TRIBUNA DOCTORANDULUI

TOWARDS A COMPREHENSIVE CONCEPT OF TERMINATION OF CONTRACTS

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REZUMAT:
SPRE UN CONCEPT ATOTCUPRINZĂTOR AL REZOLUŢIUNII ŞI REZILIERII CONTRACTULUI

În prezentul articol examinăm accepţiunile termenului rezoluţiunii şi rezilierii contractului, diferitele definiţii propuse de doctrina mai multor jurisdicţii, şi ne expunem în susţinerea tendinţei moderne a unui concept atotcuprinzător al rezoluţiunii contractului.

În mod tradiţional rezoluţiunea şi rezilierea este privită în trei accepţiuni: (1) drept subiectiv al părţii contractante de a declara ori cere rezoluţiunea sau rezilierea; (2) actul prin care partea contractantă declară sau cere rezoluţiunea sau rezilierea şi astfel îşi exercită dreptul subiectiv nominalizat; (3) rezultatul exercitării dreptului subiectiv asupra raporturilor contractuale.

În sensul său de drept subiectiv, dreptul la rezoluţiune este un drept potestativ, întrucât el oferă posibilitatea de a modifica o situaţie preexistentă, şi se exercită prin intermediul unei manifestări unilaterale de voinţă a părţii îndreptăţite.

În teoria clasică a doctrinei franceze şi româneşti, rezoluţiunea este văzută că o ,,sancţiune a neexecutării culpabile" a contractului sinalagmatic, care constă în desfiinţarea acestuia cu efect retroactiv. Rezoluţiunea intervine doar în cazul unei neexecutări culpabile, iar desfiinţarea contractului pe motiv de imposibilitate fortuită nu intră sub incidenţa rezoluţiunii.

Doctrina europeană modernă analizată de către autor acceptă astăzi ideea potrivit căreia rezoluţiunea pentru neexecutare reprezintă un remediu obiectiv pentru neexecutarea obligaţiei, independent de motivele care au determinat-o; şi independent de imputabilitate. Suplimentar, acest remediu există şi fără vreo încălcare, în special în cazurile în care dreptul de rezoluţiune este rezervat prin contract. Autorul conchide că rezoluţiunea este o instituţie funcţională; în fiecare caz ea duce la stingerea raporturilor obligaţionale şi apariţie unui raport de lichidare. Temeiurile rezoluţiunii şi forma de exercitare a rezoluţiunii sunt variate.

De regulă, un doctrinar va defini rezoluţiunea prin prisma unuia dintre temeiurile rezoluţiunii. Această definiţie însă nu va corespunde cu celelalte temeiuri ale rezoluţiunii. Patogenia raporturilor contractuale este prea variată. Totodată, rezoluţiunea poate opera şi fără patogenie, la discreţia unei părţi contractante ce şi-a rezervat dreptul de rezoluţiune ori reziliere a contractului.

Cuvinte cheie: *rezoluţiune, reziliere, contract, sancţiune, remediu, drept potestativ, raport de lichidare*

РЕЗЮМЕ:
К ВОПРОСУ О ВСЕОБЪЕМЛЮЩЕЙ КОНЦЕПЦИИ РАСТОРЖЕНИЯ ДОГОВОРА

В настоящей статье мы рассмотрим понятие расторжения договора, различные определения предложенные доктриной в разных юрисдикциях и выскажемся в поддержку современной тенденции всеобъемлющего понятия расторжения договора.

Традиционно расторжение договора рассматривается с трех различных точек зрения: (1) субъективное право стороны договора объявить расторжение путем уведомления или в судебном порядке; (2) односторонняя сделка, по которой сторона договора, объявляет путем уведомления или требует в судебном порядке и таким образом осуществляет свое субъективное право; и (3) результат

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осуществления субъективного права в отношении договорных обязательств.

В своем значении, как субъективного права, расторжение, по сути, является дискреционным правом, что дает возможность изменять изначально существующую ситуацию и обычно осуществляется путем одностороннего волеизъявления правомочной стороны.

В классической теории французской и румынской правовой доктрины, расторжение рассматривается как «санкция за виновное нарушение» двустороннего договора, которая состоит в его ретроспективной отмене. Расторжение происходит только в случае виновности в неисполнении обязательств, а расторжение договора в силу невозможности, не попадает под определение расторжения.

Современная европейская доктрина, проанализированная автором, поддерживает идею, что расторжение это объективное средство защиты прав при нарушении обязательств независимо от мотивов и вины. Дополнительно, это средство защиты прав существует и без какого-либо нарушения, в частности, когда право расторжения предусмотрено договором.

Автор приходит к выводу, что расторжение является функциональным институтом, в каждом отдельном случае оно ведет к прекращению договорных отношении, а в большинстве случаев к отношению ликвидации. Основания и формы расторжения могут быть различными.

Как правило, исследователь определяет расторжение сквозь призму одного из оснований расторжения. Однако такое определение не будет соответствовать остальным основаниям расторжения. Патогенез договорных отношений является слишком широким. Тем не менее, расторжение может наступить и без патогенеза, просто по желанию одной из сторон, если договор или закон это прямо позволяет.

Ключевые слова: *расторжение, прекращение, договор, санкция, дискреционное право, отношение ликвидации*

Key words: *rescission, termination, contract, sanction, remedy, potestative right, liquidation relationship*

I. Dimensions of termination of contract

Traditionally termination of contract is analysed in three different dimensions: (1) a subjective right of a contracting party to declare termination by notice or ask it from a court; (2) the act by which a contracting party triggers termination by notice or legal action in exercise of its subjective rights; and (3) the result of the exercise of its subjective right in respect of the contractual relationship.

The right to terminate. This right is expressed in many forms such as „right to terminate", „entitled to give notice of termination", „right to ask the termination". For some authors the last two expressions indicate the difference between out-of-court termination (which is declared by notice) and in-court termination (that is ordered by the judge upon application by the entitled party)[1]. In this article we will alternate between these expressions, without given them a particular meaning, which will include out-of-court and in-court termination.

Termination is a right of the creditor[2] explicitly granted by law (in situations such as breach of contract; failure to adjust the contract in case of hardship) or under contract (also called *option to terminate* to indicate the absolute discretion which may be attached to the exercise of this right). It is in this sense that termination is designated as a legal remedy or, in the terminology of Article 11 of the Moldovan Civil Code, an instrument of protection of civil subjective rights.

[1] In Russian law Egorova observes this approach, but criticises it, in the end saying that even where the Russian Civil Code mentions „a right to ask the termination of the contract" the entitled party may also terminate it by out-of-court notice. See Егорова М.А. Односторонний отказ от исполнения гражданско-правового договора. 2-е изд., перераб. и доп. Москва: «Статут», 2010, с. 26.

[2] The term „creditor" is being used here based on the assumption that termination is triggered by a breach of the creditor's contractual right by breach of obligation on the part of the debtor. Hence, the term is not suitable for a general theory of termination law, applicable not only to breach of contract. Moreover, the term may falsely suggest that the contract at hand is a unilateral contract, in which a party is only creditor, and the other is only debtor. In civil law countries termination was devised, predominantly, for synallagmatic contracts, i.e. under which each contracting party holds both the capacity of creditor and debtor. A more precise expression is „party entitled to terminate" or, as Egorova suggests, the „active party" and „passive party" of termination. Whenever we use „creditor" or „debtor" the aforementioned caveat applies.

It has been rightfully observed[3] that this right is exercised on the „risk and peril" of its holder, in the sense that it may be cancelled where a judge, which may be called upon to carry out an *a posteriori* review of whether termination was justified. Some authors go further into this analysis and support that it a prerogative exercised on the risk and peril of its holder is not a true subjective right, whereas a right gives certainty to the person that uses it. The exercise of a right should not expose it holder. Termination by notice justified by breach of contract is therefore, in an opinion, an anticipation of the judgment, and not necessarily the expression of a subjective right.

We do not support the last assertion; varying civil subjective rights are subject to a number of conditions as to substance and procedure, and a judge holds the authority of verifying whether such conditions when met on the date the right was exercised. Thus, termination remains a subjective right.

Civil subjective rights are different from civil liberties[4]: while civil subjective rights constitute a possibility of the active subject to a conduct, within the legal limits, to claim that the passive subject has a corresponding conduct, and, in case of need, to resort to a court for enforcement[5], civil liberties on the other hand are granted unconditionally and afford unlimited possibilities to the holder. Subjective rights are exercised only in the interest of the holder and for purposes which do not breach the law.

From the standpoint of its legal nature this subjective civil right cannot be fitted into the *summa divisio* real right (*jus in rem*) – right of claim (*jus in personam*), but is what often is being called a *potestative right (droit potestatif; drept potestativ)*[6]. This concept owes its origin to German law, in which it is called a formational / transformational right (*Gestaltungsrecht*). Dr. Reinhard Gaier in the *Münchener Commentary to the German Civil Code (BGB)* explicitly attributes the right to terminate to this type of rights whereas its exercise transforms the contractual relationship into a restitution relationship (*Abwicklungsverhältnis*) or liquidation relationship (*Vertragsliquidierungsverhältnis*)[7]. He also characterizes this right as a *temporary right* by virtue of §350 BGB (its correspondent in the Moldovan Civil Code is Article 741).

According to the French author Aurelie Brès, rights which confer to their holder the possibility to acquire another right or to modify a legal situation may not convincingly be allotted to real rights over property or claims against a person[8]. These are called *potestative* rights. The originality of potestative rights resides in their contents and in the way they are exercised. They offer the possibility to modify a pre-existing situation and are exercised by way of the unilateral declaration of the will of a person. The right to terminate a contract is included by the author in this category. The same treatment is given by the relevant author to the right to claim that termination be ordered by a court.

In the Romanian doctrine Ion Negru carried out a detailed analysis of potestative rights on the occasion of its study of a general theory of the right of first refusal (pre-emption right)[9]. He accepts the dominant view that a potestative right is a power by which its holder may exert an influence over a pre-existing legal situation, by modifying, terminating it or by creating a new situation by a unilateral act. Three types of potestative rights are highlighted: 1) rights exercised by conduct (such as usufruct, servitudes, rights under family law); 2) right exercised by way of unilateral legal acts (such as option, first refusal, choice among alternative obligations, right to litigious withdrawal (*dreptul de retract litigios*), heir's option, termination by notice); and 3) rights exercised by legal action in court (e. g. right to ask the relative nullity of a legal transaction; in-court termination; Paulian action and Oblique (indirect) action).

Potestative rights are specific in that the power conferred to its holder to act over a legal situation

[3] Aurelie Brès. La résolution du contrat par denonciation unilaterale. Paris: Litec, 2009, p. 275.

[4] Ibidem., p. 277.

[5] Sergiu Baieş, Nicolae Roşca. Drept Civil: Partea generală. Persoana fizică. Persoana juridică. Chişinău: Î.S.F.E.P. „Tipografia Centrală", 2004, p. 217; Gabriel Boroi. Drept civil. Partea generală. Persoanele. Ediţia 4-a. Bucureşti: Editura Hamangiu: 2010, p. 61.

[6] Marieta Avram. Actul unilateral în dreptul privat. Monografie. Bucureşti: Editura Hamangiu: 2006, p. 159.

[7] Münchener Kommentar zum Bürgerliches Gesetzbuch: BGB. Band 2: Schuldrecht. Allgemeiner Teil: §§ 241 - 432. 5. Auflage. C. H. Beck. München. 2007, p. 2166.

[8] Aurelie Brès. *Op. cit.,* p. 282.

[9] Ion Negru. Teoria generală a dreptului de preemţiune. Monografii. Bucureşti: Editura Universul Juridic, 2010, p. 237 et seq.

generates a state of submission. To use a potestative right means to give full power to one's will without this amounting to an unlawful or immoral randomness. Such a right is, in the end, exercised in the interests of its holder.

The submission relationship is established among the active subjective (the holder of the right) and the passive subject, the latter being under a duty to tolerate the former's interference in its legal sphere[10].

Optional potestative rights, such as the right to terminate a contract, are special in the uncertainty of the legal situation which forms their object, and by the alternative available to their holder. Hence, one of the aspects of potestativity in general and of termination in particular is that it does not require the consent of the person against whom it is to be exercised.

In her analysis the Romanian author Marieta Avram attributes the right to terminate to the class of *extinctive* potestative rights[11].

Further, termination – by its origin – is a contractual right since it is derived from the existence of a contract and the interdependence of contractual obligations.

It may not be assigned without the remaining claims deriving from the underlying contract; a divergent solution would lead to an absurd situation where a person may terminate the contract as assignee, though the restitution effect of termination will be carried out among other parties (as original parties to the contract). But it may certainly be assigned together with the main contract claims as an accessory right. This is reinforced by the traditional rule that an assignee acquires the assigned rights in form and substance as they were held by the assignor.

Finally, the right to terminate by notice must be distinguished from its jurisdictional form of exercise – the right to ask that termination be ordered by the court[12].

The laws that regulate the terms and conditions upon which termination of contract is allowed should be treated as legal provisions which in fact regulate the right of termination and the circumstances in which it arises.

Termination as the destructive act of the entitled party. The act by which the right to terminate is exercised – the declaration of termination – is a unilateral legal act of the entitled party directed to the extinguishment of certain contractual relationships and the triggering of a new, specific legal relationship. In these cases the party is said to have terminated the contact. It is also due to this circumstance that terminate may be called an *extinctive* unilateral legal act[13].

The details of this phase of termination deal with the form in which such declaration must be made; time limitations and other limitations to which the entitled party is subject upon deciding to trigger termination.

*Termination as the result of the exercise of the subjective right***.** The most common meaning of termination is that of the result of the exercise of the right to terminate, i.e. a legal operation of ending of the contractual legal relationship and triggering of a new relationship. It is this result that determines the substance of this legal institutions and separates it from related institutions; it influences the conditions which must be met for this right to be granted by law (considering that termination frustrates the mandatory force of contract, it must not be granted in too easily); and in the end defines its legal nature.

An additional observation should be made. Oftentimes the expression „unilateral termination of contract" („*résolution unilatérale*" in French; „*rezoluţiunea unilaterală"* in Romanian) is used to designate termination. This is a pleonasm given that in many legal systems, including the Moldovan legal system, termination is effected unilaterally. The expression does make sense in those legal systems where termination is traditionally ordered by a court (e.g. in France or Romania). Here the unilateral character lies in the fact that a court order is not needed for a contracted to be terminated by a party alone.

II. Historical Background

Roman law. The right to put an end to a breached contract was not recognized in Rome for consensual contracts, such as a sales contract[14]. It is rightfully observed hence that Roman law was governed by an „iron" rule that a contract may not be set aside[15]. A seller who accepted the price to

[10] Ibidem., p. 243.
[11] Marieta Avram. *Op. cit.*, p. 159.
[12] Aurelie Brès. *Op. cit.*, p. 278.
[13] Marieta Avram. *Op. cit.*, p. 241.
[14] François Terré. Philippe Simler. Yves Lequette, Droit civil: Les obligations, 7e édition. Paris: Dalloz, 1999, p. 585.
[15] Reinhard Zimmermann, The Law of Obligations. Roman Foundations of the Civilian Tradition, Oxford University Press, Oxford, 1996, p. 800.

be deferred could not have asked restitution of the good, and was exposed to purchaser's insolvency. To avoid this risk, Roman jurists resorted to the inclusion in deeds of sales of a clause called *lex commissoria* – which French doctrine ended later on into calling *pacte commissiore* – that entitled the seller, if the purchaser failed to pay the price when due, to terminate the sale contract. The justification of this termination was the parties' prior agreement.

Justinian's Digests give the following account: Lex commissoria. Cum venditor fundi in lege ita caverit: „si ad diem pecunia soluta non sit, ut fundus inemptus sit", ita accipitur inemptus, si venditor inemptum eum esse velit (D. 18. 3. 2.). – *When the seller of the land inserts in the contract the condition: „if the purchase price shall not be paid on said date", the land must be deemed unsold, if the seller so chooses*[16].

The wording of article 1184 of the French Civil Code of 1804 (still in force) – „a resolutory condition is always implied in synallagmatic contract" – demonstrates that the drafters of the code had been inspired by Roman practice, which was largely maintained in the Middle Ages. But the drafters failed to grasp the true origin of the right of termination mentioned in article 1184, treating it as an implied *lex commissoria*, whereas there are significant differences between these. The right to terminate applies in all synallagmatic contracts and may be exercised by either contracting party, while a *lex commissoria* was inserted solely in sales and only for the benefit of the seller. The latter also was triggered automatically, while according to article 1184, a court must decide whether termination is to occur.

Anther pact that could accompany a sale in Rome was *in diem addicatio*, i.e. adjudication at the deadline, which allowed the seller to call upon termination of the sale if, before a due date, another purchaser was offering a higher price; *pactum de retrovendendo* or *repurchase pact*, by which the parties agreed that the seller could have redeem the good, in a certain period, on condition of refund of the price and costs of the sale; *pactum displicentiae* or trial sale, which allowed the purchaser to return the good, in a certain period, if it failed to meet his expectations.

Roman law also recognized in the narrow area of innominate synallagmatic contract a court action based on absence of cause, whose effects were similar to that of modern law in-court termination, and it was called *condictio causa data causa non secuta*, by which a party which performed its obligation in due time may claim its refund if the other party failed to perform the counter-obligation upon maturity[17].

In reality, the idea that a court may order a synallagmatic contract terminated originates in *Canon* rather than Roman law. Canonists shed light on the bond between reciprocal obligations in a synallagmatic contract and have identified the rule that, if a party failed to keep its promise, it forfeits the right to enforce the promise made by the other party: *Frangenti fidem non est fides servanda* (or thee who breaks an undertaking is no longer owed an undertaking). This rule was also used to explain that if a party failed to keep its promise, it not only forfeited counter-performance and allowed the counter-party to suspend it (*exceptio non adimpleti contractus*), but it was also allowed to terminate the contract. Provided that, to obtain this termination, the terminating party was to submit the matter to a court, since only a judge could release it from its own obligations. Thus, the judge was granted a broad decision-making power, taking into account not only the will of the parties, but also their morality and the economic circumstances in which they lied. Depending on the circumstances at hand a judge could have allowed or denied termination, and if it was denied, he would often times grant a period for cure; if he allowed termination, he could concurrently award damages (including ecclesiastic penalties) to benefit of the aggrieved party. Thus to Canonists termination was primarily a *sanction*, the harshest penalty for the guilty contracting party consisting of the loss of the benefit of a concluded contract: a sanction triggered by the breach of an oath, but also applied where the promise was not given under oath, by virtue of the idea that the breaking of a promise is a fraud, hence – a sin.

From French canon law the institution of termination gradually passed onto French civil law. Still its transposition took longer because of a resistance of Romanists who claims that, in particular for a sales contract, classical Roman law remedies should be maintained, i.e.

[16] Римское частное право: Учебник. Под ред. Новицкого И. В. и Перетерского И. С. Москва: «Юриспруденция». 1999, с. 417.

[17] Ion Albu. Drept civil. Contractul şi răspunderea contractuală. Cluj-Napoca: Editura DACIA, 1994, p. 130.

termination to be granted only to the seller and solely if a *lex commissoria* was agreed to by the parties. The jurists of written law (*droit écrit*) regions were particularly fond of the Roman tradition.

In customs law regions of France this aspects was less important, and in the 16th century, under the influence of Dumoulin, have admitted the theory of termination as it was developed in written law regions. French case-law of the time also took over this theory. In the 17th century, Domat mentions a general principle of termination of contract for each time where a reciprocal obligation is breached. The rule, according to him, should equally apply to sales contract; he believes it is useless that, in case of sale, a resolutory condition be implied in order to enable termination; the parties wish for the contract to continue solely where it is properly performed; the idea of cause is therefore placed at the foundation of termination of contract.

This tradition was maintained in the 18th century and Pothier adopted it. He found that in French law, as opposed to Roman law, termination of a sale may be asserted by both purchaser and seller. And to justify it, he avoids the theory of implied resolutory condition, and finds the basis of termination directly in the intent of the parties. „Breach of obligations by the seller or the purchaser entails termination where that which was promised dis so significant that the contract were not concluded without it". A clearer idea of cause therefore arises as foundation of termination.

French Civil Code. How could, after these developments, the drafters of the French Civil Code, which followed Pothier's letter, have treated termination as a resolutory condition, saying that „it is always implied in synallagmatic contracts"? In the chapter on resolutory condition Pothier came back to the matter of termination, and said that it is useless to insert a resolutory condition, because the judge will order termination in any event. The drafters of the French Civil Code, instead of saying that the inclusion of a resolutory condition is useless, said that there is an implied resolutory condition, which are to completely different things.

Thus article 1184 of the French Civil Code, in the way it is drafted, operates with an implied resolutory condition in synallagmatic contracts, and the right of a party deprived of performance to claim termination of the contract is justified by the link between the reciprocal obligations of a synallagmatic contract[18].

No body of law or academic soft law initiatives tend to define what termination is, but rather establish its legal regime or, sometimes, only use the concept of termination when regulating specific types of contracts.

III. Classical doctrine

The absence of legislative definitions and the multitude of scenarios in which termination steps in made room for plenty of academic writings reach as to volume and opinions.

Academic opinions on the legal nature and definition of termination of contract are largely shaped by the provisions of the national law of the relevant author. Two larger trends may be identified. The first, traditionalist trend – promoted by French law and its historical satellites (the Spanish or Romanian system) – lists termination among *civil sanctions* for guilty breach of contract. A second trend views termination in a wider picture, as a *legal remedy* while ignoring the guilt of the obligor as condition to the triggering of the right of termination. The common law and German legal systems are at the forefront of this ideological current; and this trend takes dominance. What follows is a more detailed analysis of both.

*French and Romanian doctrine***,** based on the 1804 French Civil Code and the 1864 now repealed Romanian Civil Code is in close to being unanimous in defining termination of contract for breach as the ending – in principle with retrospective effect – of a contract[19]. It resolves, according to the cited authors, those situations which the defence of non-performance of contract (*exception non-adimpleti contractus*) can no longer resolve. They therefore see termination as a last resort solution to a breach.

Termination is largely seen as a „sanction for guilty breach" of a synallagmatic contract which consists in its retrospective unwinding.

Romanian doctrine of the beginning of the 20th century attributed termination to the class of unwinding of contract (*desfiinţarea*

[18] François Terré. Philippe Simler. Yves Lequette. O*p. cit.*, p. 587.

[19] Ibidem., p. 585; Alain Bénabent, Droit civil. Les obligations, 8e edition. Paris: Edition Montchrestien, 2001, p. 252.

contractelor)[20]. Constantin Hamangiu et al. do not explicitly define termination, but, comparing it with nullity say that „contract may be unwound and for other causes: by the fulfilment of a condition subsequent (condiţie rezolutorie) or by the court, following the claim of a party relying on the breach of obligation by the other party. In these cases, the unwinding of the contract operates by way of termination (*rezoluţiune* sau *reziliere).* [...]" When termination is applied to a continuing contract (such as a lease) called *reziliere* it applies only for the future and has no retrospective effect.

Authors propose the following classification of termination: „termination is *contractual* (where, for instance, a termination clause was included in a lease contract) or *unilateral* (such as the denunciation of a services contract entered into for an unspecified period of time).

Termination can also be conceived for *intuitu personae* contracts, in case of death of a person who personality was considered upon the making of the contract; these are services and works contracts, partnership and mandate."[21]

A more recent Romanian scholarly writing, from the end of the 20th century, represented primarily by Constantin Stătescu and Corneliu Bîrsan, define termination of contract as „a sanction for the guilty breach of a synallagmatic contract, consisting in its retrospective unwinding and re-positioning the parties in their status before the conclusion of the contract."[22] Termination of continuing contract (*rezilierea*) is not defined separately but it is said that they should be distinguished among them. A one-time performance contract is terminated with retrospective effect, while termination of a continuing contract ends the effects of the contracts solely for the future, while the past performances remain unaffected". Similar definitions are supplied by other Romanian scholars.[23]

Valeriu Stoica in its monograph on the subject defined termination, in a strict sense, as an unwinding – either by way of judicial proceedings or conventionally – of a synallagmatic contract, of a one-time performance (*uno ictu*) contract, in case where the obligations undertaken under the agreement are breached, with guilt, which unwinding produces retrospective effects.[24]

The following consequences are therefore drawn by the relevant author: firstly, termination is not an automatic unwinding of the contract, but a judicial decision, as opposed to impossibility of performance of obligations, which leads to either the *ipso facto* unwinding of the synallagmatic contract, or only the extinguishment of the impossible obligation. Secondly, the „unwinding, accompanies by damages" of the synallagmatic contract involves the idea of guilt (*culpa*) because only a guilty breach of contractual obligations may entitle the obligee to seek damages. We observe here that the author confuses termination of contract with the right to claim damages for breach of contract. These rights are however separate.

In a broader sense, for this author termination (*rezoluţiune*) includes both termination in a stricter sense, as well as termination of continuing contracts (*reziliere*).

The traditional approach of Romanian doctrine – based on the provisions of the old 1864 Civil Code, but also legal tradition - was therefore that termination occurs solely in case of guilty breach of obligations, while the unwinding of a contract due to impossibility does not fall under termination.

Constantin Hamangiu[25] mentions termination in its chapter on unwinding of contract, specifying that „the causes of unwinding of contracts are of two types: some have retrospective effect, such that the contract is deemed never to have existed; others have effects solely for the future, such that they stop the effects of the contract from the date when termination occurs, without affecting past performances.

Retrospective causes are nullity and termination of single performance contract*;* to the latter he also ads *exceptio non adimpleti contractus.* Non- retrospective causes include revocation and termination of continuing

[20] Constantin Hamangiu et al. Tratat de drept civil român, Vol. II. Bucureşti: Editura ALL BECK, 2002, p. 530.

[21] Ibidem., p. 542.

[22] Constantin Stătescu, Corneliu Bîrsan. Drept civil. Teoria generală a obligaţiilor, ediţia a III-a. Bucureşti: Editura ALL BECK, 2000, p. 86.

[23] Ioan Adam. Drept civil. Teoria generală a obligaţiilor. Bucureşti: All Beck. 2004, p. 92; Ion Dogaru. Pompil Draghici. Bazele dreptului civil. Vol. III, Teoria generală a obligaţiilor. Bucureşti: Editura C. H. Beck: 2009, p. 151; Liviu Pop. Drept civil. Teoria generală a obligaţiilor. Tratat, Ediţia a II-a. Iaşi: Editura Fundaţiei „Chemarea", 1998, p. 76.

[24] Valeriu Stoica. Rezoluţiunea şi rezilierea contractelor. Bucureşti: Editura All, 1997, p. 15.

[25] Constantin Hamangiu et al. *Op. cit.*, p. 530.

contracts, to which we can also add expiration of a term."

According to Valeriu Stoica, while being based on the idea of guilt or fault, termination of contract is a civil law sanction. This qualification, though correct, fails to fully reveal the true legal nature of termination whereas it is not a *sui generis* civil law sanction, but rather are varieties of contract liability. The author comes to the conclusion that termination constitutes a variety of enforcement of obligations by payment of compensation in lieu of specific performance (*executare silită prin echivalent*), because termination is the „equivalent" of specific performance, where specific performance is no longer possible or of interest to the creditor due to the debtor's fault. The author explains his theory of equivalent by the fact that the creditor received an equivalent in lieu of specific performance, i.e. the right to withhold its own performances or the loss of legal basis for prior made performances, which justifies their restitution.[26]

Even in the case of this doctrine, the term „sanction" remains arguable as long as we accept that termination does not necessarily involve the fault of the obligor[27]. A sanction is a measure to punish a mistake, a deed that is committed with certain guilt. According to Liviu Pop, the occasional absence of the element of guilt from the series of conditions of termination sheds a light of uncertainty over its qualification as „sanction" at least not as part of a general theory that captures the nature of termination in all of its manifestations. The tendency to qualify termination as a sanction is due to the patent influence of Canon law which is at the basis of the ideology of the French Civil Code on the mechanism of termination. In Canon law, termination is a punishment (hence, a sanction) for breach of one's given word (hence, a sin), a breach that consisted in a lie, and hence could not have remained unsanctioned[28].

Italian doctrine[29] critised the theory of sanction based on the following:

- private law, as opposed to public law, is not set up in such a way as to allow sanctions to be applied by one party to the other; one can accept that nullity of a juridical act is, in a certain way, a sanction because it deprives both parties from the benefit of the void contract, because they failed to abide by the norms of the legal order;
- a sanction should be incurred solely by the party which breached the contract; whereas termination affects both parties equally, without discrimination, except that the right of the obligee-victim to seek damages from the other contracting party at fault. Thus, the difference between the victim party and the guilty party is solely that the victim party decides whether termination should occur, and the guilty party is bound to accept it as such. One cannot exclude that the guilty party may also be, in principle, in agreement with termination.

This analysis indeed offers a fair, detailed description of the state of affairs, beyond the appearances of the theory of sanction.

A similar discussion is held in the Russian doctrine. For Karapetov[30] the fact that termination of contract is a form of civil responsibility is only a problem of definition of the concept of civil responsibility. According to the opinion of the reputed Joffe[31], which is dominant in Soviet and modern Russian legal doctrine, civil responsibility is a sanction for breach of a legal rule that entails adverse consequences for the offender by way of his deprivation of subjective rights or the establishment of certain new or additional civil obligations. The form of responsibility which consists in the deprivation of rights may here include termination of contract, as it extinguishes rights.

Karapetov opposes such a definition and especially the solution – that termination is a form of civil responsibility. The incompatibility between civil responsibility and termination, in his opinion, is that fault of the wrongdoing party is a condition of responsibility, while termination is independent of fault. He proposes to define civil responsibility as the sanction applicable at the initiative and in favour of the party that is the victim of a breach, under the form of additional

[26] Valeriu Stoica. *Op. cit.*, p. 30.

[27] Ionuţ-Florin Popa. Rezoluţiunea şi rezilierea contractelor în Noul Cod civil (I). În: Revista Română de Drept Privat. 2010, nr. 5, p. 107.

[28] François Terré. Philippe Simler. Yves Lequette. *Op. cit.*, p. 586.

[29] Gianluca Sicchiero. Il Codice Civile. Commentario. La risoluzione per inadempimento. Artt. 1453-1459. Milano: Ed.: Giuffrè, 2007, p. 40.

[30] Карапетов А.Г. Расторжение нарушенного договора в российском и зарубежном праве. Москва: «Статут», 2007, с. 152.

[31] Иоффе О.С. Обязательственное право. Москва: Юридическая литература, 1975, p. 97.

proprietary burdens incumbent on the wrongdoer, reflected through the loss by the wrongdoer of certain proprietary values[32]. In such a definition, termination and civil responsibility are distinct concepts

He is supported by M.A. Egorova[33] which finds in the Russian Civil Code[34] a number of cases when the unilateral right to refuse the performance of the contract, which is not connected to breach of contract by the counter-party. In these situations the refusal may not be qualified as a sanction since the counter-party is well performing; rather it should be qualified as a civil measure of protection of the legal interests of the party entitled to such a refusal.

In the Romanian doctrine Marieta Avram shows that a declaration of termination is a juridical act which, in order to produce its extinctive effect, must be exercised only where the general conditions of civil responsibility are met[35].

For Sergiu Mămăligă, termination on account of faulty breach of contractual obligations is a form of civil responsibility. Thus, in such a case, the creditor may, under the general rules of contract responsibility, claim either specific performance of the obligation with delay penalties, or the indirect specific performance (damages in lieu of specific performance). However, depending on the conditions of each case at hand, any of these two solutions may prove disadvantageous for the party which performed or tendered its performance. It would be unfair for a creditor to maintain the contract if the other party were to be held insolvent or, even here solvent, if, because of the delay in performance, the creditor would lose interest in receiving the relevant performance. In all of these situations, the safeguard of fairness is not possible simply by applying the general rules of civil responsibility, but via termination of the contract. Any of these special forms of contract responsibility allows a party to terminate and, consequently, recover all past performances. By recognizing such party's entitlement to choose between specific enforcement and unwinding of the contract by way of termination, the lawmaker reached a natural balance between the binding force of contract, the principle of specific in-kind performance and protection of good faith and fairness in the law of obligations. A logical conclusion, according to the quoted author, is that termination for fault is a variety of damages in lieu of specific and thus a form of civil responsibility[36].

IV. Modern trends

In its extensive monograph dedicated to termination for breach[37] the French author Thomas Genicon sees in the institution at hand an original technique of destruction of the contract. It is original and must not be confused with other institutions which lead to the end of an agreement. Supporting the idea, enshrined in French scholarly writings, that termination is a „sanction", he compared it with the English term „remedy", which gains popularity, and concludes that the term remedy is broader and more precise. Apart from the strict meaning as penalty, the term sanction designates, in a broader sense, an instrument of protection of the subjective right, which gives him force and ensures efficacy. The author thus suggests that termination can also be seen as a potential sanction for breach of contract due to impossibility. We note here that traditionally the French doctrine breach due to impossibility (i.e. outside any guilt of the debtor) does not entail termination of the contract, but only its extinguishment due to impossibility (the theory of the risk of the contract).

The same author compared two views on termination: an objective view – the objective disappearance of the contract as established by the judge; and an objective view – termination is a decision, either of the contracting party or of the judge by which both parties are released from obligations that were once binding upon them. He supports the subjective concept for French law. The analysis is useful in that it shows termination as a right, an option of the contracting party.

A revelatory opinion is expressed by the French author Rigalle-Dumetz saying that *termination of contract does not exist*[38]. If

[32] Карапетов А.Г. *Op. cit.*, p. 155.

[33] Егорова М.А. Односторонний отказ от исполнения гражданско-правового договора. 2-е изд., перераб. и доп. Москва:Статут, 2010, с. 14.

[34] Codul civil al Federaţiei Ruse. Partea I din 1994 şi Partea II din 1995.

[35] Marieta Avram. *Op. cit.*, p. 254.

[36] Ibidem., p. 200.

[37] Thomas Genicon, La résolution du contrat pour inexécution. Thèses. Tome 484. Paris: Ed. L.G.D.J., 2007, p. 11.

[38] Thomas Genicon. *Op. cit.*, p. 42.

termination was triggered, it must be understood that it has an effect solely on the obligational relationship stemming from the contract, but does not the contract itself – understood as a mere agreement previously reached by the parties – which remains unaffected. This approach is being picked up by Italian and French scholars.

In this opinion, where a contract is made, the parties' agreement generates a new legal rule whose primary subject-matter is the creation of a new obligational legal relationship. The mandatory force of contract must therefore be understood as the submission by the parties to the law so created, a law which organizes their legal relationships and is the source of the obligations among them. Thus, the author concludes that termination does not affect a contractual legal rule, but only its obligational effect. Only the obligational relationship is affected thereby. It would thus appear is a false concept. The contract lives on in spite of termination of some of the obligations.

The merit of this theory is that finally gives an answer to the multiple practice questions raised in respect of the effect of termination; in particular, it explains why, despite the contract being terminated the party at fault continues to owe contractual damages to the other party. This is why some clauses of the contract remain binding after termination takes effect.

In other words, termination does not affect all contractual relationships, but solely those compromised by the breach.

The contract – sometimes call the grand coordinator of the relationship – remains intact, and the obligational relationships (being the sole which may be terminated) are maintained or extinguished depending on whether a breach affected the balance in that specific relationship; the extinguishment of one of the relationship will not necessarily lead to the extinguishment of the other relationships arising under the same contract. Though it is traditionally sought that the legal effects of termination are measured time (i.e. retrospective effect, *ex tunc*, or with effect for the future, *ex nunc*), it can be observed that it is in fact measured in scope: it is not that a period of time remains unaffected, but a part of the contractual relationship is maintained.

This approach is not found in any existing body of law of those principal legal systems that we had examined. All civil codes speak about „termination of contract". The most recent European soft-law initiative, the Draft Common Frame of Reference (DCFR)[39], has however adopted this approach completely. Instead of using „termination of contract" it refers to „termination of contractual relationships" (in French, „resolution") defined as the termination of the contractual relationship in whole or in part and „terminate" has a corresponding meaning. Article III. – 3:501(1) DCFR specifies that the Section on termination applies only to contractual obligations and contractual relationships.

According to Thomas Genicon this theory, as seducing as it may be, does not escape criticism. It is not really sure if termination affects only the obligations created by it, and not the contract itself. First of all, the simple extinguishment of obligations is insufficient; it does not explain the restitution of past performances. We believe this criticism is valid in the specific context of the French legal system – where the contract itself transfers ownership and other *jus in rem*. Ownership returns to the seller only if we find that the contract not only ceased, but was unwound, thus its effect of transfer of ownership would also unwind retrospectively (*ex tunc*).

French doctrine recognizes that this logic (i.e. critique) does not apply on those legal systems where the transfer of ownership is not dependent solely on the conclusion of the contract, but also by some subsequent formalities. The classical system here is the German legal system, where by virtue of the separation principle (*Trennungsprinzip*) and the abstraction principle (*Abstraktionsprinzip*) ownership is not transferred by virtue of the contract alone. The contract merely obligates a party (e.g. the seller) to transfer ownership of the property to the other party, which does not automatically acquire it. For transfer of ownership, another contract needs to be entered into, one that transfers ownership from a party to the other. For movable property, it would normally be deemed concluded upon transfer of

[39] The Draft Common Frame of Reference represents a landmark in legal scholarship on European legal history and comparative law. The study is commissioned by the EU itself, and will form a central part in all future discussions of legal harmonization within the EU. It was issued in 2008 by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). See Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR). Outline Edition. Dieter Fuchs Stiftung, Dissen, 2009.

possession. Though not completely clear on the theoretical side, this seems to also be the approach of Article 321 of the Moldovan Civil Code, which separates, as a matter of principle, the making of the contract from transfer of ownership. Hence, for these legal systems restitution of ownership is not explained by the retrospective unwinding of the contract (*ex tunc*), but rather by the establishment of a new positive obligation to retransfer ownership. Up to then, the possessor is also an owner and incurs all costs and risks related to it.

The second objection raised to this theory is that it does not resolve those relationships which occur in continuing contracts and which have not been breached, but rather properly performed. The critics find that the theory is more often one of temporary, but irreversible, suspension of the contract, than one of extinguishment of obligations.

Our view is that this theory must be given credit. The extinctive effect of termination cannot be denied, and we find that in the Moldovan legal system it is not necessary to resort to the concept of retrospective unwinding of the contract (*ex tunc*), which, in substance, is a contract that was in fact made.

If we are to accept this theory, we should recognize that the words „termination of contract" is an ellipse (just like „breach of contract" is) and a more pure wording is „termination of contractual relationships" (respectively: „breach of contractual obligations "). This also corresponds to the intent of the parties that terminate a contract – to release themselves from obligations and not to destroy the original agreement among them.

A hesitation here is that, though the theory properly displays termination from the stand point of its mechanism of functioning and its effects, what remains unanswered is the purpose of this mechanism – is it used a sanction, remedy or something else?

An Italian doctrine asserts that[40], an examination of the mechanism of termination in terms of its functionality shows that its central aspect consists simply in the possibility to put an end to the contract where the exchange of performances cannot be effected because of a breach that is economically relevant to the interests of the victim party, but not as a sole remedy, since the entitled party may decide to maintain the contract.

It is widely accepted today in Italian doctrine that termination is an **objective remedy** for the breach of obligations, independent of the motives that stood behind it; regardless of immutability or fault, or the conduct of the party whose obligations were breached[41].

Relying on Article 12 of the Russian Civil Code, Russian doctrine[42] does not hesitate to qualify termination as a means of protection of civil rights (*способ защиты гражданских прав*). In light of this view, and considering the similar provisions of Article 11(j) of the Moldovan Civil Code, under which the unwinding of a legal relationship is a means of protection of civil rights, we find that termination should indeed be treated as an objective remedy. This since Article 11 does not impose the existence of fault of the wrongdoer to protection of civil rights, even those rights violated without a fault should therefore be protected by the legal order.

Moreover Karapetov[43] places in-court termination in the category of jurisdictional forms of protection of rights, while out-of-court termination in the category of methods of self-defence of civil rights, in the subcategory of methods of operative reaction (*мера оперативного воздействия*). We believe this analysis to be trustworthy but its applicability under Moldovan law creates certain inconveniences. Article 13 of the Moldovan Civil Code, while regulating self-defence, establishes that is may be used by the victim only if the help of law-enforcement authorities may not be obtained. This condition contradicts the very substance of out-of-court termination.

Recently, due to the influence of soft law instruments (such as the UNIDROIT Principles, European Principles of Contract Law and the Draft Common Frame of Reference), Romanian doctrine started to accept the concept of „remedy", of which termination forms a part.

Recent Romanian doctrine[44] considers „immune„ and more objective the qualification

[40] Gianluca Sicchiero. *Op. cit.*, p. 50.

[41] M. Cristina Diener. Il contratto in generale. Seconda edizione. Milano: Ed.: Giuffrè, 2010, p. 832.

[42] Карапетов А.Г. *Op. cit.*, p. 151.

[43] Ibidem., p. 159 - 160.

[44] Ionuţ-Florin Popa. *Op. cit.*, p. 107.

according to which termination is an original technique of unwinding of the contract, as promoted by some recent French scholarly writing[45]. As Thomas Genicon puts it, termination for breach is an „original technique of destruction of the contract".

According to the Romanian Ionuţ Florin Popa[46], although modern codifications abandoned the traditional terminology of the continental legal system of calling the possibilities that a creditor has at hand in the event of breach of the contractual obligations, calling them instead remedies, the new Romanian Civil Code keeps a neutral stance and prefers not to call them as such. In general this code refers to „rights of the creditor" in case of breach, but that after that calls them remedies, so that in the end it would call them „enforcement of specific performance" („executare silita în natură") (Article 1527 - 1529 of the new Romanian Civil Code). The author concludes that, from a technical standpoint, termination represents, together with the other means of protection of the creditor in case of breach, *remedies* and prefers to call them as such.

He continues by viewing termination as a *cause of ending of the contract* and establishes that, as a matter of principle, this position is consistent with the provisions of the new Code.

The Spanish scholar Manuel Albaladejo[47] treats termination upon the initiative of a party in the chapter on *extinguishment of contracts* (besides nullity and termination by mutual agreement). Hence, he states that the extinguishment of the contractual relationship is based on the will of only one of the parties when it ends upon the request of the entitled party. This „faculty" may stem from the law or can be granted by the contract; it can be granted to one of or both parties; it can be granted without any reason or after meeting certain conditions.

The effects of termination may vary, as the case may be, and according to these, the terminology used to designate the disruption of the contractual relationship by one of the parties. Thus, in Spanish law one can speak of *revocation* (*revocación*) for donation; termination (*resolución*) for sale and purchase; rescission (*resción*) in case of unfair advantage; denunciation (*denuncia*), etc. In reality, says the author, all these terms converge in the concept of destruction, based on the will on one of the parties (which differs from the termination agreement – *mutuo disenso*), of the contractual relationship in case if it was validly formed (which distinguishes it from its disappearance on account of *nullity*) that leads to the ending of the legal effects of the contract.

German doctrine supports that, apart from the contract disappearing by way of normal performance, it may end by the parties' agreement (*contrarius consensus*): in this case the contracting parties revoke what they have done before – *Aufhebungsvertrag* – and agree whether this disappearance refers solely in respect of future performances or whether past performances would also be affected[48].

In the German legal system the contract may disappear by the unilateral will of the parties and there are two legal institutions enabling it:

- termination (*Rücktritt*) – which is characterized by the ending of the rights and obligations arisen from the contract (to the extent not performed) and the establishment of a new legal relationship directed to the restitution of past performances;
- rescission (*Kündigung*) – usually does not affect past performances.

The termination right may be based on a contractual stipulation (in which case there is conventional termination – *vertragliches Rücktrittsrecht*), or on a legal provision (*gesetzliches Rücktrittsrecht*).

The legal regime of termination has made the object of a reform with the implementation of the German Law on the Modernisation of the Law of Obligations dated 10 November 2001[49], which modified the German Civil Code (BGB)[50]. The Draft Moldovan Civil Code[51] and, hence, the new Moldovan Civil Code, have largely taken over its texts in respect of termination.

The reputable *Russian* scholars Braginsky and Vitryansky do not actually define termination

[45] Thomas Genicon. *Op. cit.*, p. 11.

[46] Ionuţ-Florin Popa. *Op. cit.*, p. 133.

[47] Manuel Albaladejo. Compendio de Derecho civil, Edition 12. Madrid: Edisofer s.l., 2004, p. 227.

[48] Michel Pédamon. Le contrat en droit allemand. Paris: L.G.D.J., 1993, p. 165.

[49] German Law on Modernization of Law of Obligations (SMG) dated din 10 November 2001 (in force as of 1 January 2002).

[50] BGB – the German Civil Code as of 1896.

[51] Proiectul Codului civil al RM. În: Drept moldovean. 2002, nr. 1, p. 1 - 451.

(*расторжение*), but only find that it has a large scope of application[52]. In their view, termination occurs both due to breach of obligations, either faulty or not, as well for other reasons, such as hardship, denunciation in *inuitu personae* contracts or revocation of donations. All these are treated by the authors as termination cases. Moreover, termination is not treated as a form of civil responsibility.

As in the old Soviet Moldovan Civil Code in force up to 11 June 2003[53], in the Russian system no distinction is made between termination of contracts of single performance contracts and termination of continuing contracts.

Somenkov defines termination as an act directed towards the ending of the force of a breached contract (or o a continuing contract), ending for the future the obligations arising from it[54]. Meanwhile Karapetov[55] admits that out-of-court termination is a unilateral act since it meets of all elements. This approach, in our view, is the product of confusion between the termination and the declaration of termination, the latter being indeed a unilateral juridical act. The way in which the discussed institution is put into effect is not a conclusive indicator of its true and profound legal nature. The theory also cannot be applied to all forms of termination, including in-court; it is therefore unsatisfactory.

Finally, according to the Russian Kamenetskaya the concept of termination has two meanings: *juridical fact* that leads to the ending of the contractual obligational and *legal relationship* among the parties to the terminated contract[56].

In conclusion, in Russian law termination is understood in its broader sense, and it applies to both a breach, hardship, as well as, where it is allowed by law or contract, independent of any breach.

CISG. As the commentators of the UN Convention of the Contracts for the International Sale of Goods dated 11 April 1980 („**CISG**"), Fritz Enderlein and Dietrich Maskow, tell us, the term „avoidance", used in lieu of „termination", denotes an early end in a neutral form. Terms like „termination" or „withdrawal", which have a defined meaning in the national legal language, are deliberately omitted. It is stressed in this way that the CISG has developed an original concept of putting an early end to the contract.

They proceed on the assumption that the right to avoid the contract applies irrespective of the cause of the respective breach of contract, hence also in the event of impossibility. But also those, who through the national law want to include an automatic early termination of the contract by virtue of law, believe that an analogous application of „certain provisions" of this section is possible in the matter.

They further believe that that the section of CISG relative to the effects of avoidance does not only apply to legal but also contractual rights of avoidance. This goes also for functional equivalents like the right to withdraw from a contract. However, where terms other than those of the CISG are used, it is to be examined with particular care whether because of the ideas which the parties usually have in regard to the former, certain rules of the CISG have to be regarded as having been abrogated or modified[57].

In the opinion of the commentators of the CISG, avoidance means the ending (*terminación*) of the juridical act by the will of one party[58]. The author makes a relevant observation: „one must admit that the concept of avoidance, as it is treated in the CISG, is both ample and generic as compared to the meaning given to the same concept in many other legal systems, because it does not have a uniform meaning in all systems. Thus, in French law it is known as „condition résolutoire" in „contrats synallagmatiques", in

[52] Брагинский М.И., Витрянский В.В. Договорное право: Общие положения. Москва: «Статут», 1998, с. 349.

[53] Codul civil al R.S.S. Moldoveneşti. Aprobat prin Legea R.S.S. Moldoveneşti cu privire la aprobarea Codului civil al R.S.S. Moldoveneşti din 26 decembrie 1964. În: Veştile Sovietului Suprem al R.S.S. Moldoveneşti nr. 36 din 1964 (abrogat).

[54] Соменков С. А. Расторжение договора в одностороннем порядке. В: «Государство и право». 2000, № 4, с. 42.

[55] Карапетов А.Г. *Op. cit.*, p. 160 - 161.

[56] Каменецкая М. С. Права и обязанности участников договора при его расторжении. В: «Законодательство». 2004, №1, с. 37.

[57] Fritz Enderlein, Dietrich Maskow. International Sales Law. United Nations Convention on Contracts for the International Sale of Goods. Convention on the Limitation Period in the International Sale of Goods. A Commentary. New York: Oceana Publications, 1992, p. 339.

[58] María Clara Cabrera Orjuela. Diego Ricardo Galán Barrera, Comentarios a la Ley 518 del 4 de agosto de 1999, aprobatoria de la Convencion de las Naciones Unidas sobre los contratos de compraventa internacional de mercaderias. [On-line]: http://www.cisg.law.pace.edu/cisg/biblio/cabrera-galan.html. (Vizitat la: 09.09.2012).

Spanish law „condición resolutoria, „resolución de la venta" (avoidance of sale) and „rescisión de los contratos" (rescission of continuing contracts), in Italian law „risoluzione del contratto" (avoidance of contract), „clausola risolutiva espresso" (explicit avoidance clause), „risoluzione del contratto della vendita" (avoidance of sale contract), an in the common law „rescission", „termination of a contract", „discharge by breach" and „avoidance of contract".

The Russian scholar Ovechkina finds that the substance of the concept of avoidance of contract in the CISG consists in it being a means of legal protection of a right (*правозащитный характер*)[59]. On one hand, by declaring termination, the injured party releases both itself and the counterparty from contractual obligations, and, on the other hand, may claim recovery of all past performances.

Another definition is that avoidance under the CISG is the premature ending of the contract where the other party breached it[60].

Finally, in another opinion avoidance under the CISG consists in the retrospective unwinding of a contract for international sale of goods with single performance, at the initiative of a party, following the breach by the other party of its obligations for causes imputable to it[61]. Considering the arguments brought by Fritz Enderlein and Dietrich Maskow this definition cannot be accepted simply because it is based not on the text of the UN Convention, but on the texts of the French and Romanian national legal doctrine.

Moldovan law. A fist definition express in the examination of the nullity of juridical acts is that of authors Sergiu Băieşu and Nicolae Roşca[62], according to which termination (*rezoluţiunea*) is „civil sanction which unwinds retrospectively a juridical act, the motive being the guilty breach of an obligations under a contract of single performance". Rescision (*reziliere*) is defined as a „sanction that unwinds for the future the synallagmatic continuing contract (a lease) as a result of the guilty breach of obligations by the other party. [...] The difference between these two types of termination, find the author are that the first one is retrospective, while the second does not unwind the legal effects that have already arisen, but rather is effective solely in the future." A similar view is taken by Dorin Cimil and Inesa Poiras[63], as well as by Aurel Baieşu[64].

These definitions are in principle consistent with the Romanian scholarly definitions and above authors in fact refer to Romanian legal doctrine issued under the old Romanian Civil Code.

It is our view that it is inappropriate to determine termination under Moldovan law, whose legal regime is governed by completely different provisions.

The Moldovan scholar Nicolae Eşanu[65] also views termination as a retrospective unwinding of single performance contract (*uno ictu*) in case where one of the parties fails to perform its contractual obligations. Therefore, the author supports, by means of the termination declaration the contract ceases to produce effects as from the date of its conclusion, and third party acquirers of the goods will also be affected by termination under the principle *resoluto iure dantis…*[66]. Rescission (*reziliere*) as the other form of termination is understood a legal sanction that steps-in in case of breach of a continuing contract and consists in the ending of legal effects of the contract for the future.

These definitions constitute an evolution in that they exclude fault as a condition to the triggering of the right to terminate, whereas the author himself finds that fault is irrelevant[67]. Otherwise, he adopts the classic approach.

While distinguishing termination from *revocation*, he indicates that, as opposed to termination which intervenes in case of breach of contract by a party, for revocation to apply there is no need for there to be a breach of contractual

[59] Овечкина О. О некоторых вопросах расторжения договоров международной купли-продажи. В: «Вестник». 2003, № 10, с. 115.

[60] Richard Speidel. Buyer's Remedies of Rejection and Cancellation under the UCC and the Convention. In: The Journal of Contract Law. North Ryde NSW, Australia, 1993, nr. 6, p. 131.

[61] Lilia Gribincea. Rezoluţiunea şi rezilierea contractului comercial de vânzare-cumpărare internaţională. În: RND. 2002, nr. 5, p. 40.

[62] Sergiu Baieş. Nicolae Roşca. *Op. cit.*, p. 217 - 218.

[63] Dorin Cimil. Inesa Poiras. Rezoluţiunea, rezilierea şi revocarea contractelor civile. În: RND. 2004, nr. 5, p. 28.

[64] Baieş S. et al. Drept civil. Drepturile reale. Teoria generală a obligaţiilor. Ediţia a II-a.Vol. II. Chişinău: Î.S.F.E.P. „Tipografia Centrală", 2005, p. 381 - 382.

[65] Comentariul Codului civil al Republicii Moldova. Vol. II. Chişinău: Arc, 2006, p. 337.

[66] Ibidem., p. 348.

[67] Ibidem., p. 339 and 341.

obligations[68]. We believe that this is only in part true, since there are situations where a party is granted under law a right of termination that is not justified by some sort of breach of obligations, but is based on the mere discretion of a contracting party (for example, the right that any party to a lease agreement of an undefined period has to terminate the agreement without reasons, under the terms of Article 905(1)). Also, while establishing a contractual termination right, the parties may set a triggering event that is not necessarily a breach (for example, the termination of a residential lease upon the event that the landlord's son returns into the country and needs a residence) or even without reasons.

According to Sergiu Mămăligă[69], for the purposes of the Moldovan Civil Code „termination" the unwinding of a validly concluded contract as a result of the breach of the obligations inuring to one of the parties, regardless whether the breach is faulty or is determined by a circumstance for which the obligor is not accountable. Further, the author recognizes that, in the system of the Moldovan Civil Code, the term termination includes, apart from unwinding of a contract base on its breach, faulty or not, of a party's obligations, the unwinding of a contract due to change in circumstances that existed upon the conclusion of the contract (*hardship*), if the adjustment to the new conditions is impossible or may not be imposed on one of the parties (Article 623(5))[70].

Termination in the form of rescission is defined by the author is an ending with effects for the future (*ex nunc*) of a continuing contract, and analyses it in two perspectives:

- firstly, it is the same as standard termination of contract except that it applies to continuing contract (Article 747(1));
- secondly, termination is used in respect of the unwinding of a continuing contract by way of the unilateral declaration of a party (discretional), granted by law or by a clause. He says this use of the term in the following articles of the Moldovan Civil Code: Article 866 (gratuitous use contract), Article 905 (1) (lease contract), Article 942 (contract for works and provisions of services), Article 974 (services contract), Article 992 (transportation contract), Article 1072 (commission contract), Article 1143 (tourist services contract), Article 1176(2) (franchising contract), Article 1183(1) (mediation contract), Article 1233(1) (current bank account contract), Article 1242(3) (bank loan contract), Article 1352 (1) and (2) (partnership contract).

Nevertheless the said scholar concludes that „*the lawmakers understand by termination virtually any type of ending of validly concluded contract*."

This finding is not however completely precise since in this broader definition certain events may be included which are external to the parties and the will of either of them (such as for example the expiration of a continuing contract) or the end of the contract due to the proper performance by both parties of their obligations under it. These circumstances may certainly not be attributed to termination of a contract.

The merit of these considerations is that a distinction was made between termination in a strict, classical sense, and its broader meaning, to which we subscribe:

- in a *stricter sense*, in the meaning of the French legal doctrine, termination designates a sanction for the breach of contractual obligations by a party by which the other party puts an end to the contract, and both parties are bound to restitution of past performances and profits; and
- in a *broader sense*, in the way it is utilized in the Moldovan Civil Code, any ending of a validly made contract upon the initiative of one or both of the parties before its complete performance.

V. Conclusion

Termination is a functional institution; in each separate case it leads to the ending of the contractual relationship and, in most cases – a liquidation relationship. The grounds for termination and the form in which termination occurs are varied.

Most often a scholar would define termination through the lens of one of the legal grounds for termination. Such a definition would not however be suitable in respect of some other legal grounds of termination. Contract can fail in too many ways. Moreover, termination may intervene without any failure, but simply at a party's discretion where the law or contract allows this

[68] Ibidem., p. 337.

[69] Sergiu Mămăligă. Rezoluţiunea, rezilierea şi revocarea contractului. În: Ghidul judecătorului în materie civilă şi comercială a Republicii Moldova. Instituţii selectate. Chişinău: Rolsi Media SRL, 2004, p. 197.

[70] Ibidem., p. 198.

explicitly.

A first conclusion would thus be that termination is a concept which is better off left undefined, instead of running the risk of not devising a sufficiently appropriate comprehensive definition, or to develop several definitions for each ground and form of exercise of such a right of termination.

Whereas we find it useful to develop, in the long run, a general theory of termination, we would support that part of the modern legal doctrine which determines termination as a functional legal institution, *id est* as an instrument of ending of contractual relationships and the liquidation of a contractual relationship usually because of some failure or pathogenesis.

A more comprehensive concept of termination is particularly necessary whereas in many legal systems, apart from termination of a contract of breach, various similar concepts had been devised for various other types of ending of a contract, such as rescission, revocation, denunciation, renunciation, withdrawal, and linguistic equivalents in the languages of other jurisdictions.

While termination may have a sufficiently developed legal regime (grounds, way of exercise, legal consequences), many of those similar concepts do not. A general theory of termination would tend to capture those as part of a more comprehensive concept of termination and would provide a good legal basis to parties in determining their rights and obligations, and to judges in resolving related disputes.

A beginning of such a general theory of termination is the adoption of set of norms under so-called restitution law, as already done by the new Romanian Civil Code (Articles 1.635 to 1.649), and proposed under the „Catala Anteproject" of amendments to the French Civil Code (Articles 1161 to 1164-7)[71]. A similar approach is taken by the DCFR (Sections III. – 3:510 to 3:514), with the proviso that instead of having such a set of norms of general applicability, it lends the norms of termination of contract to several other types of ending of contracts, such as withdrawal from a contract by a consumer.

Regardless of the legal ground for unwinding of a contractual relationship, the said relationship will be liquidated according to the rules of restitution. This emerging institution in continental Europe is however, much more broad, and applies to other cases of unwinding of contracts such as nullity, ineffectiveness (*caducitate*) and occurrence of a condition subsequent.

A proper definition of a concept needs to be universal (i.e. such that it will apply equally to all individuals of, the same kind); proper (i.e. such that it will not apply to any other individual of any other kind); clear (i.e. without any equivocal, vague, or unknown word); and short (i.e. without any useless word, or any foreign to the idea intended to be defined). Definitions are always dangerous, because it is always difficult to prevent their being inaccurate, or their becoming so[72]. „*Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset (Every definition in civil law is dangerous, for rare are those that cannot be subverted)".* D 50. 17. 202. Lucius Iavolenus Priscus, Roman jurisconsult.

Due to this reasoning the author did not seek to identify a correct and final definition of termination of contract. With this proviso in mind, we support that termination is a *legal technique of extinguishment of non-performed contractual obligations at the initiative of a party, relying on a statutory or contractual right, and in case there are past performances in which the terminating no longer holds an interest, such extinguishment will be followed by bilateral restitution of past performances.*

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