

## CREDITOR'S RIGHTS IN CASE OF NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS. RESOLUTION, TERMINATION AND EXCEPTION TO NON-ENFORCEMENT

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### ABSTRACT

*Protecting the interests of the parties to a contract in case of non-execution by the other party has always been a current issue, and the remedies that the wronged party can enjoy have undergone changes in accordance with the development of contractual relations.*

**KEYWORDS:** *Contractual non-performance, non-performance of obligations, remedies for non-performance, resolution, termination, exception of non-performance*

### Introduction

Remedies for non-execution of contractual obligations are not a novelty brought by the current Civil Code, they were also dealt with by the previous regulation, but their qualification was "sanctions of non-execution". Resolution and interest damages were the most common such "sanctions". The ideas underlying the old terminology were based on the moral content implied by the legal sanction.

Over time, the penalty applied to the defaulting debtor turns into support given to the creditor to help him satisfy his right. Thus, at present the relatively uniform conception by which the creditor is supported, is rather a variant for the execution of the contract and not a punishment for the debtor. Only relatively uniform because the legislator has not completely abandoned the idea of a penalty in case the debtor does not fulfill his obligation

### I. Creditor's rights in case of non-performance of contractual obligations

#### 1. General considerations. Terminology

The phrase "creditor's remedies in case of non-performance" we believe should be replaced by remedies in case of non-performance, as this would be in line with European and international codification trends, and moreover, would not leave room for confusion between what they represent nowadays and what was meant by them under the old civil code<sup>1</sup>.

Moreover, part of the doctrine considers that justice, in private relationships, involves correcting or remedying injustice, not punishing it. An idea similar to the one presented previously also receives our support. The choice of the name of the remedy in favor of the sanction or another name is based on two ideas; the first would be that the name remedy is gaining more and more ground, from the common law system, to the continental law systems, even in projects of unification of law<sup>2</sup>

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<sup>1</sup> In the previous Civil Code, the remedies were insufficiently regulated, the only ones that the legislator dealt with were: the resolution, the penal clause, forced execution in kind, interest damages.

<sup>2</sup> E.g. Art. 3.2.4 from the UNIDROIT Principles it is called "Remedies for non-performance"; Art. 4:119 PECL bears the name of „Remedies for non-performance”.

*CREDITOR'S RIGHTS IN CASE OF NON-PERFORMANCE OF CONTRACTUAL  
OBLIGATIONS. RESOLUTION, TERMINATION AND EXCEPTION TO NON-ENFORCEMENT*

or even in Romanian specialized literature. The second reason that supports the choice of this notion of remedy is that of the etymology of the word. The word comes from Latin, meaning healing; thus, the idea was reached that the jurist will try to heal, to repair the imbalance produced by some non-execution. Moreover, the idea of sanction will attract the existence of a fault on the other side, but, as we will see further, there is no need to establish a fault in order to exhaust the remedies.

With regard to the phrase creditor's rights in case of non-execution, or his means, we draw attention to the fact that there are certain remedies that will operate by law, indeed they operate in favor of the creditor but not at his choice<sup>3</sup>.

In the current Civil Code, remedies are regulated in Book V, "On Obligations", Title V "Execution of Obligations", Chapter II "Enforced Execution of Obligations", art. 1.516 - art. 1.557 C. civil.

We rely on a part of the doctrine that claims that the name of the chapter "Forced execution of obligations" is not the most faithful, because it deals with the resolution of the contract, contractual liability, which are not actually forms of enforced execution of obligations.

This chapter deals with the means that the creditor can use in the situation where the debtor does not fulfill his obligations, with justification<sup>4</sup> or without, whether he is at fault or not<sup>5</sup>, regardless of whether it is a contractual or extra-contractual non-performance (there are certain exceptions).<sup>6</sup>

## 2. Classification of remedies

The classification of remedies is done according to the way in which they lead to the achievement of the result, thus there are natural remedies and substitute remedies.

Natural remedies are those by which the expected result is met through a normal performance of obligations; among these remedies, at the moment, we find the following: additional term of execution, forced execution in kind, correction or correction of execution, repair or replacement, exception of non-execution of the contract.

Among the substitutive remedies we find the following: resolution and termination, reduction of benefits, damages.

## **II. Termination**

### 1. General considerations

The resolution is regulated in the Civil Code by art. 1.549 – 1.554 (Section 5), in Chapter II, Enforcement of obligations, from Book V, along with termination and reduction of benefits.

Moreover, the resolution is also regulated in the texts in the field of named contracts (e.g.: resolution of the sale – art. 1.700, 1.710, 1.711, 1.724, 1.725, 1.727 – 1.729, 1.743 ff., 1.756 ff. C. Civ.; termination of the lease - art. 1.791 ff., 1.794, 1.800, 1.803, 1.817 ff., 1.872, 1.830 C. Civ., resolution of the joint venture - art. 1.872, 1.873 C. Civ. resolution of life annuity - art. 2.251 C. Civ.,

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<sup>3</sup> e.g. the termination of the contract as a result of the application of the resolution in the presence of a commissary pact - art. 1.553 Civil Code.

<sup>4</sup> In the presented situation, it is mainly about the exception of non-execution and especially about the fortuitous impossibility of execution.

<sup>5</sup> We mention the fact that the remedy of execution by equivalent operates only in the situation where the non-execution is based on the fault of the debtor.

<sup>6</sup> e.g. resolution and termination can only operate when there is a contractual non-performance; instead, statutory interest will apply even if the obligations are extra-contractual.

resolution maintenance - art. 2.263 of the Civil Code; in matters of gambling and gambling - art. 2.264 seq. of the Civil Code; in matters of insurance - art. 2.206 para. (4) of the Civil Code, etc.).

Despite the fact that resolution does not have an independent definition within the Civil Code, countless authors have tried to define it in the most complete way possible.

According to the Explanatory Dictionary of the Romanian language, the resolution is the retroactive termination of a contract with immediate execution for non-execution of one of the mutual obligations of the parties.

Another often encountered definition is that according to which, resolution is the termination of a sinalagmatic contract with execution *uno ictu* (at once), at the request of one of the parties, as a result of the fact that the other party has not executed its obligations, culpably current contracts.

The essential conditions for the judicial resolution provided by the Civil Code were the following: a) the non-execution must be an essential one; b) the non-execution must be culpable; c) the debtor must have been in arrears. These conditions were also the basis of the resolution in other legal systems, such as the French and Belgian ones, which over time abandoned the fault condition. Despite the modernization of other systems and daily needs, Romanian law did not choose to abandon this condition of fault, although part of the doctrine proposed this.

The legislator, by adopting the New Civil Code, tried to modernize the resolution, but kept some of its features found in the previous Civil Code.

The field of application of the resolution is the same as that found in the V. C. civil, respectively that of synalagmatic contracts.

To begin with, we will point out the issue of unilateral contracts with onerous title. These contracts are subject to some discussion regarding the extension of the resolution's applicability to them as well. According to a part of the doctrine, the resolution is not the way to terminate these contracts, but the forfeiture from the benefit of the suspensive term of execution, thus the debtor will be obliged to return the asset in the situation in which it is forfeited. Another part of the doctrine considers that these contracts have a regime similar to synalagmatic contracts, so that the resolution will occupy a place among the ways to terminate these contracts. Both under the V. C. civil empire, and under the new C. civil empire, the doctrine did not conclude in any way. To try to clarify this issue, we will refer to the regulations of unilateral contracts in the new Civil Code. It can easily be seen that there is no mention of the resolution of unilateral contracts, thus, we cannot consider that the legislator wanted to widen the applicability resolution and on them.

The right of option of the creditor of the non-executed obligation allows him to choose one of the existing options for satisfying the non-execution. Specifically, he has the possibility to opt for the in-kind execution of the obligation, if this is possible, the forced execution of the obligation, the resolution or termination of the contract, the reduction of the benefit or for "another means provided by law for realizing his right".

These so-called remedies by which the creditor's right can be realized, cannot be requested, in any case, by the debtor who has not performed his obligation or by the court, the only one who has this right is the creditor.

A modernization brought by the new Civil Code consists in offering the creditor of the unexecuted obligation, the possibility to appeal to the judicial resolution or to the extrajudicial resolution. According to paragraph 1 of art. 1550 Civil Code, "The resolution can be ordered by the court, upon request, or, as the case may be, it can be declared unilaterally by the entitled party". The creditor's right to choose one of the two options presented above cannot be restricted, except by inserting a clause in the contract that removes the possibility for him to opt for the judicial resolution or in the situation where there is a legal norm that removes it the possibility of choosing unilateral, extrajudicial resolution. It can easily be concluded that this right of the creditor of the unexecuted obligation is an entirely discretionary right.

*CREDITOR'S RIGHTS IN CASE OF NON-PERFORMANCE OF CONTRACTUAL  
OBLIGATIONS. RESOLUTION, TERMINATION AND EXCEPTION TO NON-ENFORCEMENT*

The novelty brought by the new Civil Code consists in the unilateral resolution, which grants greater decision-making power to the creditor of the unexecuted obligation. This power consists in the extrajudicial way to resolve the contract, which the creditor can enjoy, in the event of non-performance of obligations by the debtor, even in the absence of an express commission agreement provided for in the contract. In order for such a unilateral extrajudicial resolution to take effect, it is mandatory to comply with certain conditions provided by the Civil Code (art. 1.550, art. 1.551, art. 1.552 Civil Code). We would like to emphasize that in the presented situation, the creditor does not have the obligation to appear before the courts with a request to request the extrajudicial resolution, the courts having no role in this process.

Adjacent to the two types of resolution presented previously, para. 2 of art. 1550, regulates the full right resolution, according to this art. "in the specific cases provided by the law or if the parties have agreed so, the resolution can operate as a matter of law". From this text, it can be deduced that the legal resolution is of two kinds, legal and conventional respectively.

On the other hand, the conventional law resolution produces effects through the commission agreements inserted in the contract, and according to para. 1 of art. 1.553 C. civ, "The commission contract produces effects if it expressly provides for the obligations whose non-execution leads to the legal resolution or termination of the contract".

On the one hand, the resolution of legal right is the one expressly found in the texts of the new Civil Code and finds its application in the situation where the law expressly provides that the non-execution of the obligation within the established term, entails the resolution<sup>7</sup>. This statutory resolution does not limit the right of the creditor, who may choose to apply any other remedy to satisfy the debtor's unenforced obligation.

### **III. Termination**

#### 1. Termination considerations

In the current Civil Code, there is no clear definition of termination. According to the Explanatory Dictionary of the Romanian language, termination is "the action of terminating and its result; dissolution of some contracts, in the event that one of the mutual obligations has not been executed, maintaining those effects of the contract that occurred until the date of its dissolution." In doctrine, most often termination is defined by its differences from resolution. Thus, termination is a way of terminating, of undoing a synalagmatic contract, in which execution is successive<sup>8</sup> and as a result of the operation of the termination, the effects of the contract will cease only for the future.

In the current regulation, resolution and termination are treated together, in the content of art. 1.549 – 1.554 Civil Code According to art. 1.549 para. (3) Civil Code, the termination may be invoked under the same conditions as the resolution.

Another similarity between resolution and termination is that of significant non-performance, but in the case of termination, the legislator instituted an alternative to this significant non-performance. According to art. 1.551 para. (1) sentence II, "in the case of contracts with successive execution, the creditor has the right to terminate, even if the non-execution is of little importance, but has a repeated character. Any contrary stipulation is considered unwritten". Thus, the legislator offered the creditor the right to terminate even in the situation where the non-execution is not significant, the only additional condition is that of repeated character.

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<sup>7</sup> The text is based on the regulation found in art. 1.459 Italian Civil Code – Risoluzione nel contratto plurilaterale.

<sup>8</sup> Unlike termination, which operates only with respect to contracts with immediate execution.

The situation exposed during the discussions regarding the resolution, the one in which I referred to the need to enter the resolution in the land register or, as the case may be, in other public registers, will also be applicable in the case of termination.

The discussion held in the above chapter, the one regarding the anticipated resolution, will also find applicability in the resolution situation. The situation presented being identical, the debtor once forfeiting the benefit of the suspensive term, or waiving this term, makes the obligation enforceable. In this situation, the creditor has the possibility to invoke the common law resolution, as an early termination is not currently regulated.

#### **IV. Non-enforcement exception**

##### 1. General considerations

Exception of non-performance, or exception of non-performance, is a contractual remedy, which gives one party the option not to perform its own obligation, as long as the other party has not performed its own, provided that its own obligation to not be due before the obligation of the other party. One of the definitions found in the doctrine of the non-execution exception, presents it as "a legal means of defense, the direct consequence of the principle of the interdependence of the parties' mutual obligations in synalagmatic contracts, by virtue of which any of the parties to such a contract can refuse the execution own assumed obligation, as long as the other contracting party does not itself execute the correlative obligation that incubates it".

The regulation of this exception can be found in art. 1.556 Civil Code whose text is as follows: "(1) When the obligations arising from a joint contract are enforceable, and one of the parties does not execute or does not offer to execute the obligation, the other party can, to an appropriate extent, refuses to perform his own obligation, unless it follows from the law, from the will of the parties or from customs that the other party is obliged to perform first.

(2) Execution cannot be refused if, according to the circumstances and taking into account the small importance of the unexecuted performance, this refusal would be contrary to good faith."

As a first mention, we would like to emphasize the fact that in the Old Civil Code, there was no such text regarding the non-execution exception; at least there was no general article regulating this exception. Indeed, certain applications of the above-mentioned exception were encountered in matters of sale, exchange, remunerated storage. Going further, in order not to give us the wrong impression, the non-execution exception is not a general novelty, it existed even in medieval canon law. In those days, the exception was based on a simple principle, whereby the one who gave his word, as long as he did not perform his obligation, could not ask the other party to perform it. Returning to the current period, to modern comparative law, we can see that this exception is a common one in continental legal systems, as well as in common law.

Considering the current national regulation, in order to be able to analyze the maturity situation of a certain obligation before another, it makes us follow the route established by common law, that is, that of the simultaneous execution of benefits.

By this rule of synalagmatic contracts, each party must execute its obligation, the performance simultaneously; as an example, we refer to the sales contract, in which the buyer will pay the price at the time of delivery of the good.

The text that is the basis of the principle mentioned above, is part of the current Civil Code, and has the following content: "If the agreement of the parties or the circumstances does not result to the contrary, to the extent that the obligations can be executed simultaneously, the parties are required to execute them in this way"<sup>9</sup>.

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<sup>9</sup> Art. 1,555 para. (1) Civil Code was inspired by art. 1.591 Civil Code Q.

*CREDITOR'S RIGHTS IN CASE OF NON-PERFORMANCE OF CONTRACTUAL  
OBLIGATIONS. RESOLUTION, TERMINATION AND EXCEPTION TO NON-ENFORCEMENT*

The second article that helps to complete the regulation of the non-execution exception is art. 1.522 para. (4) Civ.<sup>10</sup>, this being also another novelty brought by the current Civil Code.

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<sup>10</sup> Art. 1522: Delay by the creditor

„(1) The debtor can be delayed either by a written notification by which the creditor requests the execution of the obligation, or by a summons.

(2) If the law or the contract does not provide otherwise, the notification is communicated to the debtor by the bailiff or by any other means that provides proof of communication.

(3) By notification, the debtor must be given a term of execution, taking into account the nature of the obligation and the circumstances. If the notification does not grant such a term, the debtor can perform the obligation within a reasonable term, calculated from the day of communication of the notification.

(4) *Until the expiration of the term provided for in para. (3), the creditor may suspend the execution of his own obligation, may demand damages, but may not exercise the other rights provided for in art. 1.516, if the law does not provide otherwise. The creditor can exercise these rights if the debtor informs him that he will not perform the obligations within the established term or if, at the expiration of the term, the obligation has not been performed.*

(5) The request for summons made by the creditor, without the debtor having previously been put in arrears, gives the debtor the right to execute the obligation within a reasonable period, calculated from the date when the request was communicated to him. If the obligation is executed within this term, court costs remain the responsibility of the creditor.”