CONTRACTUAL CIVIL LIABILITY. CONDITIONS

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The paper deals with the foundations of contractual civil liability.
One has started with the idea that the premise of the engagement of contractual civil liability is the existence of a valid contract between the creditor and the debtor. If such a binding does not exist and the liability comes into question, then this will be an extra-contractual civil liability, thus a delict.

The paper treats in detail the cumulative fulfillment of conditions that determines the contractual civil liability. These are: the existence of a delict, the existence of a patrimonial prejudice caused by the non-execution, delayed execution or inadequate execution of the obligation; the existence of a causality report between the debtor's delict and the creditor's prejudice and the guilt of the part that commits the delict. One also has in view the necessity of the existence of these conditions that come from the articles 1073, 1075-1078, 1081-1086, Civil Code.

Consequently, for the engagement of contractual civil liability one must fulfill the conditions that lead to the appearance of civil liability for delicts. Once the conditions for the contractual civil liability are fulfilled, the subjective right of the creditor to pretend damages form his debtor comes into existence. In the final part of the paper, we have done a correlation between the contractual civil liability and the right to damages.

Key words: the illicit fact; the prejudice; causality report; the guilt (culpa) of the debtor

According to the Art.1073 from the Civil Code, that represents both the fundament of the execution in kind of obligations and the contractual civil liability, “the creditor has the right to obtain the exact fulfillment of the obligation; otherwise he has a right for compensation”.

The premise for the engagement in contractual civil liability is the existence of a valid contract between the creditor and debtor. If such a bond does not exist and responsibility comes into question, then this will be an extra-contractual one, thus a delictual responsibility.

The following cumulative conditions are necessary for the engagement in contractual civil liability:

a) the existence of an illicit fact, consisting in the non-compliance *lato sensu* with of a contractual obligation, which means the violation of a creditor's patrimonial right;

b) the existence of o a patrimonial prejudice caused by the non-execution, execution with delay or inadequate execution of the obligation;

c) the existence of a causality report between the debtor's illicit fact and the prejudice suffered by the creditor;

d) the guilt (culpa) of the one that commits the illicit fact.

The necessity of the existence of these conditions arises from the articles 1073, 1075-1078, 1081-1086 of the Civil Code. Consequently, for the engagement in contractual

civil liability there must be fulfilled the same conditions that would lead to the appearance of the delictual civil liability.

From the moment that all the conditions of the contractual civil liability are met, the creditor has the subjective right to pretend damages from his debtor.

a) The illicit fact

The general premise for the engagement in contractual civil liability is given by the existence of a valid contract between parts. Thus, the illicit fact committed by the debtor consists in the violation of the rights of the other part through the execution of the contractual obligation.

The meaning of "non-execution of contractual obligations" is two-folded: *lato sensu*, consists in the total non-execution, inadequate or delayed execution of the obligations and, *stricto sensu*, is only the partial or total non-execution of these obligations.[1]

The non-execution of the obligation by the debtor can be total or partial. In the case of a total non-execution, the contractual liability will certainly arise, the debtor being obliged to repair the whole prejudice that has been done. In case of a partial non-execution, two situations will appear, in which the obligation object is indivisible or divisible.

If the obligation object is indivisible, either as it is or due to the convention of the parts, the partial execution has the value of a total one. The result also holds in the case in which the debtor does not execute an accessorial obligation, which has considered by the parts as an essential clause at the signature of the contract.

If the obligation object is divisible, an assessment of the execution of the obligation must be made, also diminishing accordingly the damages that the debtor will have to pay to his creditor.[2]

Inadequate execution consists in the execution of the benefit and obeying the quality conditions established in the contractual clauses or in the usual standards.[3] Inadequate execution can be sometimes estimated as a total non-execution. We refer here to those hypotheses when, by example, the debtor delivers to the creditor goods with hidden defects which make those goods unusable.

By the execution with delay of the contractual liabilities one understands the fact that the debtor has executed in kind his delivery or he is about to execute it after the maturity time set by the contract, and by this causing a prejudice. If in the contract there is no maturity date specified, then one can assume that the obligation must be immediately executed. Sometimes, the delay in execution can be considered either a total non-execution of obligations or a partial one. It can be a total non-execution when, by the Art. 1081 Civil Code, the obligation cannot be executed unless until a maturity term or at maturity, that has not been met by the debtor, as in the case of an obligation to deliver food to the creditor and to perform some services at a given date, which is considered to be essential.

The non-execution, the inadequate execution or the delayed execution of contractual liabilities constitute an illicit fact that engages contractual civil liability for the debtor, through the payment of damages for the repair of the losses that have been caused.

b) The prejudice

The prejudice consists in the detrimental consequences of patrimonial or non-patrimonial nature, which are effects of violation by the debtor of the debit right belonging to the creditor or by the non-execution *lato sensu* of the delivery that he has agreed upon.

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[1] Liviu Pop, "Drept civil roman. Teoria generala a obligatiilor., Ed. Lumina Lex, Bucuresti, 200, pag.337

[2] Ibidem pag. 338

[3] Ibidem pag 337 and the next ones

The condition of the existence of the prejudice arises from the Art.1082 from the Civil Code, where it is stated that the debtor owes damages if appropriate.

The prejudice must be the result of the violation of some contractual obligations, either obligations that are clearly stated in the contract, or obligations that are due to the nature of the contract.

As a consequence, if in a letting contract the landlord does not execute repairs of the good he has let, although he is obliged to do so by the contract, and the tenant cannot use properly the object of letting, then the landlord can be obliged to pay damages for this inconvenience of the tenant. This obligation holds even though the contract does not states explicitly that the landlord is obliged for such repairs, and he will be responsible for the non-execution, cf. to Art 1421 of the Civil Code.

For the repair obligation to get into discussion, the patrimonial prejudice must be certain. The prejudice is certain when its existence is certified and its bounds can be established. The actual and future prejudice are certain when there is a certitude that they will occur.

The actual prejudices are the ones that occurred entirely by the date that their repair comes into question.

The future and certain prejudices are the ones that din not occur yet, but there is a certainty they will occur, without knowing the entire bounds of the prejudice. The trial court will limit itself to only oblige the debtor to repair the certain estimated prejudice. The repair of the prejudices that will become certain after the sentence will be granted after the creditor will advocate a court action.[1]

The future and eventual prejudices are not certain because their occurrence is not sure. These will become certain after their occurrence or there is assurance that they will occur at some point in the future.

Regarding the non-patrimonial prejudices, their financial repair is generally admitted with general value by the juridical doctrine and the judicial practice if the causes where extra-contractual illicit facts[2].

On the other side, the engagement of contractual liability for non-patrimonial prejudices has a narrower range of applicability. The financial repair for such prejudices arises in contracts that deal with public transportation, Copyright contracts and other contracts that contain implicit obligations for personal protection, such as in hotels, the organization and attendance of shows or the organization of sportive games.

In conformity with the literature[3], for contractual liability for non-patrimonial prejudices, the awarded compensations are called damages. In some cases, one cannot speak about compensatory or moratory damages, because the non-patrimonial prejudices cannot be assessed in money by following strict criteria. Therefore, the legal action in Court is called action for the repair of moral damages, and not simply damage.

The task of probing the existence of a prejudice is given to the creditor, who pretends damages for the repair of the prejudice.[4] As an exception from this rule, there is not a necessity to prove the damage in the case of obligations for which the law establishes the extend of damages. Therefore, for obligations having a sum of money as the object, the

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[1]Liviu Pop, op. cit., pag.339

[2] Ioan Albu, Victor Ursa, *Raspunderea civila pentru daune morale*, Ed. Dacia, Cluj-Napoca, 1979, pag. 165 si urm

[3] Liviu Pop, op. cit., pag. 340

[4] Renée Sanilevici, Drept civil, Teoria generala a obligatiilor, Centrul de multiplicare al Universitatii , Al. I. Cuza", Iasi, 1980, pag. 63-64

3 Dumitru C. Florescu, op. cit, vol, 2, pag 85

4. Ibidem pag 85

law establishes as moratory damages the obligation to pay in accord to the legal interest. Also, in the case in which the parts have include a penal clause in the contract, by which they established *a priori* the bulk sum that the debtor has to pay as damages should he violates his obligations, the creditor does not have to prove the damage that he has suffered.

c) Causality report

For the involvement of contractual civil liability, the existence of a causality report between the non-execution *lato sensu* of the contractual obligations and the prejudice suffered by the creditor is necessary.

This condition is stipulated in Art. 1086 Civil code, where it is stated that: "Damages does not have to comprise anything but what is a direct consequence of the non-execution of the obligation".

The existence of a causality report in a contractual matter is stipulated by the law. Thus, by the Art1082 from the Civil code, the debtor is obliged to pay damages, excepting the case when the non-execution, inadequate or delayed execution come from a "unknown cause which cannot be imputed"

According to the Art.1083 from the Civil code, the debtor cannot be obliged to pay damages when the non-execution *lato sensu* of the delivery or deliveries is due to major force or accidental facts. Consequently, by "unknown cause" one can understand a case of major force or accidental. This expression has a wider sense, meaning also the creditors fact or the third party fact.[1]

Related to the contractual civil liability, there is no distinction between the effects of major force and accidental facts. These two belong to the same cause, which excludes the existence of a causality report, because the condition of civil liability is not met in this case.

There are two exceptions from this rule: (1) when the contractual debtor is asked to give answers also in the case when the non-execution of obligations is due to an accidental fact. In the case of a public transportation contract, the carter will meet the risks that will arise from the use of the transportation mean, which is an accidental case. The same situation holds for a storage contract in hotels, hospitals or restaurants. In these cases, the liability of the part that stores goods is valid even when the storage has been stolen by the own staff or by outsiders.

On the other side, by the Art.1625[2] from the Civil code, the keeper cannot be hold liable for the stolen goods made by the use of fire-arms, fact that constitutes a major force. Major force is an external circumstance, having an extraordinary character, absolutely unforeseeable and unavoidable.

The accidental case is an external circumstance having the origin in the activity field of the debtor or a circumstance or external origin which is not extraordinary and can be foreseen and avoided. Both, the major force and the accidental case, exclude directly, totally or partially, the existence of the causality report between the debtor's behaviour and the prejudice suffered by the debtor. The same circumstances exclude indirectly the guilt of the debtor.

When the non-execution *lato sensu* of obligations is due to the major force or to an accidental case, the following consequences may appear:

a) In unilateral contracts, the obligations are ceased;
b) The reciprocal contracts cease entirely

[1] Constantin Statescu, Corneliu Barsan, op. cit, pag 91

[2] According to the Art. 1625 from the Civil code, the keeper "is not liable for the stolen goods made by the use of fire-arms or by a major force."

In reciprocal contracts, the obligations of the parts are interdependent and reciprocal, so that the cease of obligations from one part due to the impossibility of accidental execution will determine the same effect to the other part. The risks of the non-execution of the contract are supported by the debtor of the impossible to execute obligation.

c) In contracts with successive execution, the major force and the accidental case, acting only temporarily, will have as effect only the cease of those obligations whose execution has become impossible. Thus, the debtor will be held to execute in kind the remaining obligations after the cease of the unknown case. Exception is the case when the debtor can prove that he also made impossible their execution.

The major force and the accidental case can have as effect the suspension of the contract execution. The effect is applied only to contracts with successive execution and to contracts made by the term. During the time-period that those unknown cases act, the creditor can pretend from the debtor the fulfillment of the obligation, e.g., the payment and small moratory damages.

d) The guilt (culpa) of the debtor

For the engagement of liability in the contractual sense, the existence of the debtor's culpa is also necessary, besides the provocation of a damage by the debtor through the violation of his contractual obligations.

In our Civil code, the contractual civil liability is a subjective liability based on the guilt (Art. 1082 from the Civil code). The necessity of the existence of the culpa for the engagement of debtor's liability yields from the liability function itself to determine some behaviour of the contractual parts.

Culpa is the psychological attitude of the debtor towards the non-execution of his obligation and towards its consequences. Culpa is the subjective behaviour of the liability.

The criteria for the assessment of the culpa can be either subjective or objective. The subjective criterion if the one for which the measure of the behaviour is given by the activity of the subject in question. The criterion is objective when the measure of the behaviour is given by sphere of activity of another person.

It is necessary to make distinction between the objective assessment criterion of the culpa and the objective liability, such that confusions cannot arise. The objective liability means the engagement of liability without the examination of the debtor's behaviour, while the assessment of the culpa by an objective criterion supposes an analysis of the author's behaviour, compared to the behaviour of other persons in similar conditions.

The problem that gave rise to discussions is the following: must the guilt or culpa be proven? To answer this one must necessarily take into discussion a classification of the contractual obligations according to their object. We can either have obligation of results or obligation of means.

In the case of obligations of results, one has imposed the solution that the debtor's culpa is presumed. This presumption is relative and it operates immediately that the creditor proves that the debtor has not realized or has not obtained the result that he has committed himself upon. The existence of this presumption is assessed in the articles 1073, 1075, 1082 and 1083 from the Civil code. In this way, the creditor is not held to probate debtor's culpa. Anyway, an analysis of the reasons for which the debtor has not obtained the results that he has committed himself is sometimes necessary. This examination is enforced in the following situations: when the law stipulates (in some contracts) or when there exists an appearance of execution but that is non-conformal or defective.

In all cases, the creditor must prove the lack of that special behaviour or, if the case imposes so, the non-conformal or defective execution of the obligation[1].

The situation for the obligations of means or for the obligations for diligence is different. By definition, the debtor commits himself to put in value all the necessary means and to undertake a diligent activity in order to obtain a specific result. However, he does not guarantee that result. Therefore, the lack of realization of the result does not have as effect the automatic presumption of the debtor in culpa. Contrariwise, for the engagement of the contractual liability, the creditor is held to provide proof that the debtor was in the culpa of not using the adequate means and of not undertaking a diligent activity for the realization of the result.

By the Art 1081 from the Civil code, the assessment of the debtor's behaviour in the execution of the contractual obligations is made taking into account the diligence "of a good owner" (*bonus parter familias*).

We are in the presence of a objective criterion that implies the necessity for the comparison between the contractual debtor's activity with the one of a diligent person that acts with care in the benefit of the society interests and its members, having a behaviour according to the law and the social cohabitation rules.[2]

In specific contracts, he criterion is applied with either a bigger or a smaller rigour. As examples: the Art. 1540 from the Civil code[3] states that the trustee's responsibility is less rigorous in the contract of mandate with gratuity title; the Art. 1600 from the Civil code states that the responsibility of the keeper in a contract of deposit is rigorous when the keeper has offered to receive the goods in the deposit, or the deposit is with onerous title.

This criterion is a dynamical one, as its content grows as the science develops and the level of education of the society members or their social conscience grows. This criterion is also variable, because for its application the specific conditions must be taken into account, such as time and place.[4]

[1] Constantin Statescu, Corneliu Birsan, op cit. pag. 318; Liviu Pop, op. cit., pag 343
[2] Constantin Statescu, Corneliu Birsan, op cit. pag. 318; Liviu Pop, op. cit., pag 343
[3] By the Art. 1540, paragraph 1 of the Civil code, "The trustee is held responsible not only for the dol, but also for the culpa that he has committed during the execution of the mandate", and, by the 2nd paragraph, "For a culpa in a payment mandate, the liability is applied with less rigour than otherwise."
[4] Ion M. Anghel, Francisc Deak, Marin F. Popa, *Raspunderea civila*, Ed Stiintifica, Bucuresti, 1970, pag 316-317