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Abuse of the Right of Unilateral Termination in Contract Law

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Abstract. In the present article, we analyse the regulation of the topic of abuse of rights in general in the field of civil law, and in particular the possibility and consequences of such abuse during the unilateral termination of contractual relationships. We follow the historical development of different theoretical foundations by which legislators aimed to define proper use and abuse of rights in different legal systems, distinguishing between solutions inspired by French and German legal models. We then contrast these solutions with the ones adopted by the Hungarian legislator in the past and also in the present. We then analyse the contractual and legal means by which unilateral termination of a contract is barred or discouraged, with special emphasis on the abusive exercise of a discretionary right of the party to that effect. We conclude that during its application the solution adopted by the Hungarian legislator to deal with possible situations of abuse of rights, the 'venire contra factum proprium' rule, shall result in the application of sanctions specific to abuse of rights even if the contractual party acted in good faith, but his/her actions caused damages to the other party.

Keywords: chicane, abuse of rights, contractual law, continental law, civil law, unilateral termination

I. The Development of Theory: Chicane, Unfair, or Non-Functional Exercise of Rights

The Civil Law principle of abuse of rights has undergone a long evolution in legislative history. One of the oldest records of abuse of rights can be traced to the enactment of the regulation of chicane. In the old civil codes of Europe, exercising certain rights with an intent to impair was considered as an unlawful exercise which imposed liability in damages.[1]

1 E.g. BGB 226. § The exercise of a right is not permitted if its only possible purpose consists in

As the concept of abuse of rights encompassed a wider area, new institutions emerged such as elements of exercising rights *without interest* or *contrary to the purpose* of the right.

The French doctrine (chicane) was also widely applied in German legal practice. *Innentheorie* and *Außentheorie* gave a different interpretation of the nature of the abuse of rights. According to *Außentheorie*, the external limits for exercising substantive rights are constrained by legislation ensuring the exercise of another substantive right, whereas *Innentheorie* interprets the abuse of rights as limit of the contents of a given right: the regulations related to the substantive right do not authorize persons to exercise the right contrary to its purpose.[2]

The first drafts of the Hungarian civil code (HCC), for instance, the 1928 Private Law Bill – the provisions of which had been applied by courts until the civil code of 1959 came into effect –, did regulate *chicane* and set its prohibition as a rule along with the basic principle of good faith and fair dealing. The *manifest* abuse of rights cannot be protected by law. The legal interpretation implied the prohibition of chicane in this provision. The courts held the exercise of rights to be abusive in those cases when the entitled person exercised his/her rights for the sake of his/her own legal interest, but the aim of his/her exercise of the said right was to impair the interests of another person. Therefore, not only the intentionally harmful exercise of a right but also simply exercising such a right were deemed as abuse of right when the legal purpose of the right (interests defended by law) was dwarfed by the main aim, the malevolent intent. Nevertheless, these abusive exercises of rights had to be obvious. However, this term acquired a wider meaning in judicial practice before 1959: the conflicting interests of parties were given objective consideration. All exercise of rights was considered abusive when the advantages *were disproportionately lower* compared to the disadvantages caused to another. In the matter of the Private Law Bill of 1928, judicial practice also held abusive the exercise of a right which did not cause real damage but was still disruptive to other persons. The risk of damage was sufficient to constitute abuse of right, and *there was no need* for the exercise to be immoral or obvious.[3] Hungarian author *Kelemen* defined the nature of the abuse of rights as the situation when the lawful exercise of substantive rights combined with circumstantial factors renders the whole endeavour unlawful.[4] The exercise of rights to harm another person's rights is no longer the exercise of a right – in the opinion of *Ágoston*.[5]

The legal phenomenon of abuse of right in this time was difficult to distinguish from the notion of *good faith* and *fair dealing* (Treu und Glauben).[6]

causing damage to another.

2 Tercsák 2003. 188–196. See also Verebics 2000.

3 Kelemen 1935. 10.

4 Kelemen 1935. 11.

5 Ágoston 1912. 209.

6 Ágoston 1912. 212.

It was generally accepted that substantive rights which are unrestricted – and similarly the legal interests defended by them – were not unlimited; they were provided for in order to meet economic, moral, and social requirements. These social requirements were older in judicial practice than the provisions of the first Hungarian Civil Code of 1959.

Taking into consideration the general requirement of exercising of rights in conformity with their social function[7], the Civil Code of 1959 declared the prohibition of exercising of rights in an abusive way as a violation of the above-mentioned requirement. The ideology of social co-operation between citizens, however, restricted the freedom of the exercise of rights and basically contradicted the bourgeois principle of unrestricted substantive rights. After the Hungarian Civil Code, the opinions of the Hungarian legal doctrine either made no distinction between the doctrine of abuse of rights and requirement of exercise of rights in compliance with its social function or treated the abuse of rights as the narrower category[8] or qualified the non-functional exercise of a right as abusive only when the exercise of rights caused damage (Sárándi).[9]

Following the correct interpretation of the regulation of the Hungarian Civil Code of 1959, the abusive exercise of rights has a conceptual element of non-functionality, but the minor misuse of rights is not deemed as an abusive exercise. Otherwise, sanctions against these minor abusive exercises would fundamentally harm the principles of civil autonomy and the limitlessness of substantive rights. Additionally, the distinction between the two principles is manifest in the case when abuse is embodied in the withholding (repudiation) of a statement required by law[10] as such a particular abuse would not be deemed a non-functional exercise of a right.

II. Recent Changes in the Hungarian Civil Code

The new Hungarian Civil Code (hereinafter: new HCC) of 2013 brought novelties in the system of the general principles of civil law. The legislator did not set rules for a socialist principle of the requirement to exercise rights properly. He

7 Exercising any right directed toward an objective that is incompatible with the social function of that right shall be regarded as an abuse of rights, particularly if it would lead to damaging the national economy, harassing persons, impairing their rights and legal interests, or acquiring undue advantages (see: old HCC § 5 subsection 2).

8 Eörsi–Világhy 1962. 162–163.

9 Sárándi 1965. 207.

10 Where the abuse of a right is manifested in the repudiation of a statement required by law and this conduct does injury to an important public interest or a private interest deserving special consideration, the court is entitled to substitute its judgment for the party's legal statement, provided there is no other way of averting the injury. A court judgment may be substituted for a statement, especially if the statement had been made contingent upon the bestowal of an illegal advantage [old Civil Code § 5 (3)].

considered the principle of prohibiting the abuse of rights in the form of a general clause to be a final barrier to exercising substantive rights. The examples provided for abusive exercise of rights (particular hypotheses of abuse) listed in the statute have also been repealed. The question is whether this means the revival of old Hungarian legal traditions and whether it results in placing abuse on the basis of comparison of interests.

Another important novelty is that the state of 'venire contra factum proprium', which was in the international evolution of law a subcase of abuse, is regulated now under the principle of good faith and fair dealing: The requirement of good faith and fair dealing is also violated by one whose exercise of rights stands contrary to his/her former behaviour, upon which the other party had reason to rely.[11]

In the course of the codification of the new HCC, the opinion was formulated early in the beginning that though the notion of good faith and fair dealing and the prohibition of the abuse of rights shared the same root, still these two phenomena do not fully correspond. The prohibition of the abuse of rights does not mean only the final barrier against the behaviours not complying with the requirement of good faith.[12]

The interpretation of the prohibition of abuse of rights might be changed by the judicial practice of the future. The main question is how much emphasis will be put on the principle of good faith and fair dealing.

III. Discretional Rights and Their Content; External and/or Internal Limits to Substantive Rights

A question arises as to whether the so-called *discretional substantive rights* have a content exempt from any restriction. In most cases, it is impossible to abuse these rights, for instance, the right of division of joint ownership. In addition, another question arises as to whether the right of withdrawal is also a discretional substantive right – considering that there are legal provisions which constitute barriers against the limitless exercise of this right. The legislator created rules for unilateral termination in several cases (for the sake of consumer protection, as sanction of non-performance, in the interest of a party ordering services at a distance) but also created criteria for the exercise of this right.

An essay among Salamon Beck's works deals with the problem of how a contracting party could be entitled to breach the bonds of his/her obligation. Its title is expressive and striking: 'Shaking off the Obligation'. He explained his choice going back to the Roman concept of *obligation*: 'iuris vinculum, quo necessitate adstringimur'. The obligation is like a set of legal 'shackles', and

11 CC § 1:3, subsection (2).

12 Menyhárd 2002. 28–30.

its breaking reminds him of the circus spectacle performed by an escape artist breaking the shackles by which he was bound. Beck stated that it may be possible to break obligational bonds in certain cases.[13]

The abusive exercise of the right of termination can be restricted by contractual terms which restrict or temporarily exclude the unilateral right to terminate the contract. In recent Hungarian judicial practice, these restrictions are valid on the basis of contractual freedom unless legal provisions disallow them. For example, the parties can mutually exclude their unilateral rights to terminate a preliminary agreement (pactum de contrahendo), supporting the binding nature of the contractual obligation to conclude the targeted contract.[14]

Apart from the general principle of the prohibition of abuse of rights, there are also countless elements of legal norms which function as barriers against the exercise exceeding such a limit, for the sake of preserving the purpose of the substantive right. These elements help us to interpret legal regulations supply: e.g. indefinite phrases (good reason, substantial breach), the provision for appreciating and defending the interest of another party, other barriers to exercising rights [fundamental rights, other substantive rights of debtor (obligee) and creditor (obligor), distrainee], or other relevant issues (good faith, malevolent intent). It follows that the prohibition of abusive exercise of rights is an external limit of substantive rights, and the possibility of ascertaining depends always on the causal circumstances of the exercise.

In the first area, relations between neighbours, where the legal doctrine of the abuse of rights has developed, there are numerous provisions which limit the exercise of ownership rights. Furthermore, the law of obligations also contains numerous provisions disqualifying abuse of rights, i.e.: the avoidance of contract can be noticed provided only that the mistake is essential; the claim for restoration of the status quo ante is lawful only if it will not incur a considerable expense for the parties.[15] To fulfil the social and economic purpose of the contract, not only the obligor but also the obligee has to conduct themselves and to exercise their rights in this way.[16]

Similarly to withdrawal, the right of avoidance may result in the restoration of the former status of the parties ('in integrum restitutio'). This right may be exercised discretionally even if in certain cases this right might also be abused. The limits of the right of avoidance exclude certain cases (i.e. if the party would have recognized the avoidance or did accept the risk of mistake),[17] and the limited period of 1 year for the notice of avoidance is also a significant limit of the right.

13 Beck 1941. 25–64.
14 BH2017. 50 (Curia of Hungary).
15 Ágoston 1912. 215.
16 Nizsalovszky 1949. 60.
17 See. Ágoston 1912 and the new CC: section 6:90 subsection (3).

Exemplifying the first case stands the following fact of a litigious situation: the plaintiff bought a custom-made, special 'slow vehicle' suited for agricultural works. Soon after the signing of the contract, the plaintiff (buyer) put the buyer on notice by raising an objection as to the unreasonably high fuel consumption of the vehicle. The seller offered restitutio in integrum, but it was not accepted at that time. Thereafter, the buyer used the vehicle for works in the autumn when he scraped it. Later, the plaintiff brought a claim before the court to exercise the right of avoidance, referring to his significant error in the matter of the fuel consumption.[18]

According to the facts of another case, the buyer blocked "restitutio in integrum" by overburdening the real estate to be restituted by mortgages (hypothecs). Exercising his right of avoidance for objective disproportion ('laesio enormis'), his aim was to reach a better (lower) price, while avoiding having to return the property bought to the seller.[19]

IV. Examples for the Provisions against the Right of Termination

The right of unilateral termination is based either on legal provisions or on the contract. If the parties conclude a contract for such a right, its exercise is generally conditioned to the payment of forfeit money (earnest money). The forfeit is to compensate the detriment brought to the interest of the other party.

The right of termination (cancellation) may occur from legal provisions, and it may have objective or subjective characteristics. It may be a licence or a remedy for the breach of contract. The scholastic example for an objective right of withdrawal is the one for the service-ordering customer in professional services (or product delivery). The customer shall be entitled to cancel the contract at any time – until performance –, but they shall be liable for paying compensation for any damage suffered by the contractor.[20]

Following from the frequency of cases, when the right of cancellation is a remedy of non-performance, the exercise of this right draws down larger risks of abuse because the party is not compelled to restore the former state if the other party is liable for the impossibility of restitution (restoration).[21]

Judicial practice finds possible that the parties would square accounts with each other for the future instead of *in integrum restitutio*. If the party cannot

18 BH1985. 385. See: Molnár 2009.
19 BH1994. 187, under the former CC (Act No 4 of 1959).
20 New CC § 6:249. subsec. (1)–(2).
21 New CC § 6:140. subsec. (3).

return the service that was performed because the object of performance is deteriorated, their right to terminate is not exercised abusively.[22]

The *ultima ratio* nature of the right of cancellation as a remedy appears when the exercise of the right assumes that the contractual interest (*positive interesse* in German) for the performance has lapsed. Generally, the burden of proof is on the obligee. Furthermore, the creditor is not entitled to terminate the contract if the lack of conformity is minor.[23]

The above-mentioned examples for the barriers of the right to terminate do not exclude, however, all possibilities of abuse.[24] In the following, those cases are to be reviewed when the abusive exercise of rights is tested. Extra facts recolour the circumstances of the exercise of the right and swerve the substantive law into directions of non-functionality or misuse.

V. Abuse of Right to Terminate the Contract in Case-Law

The Budapest-Capital Regional Court of Appeal qualified the following case as abusive exercise of rights. The buyer *owed for more than ten years* a defined amount of money (as interest rates for default of the amount of price) to the seller. The performance had also been impeded by several events (credit assessment, obtaining official permits, etc.), but the abusive character arose from the fact that the seller (plaintiff) claimed not the factual debt but *a large amount of money, which he requested in order to revoke his (pending) notice of termination*. The claim of the seller showed his true intent of profiteering. The court found that his claim is ill-grounded and 'he exercises his right against its social function (…)'. The abusive exercising of the right to terminate is not protected by law, wherefore this notice of termination cannot result in the termination of the contract.[25] In this case, the court held that the notice of termination was invalid (ineffective) because of abuse.

In this latter case, the right of termination had a retroactive effect and resulted (or would have resulted) in the restoration of the former (earlier) status of the parties. But if a certain contractual relationship cannot be terminated retroactively the right to terminate has effects only for the future.

Under the relevant provisions of the new HCC, the long-term contracts (concluded for indeterminate periods) can be cancelled unilaterally. As a notice of termination can harm the interests of the other party, the exercise of the right

22 No 1 of the year 2012 – Opinion of Civil Council of Curia (Supreme Court of Hungary) about implied warranty, the remedies of non-conformity.

23 New CC § 6:159. subsec. (3).

24 See also Bíró 1985, 121–122.

25 Decision No 7. Pf. 21.268/2013/6.

of termination depends on other conditions (i.e. the price of the cessation of contract by mutual consent in contracts for immovable property renting). The engendered reasonable reliance in the continuity of the contract is especially important in commercial contracts, when the party invests considerable expenses and arranges his businesses around this contract.

In the following case, the arbitrator held that the exercise of the right to terminate was abusive, taking into consideration the terms and conditions of the contract and the contractual interests of the tenant for the long-term effectiveness and durability of the contact. The plaintiff as leaser contracted the defendant (leasee) on the 27th of February in 1998 for an unbuilt site for running a parking lot. According to the contract terms, the leasee relied on the long-term contractual relationship, but the leaser gave a notice of termination shortly after the signing of the contract. The leaser relied on the continuation of the contract. The harm to the interest of the leasee was so significant that the arbitrator considered the termination abusive in this case.[26]

Another decision shows that the passing of a large amount of money at the signing of a contract confirms the intended durability of the contract in that case. The parties did not exclude the right of termination for a period of time but relied on the continuation of the contract. The large payment encouraged the parties to conclude the contract. The exercise of a right to terminate would have been abusive in this case.[27]

The above-mentioned cases raise the question whether they constitute a conduct deemed as *venire contra factum proprium*. But this state of affairs requires a behaviour contrary to good faith and fair dealing.

In the following case, the mandator has exercised the right to terminate a power of attorney abusively. He pleaded that the breach of contract by the attorney was an external reason for termination, but the attorney met the mandator's requirements. As the mandator exercised the right of termination abusively, before the results of the power of attorney would manifest, the attorney can claim compensation because he has lost his success fee.[28] The court held that the notice of termination was valid, the mandator exercised his rights lawfully, but the attorney is entitled to claim compensation of his damage (lucrum cessans), which is equal to the agreed success fee. This case was judged under the relevant provision of the Old CC, but the new CC regulates the attorney's general claim for compensation of damage.

In recent judicial practice, the abusive nature of the unilateral right of termination was also dealt with in the mass cases of loan contracts. The court

26 Decision No 1999/6.

27 Decision No 2014/108.

28 According to the uniformity decision of Civil Law Chamber of Curia No 3 of year the 2006 (PJE). Decision No 2011/66. See also: Bíró 2012. 218.

held that the right of termination could be exercised only in the event of serious breach of contract, in accordance with its social purpose. Thus, the creditor abused his right to terminate the loan contract if there would have been other remedies to enforce the adequate performance. The creditor terminated the contract abusively if the debtor's non-performance was constituted by only a one-month delay in payment and not paid at a later date and the creditor would have had the possibility to claim the additional completion of the bailment.[29]

VI. Bumper Case: Unexpected Termination and the Answers of European National Legal Systems

As mentioned above, the abuse of rights has a very close relation to the notion of good faith and fair dealing. Zimmermann and Whittaker, when framing the project of the Common Core of European Private Law, published their results arising from research in the field of good faith and fair dealing.[30] Taking into consideration the topic of this paper, one case study has to be emphasized – *Case 14: Producing New Bumpers* –, in which the authors collected the answers of national laws for a specific state of affairs from the legislative and the judicial standpoint, for the issue of the exercise of the right of unilateral termination.[31]

According to the state of affairs, Hamish, who produced cars, concluded a contract with Ian for the delivery of bumpers. These bumpers had to be manufactured for a specific new car, and thus Ian had to set up a new assembly line, which involved considerable expenses. After seven months, Hamish sent a notice of termination for Ian, as he was entitled to it under a relevant legislative provision. (It was assumed that Hamish did not just want to change his contractual partner, and there was some breach of contract by Ian, which could be the reason for the termination.) Ian had reasons to rely on the continuation of this contract, but it is true that the parties did not exclude the right of termination in order to secure the contractual relation for a long period of time.

The regulation of national legal systems and judicial practice propose three types of solutions to such a situation.[32]

Under the first, if the legislative provisions entitle Hamish to terminate the contract, the exercise of this right is not subject to restriction. Ian cannot claim any compensation of his damage. This solution is applied by the common law regimes.

According to the second type of solution, the notice (withdrawal or termination) is valid, but, in spite of it, Hamish can be obliged to compensate Ian for damages.

29 Decision No EBD2015. P. 4. (Budapest-Capital Regional Court of Appeal).
30 Zimmermann–Whittaker 2000.
31 Zimmermann–Whittaker 2000. 404–418.
32 Id. 417–418.

By the notice of termination, the contract was terminated prematurely, and the delivered bumpers' price did not cover the expenses of the installation of the specific new production line. The notice of termination is therefore deemed as an abuse of right. The abuse of right is an unlawful conduct. The claim for compensation is on the basis of the liability for unlawful exercise of rights, either a contractual or a delictual (tort) liability for damages. This type of solution appeared in the French, the Belgian, the Greek, and the Dutch law.

The third type of solution is on the basis of the invalidity of the notice of termination. Certain national legal systems (such as the German, Austrian, Greek, and the Belgian, with consideration of special facts, circumstances of the case, and the Irish law as opposed to common law) apply the notion of good faith and fair dealing. According to German law, the exercise of the right of termination constituted *venire contra factum proprium*. It is worth protecting the engendered reasonable reliance in the continuation of the contract by law. In Austrian law, according to the prohibition of immoral (*sittenwidrig*) exercise of rights and the legislative rule of supplementary interpretation of a contract, the notice was immoral and ineffective under the relevant provision of ABGB.[33]

The latest type of solution has yet to appear in the Hungarian judicial practice. The Hungarian method for regulation shows influences from the Austrian and the German model, but the state of *venire contra factum proprium* is a *very new institution* of the Hungarian Civil Code system, wherefore it is not yet interpreted by judicial practice.

VII. The Right of Withdrawal in Consumer Contracts – Opportunistic Termination

On the 14th of June 2014, the new Government (Cabinet) Decree No 45/2014. (II. 26.) regarding particular provisions of consumer-to-business contracts entered into force. This Decree is the implementation of the EC Directive on Consumer Rights (2011/83/EC). This Decree sets a period of 14 days (in fact, 8) for exercising the right of withdrawal widely among consumer contracts (primarily selling at a distance and off-premises contracts). The period cannot be altered (shortened) to the disadvantage of the consumer. The Decree enumerates the circumstances and cases when the consumer is not entitled to withdraw, but these rules cannot prevent the abusive exercise of the right.

Professional circles have already taken account of the risk that the consumer could not only try but can effectively use the 'unwanted, non-conform' product in the relatively long term of 14 days. Certain standard terms and conditions have already qualified certain consumer behaviours as abuse of the right of

33 Id. 404.

withdrawal.[34] According to the Decree, the expenses of the restoration of the pre-contractual state are placed on the business party (and so is total reimbursement of the consumer) for the sake of consumer protection, but it encourages the consumer to abuse the right and to gain undue advantage.[35] 'Between contracting at the doorstep and the expiration of the cooling-off period, the seller can hardly monitor the behaviour – specifically, the proper handling of the product – of each and every consumer. The consumer might use the product during the cooling-off period excessively, i.e. beyond adequate usage, and return it to the seller following alleged non-satisfaction.'[36]

VIII. Conclusions

The general question arising from the novelties of the new Hungarian Civil Code is which facts and circumstances will be considered by courts in the following judicial practice to hold a certain case as an abusive exercise. As the prohibition of abuse can be meant as the negative side of the requirement of good faith and fair dealing, the courts would refer to this principle more often than to the abuse of rights. But the non-functional mode/method of exercising a right does not appear always as a bad-faith behaviour.

Because the legislator has placed the *venire contra factum proprium* rule in the semantic field of the principle of good faith and fair dealing, there will be typical cases which would be redirected from the principle of the abuse of rights and come under this new principle, but according to former judicial practice the abuse of rights furthermore does not require harmful effects or intentional exercise. It means that if someone caused prejudice to another person by exercising his/her right, his conduct is against the principle of good faith. Furthermore, on the one hand, it cannot be deemed that such conduct is an abuse, whereas, on the other hand, he is obliged to repair the damages only when other elements of fact appear simultaneously – suggestive behaviour – under Provision 6:587. § of the Hungarian Civil Code.[37]

The principle of exercise of rights regarding the above-mentioned economic and social purpose (requirement of functionality) is also to be considered even if the legal regulation has changed.

34 It ought to examine the unfair nature or the nullity of these conditions, as well.

35 Howells–Schulze 2009. 184. In eBay auctions, the consumer is not entitled to withdraw – except for the sale at a fixed price, a so-called 'buy-it-now', which contracts are regulated under the norms governing sales contracts concluded at a distance –, and so businesses choose to sell via auction on eBay to circumvent the right of withdrawal.

36 Hoeppner 2012; see: Luzak 2013.

37 The court may award damages payable in full or in part by a party whose wilful misconduct has explicitly induced another bona fide person to act in a manner that has brought harm to this person through no fault of his own.

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