Contractual termination by mutual abandonment not claimed by any party?

The risks of applying the doctrine according to which a contract is deemed withdrawn from if neither party to the same appears to want it. Not only is this solution likely to be inconsistent with the parties' claims, but it also wrongly rules out other civil law options the parties could pursue upon dismissal of the action for declaration of termination.

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1. Supreme Court Judgment no. 814/2025 of 21 May (ECLI:ES:TS:2025:2218)

In 2005, the claimant signed a reservation agreement in which he declared that he had received from the defendant the sum of €100,000 as a holding (earnest money) deposit, which would be converted into a payment on account of the purchase price of commercial premises. The total purchase price was set at €220,000 the remaining €120,000 being payable at the time of execution of the deed of sale, to be formalised within a maximum period of 20 calendar days from formal notice to the buyer of the registration of the vesting of estate instrument. In 2014, the sellers brought an action for declaration of termination of the deposit agreement due to breach of contract by the buyer, as well as another for damages which, under the penalty clause, amounted to €100,000. The defendants opposed the claim and filed a counterclaim requesting the ter-

mination of the agreement due to breach by the seller and a decision ordering the counterclaimants to pay €200,000 (double the deposit) to the buyer, plus statutory interest.

The court stated as follows:

> Considering that the buyers did not breach the agreement the main claim must be dismissed, and as the buyers can choose between performance and termination under Article 1124 of the Civil Code, the counterclaim is upheld on this point, and the parties must mutually return what was the subject matter of the agreement in accordance with Articles 1303 et seq. of the Civil Code, i.e. the property with its proceeds and the €100,000 that was part of the price with interest. As for the award of damages to the buyers, it is not appropriate for them to claim double the deposit as if there had been a withdrawal in accordance with Article 1454 of the Civil Code, as this is not the case, and as there is no penalty clause replacing the damages that the sellers would have to pay to the buyers in the event of breach, the loss resulting from the sellers' breach must be proven.

The Provincial Court states that until 8 April 2010, neither party requested the other to comply with the agreement. It concludes that this lack of communication between the parties for almost five years prevents us from taking the view that we are dealing with a case of contractual termination resulting from a breach attributable exclusively to one of the parties. On the contrary, it is clear that, for various reasons, neither party was interested in completing the sale and purchase, which implies the presence of what is referred to in case law as 'mutual abandonment' (*mutuus dissensus*), which is particularly applicable to cases such as this one, in which both parties allow years to pass without compelling the other to fulfil its obligations. The Provincial Court concludes that "the effect of termination by mutual abandonment or mutual non-performance is the recovery of consideration as required by Article 1303 of the Civil Code for nullity. This would mean the return by the appellants of the sum paid. However, by virtue of the aforementioned provision, the purchasers are not only obliged to return possession of the premises, but also to return the proceeds obtained from such possession, as there is evidence that the premises were leased or at least were available for lease, this Court taking the view that the amount of rent to be recovered should be offset against the sum of €100,000 to be returned". This last point is revoked by the Supreme Court, but the matter is not relevant for the purposes of this paper.

According to the Supreme Court, based on the existence of a termination by mutual abandonment and the application of Article 1303 of the Civil Code — "aspects on which both parties agree" [sic] - the appropriate legal consequences must be drawn. The purchasers must return the

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disputed premises along with any proceeds, and the sellers must return the price received — €100,000 — with the appropriate statutory interest accrued from 2 June 2005 until the date of its actual return.

2. Commentary

§ 1. If it is true, as the Supreme Court asserts, that the parties agree on the mutual abandonment and on the application of Article 1303, then there is no dispute, and there would have been no lawsuit, or at least not in the terms in which it was brought. But the fact is that the seller requested termination due to breach by the purchaser and retention of the deposit, and the purchaser did the same by means of a counterclaim plus a claim for double the deposit. Under these conditions, Roman law would have not allowed the sale to be cancelled on the basis of mutual abandonment alone, and a repurchase would have been necessary (*potest enim, dum res integra est, conventione nostra infecta fieri emptio [...] post pretium solutum infectam emptionem facere non possumus,* Digest 18, 5, 2).

§ 2. It is true that there is 'cassation' case law that ultimately results in mutual abandonment when the two parties seeking termination have not proven the other party's breach of contract, but it is clear from the case that neither party wishes to remain bound by the agreement. Thus, Supreme Court judgment of 17 June 1986 (RJ 1986\3554). This explains the solution finally given by Supreme Court judgments of 30 June 1997 (RJ 1997\5408) and 2 November 1999 (RJ 1999\8858) and Barcelona Provincial Court judgment of 26 September 2019 (AC 2019\1307). In the Supreme Court judgment of 4 June 2020 (RJ 2020\1580), the effects of mutual abandonment and of termination are equated when both parties mutually terminate. However, this case law is not unanimous.

§ 3. We now ask ourselves whether this solution is the best for both parties taken as a whole — that is, whether it maximises for both the status quo that they would have been faced with in the event of a double dismissal — and whether it is appropriate in terms of procedural consistency. The only apparent upside is that the Solomonic solution puts an end to a conflict once and for all, i.e. it is efficient in terms of social costs (the cost of the judicial system minus any litigation fees). But that is all, and this saving in social costs should not be the decisive consideration in these disputes.

§ 4. The Solomonic decision deprives the parties of a second chance, on which their ability to make use of the option in Article 1124 of the Civil Code, between requesting termination and requesting performance, depends. The bringing of the action for declaration of termination of contract — if dismissed — does not have direct estoppel effects on the latter request. There can be a joinder of causes of action in the alternative, with the action for declaration

of termination being the main action. It is sufficient that one of the parties, in consideration of the final Solomonic decision, wishes to request performance as its second-best option.

§ 5. But what if, for both parties, the action for performance is a remedy that is no longer of interest, not even in the alternative? As the case may be, this decision cannot be made by the judge, who lacks prospective data on the secondary intention of the parties. What would happen if, from the date the mutually dismissing judgment becomes final, neither party brings an action for performance? I believe that nothing exceptional would happen, but that the two actions would simultaneously become time-barred. In other words, the seller would keep the deposit and the buyer would keep the portion of the price (if any) paid on account together with the proceeds of possession. I believe that this solution is the most respectful of the parties' procedural strategy and responsibility.

By holding the contract withdrawn from, the judge deprives the parties of the possibility of seeking performance

§ 6. The parties even have a second and umpteenth opportunity to bring an action for declaration of termination for breach at a later date if the action is based on facts (not points) that are not covered by the first res judicata. It is sufficient for one party to offer to perform its part tomorrow (and if it is the purchaser, to deposit the price) for the other party to be in (new) default, and for the action for declaration of termination or for performance to lie.

§ 7. A judgment that terminates an agreement by mutual abandonment when neither party has requested it, even by means of an implicit *allegation* (not by way of request in a claim or counterclaim), is inconsistent because it offers both parties a remedy that does not satisfy the judicial remedy they have sought. And if mutual abandonment has been requested in the alternative by one of them, they will have to prove that the other party also wanted it *before the lawsuit*, and in that case, the former will win the case, with an order to pay costs.

§ 8. The situation is no different when both parties request performance and neither request is successful. They cannot be deprived of requesting a declaration of termination with cause.

§ 9. The situation would be different in the case of a continuing contract, as in such a case the termination would not have retroactive effect, and in fact would have the same effect as an *ex nunc* withdrawal. It is more easily inferred from the continued inactivity of the parties that both have wished to withdraw going forward, because the inference would not (in principle) have retroactive effect on conduct or performance already executed or withheld.

§ 10. What certainly cannot be proposed (it is not clear whether this occurred in

our case) is that, due to the mere passage of a prolonged period of mutual inactivity, the judgment should rush to a termination by mutual abandonment, regardless of whether one or both parties prove that the other fell under grounds for termination.

§ 11. What if both prove that the other *mutually fell under* (not one and then the other) grounds for termination under Article 1124 of the Civil Code? The regulation of bilateral default makes it doubtful that this state of nirvana of mutual non-performance can occur, because the party that unsuccessfully offers performance, which is not reciprocated, can already terminate, but not the counterparty, which is simultaneously in *mora debendi* and *mora credendi*. But let us accept that the proceedings have carried on in such a way that both the claim and the counterclaim must be upheld. Neither will succeed, because, as both have failed to perform bilaterally (not one first and then the other), neither failure to perform is repudiatory. Therefore, there would be no difference between the case where neither party could prove the other's repudiatory failure to perform and the case where each party could prove such a point. Perhaps tomorrow, one or both of them may still wish, before the limitation period has expired, to demand performance, offering their own in return.

§ 12. Finally, I would like to point out this circumstance. It is not only difficult to propose that, by mutual tacit abandonment, the parties have wished to *terminate* a sale that has been totally or partially executed. Even if this possibility were accepted, mutual abandonment could not *have retroactive effect*. Such retroactivity is not available by the simple will of the parties once the sale has been completed and partially executed. Retroactivity is a fiction that only the law can produce, and it produces it because it is expressly established in Article 1120 of the Civil Code. And the matter may be important in non-fringe cases; for example, the purchaser has rented out the property, a seizure has been recorded on it, etc.