

PROBLEMS OF PROCEDURAL RIGHTS ABUSE

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Abstract. In this article, the monographic and scientific publications, the practice of unfair realization of rights by the participants of the process are analyzed based on the analysis of certain international legal acts. First of all, we study the legislative consolidation of procedural dishonesty and its consequences, and the impact of presumptions on the identification of procedural dishonesty facts. Based on attribution to investigative and adversary models, specific problems associated with procedural dishonesty are identified, and conclusions about the ways of unfair realization of rights by the participants of the process are formulated.

Key words: process, subjective rights, realization, responsibility, bad faith, abuse.

1. Introduction

Modern procedural legislation of foreign countries as well as Russian legislation pay great attention to the problems of combating procedural dishonesty. Basically, in the legislation of foreign countries, as in Russia, the principle of presumption of good faith and rationality is mentioned. As a rule, by procedural dishonesty, the legislation of different countries implies the abuse of a right that formally looks like a lawful act, but can significantly affect the timeliness of a decision or the decision itself. However, in some countries the consequences of abuse of right are indicated. For example, in England, such consequences include abusing the civil process (Abuse of Civil Process) and malicious prosecution (Malicious Prosecution) [1]. In France, the considerations of morality, expediency, rationality and justice are important [2, 3]. The ways and means of dealing with cases of abuse of law vary significantly from country to country. For example, in the United States, the attorney is the guardian of the good faith and the reasonableness of exercise of procedural rights, who is obliged to check the compliance of the timeliness and reasonableness of the use of the right of his principal. Otherwise, the court has the right to “punish” a lawyer if the documents submitted and positions presented to the court do not meet the standards of good faith and expediency [1, 4, 5]. In any case, the abuse of law or procedural dishonesty must be proved under the laws of countries belonging to both investigative and adversary model of law. To do this, as a rule, it is necessary to establish the presence of harm, and the causal link between the harm and abuse of the right. Of course, it is also necessary to take into account the presence of guilt in such an abuse of right.

2. Research Method

Various general scientific and logical cognition methods were used in this work including systemic, analysis and synthesis, abstraction, and formal-logical approaches. The disclosure of the topic was facilitated by the use of formal legal and comparative legal methods. The basis of research consisted of works of Andrews N., Fentiman R. [6], Hazard G. [7], Taniguchi J. [8], Dondi A. [9], Sohn L. [10], Gautrais V. [3] and others.

3. Results and Discussion

One of the interesting manifestations of principle of good faith in public international law is the institution estoppel, by virtue of which the party who made the presentation or performed the action loses the right to deny the “truth” of the presentation, expressed or implied. Estoppel (or rather, estoppel by representation) originates from English common law and is currently a separate legal principle recognized by both states themselves, and the practice of an international court and arbitration. The legislation of foreign countries, like Russia, does not contain a clear definition of “procedural dishonesty” or “abuse of the right”. In international law-making practice, there is a known case that the Chinese delegation proposed, at the time of developing the UN Convention on Contracts for the International Sale of Goods (Vienna Convention 1980), using the term “reasonable” in the text of Art. 9, but the proposal was rejected because of objections, which were voiced by representatives of Germany.

Their essence was that such a term could create too many problems in the application of the norms of Convention, since its meaning is not clear [11].

None of the international legal acts provide a definition of the concept of good faith and none of the doctrinal definitions are generally accepted in this area. Understanding of good faith at the institute of estoppel is relatively

definite: on one hand, as a standard of consistency, and on the other, as a true and justified mistake. However, this understanding has an obvious flaw, which is the ambiguity of a term that occurs in legal reality (a similar ambiguity of concept of good faith exists in the civil law of most states of the world, including Russian Federation), and adversely affects its application. As for other interpretations, many of them are characterized by a tautology - as a principle, obliging to conscientiously find out the actual circumstances, to choose in good faith the norms to be applied, etc.

It should be noted that most states recognize this existence in their legal systems of a distinction between an objective and subjective good conscience. Subjective good faith, as a rule, concerns the knowledge of facts or their absence, is important for the rights of property and does not cause acute controversy. Significant disputes relate to the objective good faith, which is an uncertain standard that allows judges to develop the right, depending on the circumstances. In this form, conscientiousness is often referred to as a principle, doctrine or concept, and is applied primarily in contract law. Thus, it seems necessary to consider the controversy over the abuse of procedural law in an objective sense.

Thus, English law highlights the abuse of "adversariality", which welcomes the parties to the process, as well as the judicial abuses, encountered by judges considering the case. Rules of the civil procedure of 1998 establish that the court rejects the "gross and clearly unfounded claims of the party". Abusing the right to interim measures is proposed as abuse; as well as filing a lawsuit in an already-reviewed case; filing a claim or defense without reasonable grounds; filing a hopeless appeal to gain time. The means of counteracting procedural abuse include the abandonment of unfair claims; monetary sanctions; recovery of compensation in favor of the claimant, to whom a lawsuit was filed in bad faith; refusal to try cases when the plaintiff attempts to circumvent the agreement on jurisdiction and others [1, p. 24]. The institution of abuse of procedural rights in the United States is expressed in the idea that "the right should not be damaged as a result of a gross deviation from generally accepted procedural standards." The institution in question is expressed in law at the level of individual judicial case-law cases. An analysis of such cases shows that most of them represent the phenomena that Russian procedural law regards as "ordinary" offenses. It is inadmissibility of consideration of the case by a judge interested in the outcome of the process; inadmissibility of evidence obtained in violation of requirements of the law; and the impact on jurors and others.

The unjustified delay in delivering summons or claim to the respondent, exceeding 120 days, led to the party entrusted with serving termination of the claim (Section "j" and 4 of the Rules of Civil Procedure in the Federal District Courts of 1938 - hereinafter referred to as Rules) [1 p. 25].

US law places serious demands on the procedure for exchanging pleadings, or trying to prevent possible abuses at this stage. Legislation is wary about various burdens of the process, particularly by changing the subject composition or requirements, providing for special measures to this effect. When a new person enters the process, "the court must take into account that this entry into process does not lead to an unjustified delay in the case or damage to the resolution of the rights of the original parties (paragraph "b", paragraph 24). The court is vested with the right to take orders "aimed at preventing a case being delayed or causing harm" (paragraph "b" pr.20).

The law provides the exemption of a party or its legal representative from action of a decision or order, when there was a "deception ..., misrepresentation or other incorrect behavior of the party (sub. 3, "b", para. 60).

The main means of dealing with abuses of procedural rights in the United States is refusing to satisfy claims, or to appeal on against the decision of the court of first instance. A party in the process may refer to the abuse of procedural rights granted by the opposite party, which in itself is used as a means of procedural struggle. A person who has suffered abuses may claim damages from an unscrupulous person. For judges and lawyers who admit abuses, disciplinary sanctions are provided. Attention is also paid to measures aimed at preventing the abuses, which contribute to the fact that the court must exercise reasonable care in assessing the position of the applicant.

The institute of responsibility for abuse of procedural rights in France has been developed in sufficient detail. A rather wide range of phenomena is considered as abuse which starts from delaying the process and ending with unlawful methods of procedural strategy. Sanctions for abuse are fines and compensation paid by the court. Under the current CPC, French courts can quite actively oppose the procedural abuse. In particular, Article 32.1 of the French Code of Civil Procedure establishes that whoever acts on behalf of the law, abusing his position and promoting the use of the law in his own interests, can be given a fine of 15 to 1500 euros, regardless of the claim for damages, which can also be submitted [2, p. 46].

Japanese procedural law establishes the principle of good conscience as a general principle of process, and prohibits the abuse of procedural rights. There are also special cases that could indicate procedural dishonesty. This, for example, is not taking into account the late statements of the parties by court; nullity of the right arising as a result of a procedural error, right of the court to decide against the party who intentionally destroyed the written evidence; measures of responsibility for unjustly challenging authenticity of the submitted documents and some other cases. The doctrine notes that requirement of good faith may lead to a restriction of the procedural freedom of the parties.

The abuse of procedural rights is revealed through the term "conflicting behavior" (a radical change in the procedural position in the course of process) and "illegally obtaining procedural advantages" (artificially changing jurisdiction) [2, p. 46].

Australia's civil procedure also lacks a general definition of abuse of procedural rights. There, the corresponding phenomenon is considered as a general encroachment on the process, a violation of the general principle, regardless of desecration of a specific rule of procedural law. Doctrinal understanding of the phenomenon being studied sounds like "using the process for purposes other than those for which it is intended and deviating from its generally accepted principles and standards" [12, p. 54].

The procedural legislation of Italy does not directly contain the rules on abuse of procedural rights, but in general provisions of the regulatory legal acts, the legislator points out the good faith and fairness in the procedural conduct of the parties involved (Article 88 of the Code of Civil Procedure of Italy) [5, p. 187].

The Brazilian Civil Procedure Code of 2015 replaces the term "abuse of procedural rights" with "unfair litigation", which provides for "procedural responsibility" in the form of a fine, and in exceptional cases, the unfair party is subject to moral and material damages [14, p. 188].

The category of "unfair litigation" in Brazil's civil procedure includes delaying a trial, making a claim or objection to a lawsuit against a manifestly lawful and indisputable action, distorting or falsifying facts, using the process to achieve illegal goals, providing unjustified resistance to the process, taking actions with deliberately malicious intent in any particular episode of the case or process action, and provoking to clearly groundless disputes (Article 80 Brazilian CPC) [14, p. 188]. Thus, we consider it possible to make a conclusion about the absolute importance of paying special attention to institutions of human rights risks and legal (procedural) restrictions [18; nineteen; 20; 21; 22]

4. Findings

The generalization of foreign legislation allows us to conclude that cases of procedural abuse are also common in the judicial and legal systems of foreign countries. The current situation indicates the global nature of the phenomenon being studied, as well as the need to improve means of counteracting this negative phenomenon; this is because the procedural legislation of individual countries turns out to be vulnerable to cases of procedural abuse, despite a long history and deep legal traditions.

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