BRIEF PRESENTATION OF RESTITUTIO IN INTEGRUM ACCORDING TO THE ROMANIAN CIVIL CODE OF 2009

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Abstract

This study aims to briefly present restitutio in integrum in light of the New Romanian Civil Code of 2009. Apart from the civil law point of view, it shall mention an aspect pertaining to the procedural law that should not be ignored when a court of law gives a ruling on restitutio in integrum.

Keywords: *restitutio in integrum, restitution of prestations, Romanian Civil Code of 2009, civil law, procedural law*

1. Introduction

As in many other areas, the Civil Code of Quebec has served as inspiration for the Romanian legislator in drawing up the provisions related to *restitutio in integrum*. Several articles pertaining to *restitutio in integrum* are mere translations of the Quebecois provisions in the matter.

A clear understanting of *restitutio in integrum* can only be achieved by operating with the distinction between substantial law and procedural law. In other words, it is essential to be aware of the fact that the application of any civil (substantial) provision is conditioned to the procedural decor in which the interested party seeks protection of her/his rights.

That is why this study aims to present *restitutio in integrum* not only from a civil law point of view, but also from a procedural law point of view.

2. Content

2.1. Coordinates of restitutio in integrum

According to art. 1635 of the Romanian Civil Code of 2009, which is a translation of art. 1699 of the Civil Code of Quebec, restitution of prestations takes place where a person is bound by law to return to another person the property he has received, either without right or in error, or under a juridical act which is subsequently terminated with retroactive effect or whose obligations become impossible to perform by reason of superior force – casus major, casus or another similar event a.n.

Restitutio in integrum shall take place when a person has received an indebitum solutum (art. 1341-1344 of the Romanian Civil Code of 2009) or when the contract that served as grounds for the prestations exchanged between parties was terminated with retroactive effect. Retroactive termination of a contract can occur when the contract was annulled or terminated due to the unjustified non-performance of the obligations by one of the parties (resolution).

There will obviously be no restitutio in integrum when the contract is annulled or terminated due to the unjustified non-performance of the obligations by one of the parties, when such cessations of existence of the contract generate only ex nunc effects.

Regardless of the cause of restitution, its grounds shall always consist of indebitum solutum. Once the contract is annulled or otherwise terminated, both parties or, as the case may be, one of them become(s) entitled to claim restitution. The foundation of the right to restitution is indebitum solutum, because the dissapereance of the contract leads to the dissapereance of the cause of the prestations. The contract was the reason those prestations were made. As a consequence, the termination of the contract gives right to restitution.

According to art. 1635 par. 2 of the Romanian Civil Code of 2009, that which was performed based on a future cause, which was not fulfilled, is also bound to restitution, except if the person performed the prestation acknowledging the impossibility of fulfillment or deliberately blocking its fulfillment.

Par. 3 of the same article provides that the obligation of restitution enjoys the same sureties/hypothechs as the initial obligation.

The debtor of the initial payment is the person entitled to restitution of prestations. If he has transferred his rights and obligations arising from the contract to another party, then the latter, the successor of the debtor of the initial payment, shall claim restitution. In this regard, art. 1636 of the Romanian Civil Code of 2009 provides that the right to restitution belongs to the one who performed the prestation bound to restitution or, as the case may be, to another person, entitled by law to such restitution.

Art. 1638 of the Romanian Civil Code of 2009 brings an end to a scientific dispute occurred under the previous fundamental civil legislation.

Following the nemo auditur propriam turpitudinem allegans rule, authors were of the opinion that there shall be no restitution of prestations upon the

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annulment of a contract for immoral or illicit cause (causa), because no one can claim the protection of his/her right based on his/her incorrectnes or imorality1.

Although this was the opinion embraced by the majority of authors, art. 1638 of the Romanian Civil Code of 2009 states the opposite.

Restitution of prestations shall be made in kind or by equivalence. Restitution of prestations in kind is the rule, so restitution by equivance shall take place whenever restitution in kind is not possible (art. 1636 par. 1, art. 1639-1640 of the Romanian Civil Code of 2009).

Par. 2 of art. 1637 of the Romanian Civil Code of 2009 indicates that restitution of prestations shall take place, even if damages ar not owed.

A party to a contract which was terminated is entitled not only to restitution, but also to damages, if the other party breached its obligations or, for example, if the other party is held liable for damages, following the annulment of the contract for error occasioned by fraud (see art. 1215 par. 2 of the Romanian Civil Code of 2009).

With respect to restitution in kind or by equivalence, a clear distinction has to made between restitution of movable or immovable property, on one hand, and restitution of other prestations, on the other hand.

Restitution in kind of movable or immovable property shall always be possible, with the exceptions presented below.

Restitution in kind of an amount of money or other fungible goods shall always be possible. The same rule applies for generic goods. As it will be shown below, determined goods are not always prone to restitution.

Services performed by a party or the use of a good ar not prone to restitution. In such cases, the termination of the contract only has ex nunc effects. Admission of restitution in such cases would lead to the same outcome. If, for example, a lease contract is terminated, the lessor would be entitled to the restitution of the use of the good and the lessee could claim the rent. Since the use of the good is not subject to restitution in kind, the party would resort to restitution by equivalence, which translated into paying the other party the amount of money which is the equivalent of the use of the good. Since this is equal to the rent, the two prestations are compensated and thus estinguished. That is why the termination of continuing contracts only has ex nunc effects.

Art. 1640 of the Romanian Civil Code of 2009 provides that if restitution cannot take place in kind due to impossibility, due to a serious impediment or due to the fact that restitution regards services already performed, restitution shall be made by equivalence. In cases provided for at par. 1, the value of prestations shall be assessed as at the time the debtor received what he is liable to restore.

A problem that arises from the restitution of prestations by equivalence is that of determining the amount that has to be paid to the party entitled to restitution. Between the conclusion of the contract, the performance of its obligations and its annulment or otherwise termination that leads to restitution of prestations there is a certain interval of time. Within it, the services initially performed can either increase or decrease in value, due to different factors in that specific market. The Romanian legislator has opted to determine the amount owed to the party who is entitled to restitution by taking into consideration the value of such prestations as at the time the debtor received what he is liable to restore.

In the case of total loss or alienation of property subject to restitution, the person obligated to make the restitution is bound to return the value of the property, considered when it was received, as at the time of its loss or alienation, or as at the time of the restitution, whichever value is the lowest; but if the person is in bad faith or the cause of the restitution is due to his fault, the restitution is made according to whichever value is the highest (art. 1641 of the Romanian Civil Code of 2009).

According to art. 1648 of the Romanian Civil Code of 2009, if the good bound to restitution was transferred, the claim to restitution can also be exercised against the third party who acquired that good, subject to the rules of Real Estate register, to the effect of acquiring movable goods in good faith or subject to the application of rules regarding usucaption.

According to art. 1648 of the Romanian Civil Code of 2009, if the good bound to restitution has fortuitously perished, the debtor is exempt from making restitution, but he shall then transfer to the creditor, where applicable, the indemnity he has received for the loss of the property or, if he has not already received it, the right to the indemnity. If the debtor is in bad faith or the cause of the restitution is due to his fault, he is not exempt from making restitution unless the property would also have perished if it had been in the hands of the creditor.

Art. 1643 of the Romanian Civil Code of 2009 provides that if the good bound to restitution has only suffered a partias loss, such as a deterioration of any other depreciation in value, the person who is obliged to make restitution is bound to indemnify the creditor for such loss, unless it results from normal use of the property.

From the previously cited articles, the following conclusions can be drawn:

a) if the good bound to restitution has perished following other event than a fortuitous one or was transferred by the debtor, the creditor can either claim the value of the good from the debtor or can claim the property from the person who acquired

[1] Gabriel Boroi, *Drept civil. Partea generală. Persoanele*, ed. a III-a, București, Ed. Hamangiu, 2008, p 329.

it, subject to the rules of Real Estate register;

b) if the good bound to restitution has only suffered a partias loss, the debtor has to compensate the creditor for such loss. However, he shall be exempt from payment if the loss occurs from normal use;

c) if the good bound to restitution has perished fortuitously, then the creditor is entitled to the indemnity. If the cause of restitution lays in the bad faith of the debtor or in his guilt, he shall be held liable according to art. 1641, regardless of any indemnity.

With respect to the reimbursement for disbursements made with respect to the property, art. 1644 of the Romanian Civil Code clearly provides that it is governed by the provisions applicable to a possessor in good faith or, in case of bad faith or if the cause of the restitution is due to the fault of the person who is bound to make restitution, by those applicable to possessors in bad faith.

Loyal to its source of inspiration, the Romanian Civil Code provides in art. 1645 that *the fruits and revenues of the property being returned belong to the person who is bound to make restitution, and he bears the costs he has incurred to produce them. He owes no indemnity for enjoyment of the property unless that was the primary object of the prestation or unless the property was subject to rapid depreciation. If the person who is bound to make restitution is in bad faith or if the cause of the restitution is due to his fault, he is bound, after compensating for the costs, to return the fruits and revenues and indemnify the creditor for any enjoyment he has derived from the property.*

Costs of restitution are borne by the parties, in proportion, where applicable, to the value of the prestations mutually restored. Where one party is in bad faith, however, or where the cause of the restitution is due to his fault, the costs are borne by that party alone.

Any other acts performed in favour of a third person in good faith may be set up against the person to whom restitution is owed.

2.2. Procedural aspects

Although restitutio in integrum is reciprocal, it shall take place in this manner, if both parties have filed a claim in this regard. In other words, if only the claimant files for restitutio in integrum, it shall only be granted to him and not to the defendant as well, since the civil trial is governed by a fundamental principle that states, amongst others, that the object and limits of the trial are set by the claims filed by the parties.

Consequently, if the defendant does not file for restitutio in integrum within the trial initiated by the defendant, then he can do so in 3 years starting from the date the ruling of the court.

3. Conclusions

In an attempt to achieve a set of norms which is meant to be clearer and more accurate, the legislator has opted for the systematisation of the rules relating to restitutio in integrum, to whom is dedicated Title X Restitution of prestation of the Fifth Book About obligations of the Romanian Civil Code of 2009.

It comprises of the same rules and principles that have governed this matter under the Civil Code of 1864. There are slight variations and the main aspect of novelty consists in the previously mentioned systematisation, as opposed to some rules scattered across the provisions of the Civil Code of 1864.

References

- Gabriel Boroi, *Drept civil. Partea generală. Persoanele,* ed. a III-a, București, Ed. Hamangiu, 2008.