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CERTAIN ISSUES CONCERNING THE ROMANIAN REGULATION OF THE GOOD FAITH PRINCIPLE IN CIVIL AND CIVIL PROCEDURAL MATTERS

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Abstract: One way for individuals and legal entities to pursue legitimate rights and/or interests is the judicial path. The civil proceedings as a form of settling civil litigations is governed by different principles. Among these stands out the principle of good faith, which involved the exercise in good faith of rights in both civil and procedural matters, the exercise in good faith of procedural rights, a principle which has gained new meanings after the entry into force of the new Code of Civil Procedure, as well as the new Civil Code.

1. Introduction

One of the principles that have a particular connotation in the context of the new regulations in civil procedural, as well as civil matters is the exercise in good faith of procedural rights.

Good faith [1] as a guiding principle in social relations has existed since the times of Roman law [2], when it involved sincerity in words and faithfulness in commitments. The phrase under scrutiny dates back to the end of the Republic, with the advent of Praetorian property, when the development of trade required the protection of buyers who were of good-faith in the transactions being concluded [3].

Currently the concept of "good faith" [4] takes on different connotations. Thus, the following are remarked:

- as defined in the Explanatory Dictionary of the Romanian Language [5], the term 'good faith' designates, in a primary sense, "the obligation to behave correctly which the parties must respect when concluding and executing contracts, or, in the case of states, treaties"; and in a secondary sense, "the conviction of a person that they act on the basis of a right and in accordance with the law or propriety";
- in legal doctrine, good faith has been defined as being that moral rule which expresses or imposes a will or a behaviour in accordance with the expectations of others, as well as with the rules of law, as a form of objectivising common values and interests, assumed by the community or formulated by it [6].

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At present, with the entry into force of the new codes (Civil Code and Code of Civil Procedure), it can be stated that good faith must guide the behaviour of the parties throughout the execution of the legal relation [7].

2. The principle of good faith in civil and civil procedural matters

The principle of good faith is both a principle governing civil proceedings, and a constitutional principle. In this regard, the provision of art. 57 of the Constitution stipulates that Romanian citizens, foreign citizens and stateless persons must exercise their constitutional rights and freedoms in good faith, without infringing the rights and freedoms of others.

In relation to civil proceedings, the provisions of art. 12 of the Code of Civil Procedure express the demand that procedural rights be exercised in good faith and according to purpose for which the law has acknowledged them [8], and without infringing the procedural rights of another party. At the same time, they state that the party which utilises these rights abusively, as well as the party which does not fulfil its procedural obligations in good faith, shall be responsible for any damage caused and can be obliged to pay a judicial fee.

The principle being analysed does not characterise only legal relations under constitutional and those generated by the civil process, but also legal relations under civil law. In this respect, the provisions of art. 14 of the Civil Code demand of each natural and legal person to exercise their civil rights and obligations in good faith, in agreement with public order and good mores [9], while also regulating the presumption of good faith until proven otherwise.

These provisions are taken again under a similar form by the provisions of art. 60 para. (1) of the Civil Code, which establish as limits of the right of natural person to dispose of itself the very infringement of the rights and freedoms of others, public order and good mores.

Also significant are the provisions of art. 15 of the Civil Code, establishing the conditions of the abuse of this right [10], this legal text stating that: "No right can be exercised for the purpose of causing injury or loss to another party or in an excessive and unreasonable way, contrary to good faith", and those of art. 1353 of the Civil Code which establish that: "The person who causes injury through the very exercise of their rights shall not be obliged to repair it, excepting the case when the right is exercised abusively".

Retrospectively, the current regulation of the abuse of rights in civil procedural matters reiterates, sometimes with certain additions, the stipulations of ex-art. 723 in the old Code of civil procedure according to which: "(1) Procedural rights must be exercised in good faith and according to purpose for which they were acknowledged by the law. (2) The party which utilises these rights abusively shall be responsible for any damaged caused", and after the Revolution of December 1989, under art. 57 of the Constitution, according to which "Romanian citizens,

foreign citizens and stateless persons must exercise their constitutional rights and freedoms in good faith, without infringing the rights and freedoms of others".

In this context one can also refer to the provisions of ex-art. 3 of Decree no. 31/1954 regarding individuals and legal entities, according to which "civil rights are protected by law. They can only be exercised according to their economic and social purpose".

Referring to the exercise of civil rights, it can be noted that legal provisions in force require its limitation. In this sense, the external and internal limits of rights are analysed in the literature [11]. External limits concern the extremity which its exercise can reach, and internal limits are determined by the "coexistence of scopes of the exercise of subjective rights and legitimate interests pertaining to different persons" [12]. It is only the failure to respect internal limits of a subjective right that determines the abuse of the right. More concisely, it can be noted that the scope of the abuse of rights is situated between the internal limits and the external limits, considering that the right does not exist beyond its external limits [13].

In the new regulations in the matter, subjective criteria are utilized as reference point for the existence of the abuse of rights: "the purpose of causing injury or loss to another person" or "and without infringing the procedural rights of another party", but objective ones are also employed: "in an excessive and unreasonable way, contrary to good faith" or "in good faith, according to the purpose for which they were acknowledged by law" [14].

The distinct importance of the principle of good faith is apparent from its various applications in the provisions of the Civil Code:

- in the matter of publicity of legal rights, documents and acts, third-party purchasers of good faith shall benefit from the acquisitive effects that publicity may produce "in cases and under conditions expressly foreseen by the law" [art. 20 para. (3) of the Civil Code];
- in the matter of family law, the provisions of art. 39 para. (2) of the Civil Code shall confer to the minor who was of good faith upon entering into marriage the preservation of full capacity of exercise obtained by marriage, should the latter be subsequently annulled;
- also in the area of family law, regarding the exercise of custody, art. 142 para. (2) of the Civil Code stipulates the obligation of the guardian to administrate in good faith the property of the minor, the guardian thus acting as administrator tasked with the simple administration of the minor's property [15];
- other applications of good faith in the matter of family are found with regard to the nullity of marriage, so that a marriage newly concluded in good faith by the spouse of a person who had been pronounced dead shall be deemed valid in the situation where the pronouncement of death is subsequently annulled [art. 293 para. (2) of the Civil Code]; likewise, legal provisions establish the preservation, by the spouse of good faith upon the conclusion of a null or annulled marriage, of

the situation of one spouse from a valid marriage, until such date as the judgement becomes final [art. 304 para. (1) of the Civil Code];

- in the matters of long-lasting autonomous works, performed in good faith, the provisions of art. 581 of the Civil Code establish that in the situation in which the author of the long-lasting autonomous work on the building of another is of good faith, the owner of the building has the right to either demand the court to order his registration in the land registry as owner of the work, by paying, upon choice, to the author of the work the value of materials and labor, or the added value brought to the building by the performance of the work; or demand to oblige the author of the work to buy the building at the real estate average price which it would have had if the work had not been performed; in the terms of art. 586 of the Code of Civil Procedure, in order to be presumed of being of good faith, the author of the should have relied either on the contents of the land registry in which, upon the date when the work was performed, he was registered as owner of the building, or on acquisition not subject to registration in the land registry, if, in both hypotheses, it was not evidenced by land registry and he was not aware the vice of his title. It can be noted, however, that good faith cannot be invoked by a person who builds in the absence of or in infringement of authorizations required by law. These provisions can also prevail for the author of the work who relies on superficies or on any other right which, according to the law, confers him the right to become the owner of a another's building by performing works on it;

- the principle of good faith is also incidental in the matters of real rights. Thus, after enshrining the presumption of ownership of the person who possesses a movable asset, on the grounds of the presumption that he would also hold a title of acquisition for the a right of ownership over that asset (art. 935 of the Civil Code), art. 936 of the Civil Code confers enforceability against third parties for legal documents creating or transferring real rights concluded by the owner in good faith of the movable asset. But one of the most significant effects of good faith is proclaimed by the provisions of art. 937 of the Civil Code, which confers the right of ownership over a movable asset from the time of it actual purchase, to the person who concludes, in good faith, with a non-owner, a document transferring ownership with valuable consideration referring to a movable asset. But, in the hypothesis where the asset is lost or stolen, it can be claimed from the owner in good faith, where the action is filed, under penalty of forfeiture, within 3 years of the date when the owner lost material possession over the asset. However, the text of art. 937 para. (3) of the Civil Code confers to the owner in good faith who purchased the lost asset or from a place or person who habitually sells assets of the same type, or if it was adjudicated in public auction, and the action for recovery was introduced within the term of 3 years, the right to hold the asset until full recovery of the price paid to the seller. It can be seen that these provisions do not operate with regard to movable goods that are accessory to an immovable one, but

are correspondingly applicable with regard to the acquisition of the right of usufruct and the right of use over a movable good. In such situations, "good faith" acquires particular meanings; thus, the owner is of good faith if he did not know and did not have to know, given the circumstances, the lack of the seller's ownership. The legal text also states that the date on which good faith must exist is the date of actual acquisition of the asset (art. 938 of the Civil Code);

- in contractual matter [16], since the very beginning the provisions of art. 1170 of the Civil Code impose, in national legislation, the general obligation of acting in good faith on the occasion of negotiating the conclusion and execution of a contract. The stipulation of good faith in contractual matters is in accordance with the principle of contractual loyalty regulated by the Principles of European Contract Law [17];
- another application of the principle of good faith in contractual matters is found with regard to negotiating the contract (art. 1183 of the Civil Code). Thus, civil law explicitly enshrines the obligation of the party committed to a negotiation to obey the requirements of good faith. Likewise, art. 1183 para. (2) of the Civil Code states, as an example, that the initiation or continuation of negotiations without the purpose of concluding the contract are not in line with these requirements. In this context it is stated, for any damage [18] caused to the other party, the responsibility of the party which initiates, continues or breaks the negotiations contrary to good faith.

Likewise, it can be seen that error as a vice of consent cannot be invoked by the party which is its victim, contrary to good faith (art. 1212 of the Civil Code);

- also, the special importance of good faith in contractual matters is fully emphasized by the provisions referring to the effects of the contract. In this sense one can note art. 1275 para. (1) of the Civil Code, which reiterates, to a certain extent, the provisions of art. 935 of the Civil Code and states that, in the hypothesis of successive transfer by one person to several people of the ownership of a movable corporeal asset, the person who acquired in good faith the effective possession of the asset is considered as holder of the right of ownership, even when his title is of a later date. The content of the phrase "good faith" takes on special meanings in this case, the legislator stating under para. (2) of this legal text that a purchaser in good faith is that which, upon gaining possession was not aware and could not have been aware of the obligation that the seller assumed previously.

Significant, however, are the applications of the principle of good faith of rights in civil procedural matters. These can be deduced by the interpretation *per a contrario* of provisions of art. 187 and 188 in the Code of Civil Procedure which sanction the abuse of rights determined by the infringement of obligations regarding the conduct of the proceedings, the assurance of order and solemnity during the court hearing, but also the normal conduct of enforcement. These legal texts are aimed at acts that can be classified depending on their author: acts which

can be committed by the parties, and acts which can be performed by other participants in the trial.

Acts which can be committed by the parties and which have the features of abusive exercise of rights according to art. 187 of the Code of Civil Procedure prominently include:

- the introduction, in bad faith, of principal, accessory, additional or incidental claims, as well as to exercise manifestly unfounded remedies, meant to tease the opposing party;
- filing, in bad faith, a claim for recusal or resettlement, that is without any reasonable grounds or for the sole purpose of delaying the judgement of the cause;
- obtainment, in bad faith, of service by publication by either party;
- contestation, in bad faith, by its author, of the writing or signature of a document, or the authenticity of an audio or video recording;
- obtainment, in bad faith, by the claimant whose claim was initially rejected, of precautionary measures which caused damage to the opposing party. Among these measures are: precautionary seizure (art. 952-959 of the Code of Civil Procedure), attachment (art. 970-971 of the Code of Civil Procedure) and judicial seizure (art. 972-977 of the Code of Civil Procedure);
- invoking, in bad faith, the exception of unconstitutionality, with the exclusive purpose of delaying the judgement, and thus without legal grounds. According to the provisions of Law no. 47/1992 on the organisation and operation of the Constitutional Court, this court is competent to judge exceptions of unconstitutionality invoked before courts of justice or commercial arbitration. Should it conclude that the exception of unconstitutionality was invoked solely to delay judgement, the Constitutional Court shall reject the request for adjudication;
- the refusal of party to take part in the information meeting regarding the advantages of mediation, in the situations in which he had accepted, under the law.

As regards acts that can be committed by other participants in the trial, and take on the form of the abuse of rights on the grounds of art. 187 of the Code of Civil Procedure, the following stand out:

- failure of the summoned legal witness to appear in court, or refusal to testify when present in the court, excepting the situation when he is a minor;
- failure of the lawyer (having not secured substitution by another lawyer), representative or assistant of the party to appear in court, or failure by them to comply with duties established by law or by the court, if this caused the trial to be postponed;
- refusal of the expert to receive the work or unjustified failure to submit the work within the given term, or refusal to give required clarifications etc.

Art. 188 of the Code of the Civil Procedure adds the following violations likely to be penalised:

- infringement, by any of the parties or by other persons, of measures taken by the court to insure order and solemnity during the court hearing;
- infringement, by any person, of provisions regarding the normal conduct of enforcement.

3. Penalties for the abuse of rights in the provisions of the Civil Code and the Code of Civil Procedure

In civil matters, the abusive exercise of a subjective civil right determines the penalisation of the author of the abuse by obliging him, if necessary, to the payment o compensation for patrimonial or moral damages caused as a result of such exercise, according to the norms governing tort liability [19].

In the regulation of the Code of Civil Procedure, as shown above, the party exercising procedural rights abusively shall be liable for any moral and material damage caused [art. 12 para. (2)]. As penalty, he could be obliged to pay a judicial fine whose amount can range from 100 to 1000 lei.

The same penalty shall apply to the other participants in the la trials who commit procedural violations, but the amount of the fine for them will range, depending on the violation committed, from 50 to 700 lei, or from 100 to 1000 lei respectively.

The fine is a penalty that may operate in various areas: criminal, administrative, contraventional etc. In civil procedural matters, the phrase "judicial fine" signifies a determined penalty, which is applied by the court to person who infringed the provisions of civil procedural legislation [20].

Under such circumstances, it has been asserted in the literature [21] that, in order to apply the fine, the court must establish the elements of the abuse of rights only with regard to the party, as for other participants in the trial it is sufficient to ascertain that the act was committed under the conditions of the legal text stipulating the application of the fine.

Also referring to other participants in the trial, it can be noted that they will not be fined if they can prove that certain reasonable grounds prevented him for fulfilling these obligations [art. 187 para. (2) of the Code of Civil Procedure].

Significant in this context are also the provisions of art. 189 of the Code of Civil Procedure, which confer to the interested party the right to compensation for coverage of material or moral damage caused as a result of the delay of judgement or enforcement.

As far as the procedural regime is concerned, it can be seen that such compensation can be granted at the requested of the interested party, and the competence to settle the request pertains to the court of justice or, as applicable, to the president of the enforcement court. The request will be directed, evidently, against the person who, by intention or negligence, caused the delay of judgement or enforcement, by committed an act among those stipulated at art. 187 or 188 of the Code of Civil Procedure.

It can be noted that in art. 189 of the Code of Civil Procedure, the legislator stipulated that obligation to pay compensation can coexist with the penalty of a fine.

Likewise, this legal text institutes, as a novelty in procedural matters, the possibility of covering both material and moral damages [22].

The provisions of art. 190 of the Code of Civil Procedure enshrine, as in the case of granting compensation, the competence of the court before which the act was committed or, if applicable, of the president of the enforcement court, to establish the violation committed, the fine and compensation. The act by which they pronounce themselves is the writ of execution. This must be communicated the liable person, in the situation where he was not present when the measure was adopted.

In the hypothesis of violation consisting of the filing a claim in bad faith, the competence to establish the fine and the compensation pertains either to the court before which the claim was filed, or to the court that settled it, should they be different.

Procedural norms confer special remedy to the person liable to pay a fine or compensation, through the possibility of filing a request for review against the writ of execution provided by art. 190 (art. 191 of the Code of Civil Procedure). By this he can request, on reasonable grounds, that the court of justice or the president of the enforcement court re-examine the fine or compensation or establish its reduction.

Under a procedural aspect, the request must be made within 15 days, as applicable, from the date when the measure was adopted or from the date when the writ of execution was communicated. It can be seen that in all situations, the claim will be settled by summoning the parties, by final judgment, given the council chamber, the competence pertaining this time to a different panel of judges than the one that established the fine or compensation.

5. Conclusions

Good faith, as a fundamental principle that must govern social relations, has its origins in Roman law. This concept features, in a harmonious and also logical concatenation, elements of morals, ethics and law. In the legal plane, the principle under analysis designated: rightful intention, diligence, sincerity and abstention from causing damage to others.

Presently, good faith is a corollary of any social manifestation, a fundamental and ubiquitous ethical value, but also a concept which, together with the exercise of rights in the intrajudicial area, becomes a guiding principle of the conduct of judicial actors involved in civil proceedings, on which the application of law in general must be based.

In argumentation of this idea lie the different practical facets expressly conferred by the provisions of the Civil Code, as well as, implicitly, those of the Code of Civil Procedure, in the regulation of certain institutions, such as in family law: maintaining as valid a new marriage concluded in good faith by the spouse of person who had been pronounced dead, in the situation where the pronouncement of death is subsequently annulled; in civil matters: possession in good faith, the issue of selling another person's property, in the hypothesis of privatising buildings, performing long-lasting autonomous works on the building of another, in good faith, in the matter of contractual negotiation etc.; in civil-procedural matters, for example in the matter of claims and evidence.

Given these considerations that emphasise the importance of good faith in civil and civil procedural matters, it appears as logical and welcome for all regulations in the field to penalise the person guilty of abusive exercise of rights, by obliging him, for example in civil proceedings, to the payment of a judicial fine, and, when necessary, also to the payment of compensation to the person injured.

Notes

[1] Etymologically speaking, the expression "good faith" is derived from the Latin phrase "*bona fides"* in which the term *"bonus"* signifies a good, honest person, and the term "fides" has the meaning of faith, honesty.

[2] F. I. Moldovan, T. Mara, *Drept privat roman*, vol. I, Editura Limes, Cluj- Napoca, 2016, p. 27.

[3] F. S. Cotea, *Buna-credinţă. Implicaţii privind dreptul de proprietate*, Editura Hamangiu, Bucureşti 2007, p. 1.

[4] See D. Berlingher, *Conflictul de legi în timp şi spaţiu în dreptul internaţional privat*, în journal *Transdisciplinarity and Communicative Action*, LUMEN - TCA 2014, pp. 73-74; D. Berlingher, *Instituţii de drept internaţional privat*, Editura Limes, Cluj-Napoca, 2014, pp. 99-100, 114.

[5] Academia Română, Institutul de lingvistică Iorgu Iordan, *Dicţionarul explicativ al limbii române*, ediţia a 2-a, Editura Univers Enciclopedic, Bucureşti, 1998, p. 119.

[6] I. Deleanu, *Drepturile fundamentale ale părţilor în procesul civil*, Editura Universul Juridic, Bucureşti, 2008, p. 407.

[7] I.-F. Popa, *Remediile abuzului de drept contractual*, în *Revista Română de Drept Privat*, nr. 6/2014.

[8] With regard to exceeding the internal limits of procedural rights, see I. Deleanu, *Drepturile subiective şi abuzul de drept*, Editura Dacia, Cluj-Napoca, 1988, p. 203-222.

[9] D. Berlingher, A. Sida, *Teoria generală a dreptului*, Editura Cordial Lex, Cluj-Napoca, 2012, p. 303.

[10]Referring to the meaning of the phrase "abuse of right" see D. Berlingher, A. Sida, *Teoria generală a dreptului*, *op. cit.*, pp. 268-269.

[11] See O. Ungureanu, *Drept civil. Introducere*, ediţia a VII-a, Editura Rosetti, Bucureşti, 2005, p. 83. For an overview of the abuse of rights see I. Deleanu, *Drepturile subiective …*, *op. cit.*, p. 49.

[12] V. Stoica, *Pot fi drepturile potestative exercitate abuziv,* http://juridice.ro/essentials/517/pot-fi-drepturile-potestative-exercitate-abuziv (accessed on 24.10.2016)
[13] *Idem.*
[14] A. Speriusi-Vlad, Noul Cod civil, lipsa dreptului, abuzul de drept şi mecanismul reparator al acestuia,*http://www.juridice.ro/474279/noul-cod-civil-lipsa-dreptului-abuzul-de-drept-si-mecanismul-reparator-al-acestuia (accessed on 24.10.2016)*
[15] According to the provisions of art. 795 of the Civil Code, the person tasked with simple administration has the obligation to perform all acts required for the preservation of property, as well as useful acts for it to be used according to its regular purpose. Likewise, art. 796 of the Civil Code specifies the following as prerogatives of the administrator in case of simple administration: reaping the fruits of the property and exercising the rights arising from its administration, but also collecting administrated claims, releasing valid receipts, and exercising rights arising from movable assets administered by them, as well as the right of vote, conversion and redemption.
[16] Regarding good faith in contractual matters, see M. Uliescu, *Buna-credinţă în noul Cod civil,* in M. Uliescu (coord.), *Noul Cod civil. Studii şi comentarii*, vol. I, Cartea I şi Cartea a II-a (art. 1-534), Editura Universul Juridic, Bucureşti, 2012, pp. 99 et seq.
[17] According to art. 1201 of the Principles of European Contract Law, each party has the obligation to act according to the requirements of good faith, and the parties can neither elude, nor limit this obligation. See Société de législation comparée, *Les principes contractuelles communes*, art. 0:301, February 2008, Paris, pp. 133 et seq., apud M. Uliescu, *op. cit.*, p. 99.
[18]To determine this damage, civil norms state that due consideration can be given to expenses incurred by the other party to conduct negotiations, renouncing these offers or any other "similar circumstance" [art. 1183 para. (4) final thesis].
[19] G. Boroi, C. A. Anghelescu, *Curs de drept civil. Partea generală*, Editura Hamangiu, 2011, pp. 66-67.
[20] M. N. Costin, I. Leş, S. Spinei, C. M. Costin, M. S. Minea, *Dicţionar de procedură civilă*, ediţia a 2-a, Editura Hamangiu, Bucureşti, 2007, p. 125.
[21] M. Tăbârcă, *Drept procesual civil, vol. I, Teoria generală*, Editura Universul Juridic, Bucureşti, 2013, p. 94.
[22] I. Leş, *Noul Cod de procedură civilă. Comentariu pe articole. Art. 1-1133*, ediţia a 2-a, Editura C. H. Beck, Bucureşti, 2015, nota de sub art. 189.

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