

The unilateral declaration of rescission - an extrajudicial mean of terminating a contract

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Abstract

Based on the provisions of article 1169 of the Civil Code, the parties are free to conclude any contract; however, based on the principle of the mandatory force of contract, the parties are held to execute the contract as signed. According to article 1549 of the new Civil Code, in case the debtor fails to execute its obligations accordingly, the creditor is entitled to invoke one of the following remedies: execution by equivalent; foreclosure; rescission or termination of contract or the reduction of the debtor's performance or the use of any other legal mean available in order to achieve his right². Rescission can manifest under any of the two forms: judicial and extrajudicial. Extrajudicial rescission also has two forms: unilateral rescission and conventional rescission. Unilateral rescission operates based on the unilateral declaration of rescission. At first sight, the creditor's possibility to terminate the contract by rescission presents some practical issues regarding the conditions when it can be invoked, the form of the declaration, its legal effects (namely the real possibility of reinstating the parties in their previous position) and the statute of limitation of the right to invoke rescission. All these aspects were subject to our analysis, thus attempting to find the practical solution for enforcing this highly anticipated solution in the new social-legal context.

Keywords: remedy, rescission, unilateral act, form, effects, contract.

JEL Classification: K12

1. Will and contractual freedom

Man's will is a complex process which comprises facts of intelligence, affective facts and facts of will. In case these facts cause legal effects, a person's will acquires a judicial character. Judicial will is a person's decision of committing a deed which causes legal consequences. In other words, will has a legal character when it manifests under the form of a judicial act.

Will is governed by the principle of the autonomous will. The principle of the autonomous will or that of contractual freedom³ entails the fact that individual

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² Decision no 2060 of April 24th, 2012 of section II of the High Court of Justice regarding the recession of a contract available at <http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=82922> on 25.04.2016.

³ The Constitutional Court, through decision no 365 of July 5th, 2005 regarding the unconstitutional exception of article 38 of Law no 53/2003 - Code of Employment, published in the Official Bulletin of Romania no 825 of September 13th, 2005, offers a definition of contractual freedom as follows: “contractual freedom is the possibility of every subject of law to conclude a contract, mutuus consensus, to manifest its will, in accordance with the will of the other party, to establish the content and the object of the contract, thus acquiring rights and obligations which are mandatory for both parties”.

will creates law, as it is nothing more than a synonym of human freedom⁴. In other words, will by itself lacks the power to provide rights and obligations, as it only acquires this power by law. Originating in canonical law and the school of natural right, this principle reflects a subjective conception of law and is closely connected to individual freedom expressed by the fact that anyone has the possibility to conclude a legal act; the parties of a contract have the freedom to decide the content and the form of this contract, within the limits stated by law, as the contract draws its mandatory force exclusively from the will of the parties⁵.

Opposing the subjective conception on law and contract, a series of opinions became crystallized across time thus resulting in an objective conception in regard to contract. Among these, we list legal positivism and the theory of solidarity. Legal positivism is the current which abides by the law, thus justifying reality outside of the precise legal will and outside of morals. The vision of solidarity is somewhat similar, thus will does not create law, as the individual only has the possibility to choose if he wishes to apply the objectively pre-established provision⁶. The theory of contractual solidarity acknowledges interest as the center of relations between contracting parties.

If, initially, the principle of the autonomous will was absolute, as it rejected any state intervention in the process of concluding a contract, because the contract was the sheer result of the parties' will, in time, it was thought that limitless contractual freedom might derogate from its pre-established legal purpose thus resulting in a significant decline of the autonomous will.

In contemporary law, although the principle of the autonomous will is still acknowledged, will is no longer unlimited, as it must be correlated with the respect owed to the laws; thus, individual freedom becomes an privileged instrument used to achieve social needs⁷, as contractual freedom has a relative character, limited by public order, morals and the mandatory civil provisions.

2. The creditor's right to choose

In other words, based on the provisions of article 1169 of the Civil Code, the parties are free to conclude any contract. The right to enter into an agreement is a natural right of the citizen guaranteed by the virtue of its membership into the society⁸, enshrined internationally.

⁴ I. Reghini, S. Diaconescu, P. Vasilescu, *Introduction to civil law*, Hamangiu Publishing House, Bucharest, 2013, page 433.

⁵ V. Toulet, *Droit Civil. Les Obligations*, Paradigme Publishing House, Orléans, 2004, page 16-17; Y. Buffelan-Lanore, *Droit Civil*, 7^{éd.}, Armand Colin Publishing House, Paris, 2000, page 20-21.

⁶ See I. Reghini, S. Diaconescu, P. Vasilescu, *op cit.*, page 433.

⁷ J. Four, J.L. Aubert, É. Savaux, *Droit civil. Les obligations. L'acte juridique*, Sirey Publishing House, Paris, 2006, p. 79 and the following.

⁸ R. West, *A tale of two Rights*, "Boston University Law Review", vol. 94, issue 3, may 2014, pp. 893-912. For example, in the United States of America, this right has been recognized even by the first Constitution from the 9th of April 1866-Civil Rights Act of 1866, available at http://www.pbs.org/wgbh/amex/reconstruction/activism/ps_1866.html on 9.08.2016.

According to article 1549 of the new Civil Code, in case the debtor fails to execute its obligations, the creditor has the right to choose to invoke one of the following remedies⁹: execution by equivalent, foreclosure, rescission or termination of the contract or reducing the performances or any other mean stated by law in order to achieve its right¹⁰. The right to choose belongs exclusively to the creditor and it can be exercised only in case he has executed his own obligation or declares that he is ready to execute it.

We can define rescission as that cause of termination of a contract, with retroactive effect, determined by the lack of execution of a contractual obligation, determined by the voluntary lack of execution of contractual obligations by one of the parties.

According to article 1550 of the new Civil Code, “rescission can be decided upon by the court, on request, or it can be unilaterally declared by the party who has the right to do so. Also, in certain specific cases stated by law or if the parties agreed to do so, rescission can operate by power of law”.

Seeing the legal provisions quoted above, we conclude that rescission can manifest under any of the two forms: judicial rescission¹¹ or extrajudicial rescission.

Extrajudicial rescission can also manifest under any of the two forms: unilateral rescission and conventional rescission.

3. The unilateral declaration of rescission

The unilateral rescission is that particular sanction which terminates the contract as a result of the unilateral manifestation of the creditor’s will, without the intervention of the court of law. The institution of unilateral rescission is the lawmaker’s response to the needs of modern society, as it is inspired by the provisions of articles 1604-1606 of the Quebec Civil Code¹².

The creditor’s right to choose this form of termination of contract is an absolute and unlimited possibility. However, there are certain situations when the law requires the mandatory rescission of contract, such as the living trust.

⁹ In regard to the lawmaker’s possibility to choose the order in which the ways by which the creditor can valorize his interests are listed, see G. Tița-Nicolescu, *Rescission and termination of contracts in the New Civil Code* in „Universul Juridic” Magazine, February 1st, 2016, available at <http://revista.universuljuridic.ro/rezolutiunea-si-rezilierea-contractului-in-noul-cod-civil/> on 20.04.2016.

¹⁰ Decision no 2060 of April 24th, 2012 of the High Court of Justice; section II regarding the rescission of a contract available at <http://www.scj.ro/1093/Detalii-jurisprudenta?CustomQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=82922> on 25.04.2016.

¹¹ In the United States there is a controversial issue regarding the termination of an agreement/contract by arbitration, despite the fact that most communities agree this form of termination. For more information see L. Haas, *The endless Battleground: California’s continued opposition to the Supreme Court’s Federal Arbitration Act Jurisprudence*, „Boston University Law Review”, vol. 94, issue 4, 2014, pp. 1419-1458.

¹² Available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CCQ1991_A.html on 25.04.2016.

The possibility to declare the rescission of the contract is acknowledged for the creditor in the following regulated situations, as seen in article 1552 of the Civil Code:

- when the parties have expressly agreed upon this matter;
- when the debtor fails to complete or fulfill his obligations
- when the debtor did not execute his obligation although he was summoned to do so.

By analyzing the text of article 1552 first alignment of the Civil Code it is obvious that the creditor is entitled to phrase a declaration of rescission if the act which is about to be terminated expressly states the possibility of conventional rescission¹³. In order to cause the desired effects, such a contractual clause must point out the cases and conditions under which it can operate, as well as the steps which the creditor must take. Thus, the parties must agree, through the contract or by an additional act, in regard to the possibility in which unilateral rescission can be declared, the means by which this is notified to the debtor, the content of the unilateral declaration, the documents which must be filed along with the declaration, the effects of rescission and so on.

The unilateral declaration of rescission must not be mistaken for the declaration of activation of the commissoria lex clause, as stated by article 1554 of the Civil Code, as the two are different by the effects they cause. Thus, the first represents the way in which rescission operates while the second represents only the means by which the commissoria lex clause is invoked¹⁴.

In order for this type of rescission to operate certain conditions must be met.

Thus, the first condition is that one of the contractual obligations is not executed. The voluntary character of the lack of execution is deduced based on the provisions of article 1551 first alignment first thesis which states that “the creditor doesn’t have the right to rescission when the obligation which was not executed is of reduced significance”.

The obligation which is not executed is of greater importance “when the creditor is no longer entitled to expect the designated result from the contract”¹⁵. In case the obligation which was not executed is of reduced significance, the creditor has the possibility to demand the reduction of his obligations or to be awarded damages. As a novelty, in the present Civil Code, the lawmaker no longer requires

¹³ High Court of Justice, civil and intellectual property section, decision no 824/1999 stated that if the commissoria lex clause doesn’t expressly state the rescission of the contract without the involvement of the court of law, it does not operate unless the debtor was sued - see <http://idrept.ro/DocumentView.aspx?DocumentId=33009758> accessed on 12.05.2016. We appreciate this solution is valid in case of the unilateral declaration of rescission based on the provisions of article 1552 of the Civil Code.

¹⁴ F.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod civil. Comentarii pe articole (The new Civil Code. Comments by articles)*, C.H. Beck Publishing House, Bucharest, 2012, p. 1648.

¹⁵ L. Pop, I.F.Popa, S. I. Vidu, *Curs de drept civil. Obligațiile (Civil law course. Obligations)*, Universul Juridic Publishing House, Bucharest, 2015, p. 218.

the condition of the debtor's guilt in not executing his contractual obligation, as article 1548 states that in all cases there is an assumption of guilt in not executing contractual obligations. By analyzing this article, it is clear that not executing a contractual obligation is seen by the lawmaker as a conditions which affects the contract between the parties thus adopting the French vision expressed in article 1148 of the French Civil Code which states that rescission is assumed in all mutual contracts¹⁶.

Although the lawmaker is extremely thorough and explicit in his phrasing, jurisprudence¹⁷ and even some part of doctrine¹⁸ continues to valorize the old civil law regulation which required the condition of guilt.

From a formal point of view, invoking unilateral rescission must be preceded by the summoning of the debtor. According to the provisions of article 1522 of the Civil Code, the debtor can be summoned by written notice or be filing a complaint before the court. If the law or the contract does not state otherwise, the notice is communicated to the debtor by an officer of the court or any other means which ensures proof of communication. In regard to the provisions of article 7 of Law no 188/2000, as well as in the lack of any other provisions which award competence to any other organisms, the procedure of summoning the debtor is an exclusive attribute of the officers of the court. This is why, any correspondence between the parties or any other communication made by any other institution than the officer of the court does not equal summoning the debtor.

The summoning entails providing the debtor with a new term of executing his obligations. By exception, the debtor will not be granted a new term when he is summoned by power of law. According to article 1523 of the Civil Code this is the case when the contract states that reaching a specified term causes such an effect. Also, the debtor is summoned by power of law in certain specific cases stated by law such as:

a) the obligation can't be usefully executed in a certain amount of time and the debtor allowed that period of time to pass and did not execute his obligation, although there was an emergency;

b) by his deed, the debtor made the execution of the obligation by equivalent impossible or when he violated an obligation to not proceed in a certain manner;

¹⁶ Article 1184 of the French Civil Code available at <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006436635&cidTexte=LEGITEXT000006070721&dateTexte=20160425> on 25.04.2016.

¹⁷ Cluj Appeal Court, section II, civil decision no 686/2015 of January 21st, 2015, seen at <http://idrept.ro/DocumentView.aspx?DocumentId=77025834> on 12.05.2016; Bucharest Appeal Court, section VI, civil decision no 136/2.02.2015 seen at <http://idrept.ro/DocumentView.aspx?DocumentId=77018109> on 25.04.2016.

¹⁸ G. Boroi, C. A. Angheliescu, *Curs de drept civil. Partea generală (Civil law course. The general part)*, Hamangiu Publishing House, Bucharest, 2011, p. 221; I. Adam, A. R. Adam, *Codul civil. Cartea V. Despre obligații. Titlurile I-VIII (articolele 1164-1649). Comentarii și explicații [Civil Code. Book V. About obligations. Titles I-VIII (articles 1164-1649). Comments and explanations]*, C.H. Beck Publishing House, Bucharest, 2016, p. 1166.

c) the debtor manifested his intention of not executing the obligation or, in case of obligations with successive execution, he refuses or neglects to execute his obligation in a repeated manner;

d) the obligation of paying an amount of money was not respected;

e) the obligation arises from committing an illicit deed outside the contractual background.

The written notice mentioned in article 1552 first alignment of the Civil Code must not be mistaken for the communication of the declaration of rescission, which is an entirely separate unilateral judicial act. This is why, the previous written notice is necessary only when the debtor is not rightfully summoned and has the effect of a summoning, while the declaration of rescission is always mandatory and its effect is informing the debtor about the termination of the contract.

Thus, after the summoning by written notice, if the parties have established that, in case of non execution, debtor is rightfully summoned or when the term of the summoning expires and debtor fails to execute his obligation, the creditor is entitled to declare the rescission of the contract. This is a unilateral legal act by which the creditor manifests his intention of terminating the contract with retroactive effect and represents the essence of unilateral rescission.

The declaration of rescission must be made in writing, as stated by article 1552 third alignment of the Civil Code, which states the necessity of registering the declaration in the cadastral register in order to notify it to third parties.

We notice the lawmaker is not very explicit and does not determine the means by which the registration can be made, given that it is a known fact that registration in the cadastral register can be made in any of the three following ways: tabulation, temporary registration or notice¹⁹. However, by analyzing the provisions of article 902 second alignment point 11 of the Civil Code which describes the acts which are subject to notice in cadastral register, we acknowledge that the declaration of rescission is subject to notice.

The unilateral rescission of contract results in reinstating the parties in the previous situation, namely the retroactive termination of the convention and the return of all performances under the conditions of articles 1635-1649 of the new Civil Code, as well as the payment of damages which can be established by the parties in advance by a criminal clause (article 1538 fifth alignment of the new Civil Code).

In such a situation, given the fact that the effect of rescission is the reinstating of parties in their previous situation, we ask the question of whether the noting of rescission in the cadastral register entitles the creditor to request the

¹⁹ Article 24 first alignment of Law no 7/1996 regarding the cadastral register and immobile publicity, republished based on the provisions of article III of Law no 150/2015 for the changing and completion of the law regarding the cadastral registry and immobile publicity no 7/1996, published in the Official Bulletin of Romania part I, no 459 of June 25th, 2015, thus providing a new numbering for the text of law.

cancellation of the registered right in favor of the debtor and the registering of this right in favor of the party who terminated the contract?

In case the right of a person who acquired an immobile good by mutual sale promise is just noted in the cadastral register, will the seller be able to demand the cancellation of this notice? We ask this question given the provisions of article 33 of Law no 7/1196 regarding the cadastral register and immobile publicity which expressly states that registering and cancelling in the cadastral register can only be rectified based on a court order which is definitive and irrevocable or by amicable means, based on an authentic statement made by the holder of the right, based on a cadastral documentation.

In other words, in case of the declaration of rescission, will the effect of reinstating the parties in their previous situation operate by power of law? In theory, it is possible, if the parties agree or the holder of the right gives an authentic statement. In practice, it is unlikely that the person whose right was terminated by unilateral declaration of the other party to consent to the cancellation of the notice made in the cadastral register; thus, the creditor's only solution is to ask for a rectification of the cadastral register based on article 911 of the Civil Code, thus requesting the cancellation of the notice as it no longer represents the current situation²⁰.

But then the following question arises: in order for unilateral rescission to operate, is it necessary to provide an authentic statement or, based on the theory or remedies, is it enough to provide a signed act? We appreciate that the answer to this question is offered by the principle of the symmetry of forms. Thus, if *ad validitatem*, the legal act which is subject to rescission must be made in authentic form, than the rescission declaration must meet the same requirements. For example, a sale contract of an immobile good must be made in authentic form, under the sanction of annulment. Because the right arose from an authentic act, it is only natural that its termination by unilateral rescission to also be performed by authentic act.

If the authentic form is not required *ad validitatem*, than the declaration of rescission must not meet this formality. Of course, nothing prevents the creditor to provide an authentic statement. The solution we suggested is based on the principle of the symmetry of forms; by interpreting this principle we can draw the conclusion that the act of terminating a legal act must be made in the form required

²⁰ The High Court of Justice ruled that reinstating the parties in their previous situation as an effect of the rescission of the contract, represents a separate individual request which should be filed before the court; in lack of this, the court can't apply the principle *restitutio in integrum*. The High Court has stated that in case the rescission complaint is valid and the court would rule on the reinstating of the parties in their previous situation, in lack of an express request by the plaintiff, the principle of availability and the principle of contradictory procedures would be violated, much like the other party's right to defense, as it would be impossible for the other party to defend itself based on demands which do not exist in the initial complaint (Civil decision no 224 of January 28th, 2015 of the second civil section of the High Court of Justice regarding the rescission of a sale contract available at <http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5b0%5d.Key=id&customQuery%5b0%5d.Value=119920> on 25.04.2016).

by law for the validity of the terminated act; by considering the provisions of article 24 of Law no 7/1996, according to which immobile right or the promise of concluding a contract regarding an immobile good, registered in the cadastral register based on documents in which the parties have regulated the termination or rescission of contracts based on commissoria lex clauses, are terminated based on:

- a) an authentic statement by the parties;
- b) an act of the public notary which acknowledges the fulfilling of the commissoria lex clause, on request of the interested party;
- c) court decisions.

Indeed, the above mentioned text mentions conventional rescission based on commissoria lex clauses, but we see no reason to not apply this judgment to unilateral rescission, as the effect is the same regardless of the means chosen by the creditor.

In order to cause effects, the Civil Code states that the rescission declaration must be made within the term of statute of limitation stated by law. In regard to these provisions, there are a few issues which we must clarify.

The declaration rescission is usually made in the form of a unilateral legal act concluded in authentic form. But the notary procedure is a graceful, non contradictory procedure. Also, the public notary does not have the power to enter evidence (except for the cases and within the limits stated by law) or the power to make a decision in issues regarding statute of limitation. This is a contradictory matter, which is not in the competence of the public notary. Thus, we ask the natural question of what will the notary do when he is invested with a request for a unilateral declaration of rescission? Will he have the ability to refuse the declaration based on the statute of limitation? We believe the public notary is not competent in these matters, even if it appears that there is a clear case of statute of limitation, as the causes which interrupt or suspend the statute of limitation can only be verified by the court of law.

Furthermore, article 85 second alignment of Law no 36/1995 of public notaries and notary activity²¹ regulates the reasons for which the public notary can refuse a certain act, and the personal appreciations of the notary are not mentioned among these reasons. This is why, we believe that the public notary has no legal reason to reject the document. He will draw up the declaration in authentic form and the debtor will be the one who will file a complaint before the court of law in order for the court to rule on the statute of limitation.

The unilateral statement of rescission has the legal nature of a unilateral act subject to the legal regime of unilateral acts, as regulated by the provisions of article 1324-1326 of the Civil Code, thus being an act which terminates a right and

²¹ Republished in the Official Bulletin of Romania no 444 of June 18th, 2001 based on article 107 third alignment of Law no 255/2013 for the enforcement of Law no 135/2010 regarding the Criminal Procedure Code and the modification and completion of some laws which contain criminal provisions (The Official Bulletin no 515 of August 14th, 2013 with subsequent changes) thus providing new numbers for the legal text.

this is why it must be communicated to the debtor by any adequate means of communication.

Since the time the declaration of rescission is communicated to the debtor, it becomes irrevocable. *Per a contrario*, up until the time it was communicated, the creditor can unilaterally revoke the rescission declaration or he can choose another remedy. In this case, there is an issue of an abuse of law, as the unjustified attitude of the creditor can be qualified as heckling. In regard to the moment when it causes effect, by analyzing the provisions of article 1326 which regulates the theory of reception, the rescission declaration causes effects from the time it reaches its recipient, even if he does not acknowledge it for reasons which are not imputable to him. Thus, unlike the other remedies, given the character of unilateral legal act, unilateral rescission is the only remedy which prevents the creditor from changing his mind in regard to his choice, after it was communicated to the debtor.

Although a contractual clause by which the parties agree that, in case they don't execute their contractual obligations, the other party is entitled to invoke rescission without filing a complaint before the court of law; however legal control is still performed. Thus, the debtor has the possibility to perform an *a posteriori* control in regard to the justified and legitimate character of rescission. If the debtor manages to prove that rescission was not justified or legitimate, the creditor is liable and he can be forced to pay damages; on the other hand, the debtor who suffered a prejudice has the legitimate right to request the execution of the contract.

4. Conclusions

Unilateral rescission is a new way of terminating the contract by the unilateral will of one of the parties, thus avoiding the implication of the court of law. The possibility to invoke unilateral rescission belongs only to the creditor and, although it is an exclusive right, it should be a solution of last resort, adopted only in case saving the contract is no longer possible.

The unilateral rescission is the lawmaker's response to the need to ensure a fast, amicable and cheap solution to the problems which arise between contracting parties, with the benefit of the speedy retribution of the creditor for the damage he suffered as a result of not executing a contractual obligation.

However, the right of the creditor can't be exercised abusively, but only in the situations and under the conditions expressly stated in the contract, as post factum judicial control can verify these aspects. Thus, even if it is an extrajudicial mean of terminating the contract, it does not exclude the possibility of the court to check whether the declaration of rescission is legal.

Bibliography

1. F.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *The new Civil Code. Comments by articles*, C.H. Beck Publishing House, Bucharest, 2012;

2. G. Boroi, C. A. Anghelescu, *Civil law course. The general part*, Hamangiu Publishing House, Bucharest, 2011;
3. I. Adam, A. R. Adam, *The Civil Code. Book V. About obligations. Titles I-VIII (articles 1164-1649). Comments and explanations*, C.H. Beck Publishing House, Bucharest, 2016;
4. I. Reghini, S. Diaconescu, P. Vasilescu, *Introduction to civil law*, Hamangiu Publishing House, Bucharest, 2013;
5. J. Four, J.L. Aubert, É. Savaux, *Droit civil. Les obligations. L' acte juridique*, Sirey Publishing House, Paris, 2006;
6. L. Haas, *The endless Battleground: California's continued opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, „Boston University Law Review”, vol. 94, issue 4, 2014, pp. 1419-1458;
7. L. Pop, I.F.Popa, S. I. Vidu, *Civil law course. Obligations*, Universul Juridic Publishing House, Bucharest, 2015;
8. R. West, *A tale of two Rights*, “Boston University Law Review”, vol. 94, issue 3, 2014, pp. 893-912;
9. V. Toulet, *Droit Civil.Les Obligations*, Paradigme Publishing House, Orléans, 2004;
10. Y. Buffelan-Lanore, *Droit Civil*, 7 éd., Armand Colin Publishing House, Paris, 2000.