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EFFECTS OF OPPOSABILITY OF THE AGREEMENT IN THE NEW ROMANIAN CIVIL CODE

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Abstract: *The valid contract is fully effective between the parties, respectively the contract is enforceable by the parties, this being the goal and the effect of its signature. At the same time, absolutely exceptionally, the contract is effective against the third parties, respectively against parties who did not sign it. These effects of the contract are stipulated by the law and they are known in the doctrine and in the jurisprudence as being the principle of the enforceability of the contractual effects and respectively, the relativity principle of the contractual effects, but we do not intend to talk about this principle in this paper.*

Key words: *opposability, ayant-cause, successors, third parties, unsecured creditors.*

1. Introduction

We will deal with another consequence of the conclusion of contracts, respectively the *opposability* against third parties of the contract. Even from the beginning, we must clearly distinguish between the relativity of the contractual effects and the opposability of the contractual effects. The relativity of the contractual effects assumes that, except for the limitations provided by the law, a contract cannot produce rights and obligations for another person. The opposability of the effects does not contradict this principle, the opposability being a logical consequence of the contractual effects, meaning that any person must observe the arisen enforceable relations and the rights acquired by the other persons, according to the concluded contracts. In other words, no person can ignore the rights acquired by another person, according to a contract. Moreover, according to the opposability rules of the contractual effects against the third parties, any person can invoke, as we shall see, the provisions of a contract, which that particular person did not sign.

2. Current legal regulation. Provisions of comparative law

The New Romanian Civil Code, effective since October 1st 2011 expressly regulates the principle of the opposability effects of the contract according to art. 1.281. At the same time, The New Civil Code provides *expressiv verbis* in relation to the *successors of the parties*, an aspect that is strongly connected, as we know, to the principle of the opposability of the contractual effects as the successors are

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included, as we shall see below, within an intermediary category, placed between the parties and the third parties. Art. 1.282 of the New Civil Code lists the three „classical" categories of successors (universal, by universal title and by particular title) and unequivocally reveals the effects that the juridical act concluded by their author produces on the patrimony of the successors.

3. Applicable principle – opposability against third parties.

The applicable rule provides that *any* contract is enforceable against the third parties.

This rule assumes, as a principle, that the third parties can take advantage of the effects of a contract that they did not sign and they are forced at the same time to observe the provisions of a contract, or, in other words, a third party shall bear the effects of a contract or shall benefit from these effects, under certain conditions. But this rule includes two essential constraints:

- Third parties are not allowed to request the enforcement of the contract, except for the cases provided by the law;
- Third parties cannot modify the rights and the obligations arisen, according to the contract.

The first constraint of the opposability principle has, however, a few exceptions, meaning that, absolutely exceptionally, in the *limiting* cases provided by the law, there are situations when third parties may request the enforcement of a contract which they did not sign. We are talking about the direct actions expressly regulated by the New Civil Code, in which the third party has the right to action against a person with whom he did not conclude a contract.

The New Civil Code expressly regulates the right to a direct action in five situations: in the contract of mandate (the direct action of the agent against the sub-agent– art. 2.023 of the New Civil Code), within the contractor agreement (the direct action of the workers against the beneficiary – art. 1.856 of the New Civil Code), concerning the insurance (the direct action of the injured person against the insurer of the legal liability insurance– art. 2.224 of the New Civil Code), concerning the lease (direct action of the Lesser against the Sub-Lessee – art. 1.807 of the New Civil Code) and in the provision for the other (art. 1.284 paragraph 2). There is, as we know , another direct action situation that is not regulated by the Civil Code, but which is expressly regulated in the Government Order no. 51 / 1997 concerning the leasing operations and the leasing companies, and respectively the right to direct action of the user against the provider [2].

The second constraint provides no exception, the New Civil Code stipulating that the third parties cannot modify the rights and the obligations arisen from the contract (art. 1.281). The specification is necessary to avoid in this manner all the confusions: if the third parties have the right, in the limiting cases, provided by the law, of requiring the enforcement of a contract that they did not sign, they cannot under any circumstance (even when the right of direct action is recognised) modify in any manner the effective content of the contracting relations, respectively the rights and the obligations arisen by its conclusion. In other words, it is logical that the possibility of modifying the content of the contracting relations belong *exclusively* to the signing parties not to the non-signing third parties. According to art. 1.270 paragraph (2) of the New Civil Code, „the contract is modified or ceases only through the agreement of the parties or according to the legal provisions".

4. The notions of parties, third parties, ayant-cause.

In this issuer, to correctly understand the rule and the concrete consequences concerning the opposability against the third parties of the contract, it is necessary to (re)clarify the three notions that we deal with, respectively the terms of parties, third parties and ayant-cause, according to the provisions of the New Civil Code.

The parties refer to the natural persons or the legal entities who effectively participated to the conclusion of the contract, respectively the parties who *signed* the contract either directly or through an attorney in fact (representative).

The third parties (or the absolute third parties – *penitus extranei*) are persons who are not included in the contract, respectively they did not sign, neither personally or trough a representative, the contract. These have no obligations, not being parties, successors of the parties or unsecured creditors of the parties.

In the Canadian jurisprudence, correctly, in our opinion, the third party notion comprises also the juridical administrator of an insolvent company, that invoked the lack of publicity required by the law of the leasing agreement, having as object a vehicle, in the personal assets and real estates properties Register [1].

Thus, the terms of party and of third party have the meaning provided by the Explicative Dictionary of the Romanian Language (DEX), irrespectively if defined or not by the law.

On the other hand, according to the New Civil Code, the content of the ayant-cause term (taken from the Roman Law, referred to as the *habentes causam*) was modified, respectively stipulating that the intermediary category of persons who, as the third parties, did not sign the contract, but who similarly to the parties bear or benefit of the contractual effects. The French Law and, rarely, the Anglo-Saxon Law (*common law*) use the notion of *ayant-cause*.

4.1. Ayant-cause.

The ayant-cause term is regulated by art. 1.282 of the New Civil Code, text which, even though not expressly using this notion (the term, being in fact, a creation of the juridical literature of the Roman Law and of the French Law), mention two subcategories included in the term of ayant-cause and namely the universal successors or the successors by universal title and the successors by particular title. The main source of our New Civil Code – The Civil Code of Quebec (hereinafter referred to as C.C.Q.) – regulates, in a similar manner the text of art. 1.282 of the New Civil Code, the effects of the transfer to the successors and differentiates the two categories of successors : "*Upon the death of one of the parties, the rights and obligations arising from a contract pass to his heirs, if the nature of the contract permits it* (art. 1441 C.C.Q.). *The rights of the parties to a contract pass to their successors by particular title if they are accessory to property which passes to them or are directly related to it* (art. 1442 C.C.Q.)". For this purpose, according to the provisions of the Civil Code in Quebec, the juridical literature in Canada refers to a certain continuity of the legal personality of the universal successors or of the successors by universal title, however this is not enforceable for the successors by particular title [3].

Obviously, as we already know, the term of ayant-cause includes also a third subcategory, respectively the unsecured creditors of the parties, who are not expressly mentioned by the New Civil Code (as we shall see, the new regulation overtakes the general lien of the creditors).

The universal successors are the persons who acquired a universality of assets, namely the *entire* patrimony of a person who was a contracting party. Such an universal transfer is met, for instance, in the case of *death* of a natural person (when his patrimony is totally overtaken by a *sole* heir) or in the case of the *reorganization* of the legal entity as a merger (for instance, the merger by absorption, when, according to art. 235 of the New Civil Code, the entire patrimony of the absorbed company is overtaken by the legal entity by which it is absorbed, or the merger by acquisition, when the patrimonies of two legal entities are overtaken by a new company). By the universal transfer, the universal successors acquire, as we mentioned, the entire patrimony, respectively they overtake both the *rights and the obligations* from the contracting parties.

The successors by universal title are in the same situation, respectively they overtake both the rights and the obligations afferent to a patrimony, the only difference being the one concerning the „quantity", meaning that the universal successors acquire an entire patrimony, while the successors by universal title acquire only *part of the patrimony*; obviously, the latter overtaking only the rights and the obligations afferent to this part of the patrimony. For instance, in the case of a natural person`s death (when the patrimony of the natural person is divided between two or *more* heirs) or in the case of the reorganization of a legal entity as a division (whereas, according to art. 237 of the New Civil Code, the patrimony of the person that ceased by division shall be divided between the juridical acquiring legal entities).

The concludent example refers to the issue of inheritances, where the law (art. 1.056 of the New Civil Code) regulates the legacy by universal title as being the testamentary disposition that confers on a person or more the right to a part of the inheritance (art. 733 C.C.Q. provides the same, this article being absolutely identical to the Romanian legal provisions). It is important to remember that our New Civil Code defines the notion of part of the *inheritance part* as being the ownership of a quota of this or a dismembered right on the inheritance assets.

Thus, for these reasons, the universal successors and the successors by universal title belong to the same category of ayant-cause, the effects of the transfer being the same, namely, that the contracting rights and obligations of this person are transferred to the universal successors or to the successors by universal title, if the law, the agreement of the parties or the nature of the contract do not provide otherwise.

The successors by particular title belong, however, to a completely distinct category, their juridical nature and the effects of the transfer of rights being different from the effects created to the patrimony of the universal successors or to the successors by universal title. The successors by particular title are those persons who acquire a *certain* right, referred to as individually, a right on a *single* asset that belonged to the contracting party. The difference from the universal successors or successors by universal title is obvious: they do not acquire a patrimony, not even a fraction of the patrimony; they acquire only one asset, the typical example being the buyer of the asset or the donor of an asset, the assignee of a good, the particular devisee, etc. It is essential to remember that the successors by particular title are not bound by the obligations of the individual from whom they acquired the asset, who have no relation to that particular asset. They are held or, more precisely, can be held for any liability which strictly relates only to goods acquired. Instead the successor by

particular title can take advantage of certain rights of its author, as noted in the Canadian legal practice, in a case where warranty against hidden defects was considered a good accessory resale, which is transmitted with the good and therefore, under this warranty, the buyer can act directly against the producer of the good [3].

4.2. Unsecured creditors

Unsecured creditors are those creditors who have not guaranteed with any particular good their claim to a particular borrower. They are those creditors who have the so-called "general lien" on the debtor's assets that may run under certain restrictions, on all movable and immovable assets, present and future of his debtor (Art 2324 NCC). The legal doctrine in Canada also calls these lenders as ordinary creditors.

This general lien is a benefit of unsecured creditors, but the big disadvantage is the fact that, in competition with creditors who have a right of preference, as, for example, mortgage lenders, they are the ones that come the last to the sufficiency of their claim (art. 2345 paragraph 2 NCC).

In competition with other unsecured creditors, the common debtor's assets represent a joint guarantee, their value will be divided between them in proportion to the value of their respective claim (art. 2324 in conjunction with art. NCC 2326).

The unsecured creditors must not be confused with the successors of the parties, irrespectively if we talk about the universal successors, the successors by universal title or about the successors by particular title, as they are not a party (creditors or debtors) in the legal acts concluded by their authors. Concerning the legal acts, the unsecured creditors are really *third parties*, the legal acts in question not having direct effect on them. However, starting from the general lien that was previously mentioned and their obvious interest in the patrimony of the debtor, they became ayant-cause, as the law confers on them certain rights that a common third party cannot have. It's about unsecured creditors entitled to take precautionary measures on the the common debtor's assets (seizure and attachment) to require the provision of evidence to fulfill certain formalities of publicity and information on the debtor's account, that is, those measures called generic measures conservative and precautionary measures But the most important right of the unsecured creditors is the right recognised by the law of introducing the derivative action and the revocatory action (the action declaring the simulation or the inopposability), these being rights whose practical application is provided also by the current Civil Code.

The action declaring the simulation or the inopposability is the express denomination given by the Civil Code in Quebec, within a regulation identical to the dispositions of our New Civil Code: „ *Le créancier, s'il en subit un préjudice, peut faire déclarer inopposable à son égard l'acte juridique que fait son débiteur en fraude de ses droits, notamment l'acte par lequel il se rend ou cherche à se rendre insolvable ou accorde, alors qu'il est insolvable, une préférence à un autre créancier* „ (art. 1.631 C.C.Q. intitulat *l'action en inopposabilite*). What differs, thus, from our civil code is only the denomination, art. 1.562 of the New Civil Code naming the action as being revocatory, while art. 1.631 C.C.Q. more correctly, in our opinion, refers to as the action in inopposability.

Although no two notions (successors and creditors) cannot be confused, it is noticed that, at least in terms of heritage, the New Romanian Civil Code places the category of successors of the parties on a level with unsecured creditors. Specifically, the legal

equivalence of the two categories of persons occur with gifts in excess of the freely disposable portion of the estate where the reduction of these favours (respectively of the donations that breach the rights of the heirs who benefit from the forced heirship) may be requested only by the forced heirs, by their successors, and also by the unsecured creditors of the forced heirs (art. 1.093 of the New Civil Code).

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