

## **The utility of the rescission clause in the settlement of disputes arising from international trade contracts**

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**Abstract:** *Starting from the opportunities that the creditor of an obligation has in order to settle his claims by means of the commercial arbitration, as an alternative to court under common law, with a view to punishing in the most effective way the failure of the obligation by the borrower reveals the necessity to introduce the rescission clause in international commercial contracts governed by a foreign law. This paper aims to emphasize the practical utility of the institution of rescission clause in the light of the new Civil Code regulations, in whose presence the role of the court is entirely removed in as far as the decision statement is concerned.*

**Key words:** *arbitration, arbitration clause, failure of the obligation, rescission clause*

### **1. Introduction**

International commercial arbitration stands for an alternative way of settling commercial disputes by persons or organizations chosen and invested by the parties, which by their will remove, in as far as that claim is concerned, the jurisdiction of the courts of common law and the applicability of national procedures.

In the first sense, this concept designates the appropriate means to regulate quickly and fairly the international disputes which arise from commercial transactions in the domain of goods and services exchange (Căpăţână and Babiuc 1993, 192). The market is no longer the place where the consumer expresses his needs as demands, allowing the producer to know and satisfy them, but it has become the means by which the professional accumulates by far more capital (Neacşu 2011, 11). This new situation can induce multiplying effects once diverse mechanisms are put in place, generating results on large scales (Drumea and Spataru 2011, 387).

In another sense, international commercial arbitration is viewed as a special jurisdiction derogatory from the procedural common law, meant both to settle the disputes arising from commercial international relations and to facilitate the State's participation in international division of labor (Dăscăloiu 2003, 22). As method of

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dispute settlement, arbitration is used primarily in international trade relations that require specific and effective mechanisms meant to solve any differences in order to guarantee the confidence of the parties with regard to both the applicable legal regime and to the procedures of the solving systems.

The core element of private arbitration is the arbitration agreement. This agreement shall be made in writing under the penalty of nullity and it represents the agreement by which the disputing parties agree to resolve by arbitration the patrimonial disputes, by invoking the lack of competence of the court and by asking for the declination of competence in favor of a Court of Arbitration (Florescu and Pîrvu 2009, 343).

The Clause can also result from the introduction by the plaintiff of a request for arbitration and the defendant's acceptance that this request be settled by the Court of Arbitration.

It can be concluded in the form of an arbitration clause, stated in the main contract or in the form of an independent agreement called compromise. The agreement can also result from the introduction by the applicant of a request for arbitration and the defendant accepted that this request be settled by the Court of Arbitration.

The conclusion of the arbitration agreement represents a prerequisite and primordial condition of arbitration, of the valid investiture of the arbitral tribunal dispute before the Court. Without arbitration agreement there can be no arbitration. The arbitration agreement represents the reason for exclusion, as far as the conflict exempt to Court is concerned, the competence of the Common Law institutions, being the one that entails the material exception of courts, respectively, the transfer of the dispute from the state justice in control of the justice power to the competence of the private justice, legally organized in the form of private institutional or ad hoc arbitration. The arbitration agreement is the act that prefigures the framework and conditions of the judgment, it determines the applicable rules and, as an expression of the free will of the parties, it gives the institution a strong contractual blueprint. The arbitration agreement must be completely drawn up, that is, it is necessary for the parties to designate an existing commercial arbitration institution, to specify correctly the names of arbitrators or the manner in which they will be appointed in the panel that will be composed (Popa and Lisievici, 2011, 19).

As for the legal type, arbitration agreement can be civil or commercial arising from the nature of the dispute under judgment, but by its regulation in the Civil Procedure Code it gains a predominantly procedural nature (Lupan and Sabău, 2006, 231). The same author considers that, this agreement that has been given a strong procedural focus, should be governed by the material law.

## **2. The rescission clause - clause in commercial contracts**

Traditionally, the rescission of the contract was seen as an extraordinary event that could operate only judicially at the demand of the creditor dissatisfied by the breach of the contract by the debtor. In time, the rigor of this rule was mitigated by admitting into doctrine and jurisprudence the possibility that the parties trigger a conventional rescission by inserting in the contract the so-called *lex commissoria*, which had effects of different intensity depending on the manner in which they were written (Popa and Lisievici 2012, 19).

*Lex commissoria* clauses as they were in the old regulation, depending on the grade, required or not court intervention. Thus, in case of a rescission clause of the first or second degree, usually parts addressed the court. In the case of a rescission clause of the third degree, although court intervention was not necessary, the debtor must first be put in delay, and if this was not complied with by the creditor, the debtor can address the court in order to certify that the rescission has not occurred yet as it had not been put in delay. And in the case of a rescission clause of the fourth degree, without putting the debtor in delay, the creditor could, once the time of performance of the obligation has expired, to declare the contract terminated and to foreclose the debtor.

The provisions of the new legislation (art. 1550-1552 of the New Civil Code) have given up on the rule according to which the rescission of the contract for the wrongful non-performance of the obligations of the debtor shall be made only in a judicial way and it has been admitted that rescission can also operate on the basis of a unilateral statement of rescission issued by the entitled party, under the simple reserve of an enforcement notice in any of the following three situations: (a) when the parties have agreed so, (b) when the debtor is legally in delay or (c) when he fails to execute the formal notice within the deadline by delaying.

In spite of all these, by inserting in the contract an express rescission clause, which represents under the new regulations the old 4<sup>th</sup> degree rescission clause, involves giving up in advance on the judicial nature of the rescission without being necessary to delay the debtor.

## **3. Background to the arising of the dispute**

Following an auction opened in November 2014, the beneficiary of the contract, a Greek company, signed with a Romanian company a contract for services consisting of executing the functional restoration of two warehouses within 60 days from the signature of the contract, subsequently extended by addenda until May 2015.

The arbitration clause stipulated in the contract indicates the Greek law as the law applicable to the contract and the Athens Court of Arbitration as competent to solve any dispute arising as a result of the contract unfurling.

From the documentation in the file it results that the provider has not fully completed the functional restoration of the two warehouses within the deadlines established by supplementary addenda, which is why, in the absence of a rescission clause, which would have allowed the declaration of the rescission without any need of intervention of the court and based on the arbitration clause stipulated in the contract, the beneficiary addressed to the Court of Arbitration for the resolution of the dispute. The requests regarding the ascertaining of the rescission of the service contract, by forcing of the provider (defendant) to pay penalties for not complying with the contract and by obliging him to pay money by way of damages, the beneficiary of the services (plaintiff) bases them on the following arbitration clause stipulated in the contract "The failure of all obligations taken over by one of the parties entitles the injured party to address the Court of Arbitration in Athens in order to demand the rescission of the contract and to claim payment of damages. The solving of a possible dispute will be done by applying the Greek law by a panel of two arbitrators appointed by the parties and an umpire. "

#### **4. Discussions on solving the dispute by the arbitration court**

The creditor may opt for rescission taking advantage of the rescission clause or he may request the court or the arbitration the declaration of rescission.

In this contract due to the non-introduction of a rescission clause in the contract, the plaintiff requested for the rescission to be ascertained by the Court of Arbitration on the basis of the arbitration clause in the contract, which gives the arbitral tribunal the power to settle the dispute.

In this case, the rescission will be ascertained only by court decision on the evidence concerning the partial failure of the agreement and, respectively, the impossibility to complete the activity as effect of the failure to meet the contractual obligations by the provider within deadlines.

Consequently, the Arbitral Tribunal will ascertain that the defendant debtor has not complied with both the initial period of 60 days, calculated from the signature of the contract and set for the execution of the contract, and with the successively extended deadlines when the deliverance of the warehouses was established and it will decide upon the rescission of the service contract, supplemented by addenda.

In the case of the execution contracts in one part, the rescission has as effect the dissolution of the contract retroactively and the restauration of the parties in the state before the signature of the contract while in the case of the contracts with successive execution the rescission triggers the dissolution of the contract only for the future, the effects that occurred until execution remain in force. Therefore, the court-ordered rescission will have effects starting with the delivery of that sentence, for what has remained unexecuted.

As regards the obligation of acting meant to refund money corresponding to the value of the missing goods and materials and of the unperformed activity, in case the defendant fails to admit that sum of money, the plaintiff must prove its lack and the unperformed activity by the minutes of partial acceptance, the minutes and the appendix to the minutes of delivery-reception so that Arbitral Tribunal may order the defendant to refund the amount of money received from the plaintiff.

As for the penalties calculated at the value of the work contracted and not executed, the Court will analyze the contents of the penal clause inserted in the contract in order to see if they are claimed on the base of this clause.

By checking the calculation of penalties from the tables annexed to the application for arbitration, the Court will determine whether these were properly prepared, by applying the penalties stipulated/ day of delay at the value of the activity remaining to be performed for the period of delay from the date when work should have been completed.

If the defendant does not prove that the delay is due to responsibility-exonerating reasons, the Arbitral Tribunal will admit the claims for delayed penalties payment.

Therefore, the court will decide upon the rescission of the contract, will order the defendant to pay the value of the missing goods and materials on site, to pay the value of the unexecuted works, as well as to pay the penalties for failure to perform the work.

When analyzing the complaint referring to the granting of money as moral damages, the Arbitral Tribunal will examine how the responsibility of the contractor for the failure of assumed obligations is governed by the contract.

Taking into account the fact that in the commercial domain the moral damages are granted for any damage suffered by the creditor of the unfulfilled obligation as a consequence of the loss of credibility and prestige in relations to the commercial partners, in order to accept that type of damage, in order to repair the moral damage alleged by the plaintiff, one requires the determination of a material equivalence on the basis of elements likely to lead to a fair assessment of the degree to which the continuation and extent of future business with third parties will be affected.

If these consequences cannot be determined precisely or if the parties have limited their responsibility to the penalties in the penal clause, without mentioning other types of material or moral damages, the Court will reject this claim.

## **5. Conclusions**

It is true that, under the new national regulations the need for the introduction of an arbitration clause in the contracts governed by Romanian law declined, but in the commercial contracts governed by a foreign law, the introduction of a rescission

clause has certain advantages compared to the described situation when the judicial solution was decided upon. They are meant to avoid procedural costs, to reduce time until the effects of rescission are in force, to remove the uncertainty resulting from the judgement of the judge and the possibility of rescission for the contracts governed by a law that removes rescission.

In the contracts governed by the Romanian law, the recommendation for the use of the mechanism of the rescission clause, which requires an express contractual agreement of the parties, instead of the advantages conferred by law to unilaterally call for rescission, is that it should eliminate the necessity to prove the degree of importance of the execution or, the repeated incident in successive performance contracts and it may allow for the rescission to take place legally without any notification from the creditor.

A well-drawn up rescission clause in a contract will regulate more explicitly than the New Civil Code the threshold from which we can talk about a failure of a sufficient significance in order to trigger the possibility of rescission, what repeated failure means, how delaying operates or what might be the remedy period by the debtor of any contract breach.

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