Rules for the Enforcement of the Exception of Non-Performance in Civil Proceedings

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Abstract

In civil proceedings, contract non-performance is a substantive defense means available to a party that, by its mere invocation, can block the claim brought by the other party (which has not fulfilled its own obligation) that, in its turn, aims at obliging the party that invokes the exception to perform its own obligation.

Key words: contract, exception, civil proceedings, defense, debtor, creditor.
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1. Introduction

This exception is invoked in order to protect the contracting party that has performed its contractual obligations in good faith or that is willing to perform them. Having the right to refuse to perform its obligations, the debtor, which is, at the same time also a creditor, may avoid the eventual contest of the other creditors of the contractor. For example, if the seller were forced to deliver the item that it had sold even though the price had not been paid, it would have to face the buyer's other creditors in order to meet its claim.

This defense type can be invoked as both a substantive defense in civil and extra-judicial proceedings, directly between the contracting parties.

2. The Exception of Non-Performance

In civil proceedings, the exception of non-performance seeks to dismiss the action brought by the contractual partner in court (Kocsis, 1999, pp.15-16, Căzănel, 2014, p.275). The party invoking the exception does not dispute the claim of its partner, but on the contrary, this defense is a recognition of the respective claim and, at the same time, an implied confirmation of the debtor's decision to fulfill its own obligations when the co-contractor fulfills its obligations.

The right to defense is a distinct fundamental right that implies multiple requirements for a fair trial, but it is also an autonomous right derived from the provisions of Article 6 (1) of the European Convention on Human Rights. The legal literature has shown that the right to defense as a natural, universal, and immanent right represents the whole of the procedural means available to a party in civil proceedings, in order to protect or exercise its own legitimate rights or interests. Therefore, the right of defense cannot be considered as a prerogative belonging exclusively to the defendant in a trial and, at the same time, cannot be reduced only to the defense specific to litigation, but it is manifested in the concrete circumstances of the case and in its evolution, by many other procedural means (Deleanu,2008, pp.210-211).

From a systemic perspective, it was considered that "the effective application of the right to defense is ensured by integrating it into the structural and functional ensemble of courts, i.e. in that ensemble of processual and procedural principles and rules that imply, as a fundamental element, the judicial assistance of the litigation parties so that they can benefit from a fair trial, indispensable to the implementation of justice in democratic political regimes"(Pătulea, 2007, p.238) .

Considering that the rights of the defense are a prerequisite for a fair trial, the Court of Justice of the European Communities stated that the observance of the rights of the defense must be ensured in any open proceedings against a person who may cause damage even in the absence of specific rules (Deleanu, 2008, p.214) . The right of defense also belongs to an economic operator susceptible to sanctioning (Deleanu, 2008, p.214) . The right of defense can be valued even in the person's relationships with the Community legislator (Regulation (EC) No.3283 / 1994, which replaced Regulation (EC) No. 384/1996). The right of defense concerns not only the contradictory stage of the procedure but also the preliminary proceedings (Deleanu, 2008, p.214) . The right of defense must be assessed within the entire procedure at issue, the introductory act of the court – in the context of a non-contentious procedure in the first phase – being constituted by bringing together the plaintiff's initial application with an appeal available to the defendant (I.Deleanu, op.cit., p.214). In our country, the Constitutional Court has often been notified of the violation of the rights of the defense and, upon examining the objections or the exceptions, it delivered solutions that represent substantial benchmarks on the valences and the effectiveness of the right to defense (I.Deleanu, 2008, p.215 shows that "by Decision no.95/2006, admitting the objection of unconstitutionality of the provisions of art. 20, paragraph 5 of GEO no.154/2005, the Constitutional Court held inter alia that the possibility of the discretionary revocation of the members of the management of the sanitary units with beds, without being held responsible for committing any offense and without being given the opportunity to defend themselves at the stage preceding the issue of the ministerial order, establishing a presumption of fault in their charge, contravenes the provisions of art. 24 paragraph 1 of the Romanian Constitution") .

From a procedural perspective, the legal literature has shown that defense, as a way of exercising the right to action, is susceptible to multiple meanings. Broadly, defense designates all the means used in order to obtain the rejection of the claim or the delay in resolving it. In this sense, the defense includes both the substance of the law (the substantive defense itself, which concerns the very existence or inexistence of the claimed right), as well as its formal part, i.e. defenses related to the formal conditions of the request for a court or judgment, Court jurisdiction, judicial organization – exceptions (Tăbârcă, 2006, p.46).

In a narrow sense, the defense concerns only those means whereby objections are raised against the merits of the claim, tending to reject the petition for legal action. Therefore, in this sense, the notion of defense encompasses only substantive defenses, but not procedural ones.

Substantive defense (also called defense) was defined in the legal literature as the means whereby the defendant objects to the plaintiff's claim, seeking to reject its claim as unfounded, after examining the merits of the respective claim (Ciobanu*et al,*2005, p.233; Boroi,2013, p.86; Deleanu, 2013, pp.941-943). In this respect, the defendant "may claim, for example, that the right invoked has never existed or that, if it existed, it has been extinguished from a subsequent legal cause or that the alleged obligation would have been affected by a plea of nullity. This is the defense proper or the substantive defense" (Tăbârcă, 2006, p.46). Thus, the defendant may claim the right to property on the property in dispute through usucapion. S/he may plead debt settlement by payment (Tăbârcă, 2013, p.262shows thatin the case-law previous the new Code of Civil Procedure, it was decided that "the payments made in the performance of a contract may be opposed by way of exception, without the need for a counterclaim" - Supreme Court, Decision No. 1237/1957) or legal compensation; novation; the nullity of the plaintiff's title; the acquisition of ownership of a movable asset under art. 937 of the New Civil Code. S/he can defend himself/herself by showing that this obligation has never existed, etc(Tăbârcă, 2013, p.261shows that The Supreme Court of Justice, the commercial section, in its decision no. 669/1997 stated that "the appellant's claim that she did not owe the alleged price, since the payment obligation was generically formulated in the contract without maturity, cannot be accepted because the corroboration of the provisions of art.1361 and art.1362 of the Code of Civil Procedure with art. 43 of the Commercial Code shows that if the contract did not provide the payment date, the buyer is obliged to pay the price also at the place and time when the good is handed over").

By substantive defense, the defendant tends to prove that the plaintiff's claim is not founded in fact or in law (Boroi, 2013, p.86shows that"such a substantive defence is represented by the defendant's plea against the legal resolution under a *commissoria lex* inserted in the legal act whose enforcement is sought by the summons or by the plaintiff's oral invocation, upon the meeting, to

pay back the amount borrowed before the promotion of the action for payment of the respective amount") .

On the contrary, the procedural exception is an obstacle to the request for a summons, often temporary, whereby the defendant shows that the process was engaged incorrectly in relation to the rules of judicial organization, jurisdiction or procedure or that there are shortcomings in the right to action (According to art. 245 of the new Code of Civil Procedure, the procedural exception is the means whereby, under the law and without calling into question the substance of the law, the interested party, the prosecutor or the court invokes procedural irregularities regarding the panel composition or court constitution, court jurisdiction or court proceedings or deficiencies regarding the right of action, pursuing, as the case may be, declining jurisdiction, postponing the trial, restoring certain acts or cancelling, rejecting or obviating the application). The procedural exception can be deemed as the defendant's refusal to discuss the plaintiff's claim on its merits. It is limited to analyzing the formal elements of the trial, whether they concern procedure rules or the rules on the right of action or its components. It does not call into question the merits of the case because it does not involve the investigation of those aspects related to the evidence of the existence of the subjective civil rights exploited by the plaintiff or by its extent (Boroi, 2013, p.546).

Other authors distinguish between procedural exceptions - concerning procedural acts and facts, substantive exceptions - related to the exercise of the right of action or the procedural transposition of principles or institutions of substantive law to which the right of action relates and substantive defense - tending to reject the plaintiff's claims after examining the law merits (Deleanu, 2005, pp.192-193).

At present, there are still inconsistencies between material civil law and civil procedural law with regard to the concept that it confers to the notion of exception. In the doctrine, there was formed no unitary opinion on framing substantive law exceptions (those stipulated in the Civil Code or in special laws) or other circumstances arising from substantive law and invoked by the defendant in the context of substantive exceptions or substantive defense (Leş,2005, pp.430-431shows that "in the case-law before the new Code of Civil Procedure, it was stated that "according to the distinctions imposed by the provisions of articles 137 and 158 et seq. of the Code of Civil Procedure, doctrine and judicial practice, the exceptions raised by the parties in the civil proceedings are likely to be classified as procedural exceptions or substantive exceptions in relation to the object of the claim. Unlike procedural exceptions, which constitute defence means and which, without affecting the merits of the action brought before the court, lead to the delay or the impediment of the trial, the substantive exceptions concern shortcomings in the exercise of the substantive right to action, which have always resulted in the rejection of the action. Judicial practice has enshrined as a substantive exception all the objections to the right of action, as well as the invocation of any substantive law institution having the same effect"- C.S.J., civil section, Dec. 937/26 March 1996).

From a procedural perspective, the notion of exception has a very precise meaning. It is an objection that, without involving the case merits, is precisely aimed at avoiding or delaying its investigation. Material laws go beyond these limits and use the term of exception in a broader sense, including all the defendant's defense possibilities. In this sense, the "exception" leads rather to substantive defense.

In this broad sense, the notion of exception and defense against the common creditor is used in article 1448 of the New Civil Code, according to which "the joint debtor may oppose to the creditor all the defense means that are personal to him/her and those that are common to all co-debtors". The debtor in action cannot oppose those exceptions that are strictly personal to one of the other co-debtors. In all these cases, by the "exception" invoked, the defendant actually invests the court in investigating the merits of the plaintiff's claim.

Sometimes, even within the framework of civil procedural law, the notion of exception is used with a broader meaning than the one commonly observed. In the literature, it was pointed out that when it comes to applying the rule, "the judge of the respective case is the judge of the exception"; the term "exception" includes the proper exceptions as well as other means of defense (Ciobanu,1996, p.115). This rule, created by doctrine and jurisprudence, explains the right of the court seized with the petition to sue by the plaintiff to decide on the defense means that the

defendant uses in order to oppose this claim, even if, by these means, s/he seeks to resolve a prior issue, which is usually not within its competence (Stoenescu*et al,*1983, p.187).

Recent legal literature has attempted to clarify these institutions through a comparative analysis of procedural exceptions with substantive law exceptions (Suciu, 2012, pp.30-31where there are mentioned, as examples, the substantive law exceptions provided in the Civil Code: exceptions invoked by the joint co-debtor (art. 1448 of the NCC), the exception of contract non-performance (art.1556, NCC), the exception of the benefit of discussion and division (art.2295 and art.2298, NCC), the exception of guarantee to the evicted person against the party obliged to guarantee against eviction (art.1696, NCC), etc. It also lists the circumstances that arise out of substantive law and can be invoked by the defendant in a process: legal compensation (art.1616, NCC), payment (art.1469, NCC), debt remission (art.1629, NCC), taking over the debt (art.1599, NCC), novation (art.1609, NCC), nullity of the plaintiff's title (art.1247, NCC) etc.). The question arises whether substantive law exceptions and incidents can be included or not in the category of substantive exceptions. Given that substantive exceptions refer to shortcomings in the right of action, it must be considered whether the substantive law exceptions may constitute such shortcomings.

It has been established in the doctrine that the right to action must meet the following conditions for legal action: procedural capacity, procedural quality, interest and affirmation of a right or the formulation of a claim. It is necessary to consider whether the affirmation of a right or the formulation of a claim is affected by the substantive exceptions or that this act is related only to the merits of the case.

As stated in the literature, the formulation of a claim involves the assertion of a civil subjective right, whose existence is determined by the court with the settlement of the merits of the case. However, in order to pass to the research of the case merits, the court must first determine whether the conditions for exercising the civil action are fulfilled, if there are no shortcomings in the right to action.

Given that the right to action is a distinct right, autonomous from the affirmed subjective civil right, the court can investigate the subjective right when verifying the conditions for exercising the civil action only if such a subjective right is asserted (if a claim is made). In these circumstances, by failing to undertake an analysis of the subjective civil right, there cannot be investigated the aspects that challenge the existence of that right, such as novation, payment, compensation, exception of non-performance, the benefit of division etc. For these reasons, it has been argued in the legal literature that these types of defense cannot be classified as substantive exceptions (Suciu, 2012, p.33).

We support this view of the legal doctrine, since the existence of the right is only a condition for admitting the action on the merits, while it is sufficient for the applicant to assert a right in order to start the trial. Thus, in order to verify the existence of the right, whether it is legitimate or not, current and exercised for the purposes recognized by law, the court shall analyze the merits.

Thus, the exception of non-performance is perceived as a substantive defense available to a party which, by simply invoking it, can block the claim brought to justice by the other party (which has not fulfilled its own obligation), which aims at obliging the party that invokes the exception to perform its own obligation (Albu, 1994, p.128; Motica, 2005, p.79;Tăbârcă, 2013, p.262, Căzănel, 2013, p.22).

Another argument wherefore the exception of non-performance is classified as a substantive defense and not as a procedural exception typical of formal law is the fact that it is an institution inherent to substantive law, being a defense means at the disposal of the party requested to perform its obligations arising from the conclusion of a synallagmatic contract by the party that has not fulfilled its obligations. The invocation of the exception of contract non-performance also calls into question the plaintiff's subjective right, which remains unjustified (Boroi, 2013,p.548).

This distinction between procedural exceptions and substantive defense was also highlighted in the case-law previous to the New Code of Civil Procedure. Thus, the Bucharest Court of Appeal - Civil Section IV, in its decision no.2321/19.12.2006 , decided: "The Court cannot examine the exception of contract non-performance invoked orally by the plaintiff because such an exception is not a reason of public order, within the meaning of art. 306, paragraph 2 of the Code of Civil Procedure. The exception of contract non-performance does not constitute an absolute and dissuasive exception, which might be invoked by the court itself at any case stage, but constitutes a

defense means at the disposal of one of the parties to the synallagmatic contract, a defense means that must be invoked under the conditions provided by art. 115 and art. 132, paragraph 1 of the Code of Civil Procedure. As this exception was not invoked before substantive courts, it cannot constitute a ground for appeal and even less a ground for public order appeal, which can be invoked after the time-limit for motivating the appeal" (Rusu, 2007, pp.187-191).

Similarly, the Bucharest Court of Appeal, in its decision no.119 / 8.02.2011, held that the request to ascertain that the plaintiff did not fulfill its own obligations constitutes a genuine exceptio non adimpleti contractus, which the defendants can support also in defense of the plaintiff's claims, without the need for a separate action to rescind the contract. The court stated that "the exception of contract non-performance is a means of defense available to one of the parties to the synallagmatic contract if it is claimed to perform the obligations incumbent upon it without the party claiming the enforcement to have performed its own obligations. The contract non-performance, based on the principle of reciprocity and interdependence of contractual obligations, is neither a procedural exception nor a substantive exception within the meaning of the law, but only a defense means which a party, usually the defendant, can invoke and on which the court is ruling based on the evidence in question" (Dănăilă*et.al,* 2012, pp.140-145).

3. Conclusions

In civil proceedings, the exception of non-performance seeks to dismiss the action brought by the contractual partner in court and the party that invokes the exception does not dispute the claim of its partner, but on the contrary, this defense represents a recognition of the respective claim and, at the same time, it is an implicit confirmation of the debtor's decision to execute its own obligations when the co-contractor fulfills its own obligations. Thus, the exception of non-performance is perceived as substantive defense.

An argument in this respect is the fact that it is an institution inherent in substantive law, being a means of defense at the disposal of the party requesting the perfromance of the obligations arising from the conclusion of a synallagmatic contract by the party that has not performed its own obligations. Thus, the party invoking the exception of contract non-performance calls into question the plaintiff's subjective right, depriving it of its merits.

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