the court may order the submission of documents in court, if it considers this piece of evidence to be admissible and useful.

Insofar as the document concerns national defense, the authority may refuse to submit the document. In this context, one word of caution is necessary: essentially, based on the analysis of how the legislator defined classified information, making express reference to national security, it follows that the documents relating to national defense are usually labeled as classified. Under these circumstances, by systematically analyzing legal reference texts, we find that by means of the final thesis statement in paragraph (2) of art. 298 CPC reference is made to art. 252 CPC, according to which the substantive provisions contained in classified documents can be proven and consulted only as provided for by law.

Given these arguments, we consider that only the label ‘classified’ assigned to a document may not constitute a reason *per se* for refusing to submit the respective document to court, while courts have not only the right of access to classified information but also powers to control the overstatement or understatement of the secrecy level and the duration for which they were classified. Additionally, one has to underline the fact that, in order to achieve this purpose, the phrase “*those related to national defense and security*”, contained in art. 5 para. (3) of Law no. 554/2004¹⁴, was declared unconstitutional, contrary to the provisions of art. 126 para. (6) of the Constitution

of Romania, as on the basis of this phrase the administrative acts related to national defense and security¹⁵ could circumvent the judicial review of the contentious administrative court.

Thus, we consider that the provisions of art. 298 in relation to art. 252 CPC are derogatory with respect to the need-to-know principle, whose fulfillment is checked only by the originator, who is held liable for unauthorized disclosure or dissemination. Therefore, public institutions or authorities holding the document may not refuse to submit the classified document at the request of the court only by invoking its classified nature. On the other hand, we consider that the submission of such a document may be refused to the extent that such refusal is duly justified (for instance, refusal to submit to the administrative court documents that formed the basis for issuing an adverse opinion for some individuals to enter the national territory, motivated not only by their classified nature, but also by using reference documents by the authorities with jurisdiction in criminal matters).

As for the way courts deal with classified information, this activity is regulated by the provisions of the decision of the Superior Council of Magistracy no. 140 of February 6, 2014 approving the Regulation on the access of judges, prosecutors and assistant magistrates of the High Court of Cassation and Justice to information classified as state secrets and restricted secrets¹⁶. At the same time, we would like to emphasize the fact that this act was issued due to changes in the provisions of art. 7, para. (4) of Law no. 182/2002, in terms of providing access to classified information for all judges, provided they have been appointed and taken the oath. Prior to this legislative change, only certain judges had access to classified information, an aspect that has aroused lively controversies especially in terms of ensuring the random distribution of cases.

According to art. 11 of the decision of the Superior Council of Magistracy no. 140/2014, classified documents shall be kept in separate volumes, which are not publicly available. Classified documents may be made available to court staff or, where appropriate, to prosecutors, parties, their defenders, experts, interpreters, according to the procedures stipulated by Law no. 182/2002 and Government Decision no. 585/2002, Government Decision no. 781/2002, respectively, as appropriate, and only if they have security clearance for access to classified information or access authorization corresponding to the class or the secrecy level of each of the given

¹⁴ According to art. 5 para. (3) of Law no. 554/2004 “administrative acts issued to enforce the state of war, the state of siege or of emergency, as well as those related to national defense and security or those issued to restore law and order, to eliminate the consequences of natural disasters, epidemics and epizooties, can be contested only for abuse of power.” Law no. 554 of December 2, 2004, on the administrative contentious, with amendments and supplements, was published in the Official Gazette of Romania no. 1154 of December 7, 2004.

¹⁵ In this respect, see the Constitutional Court Decision no. 302 of March 7, 2011 regarding the exception of unconstitutionality of the provisions in art. 7 para. (4), art. 17 (f), art. 20 and art. 28 para. (1) of Law no. 182/2002 on the protection of classified information, as well as art. 5 para. (3) of Law no. 554/2004 on administrative contentious, published in the Official Gazette of Romania no. 316, of May 9, 2011.

¹⁶ Available at http://www.csm1909.ro/csm/linkuri/07_02_2014__65245_ro.PDF accessed 17/02/2017. Constitutional Court Decision no. 1120 of October 16, 2008 regarding the exception of unconstitutionality of art. 2 para. (2) art. 7 para. (1), Art. 25 para. (1) and Art. 34 lit. j) of the Law no. 182/2002 on the protection of classified information and art. 3 and art. 13 of Law no. 51/1991 on the national security of Romania, published in the Official Gazette no. 798 of November 27, 2008.

documents and provided they give arguments for the need-to-know principle.

Analyzing the provisions mentioned, we have demonstrated that they cannot be fully enforced and that they are ineffective in terms of parties' access to classified documents in the file, being inconsistent with the higher level rules of law included in the Government Decision no. 585/2002. Thus, one could notice that the authorization of access to classified information is defined as a document issued by the competent institutions, the head of the legal person holding such information, which confirms that, *by performing professional duties*, the holder can have access to state secret information of a certain level of secrecy, complying with the need-to-know principle; additionally, the security certificate is defined as a document issued to the person *with direct responsibilities in the protection of classified information*, to the security officer or to the employee belonging to the security structure, who proves verification and accreditation to hold, to access and to work with classified information of a certain level of secrecy. Or, obviously, one party in a lawsuit cannot obtain authorization to access classified information / certificate security, as these authorization documents are to be issued only when they are necessary to carry out job duties.

In such circumstances, we consider that, since the resolution of a dispute involves examining classified documents, to ensure the right to a fair trial, first it is necessary to verify the conditions under which reference documents might be declassified. In this regard, the court assigned to resolve the dispute should notify the originator to consider the opportunity of declassifying reference documents, as such a procedure is possible in terms of art. 20 and art. 21 of the Government Decision no. 585/2002.

Moreover, the issuing authority is able to make and communicate declassified partial extracts, from the original document, as such a measure is expressly provided for by art. 298 CPC. In case the documents may not be declassified, the dispute will be resolved appropriately, as these documents are kept in separate volumes, access being provided only to those who hold proper authorization and who will justify the need to know the reference documents.

It is appropriate to mention in this context that, over time, the parties have invoked the constitutional challenge of art of the provisions on access to classified information, arguing that the contested legal texts infringe the right to a fair trial under one, impartial and equal justice for all. Nevertheless, the Romanian Constitutional Court was constant as far as its case law is concerned and dismissed the constitutional challenge of art as unfounded, stating that it is natural that Law

no. 182/2002 contain specific rules on certain persons' access to such information, that is persons who are parties in a lawsuit, as well as their representatives, on condition that the security clearance certificate be obtained, for which it is necessary that the requirements and the procedure, provided for by the same law, be complied with beforehand. Since the legal provisions under criticism do not have the effect of effectively and absolutely blocking access to certain information, but, on the contrary, they make it conditional upon taking certain procedural steps, stages justified by the importance of such information, one cannot advocate the infringement of the right to a fair trial or of the principle that justice shall be one, impartial, and equal for all. On the other hand, the Constitution of Romanian itself provides for, according to art. 53 para. (1), the possibility to restrict the exercise of certain rights - including guarantees related to a fair trial - for reasons of safeguarding national security¹⁷.

3. Conclusions

In civil lawsuits documents occupy an important place in terms of evidence and ensuring the parties' access to the case file is a key issue when respecting the right to a fair trial and exercising procedural rights equally without discrimination. It is to be noted, however, that there are situations where access to certain documents cannot be provided, or at least cannot be provided to all persons involved in the settlement of the dispute, as some of them do not have the effective opportunity to obtain the authorization documents required for consulting the documents.

We appreciate, however, that, in such a situation, the possibility of declassifying the documents to ensure access for all parties to all parts of the file should be thoroughly analyzed for each particular case. But in the event that such an operation is not possible, the dispute shall be settled by reference to all the documents submitted, even if not all the parties have access to them. We do not consider, however, that the existence of an ongoing lawsuit might constitute a pertinent reason to declassify a document as, usually, in a civil lawsuit two or more private interests are in opposition, because documents are assigned a classification level to protect certain general interests as it is widely accepted that individual rights must be exercised consistent with collective rights.

Finally, the restrictions related to the access to information have always been accepted, even in the practice of the European Court of Human Rights, on condition that they be provided for by law, have a legitimate aim and be necessary in a democratic society.

¹⁷ Constitutional Court Decision no. 1120 of October 16, 2008 regarding the constitutional challenge of art for provisions in art. 2 para. (2), art. 7 para. (1), art. 25 para. (1) and art. 34 lit. j) of the Law no. 182/2002 on the protection of classified information, as well as art. 3 and art. 13 of Law no. 51/1991 on the national security of Romania, published in the Official Gazette of Romania no. 798 of November 27, 2008.

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- Government Decision no. 781/2002 for the protection of restricted information was published in the Official Gazette of Romania no. 575 of August 5, 2002;
- Law no. 11/1991 regarding unfair competition, published in the Official Gazette of Romania no. 24 of January 30, 1991, as amended and supplemented;
- Constitutional Court Decision no. 302 of 1 March 2011 regarding the constitutional challenge of art of the provisions in art. 7 para. (4), art. 17 (f), art. 20 and art. 28 para. (1) of Law no. 182/2002 on the protection of classified information and art. 5 para. (3) of the Law no. 554/2004 on contentious administrative published in the Official Gazette of Romania no. 316 of May 9, 2011;
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