



Legal Aspects of Invoking the Exception of Default in the Insurance Contract

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Abstract

In this article, we will try to clarify the possibility of invoking the exception of non-performance in the insurance contract, which is a synallagmatic contract, but which presents a series of particularities that call into question the simultaneous performance of the contracting parties' obligations. Because of the specific nature of the insurance contract, the plea of non-performance of the contract is questionable, since the performances to which the contract gives rise are not simultaneous. Thus, the insured pays the insurance premium when the contract is concluded or in installments during performance, and the insurer pays the indemnity when the insured event occurs or is discharged if it does not occur. This obligation to pay the insurance premium is correlative to the insurer's obligation to pay the indemnity, but it is prior to the latter, the insurer's performance being conditional on this prior operation. At the same time, in legal doctrine, the question has been raised as to whether there is still a correlation between the reciprocal obligations assumed by each of the parties, as long as the risk has not been realized. However, the plea of non-performance of the contract is based on the simultaneous performance of the obligations by the parties to a sign-signatory contract, and when they set a time limit for performance, the plea can no longer be invoked.

Keywords: allowance, performance of obligations, reciprocity, synallagmatic contract, simultaneity

1. Introduction

The exception of non-performance of the contract has been defined as the right of each party to a contract to refuse to perform the services to which it has committed itself as long as it does not receive the services owed to it by the other party. The exception of non-performance of a contract is a legal institution which is widely applicable in practice but which, in the absence of express rules, has not been able to be analyzed in a uniform manner, giving rise over the years to numerous theoretical controversies.

The insurance contract, regulated by Article 2199 of the New Romanian Civil Code, is the contract whereby the insurance policyholder or the insured undertakes to pay a premium to the

insurer, and the latter undertakes to pay compensation, as the case may be, to the insured, the beneficiary of the insurance or the injured third party, in the event of the insured risk.

The rules governing the conclusion of the insurance contract are contained in the New Romanian Civil Code, in the Law no. 237/2015 on the authorization and supervision of insurance and reinsurance activity, as well as in the rules issued by the Financial Supervisory Authority.

2. Research Methodology

This article is based on a qualitative research approach, using an analysis of national and European legislation and legal institutions, which is complemented by an examination of national case law.

3. Goals of the Research

The purpose of this research is to analyze the changes brought by the New Romanian Civil Code in the field of contractual remedies, and to analyze the possibility of invoking the exception of non-performance of the contract in the particular case of the insurance contract. At the same time, we wish to present court decisions in which this defense was invoked.

4. Legal Characteristics of the Insurance Contract

The insurance contract presents some legal characteristics similar to the common law of contracts, but also some specific characteristics, essentially being a contract: consensual, random, onerous, synallagmatic, with successive execution and adhesion. The legal doctrine (Catană, 2008, A) also attributes to it the character of a contract of good faith, as the Court of Cassation of Romania also ruled in its decision no. 535/2.02.2007, stating that "an insurance contract must be characterized by good faith".

In this respect, the insurance regulations establish certain obligations on the insurer and the insured, prior to the finalization of the insurance contract and the legal regime specific to the contract negotiation phase mainly concerns the obligations of reciprocal information of the contracting parties (Fontaine, 2006)

Regarding insurance premiums, art. 2206 para. (5) of the New Romanian Civil Code stipulates that the insurer is required to inform the policyholder of the consequences of non-payment of the premium on the due date and to provide for those consequences in the insurance contract (Brașoveanu, 2012).

Therefore, in the insurance legal system, the contracting parties must inform each other in the process of concluding and performing the insurance contract. The duty to inform covers the essential elements of this contract and is governed by the principle of good faith both in the negotiation of the contract and in its performance.

French case law has held that the courts may hold the insurer liable in a number of situations: inappropriate reluctance, dilatory tactics, delays in compensation, etc. Two main types of misconduct are at the root of these situations: lack of loyalty or breach of the duty to provide information and advice. These two concepts can be confused, as disloyalty often manifests itself in the insurer's reluctance to provide the insured with the information in its possession. However, disloyalty can also take other forms. Loyalty, which is a moral mark on contractual relations, must be total. It forms the basis of the ancillary obligations imposed on professionals in their dealings with consumers. For insurers, these ancillary obligations include the duty to inform and the duty to advise (Robineau, 2023).

Similar in Romanian law, the main effects of the duty to provide information will occur after the conclusion of the insurance contract and differ according to the person who has breached his duty to provide information (Trandafirescu, 2007). Thus, if the insured person is the one who misinforms, i.e. gives false information or conceals certain essential aspects of the insurance he has taken out, the insurer may request the annulment of the insurance contract for fraud by deceit (Catană, 2008, B). In order for the insurance contract to be null and void in these circumstances, the insurer will have to prove the bad faith of the insured person in connection with the statements or communication of data and information concerning the insured risk.

If the parties agree, it is possible to adapt the clauses to essential aspects of the insurance of which the insurer was not previously aware, in particular where the insured is bona fide. (Trandafirescu, 2017).

On the other hand, if the insurer breaches his duty to inform, the insured, depending on the practical situation, has several possibilities. The first of these is to adapt the contract to the essential terms of the insurance, and if the insurer does not agree, the insured can request that the insurance contract be terminated, with the consequence that the sums paid as insurance premiums are refunded.

The insurance contract is a consensual contract because its validity does not require the expression of consent in a particular form (Eliashberg et al., 2002; Lanna, 2006; Macovei, 2006; Catană, 2008, C).

In relation to the consensual nature of the insurance contract, we should also note the provisions of Article 2200 of the New Romanian Civil Code, which stipulates that the written form concerns proof, and not the validity of the insurance contract, and is therefore a condition ad probationem, and not ad validitatem.

The will of the parties is materialized in standard contracts drawn up by insurers, so there are almost no cases where the insurance contract is not in writing.

The written form of the insurance contract fulfills the obligation regarding the content of the insurance contract, enshrined in Article 2201 of the New Romanian Civil Code, which lists the main information that the insurance policy must contain.

The insurance contract is a contract of chance (Catană, 2008, D), because the existence and extent of the insurer's obligation is not known at the time the contract is concluded, but depends on a future and uncertain element. The uncertain element consists of the future event - provided for in the contract - to which the insured's property, assets, life or health are exposed, such as fire, flood, death, insolvency or insolvency of the debtor, etc., against which the insured has insured himself (Stănciulescu, 2021, A).

In legal literature, it has been pointed out that the uncertain nature of the insurance contract is given only by the insurer's obligation, not that of the insured (Catană, 2008, E). The author considers that this is not so accentuated as far as the insurer is concerned, as long as he organizes at the level of his enterprise a grouping and a compensation of a multitude of risks, carried out on scientific, statistical and mathematical criteria. We consider, however, that, when attributing randomness, it is the insurance contract that is being considered in isolation and not in relation to the insurer's entire business, which is obviously a professional trader and if it does not make a profit from the business it carries on, not only cannot set aside reserves for the payment of compensation, but also self-destructs. That is why we believe that insurance remains random for the insurance company because of the uncertainty that hangs over a particular contract, and not over all the insurance it practices.

The obligation to pay the insurance premium is certain as far as the insured is concerned, in the sense that the insured knows from the moment the contract is finalized the insurance costs (amount of the insurance premium) and if he fails to pay them, the contract either ceases to exist or is terminated if the non-performance of these obligations occurs after the insurance contract is finalized.

Similarly, Swiss jurisprudence has held that, if the insured is late in paying the premiums, the insurance cover is suspended (art. 20 para. 3 LCA). Consequently, the insurance is not required to cover claims arising after the delivery of the summons (art. 20 para. 3 LCA; consid. 2.3). The insurance case arises at the time of incapacity for work and not at the time of the first manifestation of the illness. In this case, incapacity for work occurring during the suspension of the insurance due to non-payment of premiums by the employer is not covered, even if the illness (burnout) had already manifested itself previously (Carron et al., 2017).

Romanian judicial practice has addressed the aleatory nature of the insurance contract by defining it, in one case, in the following terms: the insurance contract is a contract of aleatory type, because the existence or extent of the parties' performance depends on an uncertain event. Therefore, when the insurance contract is concluded, the extent of the benefits cannot be calculated, the gain or loss cannot be quantified and sometimes it is not even known whether there will be a gain or loss, but, in so far as the insured risk has been proved to have occurred, the defendant is obliged to perform the obligations assumed (see Court of Appeal Cluj, s. com., cont. adm. adm. and fisc., decision no. 87 of May 25, 2009 in www.rolii.ro).

The random nature, based on the uncertainty of the occurrence of the insured event, is the essence of the insurance contract, because as mentioned above, according to the law, if the insured risk has occurred or it is certain that it will not occur, the contract is terminated *ope legis*.

Another expression of the random nature of the insurance contract is the provision contained in Article 2208 of the New Romanian Civil Code, according to which, in the cases established by the insurance contract, in property and civil liability insurance, the insurer does not owe compensation if the insured risk was caused intentionally by the insured; by the beneficiary of the insurance; by a member of the management of the insured legal entity, working in this capacity; by the major natural persons who, on a permanent basis, live and live and live with the insured or the beneficiary of the insurance; by the insured or the beneficiary of the insurance's representatives.

The onerous nature consists in the fact that both the insured and the insurer seek a consideration (Macovei, 2006, A; Stănciulescu, 2021, B).

Under the insurance contract, the insured seeks to obtain the protection of the insurer materialized in the payment of indemnity or compensation when the insured event occurs; the insurer seeks to collect the sums of money as insurance premium, as the price of the obligation it assumes (Catană, 2008, F).

Although they are onerous, the obligations of the parties to the insurance contract are not equivalent because, on the one hand, the insurance is random and, on the other hand, when the insured risk occurs, the compensation exceeds the amount of the insurance premiums. In the first situation, where the insured event does not occur, the lack of equivalence of benefits arises from the non-existence of the obligation to indemnify, and in the second situation, where the insured event occurs, the lack of equivalence arises from the disproportionate amount of the indemnities or the insurance indemnity compared with the sums of money paid by the insured as premium.

The onerous nature of the insurance contract is not abolished in the case of co-insurance, nor when insuring risks relating to another person or when stipulating the person who, as beneficiary, will receive the insurance benefit.

Judicial practice has configured the onerous nature of the insurance contract as follows: the insured's considerations, according to which he should have benefited from the protection of the insurance contract, regardless of the payment or non-payment of the insurance premium, on maturity and within the grace period, clearly and logically contradict the onerous nature of the insurance contract established by the lies of art. 2199 and art. 2206 of the New Romanian Civil Code, and by the contractual provisions (see Craiova District Court, s. civ., civil judgment no. 15157 of December 4, 2015, www.rolii.ro).

The successive performance character of the insurance contract (Stănciulescu, 2021,C; Macovei, 2006, B; Vasilescu, 2017) lies in the fact that the obligations of the parties are performed over time, and not *uno icto*.

First of all, it is worth noting that the insurance is for a fixed period of time, which means that the insurance policy has a certain duration. With the exception of life insurance, as a rule, the unit of time used as the duration of the insurance contract is one year.

Then, the fact that the insurance is spread over a period of time also determines the manner in which the obligations of the contracting parties are to be performed. The insurer assumes the obligation to protect the insured (Catană, 2008, G), in the sense of indemnifying him when the insured event occurs for the entire insured period, and the insured has the possibility of paying the insurance premium in several monthly installments or in other time units.

In the doctrine it has been stated that the successive performance character of the insurance contract is not abolished, even if the premium is paid only once, as a rule at the conclusion of the insurance contract, as a single (global) premium (Macovei, 2006, C).

The doctrinal opinion has been taken over with almost the same expression by the judicial practice, holding in one case: the insurance contract is of successive performance and the insured pays the insurance premiums periodically; this character is maintained also in the hypothesis in which the insured pays the insurance premium in a single payment (global amount) (see Trib. Bucharest, 6th Civil Division, decision no. 237 of January 20, 2014, www.rolii.ro).

Traditionally, the insurance contract has been considered to be a contract of adhesion.

The adhesive nature of the insurance contract is based on the fact that the insurer imposes the main clauses of the contract, which the insured either accepts, and the insurance comes into existence, or rejects them, and the contract is no longer finalized (Stănciulescu, 2012; Macovei, 2006, D; Catană, 2008, H). In other words, the insured does not have the option of negotiating the main clauses of the insurance contract.

The law imposes on the insurer the obligation to present to the insured or potential insured the main elements of the insurance to be taken out, which will constitute the essential terms of the insurance contract. Thus, according to art. 107 of Law no. 237/2015, the insurer must communicate to potential policyholders, when finalizing the insurance contract, information such as the law applicable to the contract; the method of settling claims, including: the address of the head office and contact details of the branch or other secondary offices issuing the insurance contract; the name and address of the claims representatives settling claims in the Member States etc (Brașoveanu, 2023).

In addition to the special provisions of the terms and conditions of insurance and of the contracts proposed for finalization, when concluding the insurance contract, the consumer

protection regulations, enshrined mainly in Law No 296/2004 on the Consumer Code, shall also be taken into account (Republished in M.Of. no. 224 of March 24, 2008).

In specialized judicial practice, in one case, it was decided by the court that the insurance would be a contract *intuitu personae*.

The court held that, according to Art. 2199 para. (1) of the New Romanian Civil Code, "by the insurance contract, the insurance policyholder or the insured undertakes to pay a premium to the insurer, and the latter undertakes to pay compensation, as the case may be, to the insured, the beneficiary of the insurance or the injured third party, in the event of the insured risk", a legal provision which, in conjunction with the provisions of Articles 2203 and 2208 of the New Romanian Civil Code, leads to the conclusion that the insurance policy has *intuitu personae* character, when underwriting the risk, the insurer analyzing the personal circumstances of the future insured and determining the insurance premium according to them (see Constanța District Court, s. civ., civ. sent. nr. 3885 of April 7, 2014, www.rolii.ro).

Consequently, these situations appear rather as criteria for determining the extent of the insurance premium, but do not influence the insurance contract in its entirety.

Indeed, within the insurance landscape there are also forms/types of insurance where the personal considerations/qualifications of the insured are central to the insurance relationship. This includes professional liability insurance, where the insured must be in the profession/occupation for which he/she is applying for the insurance contract. For example, in the case of malpractice insurance, the applicant must be a medical practitioner, in the case of legal professional indemnity insurance, the applicant must be a trainee or permanent lawyer, and similarly for other professional insurances such as insolvency practitioners, experts, notaries, bailiffs etc.

So, with the exception of professional insurance (to cover damage caused by the exercise of certain professions/trades and, to a certain extent, personal insurance (sickness, death, accidents, etc.)), the insurance contract is not characterized by personal considerations or by mutual trust/appreciation of the contracting parties.

5. The Particularities of the Synallagmatic Contract

The insurance contract is a synallagmatic contract because both parties, the insured and the insurer, are each bound by a performance, their obligations being reciprocal and interdependent. The insured's main obligation is to pay the insurance premium, and the insurer's main obligation is to pay the insurance indemnity or compensation when the insured event occurs. Even if the payment of the indemnity or the granting of compensation is subject to a suspensive and random condition (the occurrence of the insured event), it is not such as to affect the bilateral and bilateral nature of the insurance contract.

It has been stated in legal literature that, because of the specific nature of the insurance contract, it is questionable to invoke the exception of non-performance of the contract, since the benefits to which the contract gives rise are not simultaneous (Stănciulescu&Nemeș, 2013).

This obligation to pay the insurance premium is correlative to the insurer's obligation to pay the indemnity, but is prior to the latter, the insurer's performance being conditional on this prior operation (Catană, 2008, I, Macovei, 2006, E). The insurer's obligation to pay the insurance premium is correlative to the insurer's obligation to pay the indemnity, but is prior to the latter, the insurer's performance being conditional on this prior operation.

Thus, the insurance contract is characterized by the absence of simultaneity of the parties' obligations, especially in the event of non-occurrence of the insured event.

On the other hand, if we consider the insurer's obligation to guarantee continuous protection of the insured for compensation in the event of the insured event, we can say that simultaneity persists and is also a continuous obligation on the part of the insurer. The interdependence of the services rendered by the parties to the insurance contract arises from the fact that the existence of the insurer's obligation, which also includes the protection of the insured, depends on the existence of the insured's obligation and vice versa.

At the same time, in legal doctrine, the question has been raised as to whether there is still a correlation between the reciprocal obligations assumed by each of the parties, as long as the risk has not been realized.

It has been concluded that, even if the insured event does not occur, this does not remove the synallagmatic nature of the contract, since the obligations of the parties are reciprocal and each of them serves as a legal cause for the other. Moreover, the occurrence of the insured event does not affect the validity or existence of the insurance contract (Stănciulescu&Nemeş, 2013).

The content of both the contractual and the onerous nature of the insurance is also evident from the provisions of Article 2199 of the New Romanian Civil Code. It has rightly been observed in the specialist literature (Catană, 2008, J, Sferidan, 2019, A) that a particular feature of insurance relationships which is specific to their signatory nature is the obligation on the insured to first pay the insurance premiums, the insurer's performance being conditional on that prior operation. The doctrinal support is shared by judicial practice in the same terms (see Judecătoria Jibou, civil sentence nr. 400 of October 22, 2009, www.rolii.ro).

But, as mentioned above, the possibility of invoking the non-execution exception in the case of an insurance contract is questionable, as long as the obligations of the contracting parties, although interdependent, are not performed simultaneously.

Now, as we have shown in the body of the paper, the plea of non-performance is based on simultaneous performance of the obligations by the contracting parties, and when they set a time limit for performance, the plea can no longer be raised. We therefore take the view that, in an insurance contract, the exception of non-performance of the contract cannot be successfully invoked by any of the contracting parties.

Moreover, failure by the insured to fulfill the obligation to pay the insurance premiums within the agreed terms is sanctioned by the termination of the contract by the insurer (Marin, 2003).

On the other hand, if the insured does not fulfill his obligation to notify the insurer of the occurrence of the insured risk, or fulfills it after the deadline stipulated in the contract, according to Article 2207 paragraph 2 of the New Romanian Civil Code, the insurer has the right to refuse to pay the indemnity, which may amount to a non-execution exception. However, the legislator makes this refusal conditional on the fact that, due to the insured's failure to fulfill the obligation, the cause of the insured event and the extent of the damage could not be determined.

Thus, in the event of a dispute over the consequences of failure to communicate the occurrence of the insured risk in due time, the insurer will have to prove the impossibility of determining the cause of the insured event and the extent of the damage. It can therefore be said that, even from this point of view, we are not faced with a plea of non-execution, since we have shown that this plea is raised directly between the contracting parties, without the intervention of the court.

Moreover, in this paper, we have emphasized that the main effect of the non-execution exception is to suspend the execution of the excipiens's obligations, until the debtor will agree to fulfill his own obligations. However, in the situation provided for by art. 2207 of the New

Romanian Civil Code, the non-payment of the indemnity by the insurer is definitive and not temporary, acting as a sanction for the insured's failure to fulfill the obligation to notify the occurrence of the insured risk within a certain period expressly stipulated in the contract; thus, it is precisely the exceeding of the time limit that is sanctioned and in no way represents a suspension of the performance of the obligations.

For these reasons, we consider that, although the insurance contract is a synallagmatic contract and the obligations of the parties are interdependent, the parties will not be able to invoke the exception of non-performance of the contract because the requirement of simultaneous performance of the contractual obligations is not met.

6. Conclusion

As we have shown, the insurance contract, although it is a synallagmatic contract, has a number of particularities which call into question the simultaneous performance of the contracting parties' obligations. This contract is synallagmatic because both parties, the insured and the insurer, each undertake to provide a service, their obligations being reciprocal and interdependent. The insured's main obligation is to pay the insurance premium, and the insurer's main obligation is to pay the insurance indemnity or compensation when the insured event occurs. But the payments are not made at the same time, since the insured pays the insurance premium when the contract is concluded or in installments during the course of performance, and the insurer will pay the indemnity when the insured event occurs or is absolved if it does not occur.

We appreciate that the exception of non-performance of the contract cannot be invoked by any of the parties to the insurance contract, when they fix a term for performance, considering that this legal remedy is based on the simultaneous performance of contractual obligations.

Also, in the situation provided for by art.2207 of the New Romanian Civil Code, the non-payment of the indemnity by the insurer is not temporary, but definitive, since it is thus sanctioned the insured's failure to fulfill the obligation to notify the occurrence of the insured risk within the term provided in the contract. However, this is not a suspension of the execution of the obligations, but a sanction for exceeding the term agreed by the parties to the insurance contract.

In conclusion, we consider that, although the insurance contract is a synallagmatic contract, and the obligations of the contracting parties are interdependent, they cannot invoke the exception of non-performance of the contract, because the condition of simultaneous performance of the contract is not met.

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