Conditions for Exercising the Right to Resolution

Liliana Niculescu[1]

Abstract: With the entry into force of the Civil Code in 2009, Romanian private law has crossed the threshold of a substantial change in the termination of the contract. Traditionally, the resolution of the contract was seen as an extraordinary event, which could operate only in court, at the request of the creditor dissatisfied with the breach of contract by his debtor. Over time, the rigor of this rule was mitigated by the possibility for the parties to issue a conventional resolution admitting in doctrine and judicial practice, by inserting into the contract the so-called commissioners' pacts, which produced effects of different intensity depending on how were drafted. The new regulation adopts a major change in the legislator's perspective on the resolution, expressly recognizing at the principle level, in addition to the option of judicial resolution, the possibility to trigger the resolution and unilaterally, in the absence of a court decision or a contractual clause specific in this regard. The resolution is not just a sanction or one of the many legal remedies available to the creditor in response to the non-performance of the contract. It is not an end in itself (as opposed to the nullity of the contract), but it is a legal technique, a mechanism, which has many facets. In the Civil Code, the resolution of the contract is presented together with the termination considering the similarities between the two institutions, which we can consider decisive and defining points of support for understanding the evolution of contract theory and execution of obligations in Romanian private law. Although, in appearance, the new provisions on resolution do not substantially change, a systematic analysis of the provisions on the performance of contractual obligations leads to another conclusion. For this reason, we have chosen through this article to focus on identifying the characteristic features of this institution, insisting on the unique substantive condition necessary for the exercise of the right to terminate the contract.

Keywords: de plano; synallagmatic contracts

1. The Concept of Resolution - General Features

I consider it necessary, from the outset, to emphasize the importance of this institution in the civil law system, the effects of which restrict the moderating power of the judge, who is usually vested with the power to assess when a contract can be terminated.

[1] Assistant Professor, PhD, Faculty of Social and Political Legal Sciences Galati, Dunarea de Jos University of Galati, Romania, Address: 47 Street Domnească, Galati, Romania, Corresponding author: liliananiculescu26@yahoo.com.

De plano, we specify the fact that in synallagmatic contracts, due to the reciprocity and connection of the obligations arising from these contracts, the obligation of one party is the legal cause of the obligation of the other party. The Party in respect of which it has not been enforced shall have the choice either to compel the other to enforce the Convention, where this is possible, or to seek its annulment with damages-interests (Adam, 2011, p. 382).

Termination of the contract, usually synallagmatically, with instant execution, at the request of one of the parties for the reason that the other party has not fulfilled its obligations to which it owes, is called resolution.

Unlike the Civil Code of 1864, which is limited to conditioning the resolution on non-fulfilment of the contractual commitment, the Civil Code in force nuances the situation and stipulates that when, without justification, the debtor does not fulfil his obligation (…), the creditor can (…) obtain the resolution or termination of the contract (Article 1516 (2) of the Civil Code).

The Civil Code did not follow either the theory or the letter of the old regulation, making from the resolution a way of terminating any contract, justified, in certain cases expressly specified, on the sole reason of its non-fulfilment, regardless of the debtor's guilt or concrete cause of legally non-performance (Gorea & Saharov, 2012, pp. 79-80).

We note that, according to the regulation of 1864, the resolution remains a cause for annulment of the contract which covers the nature of a civil sanction, when it intervenes for the non-execution without justification (implicitly guilty) of the obligations.

But in addition to this solution, embraced by jurisprudence, the Civil Code in force enshrines the creditor's right to opt for resolution and in case of fortuitous impossibility, even if temporary execution, thus legislating the second opinion shared by the doctrine, according to which the resolution may also intervene for fortuitous non-execution.

Regarding the resolution, it is necessary to clarify an aspect regarding the principle of binding force that governs the contract. According to this principle, each party is required to comply with the contract exactly, the valid concluded contract having the force of law between the contracting parties.

As a consequence, the rule according to which the contract cannot be modified or terminated by the unilateral will of one of the parties was imposed. On closer

examination, it can be seen that the argument based on the binding force of the contract is not such as to prevent the recognition of the creditor's right to terminate the contract unilaterally (Toma, 2013, p. 2).

The principle of binding force presupposes both the need for the parties to respect their commitments arising from the contract, and the need to sanction any violation of the contractual rule. Therefore, whenever there is a material non-performance of a contractual obligation that compromises the purpose of the contract, the creditor of the unfulfilled obligation must have the right to terminate the contract in order to be released from his obligations and to ensure a certain individual freedom.

In addition, the right to declare the resolution of the contract, in case of non-performance of the obligations arising from it, belongs to both contracting parties and is subject to a posteriori judicial control.

Therefore, there is no question of an arbitrary termination by one of the parties to the contract, because whenever the conditions for resolution are not met, the court will censor the resolution statement of the party.

Following these considerations, the Civil Code focuses on the conventional resolution, this becoming the rule in the matter and not the judicial resolution that is kept only in cases where it is necessary to terminate the contract and where the parties have not inserted express resolutive clauses.

The option for the conventional resolution finds its justification in practical, economic reasons, the parties thus avoiding the inconveniences that the judicial resolution implies: waste of time, avoidance of procedural expenses, removal of uncertainty that may result from the judge's discretion, etc.

In summary, the institution of the resolution, regardless of the way it is presented, has the following characteristics (Adam, 2011, pp. 385-386):

a. it is an institution sanctioning the non-execution of the obligations assumed by the contract, usually meeting in synallagmatic contracts, with execution all at once (uno ictu), and by exception also in unilateral contracts, such as the pledge contract;

b. it intervenes in case the non-execution of the contractual obligations is due to the fault of the debtor, or, to some external causes such as the fortuitous case or the force majeure;

c. it operates on the basis of a court decision, a unilateral declaration of resolution or an express text of law;

d. invoking and obtaining the resolution has the effect of destroying the being of the contract;

e. the resolution releases the one who obtains it or invokes it from his own commitment;

f. the most important effect of the resolution, considered by some authors (Pop, 2009, p. 726) as a real privilege for the one who obtains or invokes the resolution, is represented by the retroactive character that produces the following consequences:

- the parties will be reinstated in the situation prior to its conclusion, in the sense that the services already executed will be reimbursed;
- the rights consecrated to third parties by the acquirer of the good will also be abolished with retroactive effect, according to the principle resoluto iure dantis resolvitur ius accipientis, the bona fide third party benefits from the effects of good faith possession, in the sense that it becomes the owner of fruits and even goods, according to the known distinction: in the case of real estate, he becomes the owner through usufruct, in accordance with the law; in the case of movable property, they are considered to be the property of the owner;
- the retroactive effect of the resolution does not affect the acts of conservation and acts of administration made by third parties;
- as stated in the legal doctrine (Adam, 2011, p. 386), the resolution penalizes the debtor for the annulment of the contract, in the sense that he may be ordered to pay damages, even when the non-performance of the contract is due to his fault;
- it has an optional character. Thus, the creditor has the right of choice between requesting either the forced execution of the obligation or the termination of the contract. Moreover, the judge is free to assess whether or not the termination of the contract is required, given a number of considerations that we will specify during the analysis of this institution.

2. Conditions for Exercising the Right to Resolution

At the moment, most legal systems are trying to meet the demands of society by creating a legal framework that encourages and streamlines economic relations between private individuals or between private individuals and the state.

In this context, the natural conduct of day-to-day operations presupposes the proper fulfilment of obligations between the parties to a contractual relationship. Whenever

one of the parties fails to fulfil its obligations, the movement of goods and services is impeded and the contract no longer has the utility expected by the parties. As the contractual objective that the parties had in mind at the time of concluding the contract was compromised, it no longer justifies its existence. In other words, failure to achieve the purpose of the contract leads to its termination, as the contract is no longer useful to the parties.

Therefore, in the current legal context, the basis of the resolution is based on the causal idea of the contract, being abandoned the idea that the resolution is based on the theory of the cause of obligation. The cause of the contract must be analysed in the light of the objectives pursued by the parties by concluding the contract, respectively the utility it brings.

In these circumstances, the new regulation of the resolution seems to establish a single substantive condition for the birth of the right to invoke the resolution - "significant" non-execution, as well as a multitude of formal conditions before or after the act of resolution, including the delay, the unilateral statement of resolution, communication of the resolution statement.

In the following, we will insist on the substantive condition and on the implications it has in relation to other legal institutions. Regarding the formal conditions, both the judicial and the unilateral resolution are associated with varied and different formal conditions.

However, whether it is a unilateral resolution, whether it is a judicial resolution or even a resolution of law, legal or conventional, the substantive condition of significant non-execution is unique and applicable in all cases.

In the context of the Civil Code of 1865, there have been numerous discussions about the substantive and formal conditions that the institution of the resolution must meet. The main dispute was related to the condition of the debtor's fault or guilt in the non-execution of the obligation.

The attachment of most authors and the jurisprudence to the retention of this condition, along with that of essential or decisive non-execution, implicitly attests the inclination towards the idea of resolution - sanction of non-execution, an idea that should necessarily involve the condition of guilt, because only guilty behaviour can and must be punished.

However, the recent doctrine, re-evaluating the conditions of the resolution, however, stopped at one substantial condition - the decisive non-execution (Adam, 2011, p. 386).

Today, all the appearances of the new provisions indicate that such a discussion should no longer be held. So:

a) according to Article 1551 (1), sentence I of the Civil Code, "The creditor has no right to termination when the non-performance is minor." The interpretation per a contrario leads to the following conclusion: the creditor has the right to resolution when the non-execution is significant.

The idea of the legislator seems to have been to give a greater freedom to assess the condition of non-execution. This is a non-execution of a sufficiently significant nature in relation to the economy of the whole contract, so as to justify the resolution.

Non-execution is "decisive" when the creditor is deprived of what he would have been entitled to expect from the contract. If this is significant, that is, significant enough, it means that the creditor is deprived of what he was entitled to expect from the contract.

In the context of our law, it is natural for such a determination to appeal to the causal notion of the contract in order to be able to determine what implies decisive non-execution at the conclusion of the contract. Thus, the non-performance of a certain service, whether essential or not from the perspective of the "center of gravity of the contract", may attract the resolution if it was the determining cause (reason) of the employment of the other party (Adam, 2011, p. 386).

b) According to article 1549 paragraph (2), the second thesis of the Civil Code. "Also, in the case of a plurilateral contract, the non-fulfilment by the one of the parties of the obligation does not attract the termination of the contract towards the other parties, unless the unexecuted service had, according to the circumstances, to be considered essential".

This time, the conclusion that emerges from the legal text is that, in the case of the plurilateral contract, the essential non-execution attracts the total termination of the contract. Which again involves appealing to the notion of the cause of the contract. It reinforces the idea that decisive non-execution is what can lead to the total termination of the contract (Pop, 2009, p. 136).

Non-performance must relate to an obligation arising from the contract. Therefore, deviations from the pre-contractual phase, deviations from the pre-contractual phase

(for example, from the contract negotiation phase) as well as all obligations arising during the execution of the contract between the parties but whose origin is of a non-contractual nature are excluded (the typical example in this respect is given by the emergence of non-contractual obligations attached to unilateral contracts such as the deposit contract, loan, etc.) (Pop, 2009, p. 139). All these obligations are of a non-contractual nature, therefore they cannot attract contractual remedies.

Without disputing the value of the idea that the only substantial condition of the resolution is the significant non-execution, it should be noted that sometimes it is necessary for the legislator himself to assign the non-execution of one or other of the parties in order for a resolution to take place.

Usually, in the doctrine, the notion of "imputability" is used to emphasize the debtor's attitude of the unfulfilled obligation towards the contractual breach he committed. For the resolution to operate, it is not necessary for the non-performance to be imputable to the debtor but the importance of withholding the guilt is significant for establishing the limits of contractual liability for damages, where the law usually requires the condition of guilt for the remedy (Article 1530 Civil Code) (Pop, 2009, p. 136).

The most important condition of resolving non-execution is related to the gravity of the non-execution. Thus, discussing the conditions of resolution and termination, the doctrine stated that "closely related to the notions of total non-execution and partial non-execution is the question of the seriousness of non-execution - an essential element when considering whether it is appropriate to sanction resolution or termination. Thus, not any partial non - execution justifies the application of such a sanction. "Moreover, the Romanian judicial practice has ruled that "The court, notified with such an action, has the duty to verify and determine to what extent the non-execution of the obligation is important and serious" (Stoica, 1997, p. 62).

In order to establish the gravity of the non-execution, in addition to the criteria established by law when applicable, the following may be taken into account: agreement of the parties, influence of clauses excluding or limiting contractual liability, personal circumstances of the debtor, etc. If the condition of non-performance is not met in order to determine the termination of the contract, the issue of a partial termination (whenever the non-performance is significant enough to be able to determine in part the termination of the contract and the contract is divisible), a reduction of the creditor's performance, if possible, and otherwise the right to damages arises in favour of the creditor (Toma, 2013, p. 7).

With regard to the formal conditions for the exercise of the resolution, by this phrase "formal conditions", we do not refer to a number of legal acts specific to civil procedural law, but to a number of legal acts and contractual rights related to the implementation of the resolving right of the creditor. It is about all the other conditions without which the resolving right could not be exercised.

The presentation of the formal conditions for exercising the resolutive right (by this right we mean the amount of prerogatives conferred on the creditor in case of essential or significant non-execution which includes what in the old regulation was called "resolutive action" and which are oriented towards termination) of contractual rights (from the option to remedy the resolution, to the choice between the different types of resolution made available to the creditor by the Civil Code), exercised through a whole series of unilateral legal acts (from the notification for an additional term of execution and until the unilateral declaration of resolution).

3. The Creditor's Right to Choose between Several Types of Resolution

In addition to the choice between the possible remedies in case of non-execution of the contract, provided by article 1516 of the Civil Code, a new option is open to the creditor when the question of the type of resolution to be invoked is raised.

The real innovation of the Civil Code in relation to the old regulation, resides in the creditor's right of the unexecuted obligation to choose between two types of contract termination, a pendant of the option enshrined in art. 1516 Civil code. Once the creditor has chosen to invoke the resolution, he can choose between two types of resolution: judicial resolution and unilateral extrajudicial resolution.

The possibility of choosing the creditor is highlighted by the wording of article 1550 paragraph 1 of the Civil Code, according to which: "The resolution may be ordered by the court, upon request, or, as the case may be, may be declared unilaterally by the entitled party.

If the creditor's right to choose between the possible remedies for non-performance seems to be limited and reprehensible (Pop, 2009, pp. 231-232), on the contrary, the creditor's right to choose between the two types of resolution is purely optional and can be limited only in exceptional conditions: by a possible contractual clause restricts the creditor's right to a judicial decision or by a possible legal provision prohibiting unilateral resolution.

There is also the issue of this right to return to the creditor's original option. That is, is it possible that, after he has chosen to invoke the judicial resolution, he will return to his choice and invoke the unilateral resolution? or, conversely, once the unilateral termination procedure has been initiated (for example, by sending the summons to perform the obligations to the debtor which does not include a unilateral termination statement at the end of the additional execution term), the creditor may not declare the contract terminated and appeal this sense to the court so that it decides on the resolution?

In the specialty literature, it is considered that the answer to both questions should be positive. The origin of this freedom of choice is found in the very optional nature of the right of option between the two types of option (Pop, 2009, p. 233).

Of course, this option must also be exercised under the sign of reasonableness and the principle of contractual coherence. On the other hand, due to the availability that governs the civil action, the waiver of the trial could not be prevented in any way (except for possible procedural reasons that do not affect the creditor's right of option, these reasons not related to substantive reasons).

Last but not least, it should be emphasized that the exercise of this option (as well as the return on this option) is limited in time. For example, it will not be possible to revert to the unilateral resolution if the declaration of resolution as provided for in article 1552 of the Civil Code has produced legal effects, being communicated to the debtor. On the other hand, the option in question is limited by the limitation period - the same for the action in resolution and for the issuance of the unilateral resolution declaration (according to article 1552 paragraph 2 of the Civil Code).

In addition, a limited option is open to the same creditor between the total resolution and the partial resolution of the contract, as can be seen from the content of article 1549 paragraph (2) Civil code according to which the resolution can take place for a part of the contract, only when its execution is divisible.

Conclusions

Regardless of the perspective, the resolution is a common problem of the legal systems in which the contract constitutes the fundamental instrument through which the legal solidarity between the members of a community is realized.

From the above mentioned ideas, I consider that the regulations in the Civil Code in force are welcome in the Romanian judicial system, especially in terms of contractual freedom, much more extensive in the new code.

Thus, from the only possible variant by which only the court could terminate the contract with retroactive effects based on the culpable non-execution of the obligation (judicial resolution), we speak in the context of the new regulation of the possibility offered to the creditor to terminate the contract by a unilateral declaration, as a consequence of a significant non-execution of the contractual obligation by the debtor, regardless of his fault (unilateral resolution).

In this context of the new regulation, the theory of the resolution as a sanction of civil law, the theory of the retroactive termination of the contract and the theory that the resolution appears only in case of fault of the debtor must pass into doctrinal obsolescence. Currently, according to the Civil Code, we are talking about resolution as a remedy and not as a sanction, the final goal being that of saving the contract and implicitly the interests of the involved parties. Moreover, in support of this idea is the fact that guilt no longer conditions only the right to damages, this aspect being irrelevant for the birth of the right to resolution.

References

Adam, I. (2011). *Civil law. Obligations. The contract – in NCC.* Bucharest: C.H. Beck.

Gorea, B. & Saharov, N. (2012). Brief considerations on the types of resolution in the regulation of the New Civil Code. *Academica Science Journal*, pp. 79-80. http://academica.udcantemir.ro/wp-content/uploads/article/studia/s1/S1A12.pdf

Pop, L. (2009). *Civil law treaty. Obligations. The contract, Vol. 2.* Bucharest: Universul Juridic.

Stoica, V. (1997). *Rezoluţiunea şi rezilierea/ Resolution and termination.* Bucharest: Juridica.

Toma, I. L. (2013). *Unilateral resolution.* Doctoral thesis. Bucharest.