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Contract Dissolution

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CONTRACT DISSOLUTION

Louisiana Civil Code articles 2013-2024, as amended by Act 331 of 1984, govern the dissolution of contracts.[1] This comment examines the operation of the new provisions in light of the prior existing law and is limited to the subject of contract dissolution. Two related areas—putting the obligor in default and determining damages—are included only insofar as these topics are necessary concomitants to a discussion of dissolution itself. Specific performance, because it is a remedy antithetical to contract dissolution, is not discussed.

It may be helpful for the reader, in considering the following discussion, to bear in mind that:

(1) "Failure to perform" includes delayed performance, defective performance and nonperformance;[2]

(2) The distinction between active and passive breach[3] is no longer used to determine whether an act of the obligee is required to put the obligor in default;[4]

(3) The arrival of a fixed or determinable term contained in a contract automatically puts the obligor in default;[5]

(4) With one exception, putting the obligor in default is not a prerequisite to the obligee's filing suit for dissolution; it merely establishes a point from which moratory damages begin to accrue;[6]

(5) The unqualified term "damages" used hereinafter refers to all damages arising from the obligor's failure to perform, whether the failure consists of a delayed or defective performance or of nonperformance.[7]

(6) The term "extrajudicial dissolution" refers to the exercise of the obligee's right to regard the contract as dissolved prior to a judicial pronouncement of dissolution.[8]

Dissolution Prior to the 1984 Revision

Under the legislation regulating contract dissolution prior to January 1, 1985, a resolutory condition was implied "in all commutative con-

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1. Articles 1756-2291 of the Louisiana Civil Code of 1870 [hereinafter cited as OA (old articles)] were repealed and replaced by new articles 1756-2059 [hereinafter cited as NA]; see 1984 La. Acts, No. 331, § 1. See also NA 1876-1878 (dealing with impossibility of performance giving rise to dissolution or partial dissolution of a contract).

2. NA 1994.

3. See OA 1931-1933.

4. See NA 1989, comment (f). Putting the obligor in default is now required only when the obligee seeks damages for delayed performance.

5. NA 1990.

6. The exception is La. R.S. 31:135-139 (1975).

7. See NA 1994.

8. See NA 2013.

tracts, to take effect, in case either of the parties do [sic] not comply with his engagements."[9] Upon the obligor's breach of his obligation, the obligee who was ready to perform or did perform at the time and place required by the contract[10] had an action for dissolution of the contract: (1) at the moment of the breach, if no act of the obligee was required to put the obligor in default;[11] or (2) after the obligor had been put in default by the obligee, if necessary.[12] A court could, depending on the circumstances of the case, grant immediate dissolution with or without damages in favor of the obligee, or deny dissolution and (1) require the obligee to accept a tender of specific performance made by the obligor in response to the obligee's suit,[13] or (2) grant the obligor additional time in which to perform.[14] The circumstances taken into consideration by a court in determining whether the obligor's breach warranted dissolution of the contract included "the extent and gravity of the failure to perform alleged by the complaining party, the nature of the obligor's fault, the good or bad faith of the parties involved, and also the surrounding economic circumstances that may make the dissolution opportune or not."[15] As a rule, dissolution of contracts had to be pronounced by the court;[16] however, the jurisprudence recognized that, under certain circumstances, the obligee had the right to "regard the contract as dissolved" prior to judicial pronouncement.[17]

Dissolution After the 1984 Revision

Obligee's Right to Dissolution

NA 2013 provides an obligee with the right to the dissolution of a contract when the obligor fails to perform.[18] This right may be exercised

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9. OA 2046. Note that NA 2013 has abandoned the implied resolutory condition as the theoretical basis for the obligee's right to dissolution, and that NA 2013, unlike OA 2046, is not limited to commutative contracts.

10. This requirement was imposed by OA 1913 and 1914.

11. See OA 1911(1), (3); OA 1932; OA 1933(1).

12. See OA 1912, 1933.

13. See, e.g., Watson v. Feibel, 139 La. 375, 71 So. 585 (1916).

14. OA 2047.

15. See 2 S. Litvinoff, Obligations § 270, at 509, in 7 Louisiana Civil Law Treatise (1975). Waseco Chem. & Supply Co. v. Bayou State Oil Corp., 371 So. 2d 305 (La. App. 2d Cir. 1979) contains an example of the evaluation process used by the courts.

16. See 2 S. Litvinoff, supra note 15, § 270, at 508.

17. See Texala Oil & Gas Co. v. Caddo Mineral Lands Co., 152 La. 549, 93 So. 788 (1922); Hay v. Bush, 110 La. 575, 34 So. 692 (1903).

18. NA 2013 provides:

> When the obligor fails to perform, the obligee has a right to the judicial dissolution of the contract or, according to the circumstances, to regard the contract as dissolved. In either case, the obligee may recover damages.
>
> In an action involving judicial dissolution, the obligor who failed to perform may be granted, according to the circumstances, an additional time to perform.

judicially or extrajudicially, but its extrajudicial exercise is always subject to later review and reversal by the court.

When the obligor fails to perform, the obligee may apply to the court for the dissolution of the contract with or without claiming damages. Judicial dissolution sued for in this manner is the proper course when the obligee desires other relief of the court, such as the erasure of a contract from the public records.[19] It is also a safer course of action than extrajudicial dissolution, regardless of whether any relief is sought by the obligee, because a unilateral declaration of dissolution by the obligee may prompt the obligor to institute an action for the enforcement of the contract or for damages in case the obligee has not performed his own obligation. If the court subsequently finds that the obligee acted wrongly in regarding the contract as dissolved, the obligee may be liable in damages to the other party. Whether or not dissolution of the contract is granted, the court may deny damages when an obligee's bad faith or negligence has caused or contributed to the obligor's failure to perform[20] or when the obligor's failure to perform is excused.[21]

Traditionally, courts have exercised wide discretion in determining whether an obligor's failure to perform, in light of the circumstances surrounding that failure, warrants dissolution of the contract.[22] This practice in the past has been justified primarily by two considerations. First, it seems unfair to allow one party to use a relatively unimportant partial failure of performance by the other as an excuse for dissolving a contract, thereby depriving the other party of the expected benefit of the contract. Second, the courts have been concerned with the effects of dissolution on the rights of third parties.[23] These problems are the subject of some of the new code articles in the chapter on dissolution. Dissolution of contracts after partial performance has been rendered is addressed in NA 2014 and NA 2018,[24] and the interests of third parties are protected by NA 2020 and NA 2021.[25] As a result, the new articles on dissolution seem to require the courts to exercise their discretion within the parameters established by the articles and not beyond them. This effects no change in the law, since the parameters drawn by the new articles are taken from the prevailing jurisprudence, as well as from prior legislation; however, the existence of legislative guidelines, though vague in some instances, should result in a greater uniformity in the courts' application of the law. Under NA 2013, once the obligor's failure

19. See NA 2013, comment (c).
20. NA 2003.
21. See, e.g., NA 1873 (obligor not liable when failure caused by fortuitous event).
22. 2 S. Litvinoff, supra note 15, § 270, at 508.
23. Id.
24. See infra text accompanying notes 52 & 70.
25. See infra text accompanying notes 58 & 74.

to perform is established, dissolution should be denied only when a reason for such denial can be founded on the provisions of the Civil Code.

Under NA 2013, "dissolution takes place upon judicial declaration."[26] However, under some circumstances an obligee has the right to regard the contract as dissolved prior to judicial pronouncement. In the past, the courts have recognized that when the obligor commits an active breach of his obligation, the obligee may regard the contract as dissolved and, if the other party sues, raise dissolution by exception.[27] The new legislation adopts this concept; however, since the distinction between active and passive breach has not been retained in the 1984 revision of the Civil Code, the "circumstances" under which the obligee may exercise this right to extrajudicial dissolution of the contract are provided in four of the new articles following NA 2013: NA 2017, NA 2016, NA 2024, and NA 2015.

NA 2017

> *The parties may expressly agree that the contract shall be dissolved for the failure to perform a particular obligation. In that case, the contract is deemed dissolved at the time it provides for or, in the absence of such a provision, at the time the obligee gives notice to the obligor that he avails himself of the dissolution clause.*[28]

Under NA 2017, if a contract provides that it "shall be dissolved for the failure to perform a particular obligation," and if a term is provided for the performance of that obligation, the obligee may regard the contract as dissolved if the obligor does not perform within the term. If the contract contains an express dissolution clause but no term for the performance by the obligor, the obligee may not regard the contract as dissolved until he notifies the obligor that he avails himself of the dissolution clause. Thus, the essential elements of extrajudicial dissolution under this article are: (1) the existence of an express dissolution clause as part of the agreement between the parties; (2) failure to perform on the part of the obligor; and (3)(a) a term for the performance of the obligation giving rise to the dissolution, or (b) notice to the obligor of termination, if there is no term for performance. If an obligee declares the contract dissolved in accordance or attempted accordance with this article, the obligor may elect to sue to enforce or to dissolve the contract. In such a case, the court should inquire whether each of the aforementioned elements exist under the circumstances of the case. If so, the

26. NA 2013, comment (c).

27. See, e.g., *Texala*, 152 La. at 567, 93 So. at 795. See also NA 2013, comment (c).

28. NA 2017.

court should declare the contract dissolved in favor of the obligee; if not, appropriate relief should be granted to the obligor.

NA 2013 provides that in "an action involving judicial dissolution," the party who failed to perform may be granted "an additional time to perform." This option should not be available to the court in an action involving extrajudicial dissolution under NA 2017. The intent of NA 2017 is to make generally applicable "the rule provided in C.C. Art. 2563(1870) for contracts of sale, although without that Article's requirement of a judicial demand."[29] Article 2563 provides:

> If, at the time of the sale of immovables, it has been stipulated that, for want of payment of the price within the term agreed on, the sale should be of right dissolved, the buyer may nevertheless make payment after the expiration of the term, as long as he has not been placed in a state of default, by a judicial demand, but after that demand, the judge can grant him no delay.

In a case involving NA 2017, the arrival of a term for performance or the giving of notice by the obligee serves the function of the putting in default requirement in article 2563 of the Civil Code. The obligee is not required to put the obligor in default by any of the methods provided in NA 1991 since that article is "not applicable to contract-dissolution which is now governed by revised C.C. Arts. 2013-2024."[30] It follows that the court may not grant the obligor any additional time to perform once the requirements of NA 2017 are fulfilled.

NA 2016

> *When a delayed performance would no longer be of value to the obligee or when it is evident that the obligor will not perform, the obligee may regard the contract as dissolved without any notice to the obligor.*[31]

In the past the courts have held that an obligor is justified in regarding a contract as dissolved upon the obligor's failure to perform when time is of the essence of the contract[32] or when the obligor has manifested an inability or unwillingness to perform or has repudiated the existence of the contract.[33] Time is of the essence of the contract whenever the parties have "made the time of performance an express condition precedent to the duty of one of the parties."[34] Even absent such an express

29. NA 2017, comment (a).

30. NA 1991, comment (f).

31. NA 2016.

32. See, e.g., *Texala*, 152 La. at 562, 93 So. at 793.

33. See, e.g., Allen v. Steers, 39 La. Ann. 586, 2 So. 199 (1887); Lawton v. Louisiana Pac. Corp., 344 So. 2d 1129 (La. App. 3d Cir. 1977).

34. 2 S. Litvinoff, supra note 15, § 246, at 462.

condition, time is presumed to be of the essence in mercantile contracts for the sale and delivery of goods on specified future dates where the market for the goods fluctuates.[35] In such a case, the recipient of a delayed performance may find that the market price for the goods has dropped below the contract price, and therefore the delayed performance is of no value to him.[36] Under these circumstances it would be unfair to require the obligee to accept late performance, and NA 2016 imposes no such requirement. Nor should a court, in such a situation, allow the obligor an additional time to perform. Though NA 2013 does not limit the court's authority to grant additional time in such a situation, doing so would defeat the purpose of NA 2016.

NA 2024

> *A contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party.*[37]

Under NA 2024 a party's right to dissolution of the contract is not dependent on any failure to perform by the other party. All that is required is a contract of "unspecified duration" and a giving of reasonable notice of termination to the other party. The text of this article does not explain what "reasonable notice" is, but comment (e) to NA 2024 indicates that the reasonableness of the notice given will depend upon its effectiveness in preventing "unwarranted injury to the interest of the other party." Uniform Commercial Code section 2-309 is cited as a source of NA 2024. Comment 8 to section 2-309 explains that the notice required by section 2-309(3) entails the allowance of a reasonable time for the other party to "seek a substitute arrangement."[38] This suggests that the availability of substitutes is one factor which may be evaluated by a court considering this question.

This article should have its greatest usefulness in connection with "contracts providing for continuous or periodic performance" when such contracts are of indefinite duration.[39] It should be noted, however, that

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35. See the discussion of this concept in Kinsell & Locke, Inc. v. Kohlman, 12 La. App. 575, 126 So. 257, 258 (1930).

36. This was the situation in *Kohlman*.

37. NA 2024.

38. U.C.C. § 2-309 provides in part:

> (2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.
>
> (3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

39. See infra text accompanying note 77.

this article does not apply to "particular kinds of contracts, such as C.C. Art. 2686 (1870), governing lease of things, and C.C. Art. 2747 (1870), governing lease of labor," which are governed by their own rules.[40]

NA 2015

> *Upon a party's failure to perform, the other may serve him a notice to perform within a certain time with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved. The time allowed for that purpose must be reasonable according to the circumstances.*
>
> *The notice to perform is subject to the requirements governing a putting of the obligor in default and, for the recovery of damages for delay, shall have the same effect as a putting of the obligor in default.*[41]

NA 2015 provides an alternative to judicial dissolution[42] which is available to the obligee in situations in which NA 2016, NA 2017, and NA 2024 do not afford the obligee the right to extrajudicial dissolution. The prerequisites to dissolution under this article are: (1) the failure of the obligee to perform; (2) the giving of notice which is a valid putting of the obligor in default under NA 1991,[43] and which (a) demands performance of the obligor, (b) within a reasonable time, and (c) warns the obligor that the contract will be deemed dissolved if performance is not rendered within the time provided in the notice; and (3) the failure of the obligor to perform within the time provided. If all of these requirements are met, the obligee should be entitled to regard the contract as dissolved. Particular attention should be paid to the reasonable time requirement which appears to leave the determination of reasonableness to the discretion of the court evaluating the circumstances of the case. This requirement apparently is derived from the rule regarding putting the obligor in default under the prior law: the debtor is not automatically cut off from performance by the formal demand made upon him to perform, but a reasonable time should be allowed him to comply with this demand.[44] Thus, the jurisprudence in this area should provide some guidance with respect to this issue.[45]

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40. NA 2024, comment (b).

41. NA 2015.

42. NA 2015, comment (b).

43. NA 1991: "An obligee may put the obligor in default by a written request of performance, or by an oral request of performance made before two witnesses, or by filing suit for performance, or by a specific provision of the contract."

44. Watson v. Feibel, 139 La. 375, 392, 71 So. 585, 591 (1916).

45. See 2 S. Litvinoff, supra note 15, § 278, at 524.

Judicial Restraint Involving Extrajudicial Dissolution

As observed earlier, the courts have enjoyed a rather broad discretion in the matter of granting dissolution of a contract.[46] While this practice may be justifiable in an action for judicial dissolution in which extrajudicial dissolution is not involved (since in effect the obligee is asking the court to settle the differences between the parties), where extrajudicial dissolution is an issue, a court should confine its inquiry to whether the legislative requirements which may apply to a particular situation have been met. There are three reasons for courts to adopt this approach. First, where "reasonableness" is a material element of extrajudicial dissolution, the court will still retain a large measure of control over whether dissolution of the contract is warranted under the circumstances. Second, if the court finds that the applicable essential requirements have been met, it is in effect finding that the parties, particularly the obligee, have themselves performed the function of the court in judicial dissolution. There should be no need for further inquiry by the court in this case. Third, compliance with the requirements for extrajudicial dissolution gives the obligee the right to "regard the contract as dissolved."[47] If the obligee has complied and therefore has the right to ignore the contract, he has the right to seek the performance not rendered by the obligor from another party. It would therefore be unjust for the court, under these circumstances, to require the obligee to accept a tender of specific performance or to grant the obligor additional time to perform.

With respect to the recovery of damages accompanying dissolution of a contract, it is clear that extrajudicial dissolution does not preclude such recovery. NA 2013 provides that whether the obligee has obtained judicial dissolution or has chosen to regard the contract as dissolved, "[i]n either case, the obligee may recover damages." However, in the latter case, of course, the obligee must apply to the court for a judicial declaration of dissolution and for damages.

Limits on the Obligee's Right

NA 2013

> *In an action involving judicial dissolution, the obligor who failed to perform may be granted, according to the circumstances, an additional time to perform.*[48]

An "action involving judicial dissolution" includes both the obligee's action arising from the obligor's failure to perform, and the action of the obligor "who complains that the obligee has wrongly declared the

46. See supra text accompanying note 22.
47. NA 2013.
48. NA 2013 ¶ 2.

contract dissolved."[49] The factors to be considered by the court in determining whether to grant the obligor additional time include "the good faith vel non of the obligor, and whether he has a valid excuse for his failure."[50] Furthermore, as previously mentioned, the court should not grant extra time to the obligor when the obligee proves that a valid extrajudicial dissolution has taken place.

NA 2014

> *A contract may not be dissolved when the obligor has rendered a substantial part of the performance and the part not rendered does not substantially impair the interest of the obligee.*[51]

The purpose of NA 2014 is to prevent "a party from receding from a contract on a mere excuse."[52] This article applies to judicial dissolution under NA 2013 and to extrajudicial dissolution under NA 2015 and NA 2016. It is possible that this article is not intended to apply to dissolution under NA 2017 because in that case the parties have agreed in advance that the failure to perform a particular obligation (presumably even one of minor importance) shall result in the dissolution of the contract. A court should be hesitant to interfere with the bargained-for result of the contract and should instead enforce the express will of the parties. Since failure of performance is not an issue under NA 2024, NA 2014 likewise should not apply to dissolution under that article. NA 2014 is designed to protect the obligor's rights both to perform and to receive performance under the terms of the contract when a partial failure to perform on the part of the obligor is not substantially harmful to the obligee (who may recover damages suffered as a result of the obligor's failure to perform).[53] In this way, the harsh effects of dissolution are not unjustly visited on the obligor, and the obligee is adequately compensated.

NA 2014 does not furnish a clear guide as to its applicability. The cases cited as examples of situations in which dissolution is refused under NA 2014 are the same as those cited as examples of partial dissolution under NA 2018.[54] The factors considered by the courts in deciding whether "substantial partial performance" has been rendered in a construction contract include "the extent of the defect or nonperformance, the degree to which the purpose of the contract is defeated, the ease of correction, and the use or benefit to the [owner] of the work performed."[55] It seems that the determination of "substantial

49. NA 2013, comment (e).
50. Id.
51. NA 2014.
52. NA 2014, comment (b).
53. Id.
54. See NA 2014, comment (a); NA 2018, comment (c).
55. See Airco Refrigeration Serv., Inc. v. Fink, 242 La. 73, 81, 134 So. 2d 880, 882 (1961).

performance" under the construction contracts involved in those cases includes both an evaluation of the performance rendered by the obligor and of the impairment of the interest of the obligee arising from the partial failure of performance. Because of this, these standards may be useful if applied by analogy to obligations generally. NA 2014 will probably be most useful when applied to contracts for "continuous or periodic performance,"[56] such as leases, in which the interest of the lessee cannot adequately be protected by the simple expedient of allowing him to recover the contract price.

NA 2020

> *When a contract has been made by more than two parties, one party's failure to perform may not cause dissolution of the contract for the other parties, unless the performance that failed was essential to the contract.*[57]

This article, like NA 2014, appears to be intended to prevent a party from dissolving a contract on a "mere excuse." The focus of the court's inquiry in a case involving NA 2020 should be on (1) the "purpose" of the contract, and (2) whether the performance of the party who failed to perform was "essential" to that purpose.[58] The purpose of the contract should be understood as the "common cause" for the parties' having entered into the contract,[59] that is, the end envisioned by the parties as a group as the inducement for contracting. If this end becomes unattainable due to the failure of one of the parties to perform, then the contract should be dissolved as between all the parties if one of the remaining parties requests dissolution. But if an acceptable substitute for the unperformed obligation is available, then dissolution should take place only with respect to the party who failed to perform. An increase in the cost of carrying out the contract to its end should not be regarded as sufficient to defeat the purpose of the contract, since under NA 2013 this increase is recoverable as damages from the party who failed to perform.

NA 2022

> *Either party to a commutative contract may refuse to perform his obligation if the other has failed to perform or does not offer to perform his own at the same time, if the performances are due simultaneously.*[60]

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56. See infra text accompanying note 77.
57. NA 2020.
58. See NA 2020, comment (b).
59. See 1 S. Litvinoff, Obligations § 228, at 410, in 6 Louisiana Civil Law Treatise (1969).
60. NA 2022.

NA 2022 "gives general formulation to the exceptio non adimpleti contractus (defense of nonperformance)."[61] This article applies "only where the performances of the parties are to be rendered simultaneously."[62] In the scheme of contract dissolution under NA 2013, withholding or discontinuing performance in accordance with NA 2022 should not be considered a failure to perform since by the nature of the commutative contract neither party is bound to perform if the other does not.[63] Thus, a party whose failure to perform or offer to perform his own obligation at the appropriate time and place has caused the other party to withhold or discontinue performance has no right to dissolution of the contract. This article should be used when a party, whose failure to perform prompted the withholding of the other party's performance, attempts to obtain dissolution of the contract based on the other party's "failure" to perform, and the withholding party wishes either to force the other party to perform according to the contract or to obtain dissolution and damages in his own favor.

NA 2023

> *If the situation of a party, financial or otherwise, has become such as to clearly endanger his ability to perform an obligation, the other party may demand in writing that adequate security be given and, upon failure to give that security, that party may withhold or discontinue his own performance.*[64]

NA 2023 appears to have the same function in the scheme of contract dissolution as NA 2022—that of providing a justification for withholding performance which deprives the other party of his right to obtain dissolution of the contract under NA 2013. Uniform Commercial Code section 2-609 (1) and (2) is cited as a source of NA 2023. Comment 1 to that section explains that "[a] seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers."[65] While the applicability of NA 2023 seems, in light of the foregoing explanation, less useful in a noncommercial setting, this article is intended to apply to obligations generally.[66]

The comments to NA 2023 establish that a party's ability to perform may be endangered by a change in his situation, "financial or otherwise,"

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61. NA 2022, comment (b).

62. NA 2022, comment (c).

63. See 2 S. Litvinoff, supra note 15, §§ 228-231, at 426-34.

64. NA 2023.

65. U.C.C. § 2-609(2): ("Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.").

66. NA 2023, comment (e).

and that security means "not only real or personal security, but also an assurance" that performance will be rendered.[67] However, the comments say nothing about what is considered "adequate security." Under Uniform Commercial Code section 2-609(2), the adequacy of security is measured "according to commercial standards." Under NA 2023 the parties apparently are left free to negotiate as to this matter, subject to the obligation of good faith in this process.[68] This approach is sound, because requiring the judicial fixing of security as a condition precedent to the obligee's exercise of his rights under this article would have the undesirable effect of allowing the obligor to withhold security pending judgment, thereby jeopardizing the interest which this article seeks to protect.[69] It is noteworthy, however, that NA 2023, unlike Uniform Commercial Code section 2-609(4), does not treat the obligor's failure to furnish security as a repudiation of the contract, which would give rise to a cause of action for dissolution under NA 2013 and 2016.

Effects of Dissolution

NA 2018

> *Upon dissolution of a contract, the parties shall be restored to the situation that existed before the contract was made. If restoration in kind is impossible or impracticable, the court may award damages.*
>
> *If partial performance has been rendered and that performance is of value to the party seeking to dissolve the contract, the dissolution does not preclude recovery for that performance, whether in contract or quasi-contract.*[70]

The first paragraph of NA 2018 speaks for itself: dissolution is to have the effect of returning the parties to the *status quo* as it was prior to the contract by restoring to an aggrieved party any performance rendered or, if this is inadequate, by an award of damages. NA 2018 further provides for the partial dissolution of contracts as follows: (1) if substantial partial performance has been rendered, the obligor recovers in accordance with the terms of the contract, minus damages sustained by the obligee because of the failure of the obligor to render perfect performance;[71] (2) if the partial performance rendered is not substantial, but is of value to the obligee, the obligor recovers in quasi-contract and

67. NA 2023, comment (d).

68. La. State Law Institute, Revision of Civil Code Book III, Minutes of the Council, Nov. 13, 1981, at 2 [hereinafter cited as Council Minutes].

69. Id.

70. NA 2018.

71. NA 2018, comment (c).

the obligee may have damages;[72] (3) if the partial performance is of no value to the obligee, the obligor recovers nothing, and the obligee may recover damages.[73]

NA 2021

> *Dissolution of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.*
>
> *If the contract involves immovable property, the principles of recordation apply.*[74]

A cited source of NA 2021 is Civil Code article 3229, which is designed to protect the interests of third-party purchasers who would otherwise be prejudiced by the dissolution of a contract.[75] The apparent intent of NA 2021 is to make restoration in kind under NA 2018 unavailable when this would impair the rights of certain third parties. NA 2021 is in accord with the general principle that "contracts may produce effects for third parties only when provided by law."[76] The "onerous contract" and "good faith" requirements of NA 2021 provide protection for the obligee from collusive acts entered into between the defaulting obligor and third parties which prejudice the obligee's right to restoration in kind under NA 2018.

NA 2019

> *In contracts providing for continuous or periodic performance, the effect of the dissolution shall not be extended to any performance already rendered.*[77]

The contracts governed by NA 2019 are distinguished from those within the meaning of NA 2018 in that the latter article refers to a single act of performance which is never satisfactory, while the former contemplates a series of satisfactory performances followed by a failure to perform.[78] Comment (b) to NA 2019 uses a lease as an example of a contract for "continuous performance" and a requirements or output contract as an example of a contract involving "periodic performance." In these kinds of contracts, restoration in kind is often "impossible or impracticable;" in other cases it would serve no useful purpose. For instance, a lessor cannot possibly be restored the enjoyment of the thing leased which is

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72. NA 2018, comment (d).

73. NA 2018, comment (e).

74. NA 2021.

75. Article 3229 provides in part: "If the sale was not made on credit, the seller may even claim back the things in kind, which were thus sold, as long as they are in possession of the purchaser. . . ."

76. NA 1985.

77. NA 2019.

78. Council Minutes, supra note 68, at 10.

conferred on the lessee during the term of the lease.[79] Furthermore, if the lessee has paid rent over a certain period before failing to pay, the lessee already has received that which he bargained for over that period. The practical solution adopted by NA 2019 is to dissolve the contract only as to the acts of performance not yet due under its terms.

Conclusion

The new articles on contract dissolution do not effect a change in the law with the exception of NA 2017 (which mandates that the courts give greater deference to the express intent of parties who include a dissolution clause in their contract) and NA 2018 (which permits the general application of partial dissolution). Otherwise, the new articles codify principles derived from the jurisprudence and from prior legislation. Any changes which might otherwise have resulted from the adoption of extrajudicial dissolution will likely be negated by the degree of control retained by the courts over the granting of dissolution, especially in the case of NA 2014. Nevertheless, reducing the principles controlling dissolution under the old law to statutory form—particularly with respect to the minimization of the importance of putting the obligor in default—should provide a measure of freedom for contracting parties not always available prior to the 1984 revision.

James J. Hautot

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79. This example contemplates a typical residential lease: a term of one year with rent due monthly.