

RESOLUTION AND TERMINATION

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Abstract: *The resolution, the termination and the reduction of labour conscription are regulated by articles 1549-1554 in the new Civil Code, which represents the common law in this matter. We appreciate that the new regulation does not conclusively clarify the issue related to whether the existence of liability in order to call upon the resolution is necessary or not, because the existence of this condition has been inferred under the previous regulation from the fact that the absence of liability shifts the inexecution issue on the domain of fortuitous impossibility of execution, situation in which the resolution of the contract is not in question, but that of the risk it implies.*

Key words: *resolution, termination, contract, effects, inexecution.*

1. Resolution and termination in the old Civil code

In the old Civil Code, the institution of resolution was regulated in articles 1020-1021 which stipulated the following: “*The condition is always implicit in reciprocal contracts, when one of the parties does not fulfill its commitments or*”, thenceforth article 1021 states that: “*In this case, the contract is not voided by right. The party whose commitment was not completed has the choice to force the other to execute the agreement when it is possible or to request its voidance with penalties. Voidance must be demanded only from legal authorities who, according to circumstances, can grant a term to the party brought to justice.*”

Starting from these two legal texts, in doctrine and jurisprudence, the following have taken shape:

a) *the basis of resolution*, on a legal basis it was that of the existence in any contract of a tacit resolutive or implicit

condition, so in case of inexecution of the obligations derived from the contract, an implicit commissary pact was activated or even more, an implicit resolutive condition in any reciprocal contract.

In the doctrine, this explanation of the legal foundation of resolution has been criticized, as it is considered that the execution of the assumed obligation represents an essential effect of the contract, being impossible for it to be considered only an incidental form of it, as the condition exists [3].

Moreover, if the resolution had not been based on the idea of meeting a resolutive condition, it should operate by right, like any condition, without the intervention of the court or, as it was provided in article 1021 Civil Code, a legal decision was necessary for the resolution of the contract.

Consequently, in reference sources [3] it was asserted that the legal basis of resolution consists in reciprocity and interaction of the obligations in the reciprocal contract, the circumstance that

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each of the reciprocal obligations is the legal cause of the other. The inexecution of one of the obligations deprives of legal support the reciprocal obligation therefore the voidance of the entire contract is required.

b) *the resolution of the contract was judicial* – thus giving a legal decision in order for the effects of resolution to produce was considered absolutely necessary, even given the hypothesis of the existence of commissary pacts [4].

c) the resolution of the contract could operate by virtue of *express resolatory clauses* (the so-called commissary pacts) which restricted the ability of the judge to express his power of censorship over the resolution and, especially over its opportunity: the so-called *“legal” resolution or that of “full right”* – its significance being that the lawmaker made an anticipatory evaluation of a certain type of inexecution as having a resolatory character, without the possibility for the resolution to operate against the will of the obligee. The typical case of resolution in penology was that of sale of products, provided by article 1370 from the old Civil Code.

d) *the essential conditions* for declaring the legal resolution were that: there was an essential inexecution, the inexecution being culpable, and the obligor to have been put in delay.

2. The regulation of resolution in the new Civil Code and the general conditions of prosecution

The resolution, the termination and the reduction of labour conscription are regulated by articles 1549-1554 in the new Civil Code, which represents the common law in this matter.

Thus, article 1549 from the Civil Code provides that in the situation in which the contractual obligations are executed and

repossession is not required, the obligee has the right to resolution or, according to case, the termination of the contract, as well as penalty clauses if he/she is entitled to them.

The existence of the obligor’s liability in non-executing the obligation does not follow from this article, a reason for which in the doctrine it was estimated that this condition used in order to appeal to resolution is no longer necessary, the basic condition of resolution being that of “considerable inexecution” [2].

This is because, according to article 1551, paragraph 1, thesis I from the Civil Code, *“the obligee has no right to resolution when the inexecution is of little meaning”*. The *per a contrario* approach forces us to draw the conclusion that the resolution operates only when the inexecution is considerable.

Discussions regarding the fact that the liability condition is not necessary in order to call upon the resolution have taken place also under the old regulations, being considered that the only condition in order for the resolution to be called upon is “the illicit inexecution of the contractual obligations by the debtor, no matter if the inexecution is transgressive or not.” [1]

So much more as articles 1020-1021 from the old Civil Code did not provide the liability condition in order to call upon the resolution.

As it has been remarked in the doctrine, the fortuitous case starts where the liability ends, so that the inexecution of the obligations is not due to liability but to the fortuitous case; the provisions of article 1634 from the Civil Code apply, according to which: *“The obligor is released when his obligation cannot be executed because of an act of God, of a fortuitous case or of other events that can be assimilated to these, which have occurred before the debtor was put in delay.”*

In the same context, we underlined that according to article 1557 from the Civil Code: “(1) *When the impossibility of execution is total and indefeasible and regards an important contractual obligation, the contract is abated by right and without any notification from the very moment when the fortuitous event took place...* (2) *If the impossibility of execution is temporary, the obligee can suspend the execution of personal obligations or can obtain the voidance of the contract. In this last case, the rules regarding resolution are applicable conformably.*” From the content of these regulations it follows that the lawmaker makes a distinction between the voidance of the contract following a fortuitous impossibility of execution and resolution, which cannot be determined by the intromission of a fortuitous case.

These are the reasons for which we do not share the expressed point of view, in the sense that in order for the resolution to intervene, the condition of the obligor’s liability is not necessary in the inexecution of the contractual obligations.

As shown above, in order for the resolution to intervene, it is necessary that the inexecution of the contractual obligations to be serious enough, as in the situation of an inexecution of little relevance, the Civil Code does not allow for the resolution to be necessary, but gives the obligee the right of proportionally reducing his performance if, according to circumstances, this is possible or if the abatement of the performances cannot take place, the obligee has the right only to penalties (article 1551 Civil Code).

Exceptionally, “*in case of the contracts with successive execution, the obligee has the right to termination, even if the inexecution is of little importance but is repeated. Any contrary provision is considered unwritten.*” (article 1551 paragraph 2, 2nd thesis Civil Code).

In the doctrine [2] it was observed that in case of contracts with successive execution, the lawmaker considers inexecution as sufficiently important even in case of the minor execution because of its repeated character.

Regarding the meaning of the notion “significant inexecution”, the doctrine [4] makes reference to the idea in question in the sense that the inexecution is significant if it causes the obligee’s lack of interest in maintenance of the contract. Also, it is shown that this appreciation must relate to the moment of signing the contract.

Taking into consideration the fact that the preponderant subjective character can be blamed, two different criteria can be resorted to: the one of *legitimate expectance*, namely of the economic advantages or of any other kind that the parts can expect arising from the contract, doubled by that of the *reasonable prevision*, both related to the moment of signing the contract. [2]

Beside the basic conditions stated above, it is necessary to delay the obligor in order to operate the resolution, with the exception of the situation when the obligor is rightfully behindhand.

3. Types of resolution

According to article 1550 from the Civil Code: “(1) *Resolution can be ruled by court or, depending on the case, can be declared unilaterally by the legitimate part.*

(2) *Furthermore, in the special cases provided by the law or if the parts have thus agreed, the resolution can operate by full right.*”

From this law text it follows that the real innovation of the new code in comparison with the old regulation consists in the right of the obligee’s unexecuted obligation to opt between two types of resolution of the

contract: the judicial resolution and the unilateral extrajudicial resolution.

The obligee's right to opt between the two types of resolution is discretionary, as it represents an absolute novelty on the Romanian legal landscape.

Together with the main types of resolution, the new regulation specifies the full right resolution, which can have its source in the law (when the law expressly provides that the inexecution of the obligation within term calls for the resolution) or the convention of the parties (which operate under the commissary pacts).

Moreover, the resolution can be total and partial, namely for only one part of the contract, case in which "*only when the execution is separable*" (article 1549 paragraph (2) 1st thesis, Civil Code).

a) **The unilateral resolution** implies the possibility offered to the obligee to call upon the resolution of the contract for inexecution, even in the absence of an express commissary pact, without resorting to a court or any other external authority out of his personal will, in a unilateral and extrajudicial manner, the potential role of the court being that of controlling *a posteriori* the fairness and the opportunity of calling upon the resolution.

Apart from the general conditions of exercising the above stated resolution, in case of this type of resolution, the obligee must notify in writing the obligor of the unilateral declaration of resolution which produces effects in the situation in which the obligor was rightfully delayed or did not execute the obligation in the appointed term by being delayed.

The declaration of resolution must be made in the prescription term provided by the law for the potential action in resolution (article 1552, paragraph (2), Civil code) and, if it concerns contracts under disclosure, this declaration "*is recorded in the Land Register or,*

accordingly, in public registry books in order to be opposable to the third parties" (article 1552, paragraph (2), Civil Code).

Like any unilateral legal action which implies communication, the obligor can reconsider his/her unilateral declaration of resolution if it has not been communicated to the obligee, the moment of communication or that when the term of delaying arrives, in case the declaration of resolution has been communicated together with the delaying, this being the moment when the declaration of resolution becomes irrevocable.

The effect of the declaration of resolution is that of contract voidance.

b) **The conventional resolution** can operate by virtue of a resolatory clause – commissary pact – through which the parties establish beforehand which contractual inexecution results in resolution.

The advantage of commissary pacts is that the arbitrary way in which inexecution is appreciated as being significant or not is eliminated through the resolatory clause.

In the doctrine, this provision is analyzed as a condition regarding the clarity of commissary pacts, inferring that if the pacts are not clear, the court can censor them, considering the contractual interpretation [2].

Another condition prescribed by the lawmaker in order to operate the conventional resolution is that of delaying, accompanied by pointing out expressly in the delaying the conditions in which the commissary pact operates. (article 1553, paragraph (3), Civil Code).

Exceptionally, in case of the most dynamic commissary pact, in which it was provided that the full right resolution results simply from inexecution, without necessitating other formalities, delaying is no longer necessary (article 1553, paragraph (2), Civil Code).

The formal condition for the conventional resolution to function is that of specialized notification. Thus, even if the requirement of delaying is excluded through the commissary pact, in order for the conventional resolution to operate effectively, the specialized notification is necessary – which represents the commitment of the obligee to notify the obligor through a notification the fact that he/she invoked the resolution of the contract and the conditions in which this operates.

c) **The judicial resolution** intervenes if the obligee decides to use the means of judicial resolution even in the situation in which he/she could invoke a unilateral resolution and even when a commissary pact is stipulated, he/she can still consider doing this.

The interest can consist in eliminating the risks that a personal appreciation of the severity of the inexecution can come from the obligor. The lawmaker sometimes provides in special texts the compulsoriness to inform the court, not allowing the obligee the alternative of the unilateral resolution. For example, considering the hypothesis of the caretaking contract, article 2263, paragraph (3) Civil Code provides that, in case the resolutive inexecution consists in the action of the other part which makes execution impossible in conditions conformable to the good manners, it will be possible for the resolution to be pronounced only by the court.

In order for the judicial resolution to operate, the general above-mentioned conditions of exercise need to be met, including the formal condition of delaying.

In the case in which the obligor has not been delayed, the court must give a reasonable execution term from the date in which the subpoena was communicated to the obligor, thus avoiding the resolution (article 1522, paragraph (5), Civil Code).

In the situation in which the obligor executes his/her contractual obligations in the reasonable term granted by the court, the obligee-claimer loses his/her right to being granted advanced legal expenses, with the exception of the situation when this is legally delayed.

4. Termination

The **termination** of the contract is specific to those contracts in which execution is successive, the essential difference between resolution and termination being that in case of the latter, its effects do not apply retroactively, but only in the future.

The conditions to invoke termination both to a substantial level, and a formal one are identical to those of the resolution the only difference referring to the fact that termination can also be invoked for an inexecution of little account which still has a repeated character.

As a matter of fact, article 1549, paragraph (2) Civil Code stipulates that “*If there are no other provisions, the stipulations regarding the resolution apply as well in case of termination.*”

5. The effects of resolution and termination

According to article 1554, paragraph (1) from the Civil Code, “The contract abated through the resolution is considered never to have been signed. If the law provides otherwise, each party is obliged in this case to return to the other party the benefits received”.

Furthermore, the following are stated: “*The resolution does not have effects on the clauses referring to the settlement of arguments or over those which are meant to produce effects even in case of resolution. The void contract ceases only for the future.*” (article 1554, paragraphs (2) and (3), Civil Code).

In the current Civil Code, there is an attempt of summarizing the rules which must be followed in those situations in which the restitution of benefits is enforced under the title “restitution of benefits”, which consists of articles 1635-1649, Civil Code, rules which are applied in all the situations in which we deal with the voidance of a contract *ex post facto*, therefore in the situation of the resolution.

Thus, the fundamental rule is that of restitution of the benefits in kind, with the possibility of restitution in equivalent in the situation in which the restitution in kind is no longer possible because of an objective impossibility or a serious impediment or if it concerns the benefits of certain services already performed (articles 1639 and 1640, paragraph (1), Civil Code).

In case of restitution in equivalent, the basic rule is that the value of the benefits is assessed depending on the moment in which the obligor received what he/she had to return (article 1640, paragraph (2), Civil Code).

The good faith or the bad faith of the obligee has a special effect on the extent of the obligation of restitution in equivalent, a series of special rules regarding restitution in equivalent being provided and in the situation in which the commodity that is to be returned partially disappeared.

The restitution in nature or in equivalent can be backed up by a requirement for recovery of damages to the extent in which a prejudice was caused to the obligee of the unexecuted contractual obligation.

Regarding the effects on third parties, *regula resolutio jure dantis, resolvitur jus accipientis* provided in article 1648, Civil Code meets certain waivers:

a) the action in restitution cannot be drafted towards the third party purchaser, if cadastral rules prevent him/her from doing so [article 909 Civil Code];

b) the restitution cannot be invoked against the party who acquired in good faith a movable commodity in conditions of the articles 937, 939 and 940 from the Civil Code;

c) the action in restitution cannot be invoked neither against the third party who usurped the commodity which is subject to restitution;

d) all the legal documents, with the exception of those of disposition and the ones with consecutive execution (which will be kept one year at the longest from the dissolution date of the constitutor title if it was subject to disclosure formalities provided by the law), will be maintained according to article 1649 Civil Code if they were made in favour of a third party in good faith.

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