Exceptions to the principle of the binding power of contract effects on the relationships between the contracting parties under the New Civil Code

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Abstract: *The importance of contracts in the new Civil Code is revealed not only by the important number of legal texts that the legislator devoted, but also by a series of innovating situations which enjoy a quite judicious regulation. This importance paid to the contract also resides in the fact that the society is constantly evolving and both the individual and the collective interests need more adequate protection. On the one hand, the effects of a contract on its parties create fundamental rules illustrated primarily by the principle of the binding power, which presents a particular theoretical interest; however, within this paper, we aimed at emphasizing the exceptions to this principle.*

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1. Preliminaries on the contract effects on the relationships between the contracting parties

As well-known by the specialists in the field, since ancient times, it was considered that a contract can produce special effects for the contracting ***parties*** [1]. These effects are known through the principle ***of the binding power of the contract***, which has a legal regulation in art. 1270 of the NCC [2]. The principle of the binding power of the contract is not simply a legal transposition of "***Pacta sunt servanda***" principle because par. (1) of the above mentioned provision states that "*the validly concluded contract has the force of law between the contracting parties*".

The principle *of the binding power of the contract* stipulated by the above mentioned rule of law, but also in conjunction with other rules related to the effects of the contract upon the relationships between the contracting parties (art. 1270-1279 of the NCC) reveal two fundamental consequences, namely: 1. *the contract can be revoked or modified unilaterally only where authorized by law* and 2. *the principle of the binding power can be limited only by court intervention, in some cases, under the law.*

Therefore, in some cases, the law provides for a number of exceptions to the principle of the binding power of the contract, such as: - *the prorogation of the effects of certain legal acts with the extension of the effects of the contract with successive execution, due to the temporary suspension of its execution, as long as the suspension clause*; - *the legal moratorium*; - *the tacit relocation*; - *the cancellation clause*; and - *the unforeseeability last*. However, from a didactic perspective, we consider useful to present, within the first

consequence, among others, some considerations related to the cancellation clause, while the unforeseeability will be analyzed within the second consequence, because the court can restrict the principle of the binding power upon finding the unforeseeability [3].

2. The contract can be unilaterally revoked or amended only in cases authorized by law.

The general principle according to which the validly concluded contract has the power of law between the contracting parties forbids its unilateral revocation or amendment. Thus, under this principle, a contract is modified or terminated only by agreement of the parties (*mutuus consenssus/ dissensus*) and, in the absence of the agreement of the parties, exceptionally, in cases authorized by law.

It is well-known that any valid contract is binding and entails effects only between the parties (*inter partes*) which are bound to observe the contractual rights and obligations, as established within the legal act in question [4]. Moreover, regarding the obligatoriness (the executory nature) of the contract, unless the law limits the binding power of the act (for example, the unforeseeability), any person is bound to perform the obligations which he/she has contracted, and the creditor, under art. 1516 of the NCC, is entitled to the full, accurate and timely fulfillment of the obligation.

Therefore, the fundamental effect of the principle of the binding power for the contracting parties is that they are required to execute exactly the services under the contract. This execution (for the debtor) should comply with the requirements set within the contract (quality, quantity, place, time, etc). If the debtor does not execute the services exactly, he/she may be deemed in default by the creditor, under art. 1521 *et seq.* of the NCC, which even force the debtor to pay for damages (art. 1530 of the NCC).

However, there may be cases where the creditor unreasonably refuses the payment offered properly or where he/she refuses to perform the preparatory acts without which the debtor is not able to perform his/her obligation. In these cases, according to art. 1510 *et seq.* of the NCC, the debtor has the right to deem the creditor in default; thus, the creditor will overtake the risk of the impossibility to perform the obligation and the obligation to repair any damage caused by delay, and to pay for the equivalent costs of the conservation of the due asset. Also, after the formal notice of default to the creditor, the debtor shall not be prevented from refunding the collected fruit [4].

Returning to the possibility ***of revocation or amendment of the contract***, as already stated, this can be done ***by the mutual agreement of the parties*** or by ***the authorizing statutory provisions***.

a. ***Revocation or modification of the contract by the mutual agreement of the parties.*** The parties to a contract have the capacity of reconsidering their obligations, entailing an amiable revocation or amendment.

In a contract with successive execution, the parties may agree to its revocation or amendment; however, these legal operations cannot produce retroactive effects due to the irreversibility of the already performed services. In these circumstances, the amiable revocation or amendment shall take effect only in the future, the parties establishing, if necessary, *a time shift of successive execution* (e.g. for a lease contract), in case of an amendment to the contract or of *the restoration of the previous situation*, in case of cancellation of the contract.

As far as the contract with immediate execution is concerned, the future effects of revocation or, if necessary, of the amendment by the agreement between the parties shall be somewhat different. Similar to the

contract with successive execution, the revocation or amendment of the contract with immediate execution do not entail retroactive effects; however, if by this contract, property rights on an asset have been transferred, the doctrine states that, by restoring the previous legal situation, the parties actually sign a new contract for the transfer of the asset from acquirer to seller [5].

b. ***Revocation or modification of the contract by authorizing statutory provisions.*** In some cases, the law allows the forced or unilateral revocation of the contract, without taking into account, where appropriate, the will of the other party or even the common will consecrated within that legal act. Regarding the unilateral revocation (termination) of the contract, it can take place, usually, under a (unilateral or bilateral) cancellation clause and the provisions of art. 1276 and 1277 of the NCC provide for several essential rules, namely:

- *the right to terminate the contract should have a legal or contractual consecration;*

- *for the contract with immediate execution, termination may be exercised as long as the execution has not started;*

- *for contracts with successive execution, the right of termination may be exercised subject to a reasonable notice, even after starting the execution of the contract; however, the termination takes legal effect only in respect of future services;*

- *if a service in exchange for termination is stipulated within the contract, the termination shall take effect only after the performance of the service;*

- *for contracts concluded for an indefinite period, the unilateral termination by either party shall operate under the observance of reasonable notice. Any contrary clause or stipulation of a service in exchange for termination is deemed unwritten and shall be partially null and void, according art.1.255, para. (3) of the NCC.*

The forced revocation of the contract can be applied in contracts with successive execution concluded *intuituu personae*, when the contract was executed only by the person in whose consideration it was concluded, its death or incapacity leading to the rightful termination of the contract [6]. The individual labor contract can be part of such acts subject to forced termination.

3. The limitation of the principle of the binding power through court intervention, in some cases regulated by law.

For the parties, the executory nature of the contract is undeniable; however, during its execution, certain situations may occur. Thus, in some circumstances which were not anticipated upon the conclusion of the contract, the execution of obligations may become difficult for one party. Therefore, against the background of this fundamental consequence of the effects entailed by a contract, we will try to illustrate some cases where judicial intervention is required on the will of the parties established in a contract, for the adaptation or equitable distribution of losses and benefits, or even termination.

First, we will present some generalities related to unforeseeability, as regulated by the provisions of art. 1271 of the NCC and, further, we will discuss the circumstances for the judicial finding *of unfair contract terms*.

a. *Unforeseeability.* Even if it is expressly regulated by the new civil provisions, the unforeseeability intervenes exceptionally and especially in contracts with successive execution. Paragraph (1) of art. 1271 of the NCC establishes that *the parties are bound to perform their obligations even if their execution has become more onerous, whether due to the increasing costs of the execution of obligations or due to the decrease in value of the consideration*. These provisions do nothing than to point out that each contracting party shall execute its obligation according to the contract terms, even when their own obligations have become more onerous than appeared upon the conclusion of the contract, thus disrupting the originally presumed equilibrium of mutual services. Next, paragraph (2) provides, *in terminis*, for ***the exception of unforeseeability***, in the sense that *the court may rule if the performance of the contract has become excessively onerous due to an exceptional change of circumstances, which would clearly reveal that it would be unjust to oblige the debtor to execute his/her obligation*. Under the right to dispose, granted to the parties to a civil trial, the court may be referred to by any party to a contract affected by unforeseeability; the respective party must demonstrate the cumulative fulfillment of the following ***conditions***:

- the element entailing the exclusive nature of the debtor's obligation did not exist when the contract in question was concluded; on the contrary, it arose afterwards;
- the modification of circumstances and the extent thereof were not taken into account and it was not possible for the debtor to reasonably consider them when the contract was concluded;
- the debtor in difficulty did not expressly assume, under the contract, to bear the risk of changing circumstances and it was not possible for the debtor to reasonably consider them when the contract was concluded;
- the debtor tried, within a reasonable time and in good faith, to negotiate the reasonable and equitable adjustment of the contract.

As shown by this last condition, the referral to the court is the second phase that the debtor might go through when his/her obligation would be affected by unforeseeability, because, previously, he/she must prove that he/she tried to negotiate with the other party, in order to obtain the adjustment of the contract.

Also, if the debtor proves that he/she cumulatively fulfills these conditions, he/she may refer to the court, which may pronounce one of the following ***solutions***:

- *the adjustment of the contract* in order to equitably distribute between the parties the losses and the benefits resulting from the change in circumstances;
- *the termination of the contract* at the time and under the conditions it established.

All these considerations reveal that the usual simple changes in price or cost of a contract do not give rise to unforeseeability; however, if these new circumstances create an imbalance of a certain severity, which can be assessed by the judge (by the cumulative fulfillment of the conditions listed above), then unforeseeability can be ascertained. In these circumstances, the debtor must prove that these new circumstances placed him in a very difficult economic position, such as bankruptcy, inflation, etc;

b. *Unfair terms.* The finding of unfair terms in a contract, indirectly, reveals an abuse of the contractual right against the other party to the contract. As we know, the provisions of Law no. 193/2000 regulates the incidence of unfair terms, only in contracts concluded between professionals and consumers. This regulation reveals, *in terminis*, regulations about unfair terms and has an obvious protectionist content established in favor of the consumer. The protectionist nature of the law clearly results from the onset, specifically from art. 1, para. (2), which states that: "*In case of doubt on the interpretation of contract terms,*

they will be interpreted in favor of the consumer". In order to strengthen this provision, paragraph (3) of the above mentioned article imperatively establishes that "*the professionals are forbidden to stipulate unfair terms in consumer contracts*". Also, more accurately, at the end of the regulation, the legislator considered it useful to devote an appendix, which is part of the law, presenting a list of terms which are considered unfair.

Conclusion

Generally, the effects of the legal act imply individual rights and civil obligations, to which it gives rise, amends or terminates. Unlike the previous regulation, where the effects of contracts and of the principles that govern them were devoted only two texts (art. 969 and 973), the new Civil Code devotes a much broader regulation, both in relation to the contract effects on the relationships between the parties (art. 1270-1279), as well as the contact effects on third parties (art. 1280-1294).

Regarding the contract effects on the relationships between the contracting parties, the principle of the binding power is the most important effect that can occur after the conclusion of such a legal act. However, as shown in our brief theoretical approach, the legislator provided for a number of exceptions to this principle, which can be translated into practice, the latter demonstrating their usefulness and efficiency.

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