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A COMPARATIVE ANALYSIS REGARDING THE OBLIGATION OF RESULT AND THE OBLIGATION OF CONDUCT (OF MEANS) IN CIVIL LAW

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Abstract: *This study proposes to achieve a comparative analysis with regard to the obligation of result and the obligation of conduct in civil law, from a perspective of the professional duties and responsibilities arising out of a lawyer's practice. The point of departure in this analysis consists in an overview including the main forms of social responsibility, continuing with juridical responsibility, with a main focus on the problematic of civil responsibility in both of its forms – contract responsibility and delictual responsibility -.*

Key words: *civil responsibility, obligation of result, obligation of conduct.*

1. Introduction

This first part of the study includes a brief overview regarding the most significant issues of contract responsibility and delictual responsibility.

The reference elements entailing the occurrence of either of the above mentioned forms of civil responsibility are the same namely, an unlawful act; committing a culpable act; a patrimonial damage, as well as, the causal relationship between an unlawful act and damage. As regards culpability, the analysis of the occurrence of this aspect within the lawyer's civil responsibility addresses mainly the nature of the obligations incumbent upon the latter. Usually, in the case of a lawyer, this regards diligence obligations, prudential obligations or conduct obligations, since a lawyer's duty is to make use of all of his expertise and knowledge in order to win a lawsuit, yet without any obligation for such favourable outcome.

However, if the lawyer is determined to achieve a specific result, e.g. writing a document of legal content, the hence ensuing obligation is one of result.

The case analyzed within this paper is intended to highlight precisely this distinction between the two types of obligations.

2. Social responsibility versus judicial responsibility

The area of social responsibility is, generically speaking, very wide, since this includes „moral responsibility, political responsibility, judicial responsibility, as well as other modalities by which, one way

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or the other, human society members are called to become accountable for their conduct in social life" [12]. These forms of social responsibility which are incumbent upon every person, do not occur disparately, independently from each other – they even show possible interferences, which, however, are unable to affect their individuality.

By confining the concept of responsibility to the judicial domain, we can distinguish between penal, civil, disciplinary, and administrative responsibility as well other types of responsibility that are specific to the various branches of law.

Judicial responsibility can be defined as a complex of interconnected rights and obligations that derive as a consequence of committing an unlawful act and constitute the framework for achieving state coercion through enforcing judicial sanctions in order to maintain the stability of social relationships and to provide guidance to society members in the spirit of the rule of law [2].

With regard to the lawyer's responsibility it can be expressed in form of a civil, penal or disciplinary responsibility [6]. These forms of responsibility are determined „depending on the judicial norm that the lawyer violates in the exercise of his profession or, respectively, depending on the defended social relationships" [3].

The literature highlights the fact that „the source or basis of the lawyer's responsibility consists of failure to fulfill obligations [...] some obligations are stipulated by the law, others are contract clauses; some obligations are judicial, others moral or deontological; some obligations belong to the system of professional exigencies, others to the rigours of the judicial system" [4].

It was also contended that „the analysis of the problem of a lawyer's responsibility cannot be separated from the general framework of her/his obligations assumed by signing a contract of legal assistance, neither can it go beyond the judicial nature of the obligations that can be assumed by a freelance lawyer, which is that of diligence or conduct obligations, and by no means that of result obligations" [4].

However, there are opinions in support of both the existence of obligations of diligence, as well as the existence of obligations of result. „This issue needs a more nuanced view: if the sagacity of consultancy is aleatory, then the lawyer has an obligation of conduct; if it involves the accuracy of information or of consultancy, the obligation is one of result. But even in the case of obligations of result, the client's freedom of decision remains undeniable" [4].

As regards civil responsibility, it can take two forms, – delictual and contract -, both of which are based upon the principle of repairing a patrimonial damage caused by an unlawful and culpable act [8]. The existence of one or the other of these two forms of civil responsibility depends on the same, previously mentioned, situations: committing a culpable act; a patrimonial damage, as well as, the causal relationship between an unlawful act and damage.

Consequently, one of the essential prerequisites for a person to assume personal civil responsibility relative to the damage caused, in general, and that of a lawyer, in particular, consists in the culpability of the person concerned, as the subjective element.

„When we analyze the culpability of the person that caused the damage, we are concerned with the subjective side of the act, with the subjective attitude of the offender towards the offense committed and the consequences of the latter, at the time it was committed" [12].

An analysis of the existence of this element of the lawyer's responsibility

should start with the nature of the incumbent obligations.

3. The subjective civil obligation

According to doctrine, civil obligation was defined as "the duty of the passive party in a civil judicial relationship of having a certain conduct, in accordance with the correlative subjective right, a conduct that can consist in giving, doing or not doing something and which can be imposed, if necessary, through the coercive power of the state" [1].

These obligations can be classified according to a multitude of criteria; however, this analysis wants to emphasize only one, namely the one that regards the object of the obligations, according to which there are obligations of result or determined obligations, and prudential, diligence or conduct obligations.

In accordance with the doctrine "the obligation of result (determined) occurs whenever the passive party of a judicial relationship obliges himself to achieve a determined result" [11], whereas "the obligation of prudence or of diligence (of conduct) occurs whenever the active party obliges himself to make every effort using all his knowledge towards achieving a certain result, yet does not oblige himself to obtain the respective result, which can materialize or not, depending on the concrete circumstances"[11].

4. The nature of obligations that are incumbent upon a lawyer in exercise of his profession

A concrete answer to the question relative to the nature of obligations incumbent upon a lawyer cannot be provided in the absence of a detailed analysis, which should take a particularized form for every distinct type of obligation.

However, it can be said with certainty that usually, the obligations assumed by a lawyer are obligations of diligence or conduct, according to which he obliges himself to use every diligence towards achieving a certain result, yet does not oblige himself to obtain the respective result. In the process of assuming and exertion of his multiple roles [7] „he is obliged to use all his abilities – his entire juridical knowledge, diligence and talent to the benefit of the client, in order to achieve the targeted result" [10], without interpreting the lawyer's position as "strictly subordinated" with respect to his client "but one of relative independence" [5].

Certainly, there are situations when a lawyer assumes obligations of result, in which case the responsibility for non-fulfillment or faulty fulfillment of these obligations will be obviously more severe compared with the case of obligations of conduct. For instance, such obligations of result arise when the object of the contract concluded with the client consists in drafting a document of legal content (a contract, an offense complaint, a petition), in launching an appeal against a sentence, or in the case of the obligation to keep the professional secrecy [9] etc.

The lawyer's failure to comply with these obligations, designated as obligations of result, engenders the assumption of culpability against the former.

On the other hand, for the case of obligations of diligence, the rule that applies establishes that „non-achievement by the client of the desired result does not, in itself, constitute proof of culpability, but it is the client's burden to provide direct proof that the debtor did not make use of the required prudence and diligence to achieve the result" [3].

Ion Deleanu, claims that, for the case of obligations of result, the lawyer's culpability is presumed *ipso facto*, whereas

for the case of obligations of conduct, the client has the obligation to produce evidence of the debtor-lawyer's culpability.

5. Case study

In accordance with action 12068, filed July 11th 2002 in the registry of the civil court of Braşov, the plaintiff G.D.T. against the lawyer D.L – defendant - asks the court to order the defendant to pay the amount of 10,000 USD or its equivalent in lei as civil damages and the expenses arising from this lawsuit.

Subsequently, the plaintiff changed his action in the sense that he increased his demands to 15,000 USD and 55,000,000 lei as compensation for damages.

In the cause of his action the plaintiff shows that the defendant, in his capacity of lawyer, representing the former in the drafting of an addendum to a real estate sale-purchase contract, by professional guilt has caused the above mentioned damage to the plaintiff, either directly or circumstantially.

The court of Braşov, by civil sentence 8096 of October 1st 2003, has rejected the exception of absence of passive *locus standi* of the defendant and consequently has rejected the cause of the plaintiff's action. In support of its decision the court noted, in essence, with regard to the exception invoked by default, that the action is groundless.

On the merits, the court held that the defendant in his capacity of lawyer cannot guarantee the client the achievement of a certain result and, consequently, the obligations engendered by the contract of judicial assistence are obligations of diligence.

In this case, the plaintiff did not provide evidence that the defendant would have made use of his entire diligence since the drafted document was signed willingly by him.

The appeal launched by the plaintiff was allowed by decision No.171/Ap of March 4th 2004, of the Court of Appeal Braşov, Civil Division, which partially changed the appealed sentence, allowed the plaintiff's action and obliged the defendant to pay the plaintiff the amount of 5,000 USD and 6,000,000 lei, as compensatory damages.

It maintained the Court's decision with regard to the way of solving the *locus standi* exception and obliged the defendant to pay the plaintiff the amount of 22,967,500 lei, as lawsuit expenses.

In support of its decision, the Court of Appeal noted the following:

The relationship between client and lawyer falls within the scope of the principles and norms of Private Law due to the existence of a contract of judicial assistance between these two, the content of which is governed by the Civil Code and the Lawyers' Statute (Annex 8).

The lawyer will be held liable for the damages caused to his client as a consequence of the former's professional activity, in terms of common law namely, in accordance with Art. 1073-1090 of the Civil Code, insofar as these texts apply under the specific circumstances of the relationship between a lawyer and his client.

In what regards the nature of the obligations assumed by the lawyer towards his client these can be both of „conduct" as well as of „result".

In this case, the object of the contract of judicial assistance reg. no. 24, April 24th, 2001, consists in „drafting of a notarial act intended to recover the price difference against the sale purchase contract authenticated under reg. no. 730, June 8th, 1998 by the B.N.P.P., including drafting and pursuing civil action or penal complaint to the competent bodies",

therefore involving both obligations „of result", as well as obligations „of conduct".

Also noted imputable to the lawyer, is considered the non-execution of all his assumed obligations, namely, drafting and pursuing the action intended for the recovery of the price difference which was qualified as a „result" obligation, and consequently, the defendant's culpability is presumed, since the latter does not overthrow this presumption.

In this matter, the defence of the respondent (defendant) regarding the obligation of his client to pay the stamp tax in advance amounting the claims deducted from the lawsuit, was eliminated by the appeal instance, because, according to Art. 13 of the Lawyers' Statute, „before taking a case, the lawyer is obliged to inform the client about the probable expenses involved by it".

The issue of non-taxation by the client of an action pursued in court by the lawyer would have shifted the culpability, from the lawyer's to the client's burden. Consequently, by not filing his actions in the court the defendant has caused a damage to the plaintiff on appeal.

Consequently, the Court of Appeal admitted the circumstantial evidence of the damages only with regard to the following: the price difference - accepted and stated by the parties in the writ drafted by the respondent defendant, yet not recovered, and the stamp taxes afferent to this amount.

The other claims of the appellant with regard to „collateral damage", were rejected as groundless.

The defendant filed an appeal against decision No. 171 of March 4th 2004 of the Court of Appeal Braşov Civil division, invoking the ground of cassation as stated by Art. 304, item 9 Code of Civil Procedure.

Explaining the grounds for appeal, the defendant showed, in essence, the following:

The plaintiff filed his summons for judgement on the grounds of Art. 998 Civil Code regarding delictual responsibility, and Law no. 51/1995 regarding the exertion of a lawyer's profession, for professional misconduct and not for non-execution or improper execution of the judicial assistance contract, as contractual civil liability.

Respectively, the Court of Appeal approved and tried the appeal in accordance with the provisions of Art. 1073-1090 Civil Code regulating the civil contracts, namely, the contractual civil liability.

Such way of proceeding has violated the procedural norms regulating the procedure of appeal, thus overthrowing the burden of proof, in the sense that it noted the presumption of culpability for the non-execution of a contractual obligation in relation with the delictual responsibility where the culpability must be proved.

Also, the appellant claimed that, in its analysis, the Court has mixed up the two forms of responsibility - delictual and contractual, yet provided a result specific to delictual responsibility. On the other hand, the contract of judicial assistance was executed in its entirety, since the agreement between the respondent (defendant) and SC IALTRANS SRL as purchaser, provided that the price of 5,000 USD, would be paid immediately after collecting a debt from a Danish citizen, but not later than 1st May 2003.

Consequently, the pursuance of the obligation of payment, regarding the price difference amounting to 5,000 USD, did not fall within his responsibilities, since the court has disregarded the principle of unforeseeability of contract execution.

Therefore, due to the plaintiff's lack of diligence, in terms of ensuring the civil

instruments that would have allowed him to collect the price installments stated in the sale purchase contract, the former has assumed the collection risks, which he accepted.

He also explained, as non-imputable, the fact that he did not file an action for claims on his own initiative, considering that non-payment of judicial stamp taxes does not constitute a legitimate reason, since the Stamp Law does not admit such registration, and the payment of the price difference was not yet due.

Also, with regard to the payment deadline –May 1st 2003, it would have been the Court's duty to analyze and ascertain the absence of a causal relationship between the damage caused to the plaintiff and the obligation arising from the contract of judicial assistance.

With regard to the presented considerations, the appellant has applied for permission to appeal, for changing the decision under appeal, and on the merits, to maintain the decision of the first court.

The appeal is groundless.

In accordance with Art. 294, item (1) Code of civil procedure, the capacity of the parties under appeal cannot be changed, nor can the case or the object of request for legal action be changed, and no new applications are allowed either.

This means that launching an appeal does not widen the procedural framework as it was established by the first instance court, in accordance with the principle of inadmissibility of changing, during appeal, of the essential elements of the civil action.

The essential elements of a civil action are: the object, the cause and the parties.

According to the provisions of Art.133 Code of civil procedure, the sanction for the lack of essential elements is nullity.

The private cause of action does not constitute an essential element of the action, since offence classification constitutes the magistrate's duty.

In the present case, the plaintiff's *de jure* statement of grounds was made in accordance with the provisions of Law 51/1995, regarding improper execution of the contract of judicial assistance, a form of civil contractual responsibility.

The fact that the plaintiff also indicated legal grounds, as stated in Art. 998 Civil Code, does not lead to the conclusion that any of the the appeal procedures have been violated, since the court has the power to classify the complaint depending on the plaintiff's purpose namely, to collect compensatory damages arising as a consequence of improper execution of the contract of judicial assistance. The appellant's criticism is also groundless with regard to the court's analysis on the appeal, in terms of responsibility forms and the culpability involved.

The object of the contract of judical assistance includes the following :

- drafting of a notarial document intended for the recovery of the price difference arising from the authenticated contract of sale purchase No. 730 of 8th June 1998, B.N.P.P.;
- drafting and bringing a civil case or penal complaint to court.

With regard to these services arises the nature of the obligations assumed through the contract of juridical assistance, which are both obligations of conduct (means) as well as obligations of result, as they were correctly classified by the appeal court.

A characteristic of the result obligation is the fact that this particular obligation is strictly determined in terms of the intended object and purpose, namely that, by performing a certain activity, the debtor assumes the obligation to achieve a determined result. In accordance with the contract of judicial assistance No. 24 of 24th April 2001, the appellant obliges himself to draft a notarial document intended for the recovery of the price difference from the purchaser of SC IALTRANS SRL Braşov,

to draft and bring a civil case or a penal complaint to court.

Drafting a notarial document, a civil case or a penal complaint, as a result proposed by the appellant, constitutes obviously a result obligation.

Non-achievement of the foreseen result, leads to the conviction that the appellant wasn't sufficiently diligent, that he was at fault and that he is liable for the consequences of non-fulfillment of obligation.

Also groundless is the appellant's defence, reiterated during appeal, that he did not write the civil action because the respondent failed to render him the judicial tax payment receipt, although it is known that drafting such an action is exempt from judicial stamp taxes.

Moreover, the way of phrasing the obligation assumed by the appellant, indicates without any doubt that it is an alternative one, civil action or penal complaint, the latter being exempt from the judicial stamp tax.

It must be also emphasized that the appellant, in his capacity of a professional in legal matters, should have also informed the client about the possible duties related with the pursuance of the actions he has obliged himself to. The solution issued by the court of appeal is clearly a judicious one, and the appeal was declared groundless and rejected in accordance with Art. 312 Code of Civil procedure.

6. Conclusions

With respect to the aspects examined in this paper, it may be concluded that the process of designating an obligation as it takes the forms of either conduct, prudence, diligence or result obligation represents an approach intended to establish the responsibility of the person who has violated the above mentioned obligation.

In order to emphasize this distinction between civil responsibility that derives from the violation of the two types of obligations, we refer to the obligations assumed by a lawyer in exercise of his profession.

As was shown, there is no unitary classification of these obligations, a situation which requires a separate analysis of each specific case to identify whether it involves an obligation of result or one of conduct (means). Non-observance of result obligations entails more serious consequences in the area of civil responsibility, engendering the presumption of culpability of a lawyer in exercise of his profession.

The category of responsibility obligations also includes, for instance, the lawyer's obligation to draft a contract, a complaint, to initiate a way of appeal against a judge's decision etc. The main particularity of the above mentioned obligation consists in the fact that the lawyer obliges himself to achieve exactly the targeted result. Non-observance of an obligation of diligence does not automatically engender the lawyer's presumption of culpability since the client must prove the fact that his lawyer has failed to use his entire diligence and knowledge and to make every effort towards achieving the desired result.

The main characteristic of the obligation of conduct consists in the fact that the obligor's duty is to use all his diligence *towards achieving* a certain result, yet without obliging himself to achieve the respective result. Therefore, a lawyer will never oblige himself to win a certain lawsuit but will make every effort to this purpose.

The case analyzed in this paper is intended to emphasize the distinction between the two categories of obligations along with the consequences engendered by their non-observance.

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