Regulation of the Exception for Non-performance under the New Civil Code

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Abstract: Synallagmatic contracts represents the category that fits most contracts and is, first and foremost, characterized, by the fact that these contracts present certain specific effects which, with the exception for non-performance, constitute a means of defense available for the party who is claiming nonperformance by the other party but has not accomplished its own obligations. The New Civil Code, following the opinions formulated in the doctrine under the authority of the Civil Code from 1864, legislatively consecrates this institution, for the first time, under Art. 1556. Despite the clear specification of the indicated norm, recently, opinions following the French doctrine have been expressed especially regarding the field of exception for non-performance, to which we do not acquiesce, even if a part of Romanian doctrine has approved the latter. Our opinion is based primarily on the legal interpretation of the new legal provisions but also on "traditional" approaches of the old regulations concerning performance, which interested both theoreticians and legal practitioners. Our study shows that the old regulations as well as the interpretations to where the law did not state were not clearly formulated, allowing for different interpretations.

Keywords: synallagmatic contract; exception for non-performance

The synallagmatic contract is a contract in which each party is bound to provide something to the other party, their obligations being reciprocal and interdependent. Art. 1171 indent I from the New Civil Code stipulates in this respect that a contract is synallagmatic "when the obligations arising from it are reciprocal and interdependent." We notice here that the duality "synallagmatic or bilateral contract" has been removed, thus eliminating the confusion with bilateral judicial acts, where provisions of the type "the contract is bilateral as it is concluded

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between two parties" might generate confusion as regards the qualification as bilateral act or contract.

Reciprocity of obligations means these have as source the same contract and their interdependency resides in that the obligation binding each contracting party constitutes the legal cause of action for the obligation of the other party (Stoica, 1997, pp. 26-27), the definitions of the various contracts called synallagmatic invariably containing the phrase "in exchange for".

According to Art. 1516 NCC, in the case of voluntary non-performance of the contract, the creditor may ask for foreclosure in kind or by equivalence, resolution or termination of contract, respectively, or reparation for loss on the basis of contractual liability. Also effects of non-performance of contracts, but applicable exclusively in the case of synallagmatic contracts are: reduction of creditor's own obligation, exception for non-performance and fortuitous impossibility to perform the contract (the risk).

The first mention that needs to be made in regard to the exception for non-performance is that the provisions of Art. 1556 NCC comply with the opinions formulated under the authority of the Civil Code from 1864[1], the latter not containing general rules on this institution[2].

[1] The French Civil Code, the source of inspiration for the Romanian Civil Code from 1864, does not contain rules in what regards the exception for non-performance, only rules regulating several applications for certain special contracts; Art. 1612 Fr. Civ. C. stipulates that the seller may refuse to deliver the property as long as the price has not been paid; Art.1653 Fr. Civ. C. allows the buyer to delay payment of the price if there is a risk of being deprived of the property acquired; Art.1704 Fr. Civ. C. allows the co-permutant to refuse delivery of the property when his co-contractor fails to perform the obligation of delivery; Art.1948 Fr. Civ. C. provides that the depository can refuse performance of the obligation to restitute the property brought into deposit if the depositor has not paid the remuneration agreed.

[2] The previous Civil Code did not expressly regulate the exception for non-performance, this being the result of the concept of the doctrine and case law, but it did contain certain applications, in matters of selling, exchange, remunerated deposit. For example, Art. 1322 stipulated that "*the seller is not obliged to deliver the property, if the buyer does not pay a price and has not been given a payment deadline by the seller*". Art. 1364 stated that "*the buyer affected by a mortgage action or an action for restitution, related to the property acquired, is authorized to suspend paying the price until the seller eliminates these disturbances*". In matters of exchange contracts, Art. 1407 stipulated that when the other co-permutant is proved not the owner of the property delivered, the other part "*cannot be bound to deliver that which he promised, but only to return that which he received*". Similarly, Art. 1619 admitted that "*the depository can stop the deposit until whole payment due to him as a result of the deposit*".

The exception for non-performance (*exceptio de non adimpleti contractus*[1]) of the synallagmatic contract is a specific means of defence (Buffelan-Lanore & Larribau-Terneyre, 2010, p.410), based on the interdependence of the reciprocal obligations, at the disposal of the party who is claimed performance of the obligation borne, even if the party who claims this performance has not performed his own obligation (Ghestin & Jamin & Billiau, 2001, p.86) or offered performance thereof (Boroi & Stănciulescu, 2012, pp.180-181).

According to another definition, the exception for non-performance is the right of each party in a synallagmatic contract to refuse performance of the services binding upon them as long as they do not receive the services due by the other party (Terre & Simler & Lequette, 2005, no. 623). It represents a guarantee for the creditor and a means to urge the debtor, which creates a provisional situation (Malaurie & Aynes & Stoffel-Munck, 2009, p.471, no. 858). At the same time, it is an institution of private justice (Pop & Popa & Vidu, 2012, p. 276), a preliminary judicial authorization not being necessary, while invoking it is unilaterally decided by the debtor, who, thus, assumes the risk of the subsequent legal supervision (Pop & Popa & Vidu, 2012, p. 276), being possible for the party upon whom the exception for non-performance produces effects to notify the court whenever he claims that invoking it was abusive. Thus, the one against whom the exception for non-performance of the contract is invoked can ask the court to ascertain that the non-performance was not possible due to the act itself of the one invoking the exception, or that the non-performance of the obligation on the part of the one against whom it is invoked is only partial or of little importance, and so it does not justify the refusal by the other party to perform his obligations.

The New Civil Code presents the exception for non-performance as "a justified case of non-performance of contractual obligations", this being expressly regulated under rt. 1556 NCC

[1] Despite the Latin name, it does not originate in the Roman law, but in the Middle Ages, under the influence of canon law, in the case of some synallagmatic contracts, having as justification the moral consideration that a party cannot claim what is due to him by contract unless he delivered to the other contracting party what he committed to offer in exchange (*Malecki, 1999, pp. 7-8).*
In French law, the exception for non-performance appeared, at the beginning, in the 16th- 18th centuries, under the form of several applications, and in the 19th- 20th centuries, under the influence of the German civil law, in which it had been consecrated as a general rule (Art. 320 and next BGB), it was acknowledged as a mechanism applicable to all synallagmatic contracts and then to the synallagmatic legal relationships. (Ghestin; Jamin; Billiau, 2001, no. 422; Buffelan-Lanore; Larribau-Terneyre, 2010, p. 410)

Exception can be invoked against the co-contractor, as well as against third parties whose rights are based on the synallagmatic contract. Thus, in the case of a provision for another party constituting a synallagmatic contract, the promisor would be able to invoke the exception for non-performance against the third beneficiary if the provision-maker has not performed his own obligations, on the basis of Art.1288 NCC[1].

In order for the exception for non-performance to be invoked and produce effects, the following conditions must be met[2]:

- the parties' reciprocal and interdependent obligations shall have as source the same contract. Thus, even if between certain persons there are reciprocal obligations which are not interdependent due to different sources, the exception for non-performance[3] cannot be invoked, the party concerned having the possibility to resort to other judicial instruments, such as, for example, compensation.

The French law allowed for the scope of the exception for non-performance to be extended to all synallagmatic legal relationships, even if they do not have a contract as source, as is the case of those borne by the business (Malaurie & Aynes & Stoffel-Munck, 2009, pp. 473-474, no. 860). The solution was adopted by the Romanian doctrine, as well (Vasilescu, 2012, p. 516), stating that it is irrelevant whether or not synallagmatic obligations "have as source a homonym contract or another judicial situation", and giving as examples of such sources the law or the court decisions. Only that Art.1556 indent 1 NCC uses *expressis verbis* the wording "obligations borne by a synallagmatic contract", the indicated rule being, as a matter of fact, inserted in the section entitled "Justified cases for non-performance of contractual obligations" (Ioan & Dumitrescu & Iorga, 2011, p. 108). We consider, that, in this way, the scope of the exception for non-performance was clearly determined and limited to synallagmatic contracts;

- the non-performance of the obligations due to the other contractor shall be of sufficient importance to justify invoking the exception. Thus, non-performance can

[1] Art. 1.288 N .Civ. C.: "The promisor can invoke on the beneficiary only those defences based on the contract containing the provision".
[2] These conditions are of content and form. (Malaurie; Aynes; Stoffel-Munck, 2009, p. 473, no. 860-862). In fact, we notice that there are no conditions of form, with the exception of the case in which the contract between the parties stipulates special formal conditions in which the exception for nonperformance functions. As a matter of fact, the wording contains negations: "it is not necessary to place in default", "it is not necessary to notify the court".
[3] The French Court of Cassation, the Financial and Commercial Chamber, decision dated 26th November 1973 (Malaurie; Aynes; Stoffel-Munck, 2009, p.474, no. 860).

be even partial but of sufficient importance to justify such measure. In the French literature (Malaurie & Aynes & Stoffel-Munck, 2009, pp. 474-478, no. 861) it is shown that there can be a total or partial non-performance, or even an imperfect performance[1], what is important being its seriousness. Only that, overlooking the existence of other remedies, the imperfect performance does not match the hypothesis regulated by Art.1556 NCC, which expressly stipulates that "one of the parties does not perform or does not offer performance of his obligation".

This condition must be regarded from the point of view of the contract cause, and only taking into account this element can one consider whether a partial performance is in condition to meet the demands of the creditor.

If the service not performed is of little importance or concerns an accessory obligation (Malaurie & Aynes & Stoffel-Munck, 2009, p. 475, no. 861), not affecting performance of the purpose for which the contract has been concluded, and taking into account also the concrete circumstances of the case, the performance cannot be refused, the refusal running against good faith (Art. 1556 indent 2 NCC). For example, the lessee cannot invoke the exception for non-performance towards a suspension of the obligation to pay the rent, by invoking that the lessor did not perform the obligation to provide the repairs necessary to maintain the dwelling in an appropriate state of use throughout the lease (L. Pop, 2009, p.718 and the case law there cited). Thus, according to Art.1788 indent 2 NCC, if, after concluding the contract, the need arises for repairs that fall within the lessor, and the latter, although notified, fails to take the necessary measures, the repairs can be made by the lessee. In this case, the lessor is due to pay, apart from the sums put up by the lessee, interests considered from the date the expenses were charged;

- the non-performance shall not be due to the act itself of the party invoking the exception. Thus, if a party "offers to perform the obligation" and the other refuses or overlooks receiving it, the latter cannot invoke the exception of non-performance, in application of Art. 1517 NCC. The position of the debtor regarding the non-performance is not relevant, as it does not matter whether it was out of guilt or fortuitous in relation to him;
- the obligations shall be due simultaneously (Vasilescu, 2012, p. 516).

[1] We consider that the text of the cited work contains a mistake of translation or typing, and that it is not about a non-performance, but rather of an imperfect performance.

The situations which are included here are the following:

A. the parties shall not have agreed on a term for performance of one of the reciprocal obligations, the stipulation of a term being equal to renouncing the simultaneity of performance (Stătescu & Bîrsan, 2008, p. 87; Pop, 2009, pp. 719-720). Moreover, the former can resort to placing in default the co-contractor and to an offer of payment followed by deposit, under the provisions of Art.1510-1513 NCC (Vasilescu, 2012, p. 517).

This is because the obligations borne by the synallagmatic contracts are reciprocal and interdependent and, in some cases, temporally ordered, and these characteristics trigger certain rules for performance as well as rules concerning the judicial conduct of the parties in the case in which the other party fails to perform its own obligations, as is the case of invoking the exception of non-performance (Stătescu, Bîrsan, 2008, p.86). The order in which obligations are performed is stipulated under Art. 1555 New Civil Code. Thus, unless otherwise mentioned in the agreement between the parties or due to circumstances, to the extent in which obligations can be performed simultaneously, the parties are bound to perform in this way. If, by exception, performing the obligation on the part of one of the parties requires a period of time, the other is bound to perform the contract first, unless specified otherwise by the agreement between the parties or due to circumstances thereof.

For example, as a rule, in matter of sale- purchase, in default of a term, the buyer may ask the delivery of the property as soon as the price is paid (Art.1693 indent I-a NCC). Thus, if the parties agreed for the delivery of the property to occur at a date after the price has been paid, the buyer will not be able to invoke the exception for non-performance of the obligation for payment of the price on the grounds that the seller did not deliver the property. The existence of the term, however, can be inferred also from the circumstances. Insomuch as these were known to the buyer at the time of the sale, the delivery of the property cannot occur until after the lapse of a term, presuming that the parties have agreed the delivery to take place at the expiry date of the respective term (Art.1693 indent II NCC);

B. from the law or practice shall not result that the party invoking the exception had to perform first his own obligation. This is because the parties might find themselves in a situation similar to that in which a term has been stipulated for performance of one of the reciprocal and interdependent obligations, the simultaneous character of these obligations being, thus, removed. For example, in

the case of an insurance contract, the obligation for payment of the insurance premium which lies with the insured party is, according to the law, prior to the obligation for payment of the benefit by the insurer, the insured party not being able to invoke in this case the exception for non-performance[1]. Also, in the case of activities for food supply services occurring in restaurants (code CAEN 5610), payment of services is done, as a rule, after consumption.

Without eliminating the binding power of the contract, the result of invoking this exception – extra judicially or judicially[2] - consists in suspending the performance of its own obligation by the party invoking the exception, the contract remaining in existence. In this way, the other party is urged to perform (Popescu & Anca, 1968, p. 136) because in default of performance of his own service, he is deprived of obtaining the service he was entitled to. The party invoking the exception for non-performance shall have to perform his obligation at the time his co-contractor performs his own, the binding report not being removed.

Suspension of performance of obligation by the party invoking the exception occurs without placement in default or notification of the court being necessary and lasts until the obligation of the other party has been performed. It can refer to the parties' own obligations in whole or in part, according to the manner in which the party against whom it was invoked has not performed his obligations- totally or partially. The suspensive effect is, however, opposable, *erga omnes*, also to the creditors of the party invoking the exception (Vasilescu, 2012, p. 518).

Conclusion

To sum it up, while creating the new Civil Code, in what regards the nonperformance exception, the legislators took into account the old approaches formulated in theory and in legal practice. While this new civil code is undoubtedly a progress, it is not without reproach including the matter of nonperformance. While the notion, conditions and effects of nonperformance are almost unchanged and therefore are not subject to controversy, the field of nonperformance has been,

[1] Art. 2.199 indent 1 New Civil Code.: "Through the insurance contract, the insurance contractor or the insured party binds himself to pay a premium to the insurer, while the latter binds himself that, in the event the risk insured occurs, he shall pay a benefit, if the case may be, to the insured party, to the beneficiary of the insurance or to the third injured party".

[2] It is the situation when a party sues the other party for obligation to perform a contract, but the latter invokes the exception for non-performance.

artificially increased, in our opinion nonperformance being applicable only to synalgmatic contracts and not synalagmatic relations.

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