

Assessment of Recovery of Damages in the New Romanian Civil Code

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Abstract

The subject's approach is required also because, once adopted the New Civil Code, it acquired a new juridical frame, but also a new perspective. A common law creditor who does not obtain the direct execution of his obligation is entitled to be compensated for the damage caused by the non-execution with an amount of money which is equivalent to the benefit that the exact, total, and duly execution of the obligation would have brought the creditor.

Keywords: interest, damages, civil code, juridical responsibility.

1. General aspects on the notion

The stipulation of the concept and market economy, in Art. 135 of the Constitution, leads to the reanimation of the economic relationships which are more and more frequently used through contracts. Signing a contract is considered to be a consequence of at least two contractual partners who express their will and that is why it is also submitted to the principle of good faith, as it is provided in Art. 14 of the Civil Code: "Any natural or legal person must exert her rights and perform her civil obligations in good faith", which is presumed until proven otherwise. Since equality between the two contractual partners is sometimes fictitious, it is deemed that a contractor who would use his economic power, superior ability in order to impose obligations to his partner whose value is to be in disproportion compared to the advantages that the partner would obtain from the contract, situation which would impose the rehabilitation of the contractual equilibrium.

When the contractual debtor performs the labour conscription he owns to the creditor, the obligation will end; if not, the contractual creditor is entitled to ask the debtor for the discharge in kind of the labour conscription he has undertaken according to Art. 1516, par. 1 civil code, which also represents the seat of the complete repair of prejudice, which specifies: *The creditor is entitled to the complete, exact and duly execution of the obligation*. From the legal text is understood that the execution in kind of the obligations implies the execution of the very labour conscription the debtor has undertaken and according to the object considered by both parties, the debtor is unable to replace the object with another type of labour conscription, without the creditor's consent. This principle is line with the doctrine, but also with the settlement of the Civil Code of 1864, where in Art. 1073 was acknowledged the right of the creditor to obtain the exact execution of the obligation, if not he had the right to compensation. According to the new civil code, when the debtor does not willingly execute the obligation provided in the contract, according to Art. 1527, he may recourse to forced execution: *The creditor can always ask for the debtor to be obliged to execute in kind the obligation, except for the case when such a execution is impossible (par. 1), the right to discharge in kind includes, if applicable, the right to repair or replace the good, as well as any other means to remediate a faulty execution (par. 2)*. If the forced execution comprises obliging the debtor to an execution in kind when restoring the parties to the situation prior to the unlawful fact, or the creditor is no longer presenting interest for such a situation, he can obtain an equivalent execution.

In order to repair the damage created by the debtor by not discharging the obligation, the inappropriate or late execution entitle the creditor to ask the repair of the damage called: indemnity, compensation, or recovery of damages, which actually represent the loss he suffered, and the benefit he was deprived of. Both the doctrine and judicial practice define the recovery of damages as being:

compensations in money that the debtor is indebted to pay with the purpose of repairing the damage suffered by the creditor as a consequence of the culpable non-execution of the contractual obligations. The notion does not constitute legislative news of the current civil code, also being included in Art. 1082 in the Civil Code of 1864 which provided: *The debtor is obliged, if appropriate, to pay for the recovery of damages, or for the non-execution of the obligation, or for the delay of the execution, although it is not bad faith, only if he will not justify that the non-execution comes from an unacquainted cause which cannot be imputed to him.*

According to Art. 1534, the legislator introduced a new concept in this material: *The damage imputable to the creditor*, from which results that the compensations under the responsibility of the debtor will consistently diminish if *through his culpable action or omission the creditor contributed at producing the damage*, but also when the damage is partly caused by an enounce whose risk has been assumed by the creditor. Still on the same principle of responsibility, Art. 1533 provides that: *the debtor answers only for the damages he has foreseen or could have foreseen as a consequence of not discharging at the moment of entering into the contract, except for the case when the non-execution is deliberate, or owned to his serious guilt.* By compensating the creditor who has as object an amount of money does not mean transforming the initial obligation into another obligation, but a sanction of the nonexecution of the initial obligation.

2. The terms of liability training

Although the end-point of the liability is constituted by the damage's repair which cannot only be complete, an essential element is represented by finding the damage, through which is understood the activity of establishing the nature, particularity and extent of the direct damaging consequences of a damaging fact, which trains the liability and their financial evaluation. To grant recovery of damages is necessary an unlawful deed, the existence of a damage caused by it, and the existence of the debtor's fault. But only reaching the deadline of the obligation is not enough for the debtor to be late, in a legal sense. The legislator provided in Art. 1522 that in order to produce legal consequences when reaching the term is necessary for the debtor to be formally delayed, which means to be notified by the creditor that his debt is demandable. Although this notification can be made by electronic means: fax, e-mail, mail, the most efficient way of doing it is by judicial executor (Art. 1522, par. 2). In this case, the execution term must be a "reasonable" one, which if has not been established by the creditor can be assumed by the debtor (par. 3).

3. Ways of evaluating the damage

Even if *the contract is the law of the parties*, it remained recognized only in tradition, the spirit of the expression was considered by the legislator since in Art. 969 of the old civil code, and in Art. 1270 of the new civil code is mentioned that those conventions legally concluded by the parties, have law authority. Founded on the principle of contractual liberalism, the Romanian legislator has mentioned in Art. 1538 that the parties of a contract can establish its content as they please, including the debtor's possibility of anticipatory commit himself to a labour conscription which cover the value of the damage suffered by the party which has discharged its own contractual obligations. This accessory-convention inserted in the main contract wears the name of penalty. The notion has its origin in the Roman law, under the Latin name of *stipulation poenae*, but we also find it in the French law, named *clause poenae* and in the English law named *penalty* or *iquidated damages*, having as purpose the execution of an obligation without possibly being conducted by a judge. Holding at the beginning only a comminatory position, the penalty included in it could have been cumulated with the owned recovery of damages to compensate the non-execution of the obligation assumed in the initial contract, for that afterwards to prevail the reparatory function, not being possible to cumulate anymore. The utilisation of this clause on the Romanian territory can be found since the year 131 AD in a contract for

building a banking company, mentioned on one of the wax tablets found at Rosia Montana, penalty which severely and originally sanctioned the attempt to defraud one of the banking companies by the other one, for the stipulated penalty is expressed in a multiplication coefficient and not in lump sum, and in the Roman law.

Judicial evaluation. According to this modality, the value quantum of the sum that the debtor must pay to the creditor as a consequence of the non-execution of the labour conscription it will be established by the court. The legislator set three principles according to which the court will establish the compensations quantum. Thus, the Art. 1531 of the par. 2 provides that: the creditor's damage covers the actual suffered loss, which means the decrease of the creditor's patrimony, caused by non-performing the contractual obligations by the debtor, and the lost benefit, meaning the gain that the creditor would have obtained if the obligation had been executed according to the contract. Compared to the old code, the legislative news Art. 1531 in par. 2 mention that: *At the establishment of the extent of the damage it is taken into account the expenditures that the creditor has made in a reasonable limit to avoid or limit the damage.*

Another principle is the one of repairing the predictable damage, according to which the debtor answers only for the damages he has foreseen, or could have foreseen as a consequence of non-execution when concluding the agreement. The specialists have shown that this principle only applies in the matters of contractual liability, considering that the notion of predictability is only compatible with the contractual activity, which is based on the parties' will.

The last principle, according to which the evaluation of the recovery of damages is to be made by the court, is the one according to which only the direct damage will be repaired, the one which is in causal connection with the fact that generated the non-execution of the contract.

The compensatory recovery of damages – represent financial compensations that the debtors own to the creditor to repair the damage caused by the total or partial non-execution of the contract, or by an inappropriate execution.

The doctrine has decided that the finalization of the compensatory recovery of damages is: the complete repair of the damage caused to the creditor, ensuring his restoration in the patrimonial situation he would have found himself in, if the debtor's obligation had been precisely executed. When the compensatory recovery of damages replace the execution in kind of the contractual obligations, the debtor shall not be obliged to pay compensatory recovery of damages, and to execute in kind the contractual obligations. To give this type of damages is required the necessity of fulfilling the following conditions: a) to exist a viable obligation; b) to exist a created damage; c) the debtor is guilty; d) the debtor is delayed. The moratorium recovery of damages (*mora debitoris*) represent financial compensations owned by the debtor who has to pay them to the creditor for delaying the execution of the obligation. According to the judicial practice, the moratorium recovery of damages do not replace the execution in kind of the obligation taken by the debtor, so that at the same time the moratorium recovery of damages can be cumulated also with the compensatory recovery of damages. To be noticed that the moratorium recovery of damages regard both the obligations in kind and the pecuniary ones.

4. The recovery of damages in contracts

In the market economy context, when everything is sold and bought, we often encounter cases of recovery of damages solicitation as a consequence of *the contract of sale*, in the eviction situation. Thus, in case of total eviction, the buyer is entitled to ask 1. The rescission of the contract pursuant to Art. 1700 of the civil code, according to which the buyer can ask the rescission of the sale if he has been evicted from the total good, or from a big part of it, so that if he had known the eviction, he would not have entered into the contract. In compliance with the Art. 1701 of the civil code, he may ask the refund of the price, meaning that the seller is held to restore the whole price, even if at the date of the

eviction, the sold good's value decreased, or suffered damages out of the buyer's neglect, or out of force majeure. When the buyer obtains a benefit from the damage of the good, the seller can drop the proper amount of money from the price. When the sold good has at the eviction date a bigger value, the seller is obliged to pay the accumulated increase along with the selling price. Both the damage's repair and the restoration of the price can be solicited at the contract's rescission.

With respect to the extent of the recovery of damages owned by the seller, complying with Art. 1702 of the civil code, these cover: 1. The value of the fruits that buyer is responsible to return to the one who has evicted him; 2. The court expenditures effectuated by the buyer during the trial with the one who has evicted him, as well as during the trial of making a claim against the seller; 3. The expenditures for concluding and fulfilling the agreement by the buyer; 4. The suffered loss and the profit not achieved by the buyer due to the eviction.

From Art. 1789, of the civil code, we learn the obligations within the lease contract. Thus, the lessor has the duty to give the rented good to the tenant, and to maintain the good in good condition during the lease, but also to ensure for the tenant peace, and useful running of the good during the whole time of the lease, complying with the code's provisions: *The lessor is obliged to do whatever necessary to constantly ensure for the tenant the peaceful and useful running of the good, being obliged to refrain from anything that could stop, diminish, or embarrass such a running of the good.* Art. 1790 points out the lessor's obligation of guaranteeing the good which makes the subject of the lease against the defects, even if he was not aware of them when concluding the agreement and without being taken into account if they also existed before the contract.

The injunction refers to the hidden defects, whereas the lessor is not responsible for the defects apparently mentioned in par. 2 if the tenant has not denounced them, and they do not prejudice life, health, or physical integrity. Art. 1791 of the civil code, provides that if the lessor does not eliminate the defects in the shortest time, the tenant is entitled to receive a proportional rent decrease, and if the defects bring damages, the lessor may be obliged also to recovery of damages, if he was aware of them.

5. Conclusions

The correct evaluation of the results of the non-execution, of the delayed execution, or of the inappropriate execution of the obligation, is made through a correct analysis of all the regulations in force, and the solving without litigations has been provided by the legislator through penalty as a guarantee of the execution of the debtor's obligation.

References

- Adam, I. (2011). Drept civil. Obligațiile. Contractul, pp. 684, Bucharest, Publishing House C.H.Beck.
Art. 1369, Obligația se va stinge prin plată atunci când prestația se execută de bunăvoie.
Art.1690 of the Civil Code
Bâldea, G. (2000). Clauza penală expresie a răspunderii contractual, in the magazine *Dreptul*, no.2, pp.14.
Culegere de decizii (1963). Tribunalul suprem, pp. 39.
Culegere de Decizii (1975). Tribunalul suprem, pp.234.
Curtea Supremă de justiție .S.com.Dec.nr.661/1995
Deleanu, I. & Deleanu, S. (2003). Considerații cu privire la clauza penală, no.1, pp. 113, in the magazine *Pandectele Române*.
Dumitru, M. (2008). Daunele interese în materia obligațiilor comerciale, pp. 17, Publishing House Hamangiu.
Dumitru, M. (2010). Regimul juridic al dobanzii, oratoria, pp. 177, Bucharest, Publishing House Universul Juridic.

- Ludușan, F. (2014). Clauza penală conexiuni și diferențe, în revista Dreptul, *no. 4*, pp. 95.
- Motica, R.I. & Lupan, E. (2008). Teoria generală a obligațiilor , pp.560, Bucharest, Publishing House Lumina Lex.
- Muresan, M. (1980). Clauza penală, in *Dicționar de drept civil*, pp. 90, Bucharest, Publishing House Editura Științifică și Enciclopedică.
- Piperea , Gh. (2008). Drept commercial roman, *vol.II*, pp.74, Bucharest, Publishing House C.H.Beck.
- Pop, L. (1998). Teoria generală a obligațiilor, pp. 343, Bucharest, Publishing House Lumina Lex.
- Popa, T.R. (1968). Efectul obligațiilor, pp.333, Bucharest, Publishing House Editura Științifică.
- Romano, E. S. (1991). Drept civil, Obligații. *Vol.I.*, pp.242, Piatra Neamț, Publishing House Intelrom.
- Turcu, I. (2008). Tratat teortie și practic de drept comercial, *vol II*, pp. 526, Publishing House C.H.Beck.
- Țuțuianu, I. (2007) Evictiunea în contractele civile și comerciale, pp.7-19, in *Revista de Drept comercial*, *no. 10*, Publishing House Lumina Lex.
- Țuțuianu, I. (2009) Principalele efecte ale contractului de vânzare în dreptul românesc și în dreptul comparat, *no. 8*, p. 11-15, Chișinău, in *Revista Națională de Drept*.
- Țuțuianu, I. (2009). Dreptul afacerilor, Bacău, pp. 68, Publishing House Alma Mater.
- Țuțuianu, I. (2015). Dreptul afacerilor, pp.83, Iași, Publishing House Pim.
- Ursu, V. Contribuția practicii judecătorești la dezvoltarea principiilor dreptului civil român, *vol. II*, p.144.