

THE MEANING OF THE EXPRESSION: “RESCISSION BY OPERATION OF LAW”

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Abstract

The non-compliance of the debtor's obligations doesn't lead automatically to the termination of the contract, even if a legal or a contractual resolatory clause is incident. Rescission by operation of law makes that the court's intervention to be limited, compared to the case of unilateral and judicial rescission.

Keywords: *rescission, termination, formal notice, non-performance, judicial review.*

Introduction

The concept of rescission has evolved according to the socio-economic needs, so the Romanian legislature, by regulating the new Romanian Civil Code, has partially aligned with the trends reflected in contemporary legislation.

1. Legal consecration of the analyzed expression

Rescission of the contract is one of the most energetic remedies that may be used by the creditor, in case that the debtor fails, without justification, to perform its obligations. Since the main effect produced by rescission is the abolition of contractual relationship, it was considered that the final part of the text of Art. 1321 of Romanian Civil Code, establishing the grounds for termination of the contract, it also refers to the resolution, when it states: "as well as any other cases provided by law"¹.

One of the phrases employed in the new regulation, susceptible to interpretations, is the one used in drafting art. 1550 par. (2) of Romanian Civil Code, which, referring to the operation of termination, provides that "rescission can operate of law". In order to determine the real meaning of this phrase, we will recourse to several rules and arguments of interpretation.

2. The motivations drawn from a teleological interpretation

The new Romanian Civil Code establishes several forms of rescission, in terms of its source: judicial rescission, unilateral rescission, legal rescission and conventional rescission.

Of all these forms, only about legal and conventional rescission it is stated that are operating of law. Researching the history of development of the new Romanian Civil Code, we find that, in its original form, shaped by the Law no. 287/2009², the operation of the rescission by law was not provided. Specifically, art.1500 of the Romanian Civil Code consisted of a single paragraph, which established unilateral and judicial rescission of the contract. Consecration of legal and contractual rescission that is operating of law was achieved by introducing para. (2) of art. 1500 of the Romanian Civil Code, through art. 190

¹ See I.Turcu, *Noul Cod civil. Legea nr. 287/2009, Cartea a Va. Despre obligații, art. 1164-1649. Comentarii și explicații*, “C.H. Beck” Publishing House, București, 2011, p. 381.

² Published in The Official Gazette of Romania, no. 511/24.07.2009.

point 71 of Law no. 71/2011 for the implementation of the New Romanian Civil Code³. Although the argument that formed the basis of this change was precisely the need to bring clarity and legal certainty, paradoxically, the new format of the legal text, had made its interpretation to be more contradictory.

Clarifying the meaning of the phrase: "rescission by operation of law" is facilitated by the research of the amendments made to the project in December 2008. Thus, the former art. 119 789 (now art.1549 of Romanian Civil Code) stated that, in terms of rescission conditions, the analyzed text "should be linked to art. 119 755 (now art. 1516 of Romanian Civil Code), which establish the general means provided to the creditor, in order to remedy the debtor's failure in performance of the contractual obligations. "

Achieving this legal structure, in a piecemeal way, had generated some contradictions as those to which we refer below.

3. The meaning inferred by interpreting *ad absurdum*

Literal interpretation of the words "by operation of law", first used in the content of art. 1550 par. (2) of Romanian Civil Code, and then resumed in the formulation art. 1553 par. (2) of Romanian Civil Code, for indicating the operation of conventional rescission, leads to the conclusion that this occurs automatically, simply by non-compliance of certain provisions established by law, or, where applicable, of the obligations expressly described in the content of the commissory pacts. More specifically, this means that contract termination depends only on the debtor's conduct, without the need for expression of the creditor's interest to terminate the contract. Such a conclusion is incorrect, as we will demonstrate. Introduction para. (2) art. 1550 of Romanian Civil Code, indicates the intention of the legislature to establish a third way of operating termination, namely rescission of law, which acts distinct from the other two arranged in par. (1) of that article, respectively judicial rescission, which "may be ordered by the court, on request" and unilateral rescission, which "may be declared unilaterally by the entitled party". Distinguishing criterion used by the legislature to delineate these forms of resolution is, as indicated by the marginal name of the article, the mode of operation. The combined interpretation of legal texts enshrined to rescission, leads to the following results:

- judicial rescission is operating pursuant to final court judgment, through which was admitted the creditor's claim for a resolution, following the verification of the conditions laid down in art. 1549; 1551 of Romanian Civil Code⁴;

- unilateral rescission operates on the basis of issuing and notifying to the debtor of the creditor's declaration of rescission, with observing the requirements established by art. 1552 of Romanian Civil Code⁵;

- rescission by operation of law can rests on two different sources:

- legal rescission is incident in cases specifically provided by law, respectively the special regulations of Romanian Civil Code in matters relating to contracts, or other special laws, which establish the remedy of termination as a result of non-compliance of certain contractual obligations⁶;

- conventional rescission occurs in cases expressly described in commissory pacts, which shall provide, as determined by art. 1553 of Romanian Civil Code, the obligations whose failure to perform draws rescission of⁷.

³ See the Report no. 850/03.05.2011 on the draft of the Law no. 71/2011, available at <http://www.Cdep.ro/comisiii/juridica/pdf/2011/rp850/10.pdf>, p. 263.

⁴ See L. Pop, I. F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligațiile*, "Universul Juridic" Publishing House, București, 2012, p. 292.

⁵ Unilateral rescission is thus for the first time acknowledged by Romanian law, unlike the "common law" system, in which it has always been the basic version of termination. See H. Beale, *Chity on Contracts, vol.I., General Principles*, "Sweet & Maxwell Ltd" Publishing House, UK, 2008, p. 1394.

⁶ As noted above, in the regulation of the new Romanian Civil Code can not be identified any proper rescission cases, but only certain legal designation of the non-enforcement of resolute nature.

⁷ It was designated as the condition of transparency of the commissory pacts.

It follows that the tie breaker between the rescission forms, suggested by grouping them in the structure of the two paragraphs, indicates only apparently the presence of the classical dichotomy between the operational modes of a legal institutions: on request, or automatically, by operation of law.

To illustrate even more obvious that this is is not the meaning which should be attributed to the term under review, we will perform a brief comparison with some legal institutions that generate automatic dissolution of the contract.

4. The meaning shown by a comparative interpretation

In the event where there is a fortuitous impossibility of enforcement, according to art. 1557 par. (1) of Romanian Civil Code, whether it is total and complete, and it concerns an important contractual obligation, the contract will be terminated by operation of law and without further notice, right from the moment when the fortuitous event occurs. By applying in this case a contrario interpretation, taking into account that in art. 1550 of Romanian Civil Code, on rescission of full right, such a dispensation is not provided, it will mean that the legislature did not intend that rescission induce a similar effect to that of the fortuitous failure of execution, namely the automatic dissolution of the contract⁸. In continuation of the same reasoning, it appears that the extinctive effect of the rescission is subject to issuance by the creditor of a notification to this effect. We consider that if in the text of art. 1550 of Romanian Civil Code would have been included an express mention towards issuing such a notification, any confusion in interpretation would have been prevented.

The illustration of the differences between operating mode of the two causes of dissolution is also achieved by reference to para 2) art. 1557 of Romanian Civil Code, showing that the rules of the rescission will become applicable, whether the fortuitous impossibility of enforcement it is temporary and only if the lender has not requested the suspension of enforcement of its obligations. Recognizing the right of the creditor to choose mainly the resumption of the enforcement, and only as a secondary alternative, to send a notice for terminating the contract, the same as in the case of rescission, is justified only if the impossibility of enforcement is not yet definitive⁹.

In case of achieving a resolutive condition, due to occurrence of the event to which the parties have attributed this meaning, the abolition of the obligations occurs automatically, according to art. 1401 of Romanian Civil Code, so, in this case, the issuing any notification by the creditor, would be unnecessary. The different tackling from the one consecrated to rescission operating of law, is explained by the fact that, in this case, the achievement of the resolutive condition was assumed by the parties as part of the contract, and whose presence influence its extinction¹⁰. Furthermore, the realization of the event can not depend solely on the will of the debtor, as in the case of a default attributable to him¹¹.

Instead, the right to require performance of the obligation is a result of the contract, which the creditor can not be assumed to have lost it, simply because of the debtors failure.

It follows therefore that termination will occur only if the creditor intend so, and communicates his will, by notifying the debtor. It has been shown that any contrary conclusion would be absurd, since if we admit that the debtor's failure would be regarded as a resolutive condition, it would still have not any effect, because, being at the discretion of the person who undertakes, it would have been considered as invalid, according to art. 1403 of Romanian Civil Code. Following the same false reasoning, it means that the obligation would be turned into an alternative one, as provided by art. 1467 of Romanian Civil Code, which gives debtor's the choice between execution of the contract in nature, or by equivalent, in case

⁸ See I. Adam, *Drept civil. Obligațiile. Contractul*, "C.H.Beck" Publishing House, București, 2011, p. 461.

⁹ See I.Turcu, op. cit., p. 653.

¹⁰ See I.Turcu, op. cit., p. 640.

¹¹ See I.Adam, op. cit., p. 389.

rescission would occur automatically¹². Such a conclusion is also wrong, because it is beyond any doubt that this choice is only in the creditor's power, by virtue of the binding force of the contract.

Compensation, as a way of extinguishing obligations, may be legal, judicial or conventional. The legal compensation operates as soon as the cumulative conditions laid down in para. (1) art. 1617 of Romanian Civil Code are met (debts are certain, liquid and falling due, whatever their source is, and whose object is an amount of money or a certain quantity of fungible goods of the same kind). This does not mean that the expected effect of art. 1616 of Romanian Civil Code, namely extinguishing mutual debts up to the lowest, occurs against the will of the creditor. Even if it takes effect without the necessity for a notice, as required for termination, compensation operates only if the creditor expresses at least his tacit intention towards embracing its effects¹³. This conclusion emerges from the interpretation of the para. (3) art. 1617 of Romanian Civil Code, which provides that either party may waive, expressly or tacitly, on compensation. The use, in compensation, of the term „of full right”, has been criticized as being likely to induce confusion with automatic termination¹⁴. Doctrine indicates that compensation waiver, by tacit acceptance of assignment or payment, due to the suppletive nature of the analyzed rule, makes that the compensation effect, which operated by right, to be retroactively removed¹⁵.

Likewise in the case of confusion of rights, as way of extinguishing obligations (which occurs when in the same report of obligations, the qualities of creditor and debtor are met in the same person) the term "by operation of law", used in the text of art 1624 of Romanian Civil Code, describes its way of operation. Dissolution due to confusion occurs automatically, since it can be seen as a case of impossibility of performance of the obligation, the claim being paralyzed¹⁶.

It follows that, unlike cases where the termination occurs automatically, termination due to rescission of law does not occur unless it is triggered by the expressing of the creditor's will¹⁷.

5. The meaning deduced from a coordinated interpretation

One of the essential conditions of termination is the gravity of non-performance, as resulting from a contrario interpretation of art. 1551 of Romanian Civil Code, which states that if the failure is of little significance, the creditor can not obtain rescission but only reduction of benefits. Failure of little consequence, which occurs repeatedly, can cause rescission, but only where of successive performance contract. It is noted that to each of the rescission forms differs not only the entity required to conduct the evaluation, but also the time when this estimating is made, by reference to the date of issue of the manifestation of the creditor's will for rescission. So we retain the following:

- in the case of judicial rescission, the assessment is posterior to the demand of the creditor;
- in the case of unilateral rescission, the assessment is concomitant with the declaration of the creditor;
- in the case of legal and conventional rescission, the assessment is prior to the notification issued by the creditor.

¹² See V.Stoica, *Declarația unilaterală de rezoluțiune*, in "Dreptul" Magazine, no. 8/2006, p. 44.

¹³ See C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol.II, "All Beck" Publishing House, București, 2002, p. 386.

¹⁴ See I.Turcu, op. cit., p. 697.

¹⁵ See Anișoara Ștefănescu, *Noul Cod Civil. Comentariu pe articole*, coord. FL.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, "C.H. Beck" Publishing House, București, 2012, p. 1707.

¹⁶ See L. Pop, *Tratat de drept civil. Obligațiile, vol. I, Regimul juridic general*, "C.H. Beck" Publishing House, București, 2006, p. 538.

¹⁷ See I. Adam, op. cit, p. 399.

The distinction mentioned above is reflected in the way of verifying this assessment by a judicial review:

- in the case of judicial termination, a binding control is performed in a direct way by the court, prior to the operation of the rescission;
- in the case of unilateral termination, an optional and indirect judicial control is performed only at the request of the debtor, posterior to the operation of the rescission;
- in the case of both legal and conventional rescission, assessing the appropriateness of termination is excluded from judicial review, because it was already definitively established, by enshrining an express legal provision or of a resolutive clause, called commissory pact¹⁸.

So, when rescission operates by law, the court can only examine if debtor's failure in accomplish his obligations was committed as described in the legal text or in the resolutive clause. It means that in order to notification of rescission lead to the dissolution of the contract, it is necessary that the facts denounced by the creditor correspond exactly to the conduct deemed by law or by a termination clause as a serious non- enforcement¹⁹. If the non-enforcement for which law or the parties' agreement had established the application of the rescission, is only partial, then the court may consider that the special conditions demanded for operation of legal or conventional termination, are not met in that case. In such a situation, it may eventually pronounce a judicial resolution, but only upon verification of the severity of that partial non-performance. The judiciary control is optionally and can be done either upon a complaint made by the debtor against the notice of rescission which was considered as abusive, or upon an exception raised in an action promoted by the creditor for applying the effects of termination (restitution of the benefits, the obligation to pay damages).

It can therefore be considered that, in essence, the phrase referring to rescission operation by law, covers only the differences in assessment the severity of the non performance, in the sense that, in the case that rescission is invoked upon legal or conventional basis, the court can not censor nor moderate its effects, so termination will invariably occur at creditor's claim.²⁰ By contrast, in the case of unilateral and judicial rescission, which have not a predefined evaluation of the significant degree of non-performance, the assessment made by the creditor can be countered by the judge's decision (on the principal or incidental). The advantage purchased by rescission of law is therefore the predictability of the cases which can attract contract termination. In no case, however, the termination effect does not occur automatically, nonperformance of the debtor's obligations being only one of the conditions to operate the rescission. The judicial review on the rescission of law isn't, however, excluded upon other substantive conditions of this remedy, namely the imputability of debtor (it should be verified only the lack of excusable reasons for non- execution²¹, not necessarily debtor's guilt) and the formal notice of the debtor (by notice by the creditor, or as under the law, or by the agreement of the parties)²². These conditions are common to all forms of termination, as resulting from art. 1516 par. (2) section 2 of Romanian Civil Code, specifying "where, without justification, the debtor, after addressing a formal notice, fails to perform his obligation, the creditor may, at its discretion, and without losing the right to damages (...) obtain, if the obligation is contractual, the rescission or termination of the contract (...)". The reiteration of the binding nature of these conditions is performed in the content of art. 1553 par. (2) of Romanian Civil Code, which, referring to

¹⁸See I. Turcu, op. cit., p. 648.

¹⁹ See C. Popineau-Dehaullon, *Les r medes de justice priv e   l'in xecution du contrat. Etude comparative*, "LGDJ" Publishing House, Paris, 2008, p. 119.

²⁰ See C. Popa, Andreea Lisevici, *Probleme privind rezolu inea contractului  n Noul Cod civil (II)*, in "Revista rom n  de drept al afacerilor" Magazine, no. 9/2012, available at www.noulcodcivil.ro.

²¹ The justified reasons for non-performance of contractual obligations are considered to be generated by: the order of execution the obligations (Art. 1555 Civil Code), exception of non-performance (Art. 1556 Civil Code), impossibility of execution (art. 1557 Civil Code.).

²² See I. Turcu, op. cit., p. 648.

conventional rescission shows that it "(...) is subject to formal notice of the debtor, unless it is agreed that it will result from the mere fact of non-performance". Therefore, either it is done by a notification (in which case an additional period of performance is provided), or it occurs of law, since the due date (if the law or the parties have so provided), the condition that the debtor being in default, is also required in the rescission of law.

Conclusions

The meaning of the term "rescission by operation of law", as it emerge from the analyzed rules of interpretation, is that the termination of the contract will become operable without implying any direct or indirect judicial review, in terms of determining the serious nature of non-performance. If the creditor's claim of termination is based on a legal or on a conventional provision indicating the obligations whose non-execution attracts rescission, the judicial review will imply only verifying of the imputability of the debtor and his putting in delay. Rescission of law can not be assimilated to other means of termination of contract, such as the resolutive condition, nor with the definitive fortuitous impossibility of performance, nor with the confusion of rights, nor even with the compensation of law, with which have some similarities.

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