THE SUBSIDIARY NATURE OF THE UNJUST ENRICHMENT ACTION. CONTRACT-BASED ACTION VS. *ACTIO DE IN REM VERSO.* JURISPRUDENCE SEPARATION ONLY

Eugenia VOICHECI[*]

Abstract

For the purpose of recovering a paid amount within the insured sum, however, in addition to the owed amount, the insurer sues his client for claims. Does the insurer have, to this end, a cleared way towards unjust enrichment?

The provisions of the 1864 Civil Code do not contain definitions of ex contractu and actio de in rem verso.

The doctrine has established the acceptability requirements of actio de in rem verso, however, it did not do the same for ex contractu, and there is no notable change to this matter after the Civil Code became effective.

This situation is also maintained in the current Law No.287/2009 on the Civil Code.

Hence, the separation of the configuration and enforcement area of the two types of actions continues to be done in terms of jurisprudence by strictly relating to the case at hand.

The study starts from an actual case the settling of which highlights the issue of determining the subsidiary nature, hence the acceptability of the unjust enrichment. The purpose of this study is to re/focus on an old dichotomy, i.e. the contract-based action (ex contractu) and the action based on an licit deed, that of unjust enrichment (actio de in rem verso).

The primary goal of the study consists of highlighting the aspects that the provisions of the 1864 Civil Code and those of the new Civil Code have in common or not in terms of the two types of actions before the court, the doctrine-related solutions given as concerns the characteristics and legal status of the two actions and the fact that, in the nex Civil Code as well, the separation line between the two actions is determined on the basis of jurisprudence, being left at the judges' discretion and wisdom, with all related consequences thereof.

Keywords: *Insurance contract: amount paid without being owed: indemnity action before the court: actio de in rem verso: ex contractu action*

Introduction

This article is not writing practice. It is derived from a particular case, i.e. the insurance contract, and initially it was believed that the issue stayed within the specific matter of this type of contract.

A more in-depth analysis reveals however the general character of the matter as the conflict between the *ex contractu* action and *actio de in rem verso* may appear each time when, in almost any type of contract, either party's performance exceeds the sphere of its contractual obligation and raises the issue of the type of action to be resorted to in order to recover the incurred prejudice.

For instance, such an issue may appear in contractor agreements, service contracts, sale-purchase contracts, in brief, in any contracts; the likelihood that such a restitution claim will be subject to the judgment of a court of law is very high.

In the 1864 Civil Code, neither of the two actions has a legal definition.

[*] PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (eugenia_voicheci@yahoo.com).

The unjust enrichment and action suitable for such illicit legal deed (*actio de in rem verso* or the restitution action respectively) were extensively dealt with in the specialized literature and consecrated in terms of jurisprudence.

Similarly, however without having a detailed treatment comparable to that of the above-mentioned concept, the *ex contractu* action (also known as contract-based action or contractual liability action) is constantly invoked in doctrine and jurisprudence, being attached to the issue concerning the contractual third-party liability and enforcement of judgment concerning contractual obligations.

Law No. 287/2009 on the Civil Code, republished and updated, includes four articles – art. 1345-1348 – on unjust enrichment and the restitution action which it generates, however, does not deal with the contract-based action.

Given that the provisions of art. 1348 of Law No. 287/2009 consecrate *in terminis* the subsidiary nature of the restitution action as compared to any "other action" which the creditor is entitled to, it is obvious that the *ex contractu* action, the most common type of action meant to cover contractual prejudice, should find a configuration both at a legislative, and doctrine level, as this procedural means can be a true exception of unacceptability in the case of *actio de in rem verso*.

The subject matter of this study

The de facto situation

The litigation consisted of the following *de facto* situation, which was given a definitive decision not objected to by the litigating parties:

S.C. A.R.A. S.A., in its capacity of insurer, and S.C. G.S. S.A., in its capacity of insured, entered into an insurance contract for a self-propelled barge. The insurance covered the risk of total loss, special and general average, third party collision liability and rescue expenses, up to the limit of Euro 205,000. The barge, loaded with plate rolls, got shipwrecked during a trip along the Danube River. It was established that major repairs were required, which repairs were done in a shipyard in Austria and shipyard in Romania.

Given that the insured event affected both the ship, and the merchandise on board the ship, this was considered a case of general average and it was decided to document the case. A specialized company[1] was supposed to draft the average adjustment document[2]. Until this document was drafted, at the insured's request, the insurer made payments to the insurance policy-related account either directly to the insured or to certain of his creditors. The amounts paid were Euro 91,701 Euro and Romanian Lei 132,927.

The general average adjustment document that was not objected to by either party after it was drafted determined that the Euro 68,562 owed amount was made up of Euro 54,781.12 – merchandise share and Euro 13,780.88 Euro – ship share.

In this context, the insurer estimated that it owed the insured only the amount determined by the average adjuster as being the ship share. For the already paid difference it submitted an action before a court of law for the restitution of the amount of Euro 52,257.57 that was allegedly paid without being owed, which action was indicated at one of the hearing as being based on unjust enrichment.

1 Average adjuster – expert who can estimate the damage and merchandise of a ship – www.dexonline.news.20.ro

2 Average adjustment – document drafted by the average adjuster according to the statutory legal standards and customs of the unloading ports for the liquidation of the general average – www.crispedia.ro

The decisions of the courts of law

In a first trial cycle, the action was rejected as expired. The decision was cancelled by the first judiciary control court by a decision maintained by the appeal court.

When re-judged, the court of first instance rejected the action as unacceptable, estimating that the claimant had the contract-based action, not the unjust enrichment-based restitution action, at his disposal. The decision was not upheld by the appeal court that, accepting the appeal submitted by the insurer, completely changed the decision made by the court of first instance, i.e. rejected the unacceptability exception, accepted the action submitted by the claimant and obliged the respondent to pay the amount of Euro 52,257.57 standing for indemnities.

The second appeal court accepted as a majority the appeal submitted by the insured, changed the decision made by appeal court, i.e. rejected the appeal submitted by the insurer against the first court decision that this second appeal court maintained. The judge expressing a separate opinion estimated that the second appeal should be rejected as ungrounded.

The conflicting issue concerned the acceptability of the restitution action in that the subsidiary nature of this action should be taken into account in relation to the contract-based action.

In brief, the following arguments were brought:

Majority opinion

The second appeal court noted as a majority that the court of first instance and the appeal court correctly accepted that the unjust enrichment was a legal deed by which a person's assets are increased based on another person's assets, with no legal basis for it and that this legal deed resulted in the restitution obligation of the person whose assets were thus increased.

The court notes that one of the legal conditions for submitting the restitution action is the absence of any other legal means of recovery. Doctrine and jurisprudence outline the subsidiary nature of this sanction in this respect.

The second appeal court notes as a majority that this case does not leave room for an *actio de in rem verso*, given the existence of the contractual insurance relations between the parties based on which the payments were made, which makes the increase of the insured's assets take place on a legal basis.

The court also notes that the insurer's allegation that only a request for the enforcement of a contractual duty or liability for non-performance or inappropriate performance would make the unjust enrichment become unacceptable.

In this respect, the second appeal court accepted that no legal provision adds to the *ex contractu* actions only those invoked by the insurer and that an action by which a contracting party requests the other party a restitution of payments made under the contract and later considered not owed is equally contractual.

To support the same opinion, the second appeal court notes that an *ex contractu* action is not exclusively a positive one, by which contract enforcement is requested, but is any contract-related action, and that a delineation between owed and not owed payments is done following an examination of contract-derived rights and obligations as well.

It is also highlighted that a distinction must be made between unjust enrichment, as a legal deed, that may, in the previously mentioned conditions, result in the right to initiate an *actio de in rem verso* and unjust enrichment as an effect of the failure to perform or appropriately perform any contract, that however does not clear the way in itself to initiating the homonymous action.

Separate opinion

It is noted that the judge expressing a separate opinion differentiates himself/herself from the majority opinion only in terms of the acceptability of the restitution action, and supports his/her decision with arguments leading to the conclusion that, in this case, the insurer did not have the *ex contractu* action at hand, hence the legal condition of the subsidiary nature of the restitution action was fulfilled, which action is thus considered acceptable.

In this respect, the judge expressing a separate opinion notes that in the 1864 Civil Code there are no legal definitions for *actio de in rem verso* and the *ex contractu* action, that doctrine and jurisprudence closely dealt with unjust enrichment and identified the material and legal conditions for the initiation of the restitution action based on this illicit legal deed, constantly indicating the subsidiary nature of this type of action that implies the lack of any other legal means to cover the incurred loss. He/she also notes that in the case of *ex contractu* he/she cannot state the same, as no definition was given by doctrine and jurisprudence.

However, the judge expressing a separate opinion notes that the legal means to recover the prejudice generated by the contractual tort may be configured starting from two legal texts: art. 1021 and art. 1073 of the 1864 Civil Code, which apply to the relevant case, bringing forth the following arguments:

The provisions of art. 1021 of the 1864 Civil Code gives the party that the contractual commitment has not been fulfilled for the right to choose between the action of enforcing the contract when this is possible and the action of terminating the contract and be paid indemnities.

The provisions of art. 1073 of the same Code gives the same contracting party the right to be granted the precise fulfillment of the obligation and, if not, the right to receive indemnities.

The two legal texts result it the conclusion that, whenever the creditor of an unfulfilled obligation chooses the action to enforce the contract (assumption I of art. 1021 of the Civil Code), he is entitled to the in-kind enforcement of this contract ("the precise fulfillment of the obligation" - assumption I of art. 1073 of the Civil Code); otherwise, he is entitled to request an equivalent enforcement ("right to compensation" - assumption II of art.1073 Civil Code).

The core meaning of both legal texts is that they give the right to a contract-based action that only the unfulfilled obligation creditor benefits from and that the object of this action is only the other party's failure to perform which may be obliged to do in kind or by equivalent.

In brief, these are the characteristics and conditions where the judge expressing a separate opinion notes that the contract-based action may be resorted to.

As concerns the aforementioned case, he/she notes that the only pecuniary obligation laid down in the parties' contract resting on the respondent, which enforcement or indemnities may be ask for, is the one concerning the payment of the insurance premium and that the parties did not include in their contract a clause under which, if the insurer paid within the insured amount limits, but not more than he owed for the actually materialized risk, the insurer undertakes to return this amount where only this clause may be a justification for an action for contract-based claims under the provisions of art. 969 of the Civil Code.

In this context, the judge expressing a separate opinion notes that the only action that the insurer may use to be able to recover the amount paid in excess of the prejudice actually incurred by the insured, even within the maximum limit of the insured amount, is the unjust enrichment action, which action was the first he submitted *ab initio* before the court of law.

Thus, the judge expressing a separate opinion deems unacceptable the thesis according to which the unjust enrichment action is excluded whenever the parties have a contractual relation, but the contract implementation exceeded the initial agreement as everything that is

performed and goes beyond the contract with no convention (even tacit) and leads to the increase in the assets of either party, in correlation with a reduction in the assets of the other party, cannot fall under the contract except in the cases expressly and limitatively laid down in art. 970 para. 2 of the 1864 Civil Code.

With reference to the same aspect, the judge expressing a separate opinion believes that the circumstance that, in order to determine the sum claim before the court, the court should examine the contractual clauses as this is exclusively intended to establish a delineation between "something owed" under the contract and "not owed" and determine where the insured risk-related indemnity payment obligations end for the insurer and where unjust enrichment (i.e. outside the contract) starts for the insured, which unjust enrichment leaves room for the *actio de in rem verso*. A relevant fact is that, according to doctrine and jurisprudence, what is owed under a convention or legal provision is based on a just cause, and what lacks such basis comes from the licit or illicit deed.

The judge expressing a separate opinion also notes that the lack of a legal regulation or doctrine examination of the legal status of the *ex contractu* action makes the extended use of this procedural means, seen as a possibility to reaching an agreement by the parties for all contract-related claims, seem justified as these claims are attached to a unique relation of facts.

However, he/she thinks this temptation should be limited whenever this generous approach harms the person who, precisely differentiating what was owed from what exceeds the contract, understands to rely on the illicit unjust enrichment, resorting to *actio de in rem verso* upon compliance with all material and legal conditions that are consecrated in doctrine and jurisprudence.

Hence, the judge expressing a separate opinion chooses the limited and restrictive interpretation of the *ex contractu* action, deriving from the aforementioned joint interpretation of the provisions of art. 1021 and art. 1073. A more extensive interpretation of the *ex contractu* action would lead to the rejection of the *actio de in rem verso* as unacceptable and would inappropriately set up, only based on the interpretation of art.969 – 970 of the 1864 Civil Code, an exception of unacceptability that, as a rule, derives and should derive from a legal norm exclusively and beyond any doubt.

All the above considerations have been the basis of the separate opinion judge's conviction that, in this case, the claimant, i.e. the insurer, could not rely on the *ex contractu* action, but only on unjust enrichment. The objection submitted by the claimant, i.e. insured, in this respect was considered ungrounded, being, hence, rejected.

Importance and current interest raised by the issue

As shown in the introduction of this study, the *ex contractu* and *actio de in rem verso* actions were not legally regulated by the 1986 Civil Code, which aspect is noted in both the majority opinion, and the separate opinion expressed in the decision of the ultimate court[3].

As concerns unjust enrichment and the restitution action which it entitles to, the Romanian and foreign specialized literature is abundant and constant, the two legal concepts being consecrated in jurisprudence as well[4].

3 Decision No. 3672 as of October 31, 2013 of the High Court of Cassation and Justice – II Civil Division.

4 The following works are worth mentioning:

-Constantin Stătescu and Corneliu Bîrsan, *Drept civil. Teoria generală a obligaţiilor,* Bucharest, All Publishing House, 1993, 107-111;

-Stătescu and Bîrsan, *Drept civil*, Bucharest, Hamangiu Publishing House, 2008, 117-123, where they quote the Commercial Decision No. 320/2005 of the Bucharest Court of Appeal – V Commercial Division and Civil Decision No. 3548/1999 of the Court of Appeal Bucharest – III Civil Division;

-Ion Dogaru "Some considerations regarding the place, the role and the mechanism of injust enrichement in the sections of civil obligations" in Ion Dogaru, Texte juridice, Bucharest, Universul juridic Publishing House, 2011, 160-166;

Contrarily, the *ex contractu* action is seldom mentioned in the specialized literature, in certain cases, being opposed to or, on the contrary, dealt with in conjunction with another type of action, with no precise description of its legal status, as was the case of *actio de in rem verso.*

Also, in a significant number of decisions, the courts of law refer to the contract-based action, particularly in commercial matters, given that the legal relations between traders are predominantly contractual in nature.

Our present analysis started from a legal relation governed by the 1864 Civil Code. The issue it raises is not, however, outdated, given that Law No. 287/2009 on the Civil Code, as updated, does not fundamentally change the particularities of the matter.

Similarly to the 1864 Civil Code, the new Civil Code includes no reference to the *ex contractu* action.

The specialized literature dealing with the provisions of the new Civil Code[5], though quite abundant, brings no novelty whatsoever in this respect. It is worth noting that one single paper mentions the *ex contractu* solution for the automatic serving of notice to the debtor, highlighting that this is done when the parties agree that "merely having reached the agreed deadline for contract performance equals serving a notice"[6]. It is obvious that the above-mentioned quote has no relation to the action before a court known as *ex contractu* action.

As far as unjust enrichment and the action driving from it are concerned, the makers of the new 2009 Civil Code focused on filling a legislative gap corrected in the former Civil Code by doctrine and jurisprudence.

These two concepts are dealt with in four articles:

Art. 1345 states as follows: "The person who got rich to the detriment of another person, but cannot be imputed this, shall restitute to the extent of the asset loss incurred by the other party, but with no liability beyond said enrichment."

Art. 1346 bring a most welcome novel element, i.e. presents the cases were enrichment should be considered justified.

Art. 1347 stipulates the conditions and extent of restitution, and its provisions are added those of art. 1639-1647 of the Code on restitution of performance.

Finally, art. 1348 concerns *in terminis* the secondary nature of the request for restitution and maintains the phrasing though it was a subject of objections and dispute in the specialized literature dealing with the former Civil Code, stipulating the following: "The request for restitution cannot be accepted if the harmed party is entitled to another action in order to get what is owed to him."

Actio de in rem verso and unjust enrichment are also discussed in the specialized literature related to the new Civil Code. Professor Paul Vasilescu's previously quoted paper may serve as an example[7].

The analysis of the two types of actions, at a legislative level – on the one hand, and at doctrine and jurisprudence level – on the other hand, makes us note the fact that the current

---

-Dimitrie Gherasim, Îmbogăţirea fără cauză în dauna altuia, Bucharest, the Romanian Academy Publishing House, 1993;
-Muriel Fabre-Magnan, droit des obligations. Vol.2. Responsabilité civile et quasi-contrats, II-ième edition mise à jour, Paris, Presses Universitaires de France, 2010, 446-452;
-Philippe Malaurie, Laurent Aynès and Philippe Stoffel-Munck, Les Obligations, V-ième edition, Paris, Defrénois, Lextenso editions, 2011, 575-584.

5 Of which we mention, exempli gratia, the following works:
-Gabriel Boroi and Liviu Stănciulescu, Instituţii de drept civil, Bucharest, Hamangiu Publishing House, 2012;
-Liviu Pop, Ionuţ-Florin Popa and Selian Ioan Vidu, Tratat elementar de drept civil. Obligaţiile, Bucharest, Universul Juridic Publishing House, 2012;
-Ioan Adam, Drept civil. Obligaţiile . Contractul, Bucharest, C.H.Beck Publishing House, 2011
-Liviu Stănciulescu and Vasile Nemeş, Dreptul contractelor civile şi comerciale, Bucharest, Hamangiu Publishing House, 2013.

6 Paul Vasilescu, *Drept civil. Obligaţii,* Bucharest, Hamangiu Publishing House, 2012, 86.

7 Vasilescu, *Drept civil,* 216-223.

legal regulation of the contract-based obligations and those based on the licit legal fact of unjust enrichment shows no content-related differences from the previous one, as the conditions for the activation of the contractual third-party liability are the same just as the material and legal conditions to start an *actio de in rem verso* are the same.

In this context, it is of significance that the law-maker unequivocally states the secondary nature of the *actio de in rem verso* and completely ignores the *ex contractu*, not giving any clue whatsoever on *who, to what purpose* and *in what conditions* can initiate it.

The issue that is unquestionably and firmly raised in this context is related not to legal status of *actio de in rem verso,* as in this case there is now a legal provision, sustained by older and newer doctrine, which is constant, and previous unitary jurisprudence in line with the doctrine principles.

In reality, the issue is raised in relation to the *ex contractu* action, a concept that seems to be obvious, but legal status of which is the object of debate and dispute, the most compelling proof being the decision made by the ultimate court with the separate opinion that we previously referred to.

In the context of the current regulations, it can be estimated that, just as in the case of the 1864 Civil Code, a configuration of the *ex contractu* action can be outlined starting from the legal provisions that keep, *de lege lata*, the essence of the provisions of art. 969, 970, 1020-1021 and 1073 of the 1864 Civil Code.

Thus, art. 1270 para. 1 of Law No. 287/2009 on the Civil Code stipulates: "The contract that is validly entered into has the power of law between the contractual parties"; this article is the equivalent of art. 969 of the 1864 Civil Code and consecrates the *pacta sunt servanda* legal principles.

Art. 1272 of Law No. 287/2009 on the Civil Code takes over and adds to the provisions of art. 970 of the former Code and stipulates:

- para.1: "The contract that is validly entered into obliges not only to the fulfillment of what is expressly stipulated, but to all the consequences that the practices set between parties, common practices, law or equity attach to the contract depending on its nature.";
- para.2: "Common contractual clauses go without saying, though not expressly stipulated."

As a novelty to the former Civil Code, the provisions of art. 1350 of Law No. 287/2009 on the Civil Code concern contractual liability, stating that any person shall fulfill his/her contractual obligations and that, if failing to do so with no reason, he/she shall be responsible for the remedy of the harm done to the other party, being obliged to remedy said prejudice under the law.

Another aspect of novelty consists of the provisions of art.1170 of Law No. 287/2009 of the Civil Code stipulate the parties' obligations to act in good faith all along the performance of the contract.

Similarly to the provisions of art. 1073 of the 1864 Civil Code, but providing more details, the provisions of art. 1516 para.1 of the new Civil Code stipulate the creditor's right to acquire the full, precise and timely fulfillment of the obligations; the provisions of art. 1516 para. 2 point 1 stipulate, in the case of unjustified failure to perform, the creditor's right to request or initiate the attachment of the obligation; the provisions of art. 1527-1529 stipulate the in-kind attachment; and the provisions of art. 1530-1548 of the same law stipulate the equivalent attachment.

As a novelty compared to the provisions of art. 1021 of the 1864 Civil Code concerning the right of the creditor of the unfulfilled obligation to request the "cancellation" of the contract, the provisions of art. 1516 para. 2 point 2 of the new Civil Code concern the possibility given to the same creditor to request the rescission or termination of the contract, or, as the case may be, a reduction of his own obligation. The provisions of para. 2 point 3 of

the same article give the same party the right to use, when necessary, any other means under the law in order to enjoy his right.

Having examined these legal texts that govern the issue of contractual obligations, we can draw the conclusion that the basis of the *ex contractu* action is, to a great extent, that in the former civil law. An examination of the provisions of art. 1516 of the new Civil Code leads to the conclusion that, whenever a contractual obligation is not performed or is performed in a delayed or inappropriate manner, the debtor of the relevant obligation may be held responsible under third party contractual liability.

If, under art. 1516 para. 2 point 1 thesis II of the new Civil Code, the creditor does not resort to the attachment of said obligation, he may choose among the remedies laid down in art. 1516 para. 2 pint 1-3 of the same Code by way of a contract-based action before a court of law.

Hence, one may conclude that, in the system set up by Law No. 287/2009, the initiator of the *ex contractu* action is the creditor of the unfulfilled obligation, which seems to leave out the party having performed the agreed obligation from such action and is targeted against the other party for the restitution of the additional performance.

These arguments result in the conclusion that a debate on the proposed topic, even if starting from a legal relation governed by the former civil law, continues to be an up-to-date matter, given the solutions proposed by the law maker, *de lege lata*, as far as the contractual civil liability is concerned.

The debate still has great significance, given the absence of a legal, doctrine or jurisprudential definition of the *ex contractu* action and that the case subject to analysis revealed the fact that courts of law may, in theory, select an wider interpretation (such as that of the majority opinion in the decision commented on) or, on the contrary, a restrictive interpretation (such as that of the separate opinion in the same decision), with significant consequences on the decision concerning the restitution action.

Mention must be made that, as shown in the separate opinion, following a more general interpretation of the *ex contractu* action, based on a logical and legal rationale, not on one or several legal texts, an exception of unacceptability may be set up against the restitution action, limiting the party's access to a legal means laid down by law and via which the damage incurred may be covered.

It is also a significant fact that the option of giving a more general interpretation of the *ex contractu* action also had consequences in terms of the expiry of the right to bring a legal action before the court.

Thus, in the case of contractual obligations, the provisions of art. 2524 para. 1 of Law No. 287/2009 stipulate the rule of the expiry deadline lapsing from the date when the obligation becomes outstanding. An obligation to restitute such as the one that generated the above-mentioned dispute cannot be considered as having a due date agreed by the parties or defined by law; hence, it appears to be governed by art. 2523 of the same law, stipulating that the expiry occurs as of the date when the party entitled to that right became aware of or, on a case-by-case basis, should have become aware of the existence of such right.

As to the action in the area of insurance, the provisions of art. 2527 in Law No. 287/2009 on the Civil Code stipulate that the expiry starts lapsing as of the expiry of the dates laid down by law or established by the parties for the payment of the insurance premium, indemnity payment respectively or, as the case may be, the indemnities owed by the insurer.

An analysis of these legal provisions results in the conclusion that, in the case of an insurance contract, the *ex contractu* action could be initiated either by the insured – for the payment of the insurance premium or indemnities, as the case may be, in which case the expiry starts lapsing on the legally defined date or the date conventionally established for the payment of these sums, or the insurer – for the payment of the insurance premium, in which

case the expiry starts lapsing on the legally or conventionally established date for the payment of this premium.

Therefore, an examination of the provisions of art. 2527 of Law No. 287/2009 on the Civil Code leads to the conclusion based on the *per a contrario* argument that the only *ex contractu* action the insurer has against the insured is that concerning the payment of the insurance premium, not the action to restitute an indemnity or indemnity paid in excess.

If we were to start from the arguments suggested by the majority opinion, we would note that in this case it is impossible to determine the exact moment when the expiry deadline started in relation to the special law - art.2527 and when the enforcement of the general rule in art. 2523 should be done, which is utterly against the *specialia generalibus derogant* principle.

Conclusions

Divergent judicial practice and lack of doctrine-based study on the matter of the relation between the contract-based action and the restitution action, with unfavourable consequences on the latter, set in the context of a legislative framework that is almost identical to that set by the 1864 Civil Code make this debate topic be a significant topic of the moment after Law No. 287/2009 on the Civil Code became effective.

This study considers the law maker's intervention as being the ideal solution that should result in a legal definition of the *ex contractu* action or in setting the legal status of this action, at least the way it approached the restitution action based on unjust enrichment.

This primary goal of our study may seem absurd and far exaggerated, but it is completely justified and real, given, on the one hand, the aforementioned arguments, that may potentially generate divergent judicial practice, hence, far from being unitary.

On the other hand, a legislative intervention is not impossible given the fact that, in the new Civil Code, the law maker frequently dealt with other action types as well. Mention must be made of the following merely as a matter of example: filiation action, action of determination of paternity outside the marriage, action for the recovery of possession, action of denial of superficies, co-ownership action, actions of acceptance of superficies, usufruct or easement, action for real estate registration etc.

The purpose of this study is not however that of determining a legislative intervention on the legal status of *ex contractu* action, but –mainly – that of starting a debate on the topic, a debate by specialists and legal professionals and that, by legal arguments, may outline the profile of this legal concept that, at first sight, seems quite simple, but, if looked at more carefully, is open to plenty of approaches with most surprising consequences.

References

- Ioan Adam, *Drept civil. Obligaţiile. Contractul,* Bucharest, C. H. Beck Publishing House, 2011
- Gabriel Boroi and Liviu Stănciulescu, *Instituţii de drept civil,* Bucharest, Hamangiu Publishing House, 2012
- Dimitrie Gherasim, *Îmbogăţirea fără cauză în dauna altuia,* Bucharest, the Romanian Academy Publishing House, 1993
- Ion Dogaru, „Some considerations regarding the place, the role and the mechanism of unjust enrichment in the section of civil obligations" in Ioan Dogaru, *Texte juridice,* Bucharest, Universul Juridic Publishing House, 2011
- Muriel Fabre-Magnan, Droit des obligations. Vol.2. Responsabilité civile et quasi-contrats, II-ième édition mise à jour, Paris, Presses Universitaires de France, 2010
- Philippe Malaurie, Laurent Aynès and Philippe Stoffel-Munck, *Les Obligations,V-ième édition*, Paris, Defrénois, Lextenso Éditions, 2011
- Liviu Pop, Ionuţ-Florin Popa and Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligaţiile,* Bucharest, Universul Juridic Publishing House, 2012
- Liviu Stănciulescu and Vasile Nemeş, *Dreptul contractelor civile şi comerciale,* Bucharest, Hamangiu Publishing House, 2013

- Constantin Stătescu şi Corneliu Bîrsan, *Drept civil. Teoria generală a obligaţiilor,* Bucharest, All Publishing House, 1993
- Constantin Stătescu şi Corneliu Bîrsan, *Drept civil. Teoria generală a obligaţiilor,* Bucharest, Hamangiu Publishing House, 2008
- Paul Vasilescu, *Drept civil. Obligaţii,* Bucharest, Hamangiu Publishing House, 2012