PREREQUISITES OF THE RESOLUTION OF A CONTRACT

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Abstract

I herein want to emphasise the prerequisites of the resolution of a contract according to the Romanian Civil Code of 2009. The prerequisites of the resolution of a contract are substantially different from those identified under the former fundamental civil legislation (the Romanian Civil code of 1864). This study aims at a better understanding of the new prerequisites of the resolution of a contract: a. a fundamental non-performance of the obligation; b. an unjustified non-performance of the obligation; c. mora debitoris The analysis of these prerequisites reveals a new possible trait of the resolution: a remedy for the non-performance of the contract rather than a sanction or a variety of contractual liability. Thus the modern legislator of the Romanian Civil Code of 2009 proposed to partially change the physiognomy of the resolution of a contract, different from the former institution and here we are in front of a new law institution. The resolution of a contract under the Romanian Civil Code of 2009 is regulated under The 5th Book – The Obligations, The second chapter – The enforcement of the Obligations, The 5th Section – Resolution of the Contract, respectively under the Article 1549 – 1554. As will be shown below, the resolution of a contract has a homogeneous structure without being spread in different parts of the Civil code. The earning lies in the action of organism the new legal provisions, apparently enriched in comparison to those found in the Romanian Civil Code of 1864. Most notably, the Romanian Civil Code of 2009 preserves the Roman legacy. The modern legislator had a difficult task: 146 years of legal doctrine and jurisprudence transposed into a new legislation which, of course, has its flaws. Nevertheless, it should be praised, as it encompasses useful tools to regulate social relations

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1. Introduction

The entry into force of the Romanian Civil Code of 2009 on October, 1st 2011 has brought about several changes and novelties in civil law. As it would have been expected, the vast majority of the institutions were kept in the new fundamental civil legislation. A great deal of these were improved, enriched with the developments achieved by both the authors and the jurisprudence throughout the 146 years of rule of the Civil Code of 1864.

Due to its critical importance, which derives from the fact that it represents the vehicle by which each party achieves its interests, contract law has been subject to many changes. Of all the modifications brought about by the Romanian Civil Code of 2009 in this area, I shall analise the prerequisites of the resolution of a contract.

For the first time in Romanian civil law, the resolution of a contract has a set of rules that shape its regime, as opposed to the former legislation where scarce rules spread throughout the Civil Code of 1864 and the Commercial Code of 1881 called upon the authors and the jurisprudence to discern its origin, conditions and effects.

The prerequisites of the resolution of a contract are substantially different from those identified under the former fundamental civil legislation. Despite this, there has been noticed a misunderstanding of the new prerequisites of the resolution of a contract in the sense that many practicioners of the law tend assimilate the new prerequisites with the old ones.

This study aims at a better understanding of the new prerequisites of the resolution of a contract.

1.1. Old and new legal provisions.

The Romanian Civil Code of 1864 had two main provisions regarding the resolution of a contract – art. 1020-1021.

According to art. 1020, the resolutive condition is always implied in bilateral contracts when one of the parties does not fulfill its commitment.

Art. 1021 provides that in this case, the contract is not terminated ipso jure. The party whose obligation has not been fulfilled can either claim the forced performance or the resolution of the contract. The resolution must be asked in court which, depending on the circumstances, can grant a grace period.

According to the Romanian Civil Code of 2009:

- the creditor is entitled to the fully, exact and in time performance of the obligation. (2) When, without justification, the debtor does not perform its obligations and there is a mora debitoris, the creditor shall, without waiving his right to damages: 1. ask for the forced performance; 2. obtain the resolution of the contract or the diminishment of his obligations; 3. use any other means provided by law fo the fulfilment of his right;
- if he does not claim the forced performance, the creditor is entitled to the resolution of the contract and could be entitled to damages. (2) The contract can be partially terminated, when its performance is divisible.

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With respect to the plurilateral contract, the non-performance of the obligation from one party does not lead to the resolution of the contract, except under the circumstances that the non-performed obligation should have been regarded as fundamental. (3) Unless otherwise provided, provisions related to resolution shall also be applied to resiliation (art. 1549);

- the resolution can be ordered by the court or it can be unilaterally declared by the party. (2) Also, when expressly provided by law or agreed by the parties, the resolution can operate ipso jure (art. 1550);
- the creditor is not entitled to resolution when the non-performance is not fundamental. With respect to continuing contracts, the creditor is entitled to resolution, even if the the non-performance is not fundamental, but it is repetitive. Any contrary stipulation shall be disregarded. (2) He is, however, entitled to perfom a diminished obligation, if such performance is possible under the circumstances. (3) If the diminishment of the obligations is not possible, the creditor is only entitled to damages (art. 1551);
- resolution of resiliation can intercede via a written notification sent to the debtor when the parties have agreed so, when there is an ipso jure mora debitoris or when the debtor has not performed his obligation within the grace period granted to him via the mora debitoris. (2) The declaration of resolution has to be made within the statute of limitations. (3) The declaration of resolution shall be registered in the Real Estate Register or in other public registers so it can be opposed to third parties. (4) The declaration of resolution is irrevocable, upon communication to the debtor or upon the expiration of the grace period (art. 1552);
- the commissary pact is effective if it expressly provides the obligations whose non-performance lead to the ipso jure resolution of the contract. (2) In the case provided for in paragraph (1), the resolution is subject to mora debitoris, unless the parties have agreed that the resolution shall result from the non-performance. (3) Mora debitoris is not effective, unless it expressly indicates the conditions of the commissary pact (art. 1553);
- the resolved contract is regarded as non existent. Unles otherwise provided by law, each party is held to restitution of prestations. (2) The resolution does not extend to dispute resolution clauses or to clauses meant to be effective even if the contract is terminated. (3) A contract which is resiliated ceases to exist, but only for the future (art. 1554).

The sources of inspiration for the legislator seem to be the Italian and Québécois Civil Codes. According to art. 1453 of the Italian Civil Code, (1) nei contratti con prestazioni corrispettive, quando uno dei contraenti non adempie le sue obbligazioni, l'altro può a sua scelta chiedere l'adempimento o la risoluzione del contratto, salvo, in ogni caso, il risarcimento del danno. (2) La risoluzione può essere domandata anche quando il giudizio è stato promosso per ottenere l'adempimento; ma non può più chiedersi l'adempimento quando è stata domandata la risoluzione. (3) Dalla data della domanda di risoluzione l'inadempiente non può più adempiere la propria obbligazione.

According to art. 1604 of the Québécois Civil Code, (1) Where the creditor does not avail himself of the right to force the specific performance of the contractual obligation of the debtor in cases which admit of it, he is entitled either to the resolution of the contract, or to its resiliation in the case of a contract of successive performance. (2) However and notwithstanding any stipulation to the contrary, he is not entitled to resolution or resiliation of the contract if the default of the debtor is of minor importance, unless, in the case of an obligation of successive performance, the default occurs repeatedly, but he is then entitled to a proportional reduction of his correlative obligation. (3) All the relevant circumstances are taken into consideration in assessing the proportional reduction of the correlative obligation. If the obligation cannot be reduced, the creditor is entitled to damages only.

2. A brief review of the foundations and prerequisites of the resolution of a contract

Since legal provisions regarding the resolution of a contract were scarce in the Civil Code of 1864, the task of identifying the prerequisites of the resolution of a contract was left to the authors and the jurisprudence.

The nature and number of such prerequisites is influenced by the foundation of the resolution of a contract (tacit *resolutive* condition, a form of contractual liability, the theory of the *causa* and the theory based on the *causa*, *the pacta sunt servanda* rule and the notion of guilt).

According to the first theory and based on art. 1020, cited above, each bilateral contract includes a tacit *resolutive* condition whose fulfilment consists in the non-performance of the obligation.

According to the second theory, the non-performance of the obligation leads to a damage suffered by the creditor. Such damage shall be repaired via the resolution of the contract, followed by its effect – restitution in integrum

The third theory claims that one party performs its obligations because and if the other party performs its own obligations and vice versa.

The reason for the fulfilment of one's obligations lies in the fulfilment of the obligations undertaken by the other party.

There is no reason to perform the obligation if the other party has failed to perform his.

A combination of the elements found in the fourth theory constitutes the foundation of the resolution of a contract.

Most authors concluded that the prerequisites of the resolution of a contract are as follows:

- the non-performance of an essential obligation;
- the guilt of the debtor;
- the damage suffered by the creditor;
- mora debitoris and

- the absence of a non-liability clause.

3. Content

Taking into consideration the previously cited provisions, the prerequisites of the resolution of a contract are as follows:

a) a fundamental non-performance of the obligation;
b) an unjustified non-performance of the obligation;
c) mora debitoris.

3.1. A fundamental non-performance of the obligation

A contract can shall be terminated if the debtor has failed to perform his obligation in a fundamental manner.

The non-performed obligation does not necessarily need to be one of the essential obligations engendered from the contract.

If the non-performance qualifies as fundamental, it shall lead to the resolution of the contract, even if the obligation is not an essential one, but a secondary obligation.

This is one of the differences in comparison to the old legislation, where many authors were of the opinion that only an essential non-performed obligation shall lead to the resolution of the contract.

The non-perfomance of an obligation shall be regarded as fundamental, if the creditor is deprived of what he was entitled to expect when he concluded the contract. From this point of view, this prerequisite for the resolution of a contract seems to be a revival of the theory of the causa, elaborated by Henri Capitant as basis for the resolution of a contract.

3.2. An unjustified non-performance of the obligation

Only an unjustified non-performance of the obligation shall lead to the resolution of the contract.

Art. 1556-1557 of the Romanian Civil Code of 2009 provides that exceptio non adimpleti contractus and the impossibility of performance constitute justified causes of non-performance.

According to these legal provisions:

- when the obligations engendered from a bilateral contract are due and one of the parties does not perform or does not offer the performance of the obligation, the other party can, in a proper manner, refuse to perform his/her obligation, unless it does not result from law, the parties' will or customs that the other party is obliged to perform first. (2) The performance cannot be refused if, according to circumstances and taking into consideration that the non-performance is not fundamental, the refusal would be contrary to good-faith (art. 1556);
- when the impossibility to perform is total and final and it regards an important contractual obligation, the contract is terminated ipso jure and without any notification from the moment of the fortuitous event. Provisions of art. 1274 (2) shall apply accordingly (art. 1557).

As a consequence, the contract shall be terminated when the debtor does not have grounds for exceptio non adimpleti contractus or when it is not impossible for him to perform his obligation.

3.3. Mora debitoris

Finally, the contract shall be terminated, if mora debitoris is in place. It can be instated following a notification sent to the debtor by the creditor or when the creditor files an action in court against the debtor.

Also, mora debitoris can be instated ipso jure, if provided by law or agreed by the parties.

Under the former legislation many authors were of the opinion that the prerequisites of the contract were: non-performance of an essential obligation; the guilt of the debtor and, occasionally, mora debitoris.

It can easily be noted that the Romanian Civil Code of 2009 does not include the guilt of the debtor among the prerequisites for the resolution of a contract. This means that the resolution of a contract seems to be one of the remedies for the non-performance of the contract and of its obligations.

It no longer has the nature of a sanction and is not a variety of contractual liability.

Caution is advised when the creditor wants to unilaterally terminate the contract or, as the case may be, when the judge is called upon to rule the resolution of a contract, because it should be perceived as a last resort used by the creditor only when it is no longer possible to receive from the debtor the prestation he was to entitled to expect at the time of the conclusion of the contract.c

Unfortunately, even if it is clear that the guilt of the debtor is not one of the prerequisites of the resolution of a contract, some courts ruled in favour of the resolution of some contracts and based their rulings on the applicable law starting from October, 1st 2011, but referred to the old prerequisites or mixed the new with the old ones.

Here are two examples:

- „the resolution of a contract is the sanction that intercedes when obligations engendered from a bilateral uno ictu contract are culpable not performed, resulting in the ex tunc cessation of the contract". It then goes on in a confusing manner referring to a fundament non-performance of the obligation and to the mora debitos;
- „the resolution constitutes a cause for anticipated cessation of a contract which intercedes when a party does not culpably perform the obligations engendered from that contract". „(...) two prerequisites must be met: (i) mora debitoris and (ii) no justified cause for the non-performance of the obligations."

4. Conclusions

The resolution or *resiliation* of a contract comprises of a new set of prerequisites and it has a new configuration with respect to the Romanian Civil Code of 1864 and also with the earning of the ancient Roman legislation, governed of their pragmatism. The analysis of these prerequisites reveals a new possible trait of the resolution: a remedy for the non-performance of the contract rather than a sanction or a variety of contractual liability. Such interpretation will partially change the physiognomy of the resolution of the contract which, until yesterday, was more a sanction than a remedy. Today, we analyse the new legislation together with its flaws, but considering its benefits and innovations.

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