

The COVID-19 pandemic has brought up the need for parties to seek various legal options for the extinguishment of contractual relations which have already been entered in.

A contract may be terminated on various legal grounds, typically due to performance or non-performance of contractual relations. Furthermore, there exist legal ways of achieving an extinguishing effect on the existing contractual relations other than those envisaged in the original contract, such as the election “to give rather than to fulfill”.

- *Unilateral cancellation due to non-performance*

Even where the contract does not envisage the opportunity for early unilateral cancellation before the expiry of the validity term, the law allows the non-defaulting party to cancel the contractual relations in cases of inaccurate, late or incomplete performance. A common mistake in this type of termination is the failure of the non-defaulting party to provide an appropriate additional grace period for the debtor to fulfill their obligations. In a limited number of cases, such an additional grace period is not mandatory but they should always be considered from the perspective of the existing specific case and its circumstances. If the provision of an additional grace period is omitted, the court might consider the contract to not have ceased to exist and hence it would be impossible to seek the remedies relating to a cancelled contract, such as return of what has been given because of the original grounds are no longer existent (e.g. return of a down-payment), or penalties and others.

It should be remembered that the cancellation of a contract is inadmissible where the unfulfilled portion of the obligation represents an insignificant part with a view to the interests of the non-defaulting party.

- *Termination by mutual consent*

However, if we are willing to terminate a contract without any non-performance of the other party and there is no such clause in the contract, the contractual relations may be terminated only when the parties reach mutual agreement. In other words, if there is no mutual consent, the contract cannot be cancelled unilaterally prior to the expiry of its validity term or prior to the fulfillment of its subject-matter. The signing of a termination agreement by mutual consent does not rule out the opportunity for the parties to provide for or negotiate a kind of

penalty in relation to the early termination.

If a party is not in a position to fulfill an obligation, like repayment of a debt, the parties might agree on repayment on the basis of the other legal option mentioned above, i.e. election “to give rather than to fulfill”.

- *Election to give rather than to fulfill*

To illustrate the essence of the legal figure of “giving instead of performance”, we could use a hypothetical example in which the parties agree that the ownership of some immovable property will be transferred so that to repay a loan. It is important to note that when an agreement is concluded to give rather than to fulfill, the extinguishment of contractual relations with regard to the original loan agreement is not automatic and the obligations continue to exist parallel to each other, i.e. in this particular case, if the debtor fails to fulfill the new contractual obligation to transfer the immovable property, the creditor will continue to be entitled to seek repayment of the loan because of the failure to transfer rather than to repay. Of course, it is possible to find legal wording of the agreement that will ensure extinguishment of contractual relations with regard to the original debt as early as the time of signing the agreement. Thus a possible non-performance would be only the failure to transfer the property but not a failure to repay the loan. Where this option is chosen, it is of paramount importance to carefully word the conditions for the extinguishment of contractual relations to take place.

- *A force majeure clause*

It is highly recommendable that the parties always include a clear force majeure clause on exceptional circumstances that would frustrate the fulfillment of the contract. The occurrence of such circumstances could be linked to specific consequences which the parties state explicitly in their contract. For example, it is possible to agree that if the force majeure lasts for a certain fixed period of time, the contract will be terminated automatically upon the expiry of the agreed period. A clear and specific definition of the term “force majeure” could prevent the payment of penalties for debt past due or for inaccurate performance. Moreover, a precisely worded clause rather than the standard force majeure clause would reduce the possibility for a party to the contract to abuse of the clause and invoke circumstances that

are subjectively treated as force majeure to its own benefit.