

TORT REDRESS

The presentation hereby has in view the legal provisions in force on the 31st of March 2004

Applicable legislation in this field

- Civil Code from 1864, published in the Booklet from the 1st of January 1997, as further amended and completed:
 - Government Ordinance no. 9/2000 on the level of the legal interests for money obligations, published in the Official Gazette no. 26/25th of January 2000
 - Government Emergency Ordinance no. 138/2000 for the amendment and completion of the Code of Civil Procedure published in the Official Gazette no. 479/2nd of October 2000
- Decree no. 167/1958 on the extinctive prescription, published in the Official Gazette no. 19/21st of April 1958, as further amended and completed:
 - Decree no. 218/1960 for the amendment of the Decree no. 167 from the 21st of April 1958, on extinctive prescription, published in the Official Bulletin no. 10/1st of July 1960

I. Concept of commercial tort

The commercial tort is the negative effect suffered by a trader as a result of the inadequate execution, with delay or of the non-execution of contractual liabilities assumed by another trader.

II. Tort redress

According to the provisions of the Civil Code, Art.998 and 999, any person causing a tort to another person by his or her illicit action has the obligation of redressing that tort.

The illicit action of a person may result from the violation of a legal liability, of general nature, which is incumbent on everybody, this being a case of delictual civil liability.

If a person violates the liabilities established in a validly concluded contract, then this is a case of contractual civil liability.

The creditor suffering a tort as a result of the non-execution or of the inadequate execution of a contract, has the right to the redressing in full of the tort resulted from the non-execution of the contract of the inadequate execution.

If a trader produces certain torts in the pre-contractual stage, namely before the signing of a contract, the rules of the delictual civil liability shall apply.

Thus, one party may request the redressing of the tort suffered during the negotiations. In the situation in which one of the parties begins negotiations or continues to negotiate with no intention of concluding a contract with the other party, it may be held responsible for the expenses performed during the negotiations by the injured party and may be forced to the payment of certain compensations for the lost opportunity by the injured party to conclude a contract with a third party.

The violation of the confidentiality liability independent of the existence of a contract brings about the liability of the guilty trader. Thus, during the negotiation, it is possible for one party to offer to the other one confidential information. The party acknowledging such confidential information is obliged not to reveal that information or to use them in a personal purpose.

The violation of the confidentiality liability brings about the liability of the guilty party and the payment of certain damages. The amount of the damages varies independently if the parties have or have not concluded a special agreement regarding the information confidentiality. Even if the injured party does not suffer any loss, it may be entitled to request from the party violating the confidentiality the benefits obtained by revealing of the information to third parties or by using them for personal purposes.

Conditions to be complied with for the tort redressing

a) the tort to be sure;

The redressing of a future tort may also be requested, namely of a tort that has not happened yet, provided that it to be sure enough.

The certainty is connected not only to the existence of the tort but also to its scope. There may be torts whose existence may be questioned, but which are hard to asses.

When the value of the damages cannot be established certain enough, then, rather than refusing any redressing or to decide upon symbolic damages, the court has the right to make an equitable assessment of the suffered tort.

According to the provisions of the Civil Code which regulates this field, a clear connection between the sure nature and the direct nature of the tort must exist, which implies a connection of sufficient causality between the non-execution and the tort. Usually the indirect tort is uncertain and unpredictable.

b) the non-execution to be imputable to the debtor

If the *non-execution is partially imputable to the creditor*, then it limits to the creditor's right to damages. Creditor's contribution to the performing of the tort may consist in his action or in an event for which he has assumed the risk. His action may take the form of an action or of an omission. Most frequently, the creditor's action consists of the failure to comply with a contractual liability; but it can also be of delictual nature or may result from the non-execution of another contract. The exterior events for which the creditor assumes the risk may be actions of certain persons for whom he is responsible, like his representatives or agents.

If a clause regarding force majeure is comprised in the contract and the conditions established by the respective clause are complied with, then the debtor is completely exonerated of liability.

Thus, the exoneration shall be partial to the extent in which the creditor has contributed to the producing of the tort. Determination of each party's contribution to the occurring of the tort may be very difficult and shall mostly depend upon the court's power of appreciation. Any tort that the creditor could have avoided by taking the necessary measures will not be redressed.

Obviously, it cannot be requested from a party that has already suffered the consequences of the non-execution of the contract, to take measures costing time and money. On the other hand, it would be non-reasonable from the economic point of view for the raising of the tort that could have been reduced by taking appropriate measures to be allowed.

The measures that must be taken by the creditor may limit the scope of the tort, especially when there is the risk for it to take longer if these measures are not taken or may avoid the increasing of the initial tort.

But the reducing of the damages to the extent in which the creditor has not taken the appropriate measures in order to attenuate the tort, should

not produce losses to that party. That is why the creditor has to recover from the debtor the expenses borne in order to attenuate the tort, with the condition for those expenses to be reasonable, considering the circumstances.

c) the tort not to have already been redressed.

1. Damages. Criminal clause

In order to compensate the torts resulted a creditor may request for damages as legal means of exclusively sanctioning, namely:

- moratory damages in case of delayed execution or for the inadequate execution accepted by the creditor;
- compensatory damages in case of impossibility of execution imputable to the debtor.

Criminal clause is a contractual clause through which the parties, by their consent, determine the scope of the tort and the quantum of the damages covering it, before its occurrence.

This clause is of great practical use as it establishes in advance the value of the tort caused to the creditor, the necessity of going to law for the tort assessment being eliminated and the difficulties occurred because of the proving of tort are avoided.

2. Establishment of the tort

As we have already specified, the creditor has the right to have redressed in full the tort resulted from the non-execution of the contract (the redressing in full of the prejudice principle).

Art. 1084 Civil Code, stipulates, regarding to the establishment of the tort for which damages are owed, the creditor's right both to the redressing of the actual tort and of the non-made benefit.

In the enforcement of the redressing in full principle, any modifications of the tort must be taken into consideration, including of the assessment in money that may occur between the moment of the non-execution and the moment of the court decision. Yet the rule has three exceptions. For example, if the creditor has already redressed the tort on his expenses, the damages granted shall correspond to the total amounts spent.

The tort resulted from the payment delay of an amount of money is Subjected to a special regime and is calculated through a lump sum according to the interest accumulated between the moment of the maturity of

the payment of the amount of money and the moment of the effective payment.

The interest is owed every time the payment delay is imputable to the debtor and begins from the moment of the maturity of the payment, without the need to be put in delay.

If the delay is the consequence of a case of force majeure (for example the debtor is prevented from obtaining the amount owed because of the introduction of new regulations in the field of the currency exchange), the interest shall be further owed, but not as damages, as compensation for the debtor's enrichment as result of the failure to pay because the debtor continues to receive interest for the amount he cannot pay.

The redressing has a lump nature. If the parties fail to establish by contract the quantum of the interest, then the debtor owes the legal interest according to the Government Ordinance no. 9/2000, as further amended and completed.

3. Moral tort

Commercial tort may also comprise moral tort.

Moral tort is that tort that is not susceptible of pecuniary assessment.

Moral torts may result both in the hypothesis of violation of certain patrimonial interests and as a result of the violation of certain personal non-patrimonial rights.

In the case of the contractual liabilities, moral torts are limited to those resulted from the inadequate execution of some of the contractual liabilities.

Redressing of the moral tort

In the case of a moral tort, resulted from a contract, the right of action for the redressing of the tort is incumbent to the creditor who has suffered a moral tort by the inadequate execution of the liabilities assumed by his debtor. If many debtors exist, their liability is in principle divisible, except the case in which the solidarity derives from the law or from the parties' agreement.

The one promoting an action in redressing of the patrimonial torts must prove the conditions provided by law for the involvement of the defendant's liability. The burden of proof is incumbent to the claimant; according to the Art. 1169 Civil Code any means of proof allowed by law may be used.

The redressing of certain moral torts may take different forms and the court is the one deciding which of them insure the redressing in full of the

tort. The court may award damages and may also decide upon other forms of redressing as publishing of a notice in newspapers, notice decided upon by the court (for example, in case of the violation of a non-competition clause or of the reopening of a business or in the case of damages caused to the reputation, etc.).

In this case the compliance with the condition for the tort to be sure is also necessary, because the redressing of an eventual or hypothetical tort is not possible to be requested from the debtor.