

# Principle of progressive (gradual) use of contractual remedies

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*“It is in the interest of the society to offer to each party to a contract a reasonable security for the protection of its legitimate interests. But it is not in the interest of the society to allow that party to abuse of such protection using an insignificant breach in order to circumvent its own contractual obligations”.*  
(Allan Farnsworth)

## **Abstract**

*In this study, we intend to answer to the question whether, in the modern contract law, in general, and in Romanian contract law, in particular, the creditor may resort almost discretionary to remedies (contractual sanctions such as termination, rescission) without being opposed that he should have resorted to other more appropriate remedies.*

*In order to answer to this question, we find it extremely useful to define the term of contractual remedy and to analyse the correlation of this principle with other principles of modern contract law.*

*Also, last but not least, we intend to define the principle of progressive (gradual) use of the contractual remedies and to detail the vocation (legal nature) of this principle in the modern contract law, having as starting point the provisions of the new Romanian Civil Code.*

**Keywords:** *principle of progressive (gradual) use of the contractual remedies, modern contract law, contractual remedy, new Romanian Civil Code.*

**JEL Classification:** K12

## **1. Theory of Contractual Remedies in correlation with the Principle of Safeguarding of Contracts**

### **A) The Concept of Contractual Remedy**

*Lato sensu* remedies mean those legal means, both in-court and out-of court (mainly the contractual sanctions – termination or rescission when they have a judiciary nature) irrespective of the purpose pursued by the creditor, whose exercise may lead to the safeguard of the contract or, to the contrary, to the cessation of its effects.<sup>2</sup>

*The proper remedies* are those legal means made available, in principle, for the creditor, and which may lead to safeguard of the contract by having its effects

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<sup>2</sup> L. Pop, I. F. Popa, S.I. Vidu, *Elementary Treaty of Civil Law. Obligations*, Universul Juridic Publishing House, Bucharest, 2012, pp. 254-262.

produced, namely by appropriate performance (voluntary or forced). The following are proper remedies: the performance deadline, the exception of non-performance and specific performance.<sup>3</sup>

### **B) Principle of Safeguarding the Contract and Contract Remedies**

Safeguarding the effects of the contract represented a concern for the legislator, since although not expressly regulated, it may be inferred from the logics of regulation. Therefore, whenever possible, each contractual partner has to use its best efforts in order to safeguard the contract, of course, up to the moment when the actions taken for safeguarding the contract would be in a severe contradiction with the protection of the personal and licit economic interests of the parties<sup>4</sup>.

The principle of safeguarding the contract represents a principle which must be enforced also by the judge, in particular, when the judge censors the contractual behaviours and attitudes of the parties throughout the performance of the contract and when the judge appreciates such as an element in favour of good – faith. We may infer from the general obligation of good – faith<sup>5</sup> the existence of a subsequent obligation to negotiate the amicable settlement of any “sensitive and tense” situation from a contractual standpoint, for example, the negotiation of tense situations which may arise between the parties throughout the performance of the contract related to the manner in which one of the parties understands to perform its obligations, the mediation of a contractual conflict where, apparently, the interests of the parties are irreconcilable, the recourse to arbitration, as a viable alternative to settle the contractual disputes under confidentiality conditions and in light of the principle of safeguarding the contract.

If, nevertheless, the nature of the conflict and the position of the parties remain irreconcilable, “*the principle of safeguarding the contract shall be a mere principle*” and, of course, exceptions to this principle will occur and we shall be in the presence of certain situations which refer to the cessation of the contract.

Therefore, the cessation of the contract, *stricto sensu*, and its causes represent cases of exception which, in principle, are neither intended nor foreseen by any of the parties at the conclusion of the contract, but which arise during its performance. Consequently, even if not foreseen and not intended at the conclusion of the contract, the cessation causes *stricto sensu* and the cessation as legal solution become a viable alternative and, sometimes, the only solution which imposes itself, considering the harmonization of the licit interests of the parties.

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<sup>3</sup> B. Oglindă, *Business Law. General Theory. Contract*, Universul Juridic Publishing House, Bucharest, 2012, p. 403.

<sup>4</sup> B. Oglindă, *quoted title*, p. 425.

<sup>5</sup> We remind that the good-faith is regulated, in general, by the NCC under Article 14 which provides that (1) *Any natural person or legal entity must exercise its rights and execute its civil obligations in good-faith, in line with public order and morals.* (2) *Good-faith is presumed until proved to the contrary.*”

## 2. Comparative Law and the Great Projects for the Unification of Contract Law<sup>6</sup>

### A. 'Favor Contractus' Rule

It is a general rule in many jurisdictions<sup>7</sup> that the aggrieved party can terminate a contract for reasons related to the other party's non-performance, only

<sup>6</sup> During the last 15 years, efforts have been made and are still made in order to accomplish certain legislative projects at Community level aimed at codifying the Contract Law within European Union's countries (M. Fabre-Magnan, *Les obligations*, Presses Universitaires de France, Paris, 2004, p. 117-121; L. Pop, *Treaty of Civil Law. Obligations*, Vol. II, Universul Juridic Publishing House, Bucharest, p. 32.)

Thus, the Principles for International Commercial Contracts were published for the first time in 1994 under UNIDROIT's aegis. In 2004, a new edition of UNIDROIT Principles was published. As regards the purpose of UNIDROIT Principles, in the preamble it is provided that "*These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by the general principles of law, the "lex mercatoria" or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as model for national and international legislators.*" (International Institute for the Unification of the Private Law is an independent intergovernmental organisation, having its headquarters in Rome, Italy. For the analysis of UNIDROIT Principles, please see V. Pătulea, Gh. Stancu, *Structural Change of the Framework for the Regulation of the Contractual Obligational Legal Relations (I)* in "Dreptul" Journal, No. 1/2008, p. 20-24).

The first academic project for the codification of contract Principles of European Contract Law PECL, principles that are thoroughly approached in Draft Common Frame of Reference. As regards their enforcement Article 1:101 of the Principle (PECL) provides: (1) *These Principles are intended to be applied as general rules of the contract in European Union. (2) These Principles shall be applied when the parties have agreed that they are to be included in the contract or when the parties have agreed that their contract be governed by them. (3) These Principles may be applied when the parties: a) have agreed that their contract be governed by "the general principles of law, the "lex mercatoria" or b) have not chosen any law to govern their contract. (4) These Principles may serve as solution to issues arisen which the applicable law system or the rules of law cannot provide.* (This project is the result of the commission known as "Lando Commission", after its chairman Ole Lando, professor at University of Copenhagen. This Commission formed pursuant to the Resolution of the European Parliament for the codification of private law dated 6 May 1994).

Very important to be mentioned is the Draft European Contract Law issued by the Academy of European Private Lawyers from Pavia, Italy (Academy of European Private Lawyers was composed of 160 professors from the most reputed law schools in Europe, under the coordination of the Italian professor Giuseppe Gandolfi. For details, please see L. Pop, quoted title, p. 33).

Also, it is important to underline within this context, at international level, the United Nations Convention on Contracts for the International Sale of Goods issued under UNCITRAL aegis and adopted on 11 April 1980 in Vienna (For an exhaustive approach of the regulation, please see B. Audin, *La vente internationale de marchandises. Convention des Nations – Unies – 11 avril 1980*, L.G.D.J., Paris, 1980, p. 3-8).

Also, at international level, as a formal source of contract law, we note the codification of usages by the International Chamber of Commerce from Paris under the INCOTERMS rules. These rules apply, in general, to contracts for international sale of goods, but nothing precludes the application of these rules to domestic contracts.

<sup>7</sup> For example: French, Italian or German legal system. Please see in this respect: J. M. Smits, *Elgar Encyclopaedia of Comparative Law*, Edward Elgar Publishing, 2006, p. 613.

if such performance is fundamental. Even if some legal systems do not openly apply the doctrine of fundamental non-performance, they do come close to such approach. The reason for this requirement is that, for the defaulting party, termination usually involves a serious detriment.<sup>8</sup> Thus, it results that the seriousness of the loss represents the criterion according to which it is opted for one or other contractual remedy.

In the Romanian doctrine, Professor L. Pop presents this progressive scale of remedies by resorting to the principle *favor contractus*, which is based on the principle *pacta sunt servanda*. The principle of the performance of obligations is the one that establishes the hierarchy of remedies, which is as follows:

- Termination may be invoked only for a significant non – performance;
- The additional period of time granted for performance reflects the interest for safeguarding the contract;
- The inclusion of the default notice mechanism in the termination mechanism;
- The predominance of partial termination.

In case of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) [CISG], the principle *favor contractus* results from the regulation of other remedies and leads to the same conclusion, namely the prevalence of performance with a view to safeguard the contract: the possibility of the buyer to require the performance of obligations (Article 46.1 CISG); the possibility of the seller to remedy any failure to perform its obligations, even after the date set for performance (Article 48.1 CISG) or to remedy the lack of conformity (Article 46.3 CISG); the possibility suggested to the parties to grant an additional period of time for performance (Article 47 CISG for the buyer, Article 63 CISG for the seller), with a view to safeguard the contract through its performance; at last, the adaptation of the contract, namely the prevalence of partial termination (corresponding to a non-essential non-performance) against the total termination (corresponding to an essential non-performance), with the known formula of reduction of the price (Article 50 CISG)<sup>9</sup>.

### **B. Importance of Non-performance of the Contract – Criterion for the Progressive Application of Remedies**

In foreign doctrine<sup>10</sup>, the breach of a contract has been classified according to the criterion of its importance in the economy of the contract as: insignificant breach, simple breach and fundamental breach.

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<sup>8</sup> O. Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, in: *American Journal of Comparative Law* 53, Berkley 2005.

<sup>9</sup> I. F. Popa, *Remedies for non-performance of the Sale-Purchase Agreement from the Perspective of Vienna Convention on International Sale of Goods (I)* in „*Revista Română de Drept Privat*” No. 2/2008.

<sup>10</sup> Roberto Martín Paiva, *Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods (1980)*, 2004, <http://www.cisg.law.pace.edu/cisg/biblio/paiva.html#309>, accessed on 20.11.2014.

An insignificant breach<sup>11</sup> does not give rise even to indemnification, and a claim for compensation or damages on its basis is considered contrary to good faith. Also, such breach does not allow termination even when an additional period of time for performance was granted (Nachfrist).

Also, it is considered that it is a breach of the principle of good-faith if one party does not allow the other party to remedy a minor issue in order to use such insignificant breach as ground for the termination notice<sup>12</sup>.

A simple breach<sup>13</sup> entails the liability of the defaulting party. It is defined in comparison with the other two types of breach; such breach cannot be considered either insignificant or fundamental. A simple breach gives right to damages or other legal remedies, such as the additional period of time or the reduction of the price *pro rata*. It is the most frequent and the most used remedy for a contractual breach.

A fundamental breach<sup>14</sup> implies a breach that creates an economic damage which affects the interests of the aggrieved party in a fundamental, principal, or significant manner. The law does not provide a quantitative measure to identify when a breach is fundamental. However, the idea that the breach must represent the fundament or must be significant implies that the interests of a party are so severely damaged that the aggrieved party is deprived of what it was entitled to obtain by virtue of the contract. Therefore, a comparison between the economic loss and the economic interest envisaged is required.

In any case, an economic loss above half of the economic interest envisaged represents *a priori* a fundamental breach.

The right to terminate the contract is considered the most severe remedy in case of breach and reflects the gravity of the negative effects of the breach or of the lack of conformity of the performance. In order to prevent potential abuses, the aggrieved party may use this remedy only under certain circumstances, without being obliged to use it once the respective conditions are met, as the ICC jurisprudence reflects<sup>15</sup>. The majority of legal systems consider that the most important condition refers to the fact that the breach should be significant. Under the English law, a significant breach of the contractual obligations is required; failure to establish a guarantee is not sufficient; under the French law, the existence of a "severe ground" is required so as the court of law orders the termination of the contract, while under the German law, the breach of a main obligation of the contract is required and not only the breach of an ancillary obligation. The same

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<sup>11</sup> *Ibidem*

<sup>12</sup> Garro, Alejandro Miguel y Zuppi, Alberto Luis, (1990), *Compraventa internacional de mercaderías*, Buenos Aires: Ediciones La Rocca, p. 200.

<sup>13</sup> Roberto Martín Paiva, *Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods (1980)*, 2004, <http://www.cisg.law.pace.edu/cisg/biblio/paiva.html#309>, accessed on 20.11.2014

<sup>14</sup> *Ibidem*.

<sup>15</sup> Award ICC No. 2583, Clunet (1976) 950, and note Derains; No. 3540, Clunet (1981) 915; 7 YBCA 124.

condition is to be found in international normative projects such as PECL or CISG<sup>16</sup>.

The ground of termination is the fundamental breach by a contractual partner and not a simple breach of minor importance<sup>17</sup>.

### **C. Gradual Character of the Application of Remedies starting with the Less Severe up to the Ones that Have for Effect the Cessation of the Contract**

In attempting to perform its obligations, the defaulting party may have incurred expenses, which are now wasted. Thus, that party may lose all or most of its investment. This argument carries great weight in international trade, where goods are sent to foreign markets. When other remedies, such as damages, are available, these remedies will often safeguard the interests of the aggrieved party sufficiently so that termination of the contract be avoided<sup>18</sup>.

The interest to safeguard the contract is met in the majority of legal systems; the explanation is of sociologic nature focused on the protection of the participants to the civil circuit. In this respect, a reputed author<sup>19</sup> of comparative law affirms that "it is in the interest of the society to offer to each party to a contract a reasonable security for the protection of its legitimate interests. But it is not in the interest of society to allow that party to abuse of such protection by using an insignificant breach as pretext in order to circumvent its own contractual obligations."

A basic principle of the civil law requires creditor be indemnified/receive damages for any breach of contractual obligations. Unidroit Principles limit the right to invoke the termination of the contract under a rule which is founded on the principle of safeguarding the contract aimed at favouring the circulation of goods and services; according to this rule, termination is permitted only when a fundamental obligation was breached.<sup>20</sup>

The foreign doctrine considers that a correct application of the principle of safeguarding the contract is made under the provisions of Article 37 and Article 48 CISG, which permit the remediation of a defective performance.<sup>21</sup> Thus,

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<sup>16</sup> Ulrich Drobnig in "General Principles of European Contract Law"; Petar Sarcevic & Paul Volken eds., *International Sale of Goods: Dubrovnik Lectures*, Oceana (1986); p. 328. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/drobnig.html>, accessed on 20.11.2014.

<sup>17</sup> Liu Chengwei, *Remedies for Non-performance – Perspectives from CISG, UNIDROIT Principles and PECL*, <http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html#ch7-12>, accessed on 20.11.2014

<sup>18</sup> Lando, Ole, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, in: *American Journal of Comparative Law* 53, Berkley 2005.

<sup>19</sup> Allan Farnsworth, *Farnsworth On Contracts* 2, 3d ed., Aspen Publishers, New York, 2004, p. 577

<sup>20</sup> Marrella, Fabrizio, *La nuova lex mercatoria, Principi Unidroit ed usi di contratti des comercio internazionale, CEDAM, Tratto di dritto commerciale e di dritto pubblico dell'economia*, Volume 30, Padova 2003

<sup>21</sup> L. Singh, *United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG]: An examination of the buyer's right to avoid the contract and its effect on different sectors*

prevalence is given to safeguarding the contract to the detriment of termination for a minor breach. "CISG contains rules that may avoid the termination of the contract due to minor or technical reasons, allowing the defaulting party to remedy the deficiency of its own performance. Thus, the right to invoke termination is limited to a fundamental breach."<sup>22</sup>

Other remedy refers to the additional period of time granted for the performance of obligations; it is intimately related to termination which represents *ultima ratio* in the hierarchy of remedies for non-performance. Under the Romanian doctrine, the rationale for the additional period of time is as follows: *if the debtor does not perform its obligation by the due date or the obligation is defectively performed, it is normal to draw its attention upon such failure (by a notice) and to grant it a possibility to remedy its contractual conduct (offering an additional period of time for such performance in extension to the contractual term) or, at least, to determine it to motivate or to clarify its contractual position.*

Thus, under the new Civil Code, the additional period of time granted for the performance of obligations has the role of safeguarding the contract as economic and juridical value and to probate indirectly the fundamental breach of the contract.<sup>23</sup>

In ICC jurisprudence, the analysis of the termination under Article 25 CISG determined the arbitral tribunal to affirm that: *"A simple delay does not however constitute a fundamental breach because the seller is usually obliged to fix an additional period of time of reasonable length so that the buyer may perform his obligations. Thus only after the expiry of the additional time for the performance of obligations, the seller has the right to declare the contract rescinded. A delay may however constitute a fundamental breach of contract in particular circumstances, the buyer must be aware of. An excessive omission of the established date, even if no additional period of time is granted, may entitle the rescission of the contract. In particular, this is the case when the buyer gave on the agreed date of delivery a notification to the seller that the deadline has been reached."*<sup>24</sup>

In other ICC case, the delay in the performance of the obligation followed by the definitive refusal to perform such obligation was considered a fundamental breach; the court of law stated that *"this conduct alone constitutes a fundamental breach because it deprived the claimant of what it could expect to receive under the contract"*.<sup>25</sup>

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*of the (product) market*, <http://www.cisg.law.pace.edu/cisg/biblio/singh.html>, accessed on 20.11.2014.

<sup>22</sup> J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Kluwer Law & Taxation Publishers, 1982, p. 65-66

<sup>23</sup> I. F. Popa, *Termination and Rescission under the New Civil Code (II)*, in „Revista Română de Drept Privat” No. 6/ 2010.

<sup>24</sup> ICC Arbitration Case No. 8128 of 1995 (Chemical fertilizer case).

<sup>25</sup> ICC Arbitration Case No. 10274 of 1999 (Poultry feed case).

In case when the aggrieved party grants an additional period of time for the performance of the obligations<sup>26</sup>, it may establish a term whatsoever; however, such additional period of time should be reasonable so as any temptation to benefit from an insignificant delay in order to declare the termination of the contract be avoided. A study of the jurisprudence reveals that the aggrieved party usually grants a short period of unreasonable length. The prevailing opinion among scholars<sup>27</sup> is that the expiry of such period of unreasonable length does not make the notice ineffective, but initiates a period of reasonable length when the obligation can be effectively performed. This view was also confirmed<sup>28</sup> by case law. For example, in a case, the Appellate Court *Oberlandesgericht*<sup>29</sup> stated that the grant of an additional period of time of 11 days to organise carriage by sea is of unreasonable length because it was dependent on the schedule of the ship and the existence of free space for freight. However, the fact that the termination notice was served after 6 weeks, thus extending the initial period, caused the statement to produce its effects. This practice seems usual in the German case law where it was reiterated the following idea: “*the additional period of time established or the performance of the obligation cumulated with the subsequent period after the first period lapsed, when it was expected the execution of the obligation, represent altogether a sufficiently reasonable period of time*”.<sup>30</sup>

Nevertheless, the fundamental breach may have as consequence the most severe sanction, namely the termination. However, it is considered<sup>31</sup> that this is a solution of last resort. Termination must be applied decreasingly, to fewer cases, in order to give priority to the principle *favor contractus*.

Some modern legal systems, such as the German or Scandinavian legal systems or some international instruments such as UNIDROIT Principles, Principles of European Contract Law approach the termination of the contract as the last remedy, which must be ordered only when no other remedies are possible. Legal literature<sup>32</sup> considers that the fundamental aim of these systems of law is to safeguard the contract. The instruments used for safeguarding the contract are: the

<sup>26</sup> Chengwei Liu, *Additional Period (Nachfrist) for Late Performance: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition: Case annotated update (March 2005)] <http://www.cisg.law.pace.edu/cisg/biblio/liu4.html#100>, accessed on 20.11.2014

<sup>27</sup> Robert Koch in *Commentary on Whether the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Articles 47 and 49 of the CISG*, (December 2004); available at: <<http://www.cisg.law.pace.edu/cisg/biblio/koch2.html>>, accessed on 20.11.2014

<sup>28</sup> *Ibidem*

<sup>29</sup> Germany 24 May 1995 Oberlandesgericht [Appellate Court] Celle], <http://cisgw3.law.pace.edu/cases/950524g1.html>, accessed on 20.11.2014

<sup>30</sup> Judgment by Landgericht [District Court] Ellwangen, Germany 21 August 1995; No. 1 KfH O 32/95. English translation by Ruth M. Janal, translation edited by Camilla Baasch Andersen; available at: <http://www.cisg.law.pace.edu/cases/950821g2.html>, accessed on 20.11.2014; Judgment by Oberlandesgericht [Provincial Court of Appeal] Naumburg, Germany 27 April 1999; No. 9 U 146/98. English translation by Jarno Vanto, translation edited by Ruth M. Janal; available at: <http://www.cisg.law.pace.edu/cases/990427g1.html>, accessed on 20.11.2014

<sup>31</sup> Vázquez Lépinette, Tomás (2000) *La compraventa internacional de mercaderías. Una Visión Jurisprudencial*. Navarra: Editorial Aranzadi S.A., p. 117.

<sup>32</sup> P. Huber, *The CISG: A New Textbook for Students and Practitioners*, Sellier, 2007, pp. 181-184



additional period of time for the performance of the obligations, the right of the seller to remedy the defects and, the third instrument, the doctrine of fundamental breach which limits the right to invoke termination.

#### **D. Correlation of this Principle with Other Principles of Contract Law**

As shown in the legal literature, the obligation of acting in good-faith functions as a concept which creates subsequent contractual obligations<sup>33</sup>, in the sense that the obligation to inform, the obligation to cooperate or the obligation of contractual coherence are, all of them, consequences of the principle of good-faith; the fundament of this obligation is represented by the theory of contractual solidarity.<sup>34</sup>

Draft Common Frame of Reference provides under Article III.-1:104 the obligation of the parties to cooperate: “*The debtor and creditor are obliged to cooperate with each other when and to the extent that this can reasonably be expected for the performance of the debtor’s obligation*”. This is considered to be an application of the principle of good – faith. Failure to observe this obligation may be found under the form of the obstruction of the performance of the obligations by the other party.<sup>35</sup> This obligation is found also under Article 5.1.3 of UNIDROIT Principles. The UNIDROIT Commentary regards the contract as a *common project of the parties*, thus each party has the obligation to cooperate. Also, it considers that this obligation is founded on the principle of good-faith for the performance of the contract and is similar to the obligation provided under Article 7.4.8 (*Mitigation of harm*) according to which: “(1) *The non-performing party is not liable for the harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party’s taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.*”

### **3. Existence of the Principle of Gradual Use of Remedies under the Romanian Law**

#### **A. Regulation of the Reduction of Obligations as Mandatory Remedy for the Creditor and the Absence of Rescission in case of Less Significant Breach**

The main criterion for the application of termination is the existence of a severe, significant breach of the contract. This requirement results from the interpretation *per a contrario* of the provisions of Article 1551 par. (1) of the Civil Code, according to which “*the creditor is not entitled to termination in case of less significant breach.*” If the breach does not exceed a certain threshold so as to become significant, in virtue of the provisions of Article 1551 of the Civil Code,

<sup>33</sup> L. Pop, I. F. Popa, S. I. Vidu, *quoted title*, p. 136.

<sup>34</sup> L. Pop, *Performance of the Contract under the Authority of the Contractual Solidarity Principle*, Dreptul no. 8/2011, p. 81 et seq.; A. S. Bourdier-Cuisinier, *quoted title*, p. 433 et seq.

<sup>35</sup> Draft Common Frame of Reference, p. 714.

the creditor cannot invoke termination of the contract, but it shall be entitled to the reduction of obligations or, if not possible, to indemnification<sup>36</sup>.

The significance of the breach must be evaluated on a case by case basis; in principle, it is reduced to the disappearance of the creditor's interest for the specific performance of the obligations or to the vanishing of the economic value of the counter – obligation; these reasons determine the unsatisfied creditor to consider that the performance of the mutual contractual interest, in general, as well as its own individual interest, in particular, is no longer possible and the maintaining of the contract is no longer justified.<sup>37</sup>

The fundament of this remedy (termination / rescission) is represented by the concept of bivalent cause, which characterizes the bilateral contracts, and which, in its turn, is materialized in the reciprocity and interdependency of the obligations arising out from these contracts, associated with the principle of the binding force of the contract.<sup>38</sup>

Therefore, when the obligation of the creditor remains without cause and he considers that the adaptation of the contract is no longer possible, the interdependence which characterises the obligations arising out from the contract, is irremediably broken off.<sup>39</sup>

The parties that intend to protect their interests against the unwanted effects that the absence of specificity of the legal provisions might have, obviously have the possibility to determine, through contractual provisions, what breaches of the contract represent, in their view, a significant breach. In case when a *commisoria lex* is included in the contract, the obligation subsists to provide expressly which failure of obligations triggers the termination of the contract by the operation of law.<sup>40</sup>

The premise allowing to resort to any of these “remedies” is the principle of law which entitles the creditor to a performance compliant with the contract; such principle is ascertained under par. 1 of Article 1516 of the Civil Code, so that the fundamental requirement in order to invoke the “remedies” is represented by a contractual breach. The significance of the breach is of maximum importance as regards the type of remedy that might be invoked.<sup>41</sup>

Only when the breach of the debtor is less significant, the creditor is entitled to reduce its own performance, if, according to circumstances, this is possible. In case it is not possible to reduce its correlative performance, the creditor

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<sup>36</sup> C. Popa, A. Lisievici, *Termination under the New Civil Code (I)*, in "Revista Română De Drept Al Afacerilor" No. 8/ 2012.

<sup>37</sup> I. F. Popa, *Termination and Rescission under the New Civil Code*, Universul Juridic Publishing House, Bucharest, 2012, p. 161-180.

<sup>38</sup> V. Stoica, *Termination and Rescission of Civil Contracts*, All Educational Publishing House, Bucharest, 1997, p. 27; L. Pop, *Treaty of Civil Law. Obligations Vol. II. The Contract*, Universul Juridic Publishing House, Bucharest, 2009, p. 729-730.

<sup>39</sup> Chr. Larroumet, *Droit civil. Tome 3. Les obligations. Le contrat*, Economic Publishing House, Paris, 1998, p. 756.

<sup>40</sup> C. Popa, A. Lisievici, *quoted title*

<sup>41</sup> I. F. Popa, *quoted title*, p. 95.

is entitled only to indemnification for the loss incurred as a result of such breach, as per par. 3 of Article 1551 of the Civil Code.<sup>42</sup>

The legal literature considered that the proportional reduction of the performances is, in reality, a partial termination of the contract. *“The reduction of the performance proportionally with the breach of the other party can only mean that for the part that was reduced and has to be reimbursed or that should no longer be performed, respectively for the part that was not performed by the debtor, the contractual support was rescinded, therefore terminated.”*<sup>43</sup>

From our point of view, the concept of “significant breach” used by the legislator is closer to the concept of “determinant breach”. The performance may be considered “determinant” when it deprives the creditor of what it was entitled to expect from the contract. We share the opinion of the authors above quoted who consider that it is useful to resort to the concept of cause of the contract in order to establish the meaning of “significant breach”.

For the evaluation of the concept of “significant breach”, we believe it is useful to apply both qualitative and quantitative criteria. With respect to the qualitative criterion, as shown above, it is useful to determine the meaning of the concept of “cause” which, in light of the significant, determinant nature of the breach, may deprive the creditor of what it would have been entitled to expect from the contract.<sup>44</sup>

In conclusion, we consider that the breach of certain obligations of less importance within the entire contractual context, will not give right to termination; at most, such breach may give rise to the other subsequent remedy, expressly considered by the legislator, in case of insignificant breach, namely, the reduction of performance.

### **B. The Existence of the Principle of Progressive Use of Contract Remedies under Romanian Law**

Under the Romanian law, the legislator, through the manner of regulating certain concepts, such as the reduction of performances (Article 1551 of the Civil Code), the additional period of time for performance of obligations (art. 1522 C. civ.), the exception of non-performance (Article 1556 of the Civil Code), rescission (Articles 1549-1554 of the Civil Code), made an implicit establishment of the principle of progressive use of contractual remedies.

Legal literature<sup>45</sup> considered that the legislator manifested a preference for some remedies, to the detriment of others; therefore, it was acknowledged the existence of the following hierarchy of contractual remedies:

<sup>42</sup> F. I. Mangu, *Termination, Rescission and the Reduction of Performance - (II) Legal Regulation, Fundament, Area of Application, Rank in the Hierarchy of Contract Remedies, Creditor's Right to Opt, Types*, in „Revista Pandectele Române” No. 2/2014.

<sup>43</sup> I. F. Popa, *quoted title*, p. 272.

<sup>44</sup> B. Oglindă, *quoted title*, p. 434-435.

<sup>45</sup> F. I. Mangu, *Termination, Rescission and the Reduction of Performance - (I) Legal Regulation, Fundament, Area of Application, Rank in the Hierarchy of Contract Remedies, Creditor's Right to Opt, Types*, in "Revista Pandectele Române" No. 1/2014.

- The first rank is held by the additional period of time for the performance of obligations which would lead to the completion, in full, of the contractual interest;
- The second rank is held by the specific performance of obligation, having the same effect as the additional period of time;
- The third rank is held by the remedy of indemnification (performance through monetary equivalent) which would partially lead to the completion of the contractual interests of the unsatisfied creditor;
- The fourth rank is held by the reduction of performance which may ensure both the observance of the principle of proportionality and the immediate performance of the contract;
- The fifth rank is held by the exception of non – performance which, even if it maintains the contract valid, suspends the effects of *pacta sunt servanda* and temporizes the contract
- The last rank among preferences is held by the rescission of the contract, which has the most severe constraints.

Also, it was considered<sup>46</sup> that “*the creditor, as holder of the power to invoke the remedies, in accordance with the principle of proportionality, is obliged to ensure the just measure both qualitative and quantitative.*” The conduct imposed by this hierarchy is in agreement with the principle of contractual solidarity which requires a certain conduct of the unsatisfied creditor according to the significance of the breach.

On the other hand, scholars consider that<sup>47</sup> legislator establishes an option right of the creditor with respect to the remedy it intends to invoke; the single exception to this option right is represented by the termination, which may be invoked “in extraordinary situations, when the breach is significant enough. The exception is justified by the principle *favor contractus, which prevails in this matter*”.

However, the prevailing opinion which we embrace refers to the existence of the principle of the progressive use of remedies; in this respect, with reference to the question whether an hierarchy of remedies exists under the new Civil Code, a reputed author of civil law affirmed that “*The Civil Code does not contain any regulation that convinces us directly about the intention of the legislator to establish an hierarchy of remedies. However, the notoriety of the principle, and, also certain particular regulations, lead us to the conclusion that the new Code favours, directly, the performance of obligations, and that the termination represents an ultima ratio, so that such must be applied exceptionally.*”<sup>48</sup>

From the analysis of the studies in the matter and from the regulations, one may infer the existence of the principle of the progressive use as one related to the

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<sup>46</sup> F. I. Mangu, *quoted title*

<sup>47</sup> V. Diaconiță, *Substantiate Requirements of Termination under the new Civil Cod*, in „Revista Română de Drept Privat” No. 6/2012.

<sup>48</sup> I. F. Popa, *Termination and Rescission of Contracts under the New Civil (I)*, în „Revista Română de Drept Privat” No. 5/2010.

performance of the contract. With reference to its legal nature, from our point of view, it is a general principle of law which may be inferred from the entire legal provisions which regulate the remedies and which, together with the principle of safeguarding the contract, contribute to the formation of two general principles of law in the sense of Article 1 par. 1 of the Civil Code, which from my point of view, the jurisprudence of the coming years may apply precisely on this very ground.<sup>49</sup>

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<sup>49</sup> From our point of view, the general principles of law provided under Article 1 par. 1 of the Civil Code represent a source of law, but not in a formal way, because they are created by the doctrine and the jurisprudence. The same is the case of the principle of progressive use of contractual remedies and the principle of safeguarding the principle, where the aim of the doctrine is to identify them, respectively to infer them from the legal regulations, since they are not expressly provided by the law. If they benefitted from an express regulation, then they would not be applied as general principles of law, but as legal provisions.

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