Interferences between the Abuse of Rights and Defrauding the Law - Conceptual Delimitations, Cases and Controversies

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Abstract: Whereas defrauding the law implies, in fact, the official, but artificial and illegitimate usage of rights to cover the real intention of the subject, which is to circumvent legal provisions, and the abuse of rights implies exceeding the reasonable limits of exercising a legally recognized right, the subject thus violating the purpose for which the law recognizes and defends that right, sometimes the two notions seem to overlap or create confusion as to the correct legal framing and contextualization of the legal situation. The present article therefore aims to present the conceptual delimitations between the abuse of rights and the defrauding the law, grafted on examples, in order to clarify a series of debates and controversies in the literature and the legal practice regarding the interference between the two concepts.

Keywords: *abuse of rights; defrauding the law; paulian action; civil offense.*

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I. Abuse of rights and defrauding the law - Conceptual delimitations

Diverting the right from its intrinsic rationality, expressed by exercising that right for the purpose it was recognized and guaranteed, or, in other words, using the right for purposes other than those envisaged by the legal norm that establishes it - purposes considered incompatible with the public interest and the exigencies of the rules of social coexistence - represents the abuse of rights: exercising a normal right abnormally, which brings about the removal of legal protection and the risk of being sanctioned (Deleanu, 1988: 51).

Defrauding the law is defined as an illegitimate maneuver made in order to circumvent the application of legal rules to illegally promote certain interests, to circumvent certain consequences that are not appropriate, to take advantage of more favorable legal regulations, through various maneuvers not allowed legally (Mihai, 2004: 188). These are also fraudulent maneuvers used by parties in drafting or executing a contract, which are aimed at violating or infringing on some imperative legal provisions (Ignătescu, 2013).

Although in some situations the legal provisions presume the existence of the abuse of rights or fraud, which makes the burden of proof much easier for the injured party (the case of the insolvent debtor that aggravates his insolvency status, a situation that can be combated by promoting the Pauline action), who will use the effect of presumptions as a means of proof, in correlation with the variety of civil legal relationships, there are vast factual displays of abuse of rights and defrauding the law, many of which are not easy to prove.

Both the abuse of rights and defrauding the law have the final effect of damaging third parties' interests, but while in the case of abuse of rights, the action is more direct, in the case of defrauding the law, it is more subversive, less obvious, since "it is not a direct violation of law but, an indirect disregard for it " (Cosma, 1969: 307). While abuse of rights is difficult to combat, because the injured party must show where the legal rights ends and where the abuse of rights begins, defrauding the law is quite difficult to prove, as most often the party that defrauds the law is actually using a series of legal provisions to help defraud those whom they wish to circumvent, so that the debate generally moves to the theoretical interpretation of the law and dismantling of the conflict (artificially created)

between legal provisions (only apparently inconsistent with one another) with equal mandatory power.

The Civil code regulates defrauding the law in the section regulating the cause of contracts, in art. 1237, where it is stipulated that the contract has an illicit cause when it is drafted only as a means of circumventing the application of an imperative legal norm. As a result, through its jurisprudence, the High Court of Cassation and Justice (by Judgement no. 1384/2014) defined defrauding the law as "that operation whereby, when drafting a legal act, in order to circumvent imperative legal norms, other legal norms are used, by diverting them from the real purpose for which they were adopted by the legislator" (Ciorobă, 2015), formally observing the letter of the law, but not respecting the spirit of the law.

The abuse of rights is regulated in art. 15 of the Civil Code, which states that "no right may be exercised in order to harm or prejudice another or in an excessive and unreasonable manner, contrary to good faith" (art. 15 Civil Code). This text of principle must be corroborated with art. 1353 of the Civil Code, which establishes that "the one who causes harm through the exercise of his rights is not obliged to repair it, unless the right is exercised abusively" (art. 1353 Civil Code) and with art. 1562 of the Civil Code, dedicated to the Paulian action: "if he proves a prejudice, the creditor may request that the legal documents drafted by the debtor in fraud of his rights be declared unopposable with him" (art. 1562 Civil Code).

As a result, the question arises: on what legal grounds will the liability in the case of abuse of rights and defrauding the law be drawn, respectively if there is only a contractual ground or also a civil offence ground to base such responsibility.

As far as defrauding the law is concerned, as it has been legally and jurisprudentially established, the basis of liability will be only a legal document. As a structure, defrauding the law is composed of an extrinsic, objective and an intrinsic, subjective element, the first consisting of signing the apparently legal document, and the second of the subjective intention to circumvent the legal provisions, which makes the document invalid (Gherasim, 1981: 101). Therefore, considering that the intention to sign the contract was not based on the real desire to enter into the legal relationships that the contract creates, but on avoiding imperative legal norms, the cause of the act becomes illicit and contrary to public order, attracting its absolute nullity.

Regarding the abuse of rights, however, its manner of regulation suggests that its scope is wider than that of defrauding the law, therefore liability will be wider. In civil law, legal relationships are born either from

legal acts or from legal facts. For legal facts, the sanctions are those specific to the civil offences, because illegitimate maneuvers, respectively the malicious maneuvers, in the absence of a framework specific for documents, are civil offences.

In the legal literature it is appreciated that under the current regulation, two aspects become obvious: 1. the abuse of rights can be sanctioned both in the field of contractual liability and of civil liability, since by sanctioning the abuse of rights a sanction can be applied not only for violating the law, but also for violating moral norms, cohabitation rules and good manners (Piperea et al., 2011); 2. the abusive exercise of the right leads to liability even in the absence of a subjective attitude of guilt (Adam, 2013), as the law establishes, for the abuse of rights, an objective liability, even more serious than the one requested for sanctioning civil liability, which requires intention, or at least fault, be it only the slightest fault.

Next, we will deal with a series of situations which, in Romanian law, represent situations of defrauding the law: in the civil law of obligations - the Paulian action -, in family law - the spouses common ownership of goods - and in commercial law - in the matter of insolvency and fraudulent legal acts.

II. Debtor's fraud and the Paulian action

The case is that of the debtor who cannot cover his debts with the assets he possesses and, nevertheless, he alienates assets from his patrimony or signs legal documents that aggravate his insolvency.

Regarding the analysis of the debtor's conduct from the perspective of the abuse of rights, it is worth noting that he exercises his right of disposition, one of the attributes of the property right, an attribute that can be exercised absolutely, exclusively and in perpetuity, while respecting the material limits and the legal limits of ownership (Stoica, 2004: 242). We note (Ignătescu, 2013, 2019) that in the absence of a debt that is bigger than the value of the debtor's assets, the exercise of the property right in the form expressed by the sale of a good is legally realized and we can speak of a abuse of rights only if the subject's right to dispose of the good is limited, as a result of activating the general pledge right of creditors.

In the legal doctrine it was noted that the debtor's fraud consists in the fact that he was aware of the harmful result of his act towards his creditor, he intended to harm the creditor, provoking his insolvency consciously, or aggravating it (Stătescu & Bârsan, 2002 : 342). It was further emphasized that the existence of fraud is presumed because of the debtor's

knowledge of his state of insolvency, of his impossibility to cover the creditors' debt with his current assets and, consequently, of the damage caused by exercising his right of disposition; it is of no importance if the debtor concluded the act to achieve his own interest or only the damage the creditor's pledge right (Weill, 1971: 834).

The legal means of combating the debtor's fraud is the Paulian action. The legal reason for this action of Roman origin has been explained in different ways, as authors proposed different grounds for their explanations. Some have considered that the action is based on the principle of executing contractual clauses in good faith and that the debtor's patrimony guarantees the execution of his obligations (Popescu & Anca, 1968: 346); others appreciated that the legal basis of the action is represented by art. 998 of the old Civil Code (which corresponds to art. 1357 of the new Civil Code) and that no person can enrich his patrimony in the detriment of another (Alexandresco, 1910: 222); there was even an opinion that the Paulian action does not fall within the limits of civil liability, but also an opinion that it is an auxiliary of the right to pledge, meant to make a subsequent forced execution possible (Alexandresco, 1910).

III. Defrauding the law in the matter of the spouses common ownership of goods

According to art. 339 of the Civil Code, the goods acquired during the legal regime of common ownership of goods by spouses (the matrimonial regime of ownership) fall under the the general rules of co-ownership, that is to say they are common goods. With the dissolution of marriage, the matrimonial regime ceases. In accordance with art. 667 and 669 of the new Civil Code, with the dissolution of the marriage, the assets acquired under the legal matrimonial regime of ownership are divided between spouses according to their agreement, and if the spouses do not agree on the division of their common goods, the court will decide.

Qualifying an asset as common or personal, and therefore as a good subject to sharing or excluded from sharing, respectively determining the contribution rate of each of the spouses to the acquisition of the common goods during the marriage is of interest both in the relations between spouses and in relation to third parties, because, in the case of sharing common goods, each of the spouses has - in principle - the interest to prove that some goods are their own and as such they are not the subject of sharing, respectively that they had a substantial, more valuable contribution to the acquisition of assets.

Except in ordinary cases, when the two spouses resort to sharing their common goods according to legal provisions, there are situations when either parties resort to divorce only formally, in order to create the possibility to exclude certain goods from forced execution by a personal creditor of one of the spouses, either requests the termination of the legal matrimonial regime of goods during the marriage, when their legitimate interests, resulting from the need to ensure a stability of the marriage relations or to satisfy some patrimonial interests of the creditors of the spouses, demands the division of common goods (Ignătescu, 2013).

Defrauding the law in these circumstances occurs when determining the the individual share of each party is not carried out according to the classical criteria, represented by the level of income and the real contribution to the acquisition of assets, but according a covert interest of significantly diminishing the assets of the debtor spouse.

In fact, the parties divorce and subsequently one of them (the solvable party, which has no personal creditors) makes a request to the court to order the sharing of common assets acquired during the marriage, claiming that they had a significant contribution to acquiring the goods, and the other party (who is the debtor) does not fight the request with contrary evidence or acquiesces to the applicant's claims.

After the repeal of art. 1200 paragraph 3 of the former Civil Code (which considered judicial confession as a legal presumption which gives full evidence against the one who confessed), this means of proof was passed among the ordinary types of evidence, therefore it can be combated by any other means (evidence allowed by law), and the court can reasonably dismiss the recognition of a party if from all the evidence administered in this case it is convinced that the respective confession is not in fact the truth (Ignătescu, 2013).

Regarding judicial confession, it is necessary to distinguish as this constitutes a probative fact, in which case it is to be regarded as valid or represents, as in the present case, a partial or total renunciation to assets, but in any case, it is appreciated that (Bacaci, 2007: 153) in the matter of sharing of common goods, defrauding the law doubled by an abuse of the exercise of procedural rights generates a form of "branch abuse" which is a definite indication of the "dishonesty of the applicant". Branch abuse is not, we consider (Ignătescu, 2013, 2019), an institution specific to sharing of common goods, this type of behavior can be found in any other case of defrauding the law.

IV. Defrauding the law in regard to insolvency

If in the branch of civil law there are controversies regarding the legal basis of the Paulian action, the law of insolvency procedure solves the problem of defrauding the law by the debtor through a very clear text of law. Thus, art. 79 of Law no. 85/2006 stipulates that "the judicial administrator or, as the case may be, the liquidator may complain to the court to obtain the cancellation of fraudulent acts concluded by the debtor to the detriment of the creditors' rights within 3 years prior to opening the insolvency procedure".

Thus, the acts committed by the debtor in bad faith and having a dual purpose are targeted: violating the rights of the creditors or circumventing the law and obtaining a profit for the debtor or another person (Turcu, 2007: 311). Like the Paulian action in its classical form, the action for annulment of fraudulent acts provided for by the law in question aims to suppress the debtor's fraud.

A relative presumption of fraud is established here, which operates only against the debtor, and not also on the third party who acquired the goods and, at the same time, a so-called suspicious period is established, which represents an exception from the rule according to which the debts prior to opening the procedure remain unchanged. In our opinion (Ignătescu, 2013, 2019) the suspicious period of 3 years extends over a too long period of time, being difficult to imagine the situation in which the debtor foresees to start an insolvency procedure from such a considerable time distance. Particularly from this point of view, we consider that a dangerous automatism is formed among courts regarding the presumption of fraud, which may be seen as absolute, although the legislator, in art. 85 paragraph 3 of the law, is extremely explicit: "if the conditions of art. 79 and 80 are met, there is a relative presumption of fraud in the detriment of creditors. The presumption may be reversed by the debtor".

Conclusions

In conclusion, both fraud and abuse of rights have a dual purpose: a) infringement of creditors' rights or circumvention of the law; b) obtaining a profit for the debtor or for another person, and this purpose can be accomplished in two ways: by the debtor himself or with the complicity of a third party.

However, the difference between the abuse of rights and defrauding the law are important when choosing the procedural methods to repair the

damage caused to third parties and to determine the type of liability that is involved.

We notice, undoubtedly, that establishing bad faith is the most appropriate way for qualifying a conduct as defrauding the law or abuse of rights, but at the same time, there are situations when the presumption of fraud is enshrined in legal texts that facilitate the burden of proof, and, in the matter of insolvency, indeed, it is imposed on the debtor, and not on the creditor (who invokes fraud, so he has the position of plaintiff, who is traditionally responsible for the burden of proof), to prove good faith in the course of his commercial relations.

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