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Specific performance. Relationship with other remedies.

Substantive and judicial perspective

Summary

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§1. Introduction

The paper desired to be a research one, developed on two levels, both that of the substantive law in the matter of enforcements of obligations, as well as in terms of the procedural part and its implications on the segment of the enforcement itself, in the conditions of obtaining an enforceable title.

Throughout the paper we have tried to argue that the two plans are in themselves two sides of the same coin, which otherwise cannot be dissociated. Such an apparently multidisciplinary approach, which combines the substantive law of obligations with the enforcement procedure law, I considered necessary to respond to the challenges that judicial doctrine and practice feel in the context of a perpetual metamorphosis of social relations.

The objectives pursued by the elaborated thesis are multiple and among the most important we can mention the following: capturing the evolution of enforcements in time and space, the analysis of enforcements in kind in Romanian law, the qualification of the different ways in which enforcements is expressed, the analysis of the other remedies for failure to fulfill the obligations at the disposal of the creditor by reference to enforcement in kind, the delimitation of contractual civil liability, the resolution, the exception of non-performance as opposed to the institution of execution in kind, and finally, the right of option between the various remedies, the analysis integrating the enforcement perspective on these aspects.

During the research I used several research methods such as: the explanatory method, the exploratory method, the comparative method, etc., by reference to the different legal systems, such as: the Dutch law model, French law, German law, *common-law* or the Quebec law, the latter being the primary source of the current local regulations.

§2. The structure of the doctoral thesis

The work is divided into (5) five titles, as follows: title I *called the remedies of enforcement in kind* includes (5) five chapters, title II called *contractual liability and enforcement in kind* is structured into (2) two chapters, title III covers *the relationship between enforcement in kind and other remedies* and is divided into (2) two chapters, title IV concerns *the right of option between remedies* and is composed of (2) two chapters and title V includes the final conclusions. Each chapter has different sub-chapters in its structure, including the intermediate conclusions drawn.

Title I was devoted entirely to the analysis of the institution of specific performance from all perspectives found to be relevant. The identification of the concept in the historical world caused the first discovery, namely that enforcement in kind is not as a "natural" a remedy as it seemed (!) to us initially.

Roman law, identified as the primordial source of current continental law, has for a long time shown itself to be a follower of *condemnatio pecuniaria*, i.e., what we understand today,

as performance by equivalent or damages, noting that only the inflation and socio-economic instability of the 3rd and 4th century activated the principle of execution in kind, known as *condemnatio in specie*.

The Middle Ages with *Antoine Favre's nemo praecise cogi potest ad factum* (1601) represents perhaps the most important moment in the development of the concept of specific perfomance. This period characterized by the influence of glossators, commentators and especially canon law had a strong imprint including on the way in which the institution still finds its applicability today. The influence of the Christian church was decisive in cataloging enforcement in kind as a general sanction with similar applicability.

As an example, we recall that the glossators of the period appreciated that enforcement in kind and the payment of damages coexist in the same relationship. The work of *Bartolus* differentiated for the first time between the institution of enforcement in kind and that by equivalent, according to the source of the obligations.

We consider that during this historical period the structure of the remedy as we know it today was configured.

Going further, I noted the work of Pothier, which was the major source of inspiration for the French Civil Code of 1804, where the physical coercion of the debtor in the view of the French legislator at the time was seen as impossible thus creating a wide space for the applicability of damages, at least at the legislative level. Courts did not comply with this new paradigm and insisted on forcing debtors to specific perfomance, continuing the practice derived from canon law. The French judges, and later those from the Netherlands, forced to determine enforcement in kind, and in the case of obligations to perform for which they pronounced enforcement in kind, invented the concept of *astreinte* or *dwangsom*, which served as the source of inspiration for the penalties found in national law.

We also noticed the way in which specific perfomance is currently regulated and applied, in the most important legal systems such as German, French, Quebec and in international unification projects, the Vienna Convention, the UNIDROIT Principles, the Principles of European Contract Law or the Common Reference Framework Project.

The analysis approach required a review of the classic classifications found in the specialized doctrine in the matter of civil obligations, at the same time presenting the categories specific to procedural enforcement law and some classifications that we developed from the analysis of procedural enforcement law. Bearing in mind the proclaimed desirability of our research, namely that of creating the bridge, or more plastically, of capturing the common membrane of the substantive law of remedies with the procedural enforcement law, we transplanted a series of the classifications already known in the substantive law in the enforcement part, while capturing the specific elements that differentiate them.

The next part of our analysis was focused on understanding the notion of specific performance in the national space and how it is applied in judicial practice, distinguishing between different types of obligations.

We noted in this approach the fact that the national regulation in the matter dates back to 2009, being inspired by the Civil Code of the province of Québec, where, in the content of art. 1590, the creditor's access to enforcement in kind is regulated in an apparently similar manner as in national law.

Taking each typology of obligation separately, the research led us to some important conclusions, such as: the monetary obligation that consists in giving an amount of money can be enforced only in its kind, respectively by paying or remitting the amount of money owed and the statement that this is susceptible to damages is not a legally rigorous one. Related to this, we have assessed that the failure to fulfil the obligation on time, gives rise to default damages, which, in turn, also represent a pecuniary obligation, secondary and derived from the violation of the primary obligation, these being an inherent extension of the remedy enforcement in kind, and not necessarily a typical manifestation of contractual liability.

Most of the debates included the analysis of the scope of the enforcement in kind of the obligation *to perform*, which, according to the classical doctrine, in principle, cannot be enforced in kind. We disagreed with this conclusion, which is far too general and relates more to the actual enforcement part and not to obtaining the enforceable title.

Obligations to perform, *ad rem*, can be carried out through forms of pseudo-enforcement (enforcement carried out by the creditor or by third parties on behalf of the debtor) or alternative remedies (judgment that takes the place of the contract) which, in our opinion, are integrated into enforcement in kind, however finding the terminology of *enforcement in kind by equivalent/by substitution*, used in Quebec law, preferable for their cataloguing.

The method of forcing the enforcement in kind imagined by the Romanian legislator for the obligations *intuitu personae, ad personam,* is embodied in the penalties or punitive damages regulated by art. 906 Code.civ.proc., which we have discussed at length.

Title II aims to analyse the relationship between contractual liability and specific perfomance, materialized in our desire to discover whether we are facing a *genre-species* relationship or, on the contrary, completely different remedies, as well as how they interact.

Our research stopped, first, at the theories developed by the national and foreign doctrine on liability. We tried to capture the content of the contractual liability, in order to clarify whether it is an extended one, which includes all the *remedies made available by law to the creditor in case of failure to fulfil the obligation by the debtor*, respectively fulfilling the obligation by enforcement in kind, damages or the resolution or termination and reduction of prestations, or on the contrary it is a limited one, which is translated exclusively by damages.

We assessed the second perspective presented as correct, concluding that the contractual liability is equal to damages and consequently only the damages dimension can be integrated into this concept.

Contractual liability therefore means, according to the concept embraced, all the mechanisms by which the debtor is required to pay damages to his creditor. These can be realized in several forms, depending on the remedy whose result is: performance by equivalent of the non-performed obligation, where the equivalent is translated, as a rule, by compensatory damages, moratory damages that can accompany compensatory damages or enforcement in kind, or damages that accompany the resolution or termination of the contract. We have tried to argue that the nature of the protected interest might differ when the damages represent a performance by equivalent to those that accompany the resolution. In the case of performance by equivalent, the protected interest is the positive one, because the amount of damages must lead to positioning the creditor in a situation similar to the one in which the debtor would have voluntarily executed his obligation, while damages consequent to the resolution or termination

could have the right purpose of compensating the creditor in such a way (beyond what involves restitution of prestations, if applicable) that it can be considered that the contractual understanding never existed (negative interest).

Title III concerns the relationship between the other remedies and specific perfomance, insisting mainly on the resolution but without neglecting the reduction of benefits, the exception of non-performance or the additional term of enforcement.

The legal nature represented the initial dilemma in this case as well, we wondered if the resolution is a form of performance by equivalent, part of contractual civil liability, as a number of authors appreciate, or, on the contrary, is it an independent remedy? The research of comparative law, in this case the French, German, Quebec or common law system, has shown us that the resolution is treated almost identically in all legal systems, distinctly from any other known remedy or sanction, being appreciated as a mechanism of stand-alone to which the creditor can appeal in case of non- performance, a conclusion that we believe is also valid in the national system.

We have agreed that resolution and contractual liability in the form of damages consequent upon resolution are compatible and can be accessed by the creditor facing a culpable non-performance that has caused him a loss.

The analysis of the right to withhold perfomance revealed other findings regarding how it operates and how it relates to the other remedies. In addition to the discussions regarding the relationship with the right of retention, which proved sufficiently contradictory in doctrine, we found it important to analyse as an essential condition for invoking the remedy the good faith of the one who wants to avail himself of the effect of the remedy, and the way in this it must appear from the way in which it has fulfilled its contractual obligations up to that moment or in which it is ready to do so in the future. After analysing several practical situations, we concluded that, if the breach of the obligation has its cause in the non-fulfilment of a previous obligation by the creditor or in his abusive conduct by which he refused to cooperate in order to execute, the latter cannot prevail against the effects of the right to withhold performance

The right to withhold performance can only manifest itself as an instrument of private justice, being able to produce effects without the intervention of judicial bodies, having at the same time a coercive effect as far as the debtor is concerned. The procedural or judicial perspective revealed to us the fact that, once invoked in the form of a means of defence, in the face of a request for enforcement in kind or in the face of a request for moratory damages, the right to withhold performance, as a rule, temporarily blocks access to these remedies, of course if it is rightfully invoked. We tried to argue that the mechanism can produce its specific effects beyond the situations in which what is requested from the debtor party is enforcement in kind or performance by equivalent, respectively that it can represent a legal impediment also in the way of resolution.

As for the additional term of enforcement, we noticed that the remedy is not found in the list on which the provisions of art. 1.516 Civ.code achieves it, being rather analysed, including by the doctrine, in the context of the conditions of access to enforcement in kind, to performance by equivalent or to resolution. We affirmed the dual function of the essentially provisional grace period, which, on the one hand, is understood as serving to grant the debtor a second chance to perform voluntarily, respectively as a necessary condition for access to the other remedies, as otherwise it is also analysed by the national doctrine.

We determined the connection between the additional payment term and the other remedies analysed by conditioning the creditor's access to enforcement specific perfomance, resolution (sometimes also to performance by equivalent) by granting a reasonable term in advance for enforcement, in order to save the contractual relationship and to give the debtor the chance of voluntary performance.

In this context, we insisted on the fact that putting in default as a concrete manifestation of the additional term of performance aims at the voluntary execution and not necessarily the enforcement in kind, the latter being only an inherent consequence of the way of fulfilling the contractual obligations.

Title IV had as its object of analysis the right of option between remedies and its potential connection with a possible ranking of remedies.

We noticed in this approach the fact that part of the doctrine as well as the recent jurisprudence of the supreme court interpreting *principus favor contractus*, affirms the existence of the principle of enforcement in kind. In opposition to the above theory is the concept of equality between remedies which means that as long as the substantive and procedural conditions are met to access two or more remedies, it is in the creditor's power to choose between them. The theory also implies the lack of any hierarchy or subordination between remedies, other than those derived from the fulfilment of access conditions.

In arguing this thesis, which we agree with, we presented the following:

- *pacta sunt servanda* represents an equal principle applicable to all remedies, the meaning of the notion of obligation not being the same, but the source is unique, regardless of the form that the performance of the obligation takes in the external environment;
- *specific performance has not always been a remedy available to the unsatisfied creditor* therefore, the historical argument presented by the doctrine of law is not necessarily insurmountable;
- *putting in default does not have the direct purpose of enforcement in kind but rather voluntary execution.*
- *the economic perspective makes such an approach useless*. I argued that from an economic point of view, forcing an enforcement at the expense of other remedies can become an extremely harmful approach for the parties involved. The contractual relationship is a relative one, which concerns and interests, as a rule, the contracting parties, and the intervention of the state must be based on the will of the parties and cannot go beyond what it means to protect their interests.
- *the resolution of the contract cannot be subordinated to the impossibility of specific performance.* The chosen principle of enforcement in kind cannot be applied if the unsatisfied party requests the termination of the contract.

We concluded that the principle of enforcement in kind should not be understood as an obligation for the creditor to always and with priority resort to enforcement in kind when he does not want it, but rather that he has this possibility, without being limited at it.

To continue, responding to the dilemma of the legal nature of the right of option, we appreciated that this is rather a claim right with alternative contents, rather than a *purely potestative* one as categorized by a part of the doctrine. We find preferable the theory according to which when the creditor chooses one of the mechanisms established by the provisions of art. 1516 Civ.code to exercise their subjective right of claim, and that the option between possible alternative forms is consumed only with the exercise of the right through one of the methods of coercion that the legislator has regulated.

Our research also considered the investigation of the limits of the right of option as well as the way in which the resolutive clauses can influence the way in which the option manifests itself. We asked ourselves if it is possible to revoke the option after the court is notified with an enforcement action or after obtaining a final decision, and the answer found was a positive one. Appreciating that the exhaustion of the right to enforcement in kind intervenes only if the debtor has effectively performed the assumed obligation or if it was carried out through substitute means, the mere pronouncement of a court decision, be it final, could not have this effect of exhaustion option, acclaimed by a part of the legal doctrine.

Finally, we examined the issue of censoring the manifested option, showing that the right of choice between the different remedies, whether it is considered to be optional or not, can be the subject of the court's analysis from the perspective of a possible abuse of law.

In this approach, we have analysed some concrete manifestations of the right of option that could be classified as abusive and we have tried to establish what is the sanction that could intervene in their case:

• invoking a resolutive clause late or formulating a declaration of unilateral resolution for a derisory non-performance;

• requesting enforcement in kind when the costs of enforcement are clearly disproportionate;

• withholding performance against a minor non-performance;

• manifesting the option in an untimely manner in violation of the obligation of contractual consistency.

Common to these situations, we have assessed that the specific sanction that intervenes in case the court considers that the right of option was manifested in an abusive manner consists, first of all, in depriving the option of any effectiveness by blocking the right exercised in bad faith.

Title V was dedicated exclusively to the final conclusions, which systematize, in a synthetic manner, the concept presented regarding contractual remedies and especially the practical solutions derived from it.

§3. Conclusions

The research process undertaken determined major changes on the initially held perspective regarding the content of the notion of enforcement in kind and the way it interacts with other contractual remedies. At the beginning of the process, our enthusiasm regarding the absolute importance of this institution led us to appreciate that the principle of enforcement in kind is a rigorous one and does not allow many possibilities of derogation from its guiding lines.

The time spent in research and the analysis undertaken have shown us that things do not fit exactly in this paradigm, appreciating in the end that the elevation of enforcement in kind to the rank of principle does not exactly meet the current rigors.

Keywords:

specific performance, enforcement in kind, resolution, contractual liability, withholding performance, grace period, damages, punitive damages, penalties, enforcement procedure, right of option, remedies for the breach of contract

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