New Civil Code. Cases of direct actions

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Abstract: *As we know, the New Civil Code brings forth important novelties in terms of contract effects, some of them being regulated for the first time in the Romanian laws, as, for example the notion of frustration of purpose or the one-sided contract termination. We hereby would like to deal only with the two exceptions from the relativity principle of contract effects, naturally focusing on the new aspects introduced by the New Civil Code, which deserve special attention by the legal literature and which will be later clarified by the case law through the resolutions passed thereto. As far as we are concerned, we believe that this approach, as seen in other cases, is really required only as long as the debate makes a comparison between the provisions of the old civil code (abolished in 2011), which the legal advisors were already familiar with, and the sources of our new civil code. Before talking about the two exceptions described by the law, we must remind you that, in the legal literature, there is no consensus regarding the circumstances that constitute actual exceptions from the relativity principle of contracts. There have been doctrinary debates about the stipulation for a third party, representation, collective work contract, direct actions and even about the promise of deed for a third party as real or apparent exceptions from the relativity of contract effects; the theories have been so varied and frequently debated over the years that, as they are very well known, we do not think it necessary to detail them herein, therefore we will only express the personal perspective of this article.*

Keywords: *New Civil Code; exceptions from the relativity principle; direct actions.*

1. Enumeration

The law provides for very few circumstances of direct action. In addition to the right of direct action of a third-party beneficiary in the matter of stipulation for a third party (that we referred to above) there are, in the Romanian law, only five situations of direct action: four of them are mentioned in the new civil code (some of them existed in the old civil code as well), and one case is expressly stipulated by the Government Order no. 51 / 1997 (on leasing contracts).

The direct actions regulated by Romanian laws are:

- The direct action of labourers against the customer under a contractor agreement;
- The direct action of an assignor against the subassignee under an assignment contract;
- The direct action of the injured party against the insurer in a civil liability insurance;
- The action of the lessor against a sublessee;
- The direct action of the user in a leasing contract.

2. The direct action of labourers against the customer under a contractor agreement (art. 1.856 NCC [1])

A contractor agreement is an agreement entered into between two parties, namely the contractor (that who undertakes to perform the works) and the customer (that who benefits from the works), which naturally gives rise to two main obligations: on the one hand, *the contractor's obligation of performing the works on time and according to the customer's instructions* and, on the other hand, *the customer's obligation of paying the price*, namely the value of the works. Therefore, each of the two parties having signed the agreement accepts two correlative (mutual) obligations, and, in case of failure of performance, is liable by virtue of such

interdependence (mutual dependence) of the obligations. Thus, if we hereby apply the principle of reciprocity, we find that the two contracting parties (contractor and customer) cannot naturally be liable before another party that is not part of the contract (third party).

However, it is an exception that we are discussing here, namely the right of a third party, *independent of* the contractor agreement (who is not part of the agreement and did not sign it), to act against one of the contracting parties. We mean the *contractor's employees and collaborators* (the people who have concluded agreements with the contractor, and *not* with the customer), whose right of direct action is expressly acknowledged. More specifically, if they were not paid by the contractor, the people who, based on an agreement concluded with the former, carried out activities pertaining to the provision of services or the performance of the works under agreement, have direct action against the customer until the amount the latter owes to the contractor when the action is filed is recovered.

As compared to the former provision, where the old civil code seemed to refer only to the contractor's *employees* („masons, wood workers and other labourers"), the wording of the current civil code stipulates without any doubt that to direct action are also entitled the collaborators and even the *subcontractors*, that is the companies being subcontracted by the main contractor for the performance of the works (subcontracting is frequently used these days also by the business environment, many times the acquisition of public works is awarded by a company which, in its turn, subcontracts to other companies certain works which have been undertaken under the contractor agreement).

3. The direct action of the assignor against the subassignee under an assignment contract (art. 2.023 NCC)

The assignment contract (which we discussed in the previous chapter concerning representation) is an agreement entered into between two parties, the assignor (that who gives power of attorney to another person) and the assignee (that who is empowered by the assignor), and by virtue of such contract, the assignee undertakes to conclude legal transactions in the name and on the behalf of the assignor. In its turn, the assignee may authorise *another* person to fulfil the tasks required by the assignor, and such person shall have the capacity of a *subassignee*. Therefore, we may say that there are *two distinct* agreements: the master assignment agreement between the assignor and assignee and the secondary assignment agreement, between the assignee (meaning the assignee in the master assignment agreement and which here acquires the capacity of an assignor) and the subassignee. In order to understand correctly the legal relations arising thereof it is important to note that: the subassignee is not a party in the master assignment agreement and the assignor (from the master assignment agreement) is not a party in the secondary assignment agreement. Therefore, by applying the principle of agreement relativity, this means that the subassignee cannot act under any circumstances against the assignor (from the master assignment agreement) and, at the same time, the assignor cannot act against the subassignee.

However, it is this the important and actual exception from the principle of relativity, namely the right of the assignor to direct action against the party whom the assignee used on his behalf, that is the subassignee. Nevertheless, we must make an important remark about this exception, which refers to the method of selecting/hiring the subassignee by the assignee.

Thus, it is important to note that the nature of an assignment agreement is based on the *personal* performance (*intuitu personae*) of the assignment by the assignee, but, if the assignor expressly agrees to it, the assignment agreement may be performed (either fully or partially) by another person selected by the assignee. Therefore, the *rule* is that the assignee may be replaced by another party only provided that such assignee obtains the assignor's *express approval*. *The exception* to this rule is that the assignee may be substituted by a third party even without the express approval of the assignor (but only in accordance with certain circumstances expressly provided for by law [2] and with the obligation that the assignee should inform the assignor about such substitution).

We will discuss in detail the assignment agreement on other occasions, too, but what is of paramount importance here is that, irrespective of whether the substitution was made by the assignee with or without the approval of the assignor, in all cases, the assignor has the right to *direct action* against the party substituting the assignee, meaning damages for the faulty performance of assignment. It is true that there are different approaches concerning the scope of the assignee's liability for such substitution, based on whether such substitution was or was not consented by the assignor. Thus:

- should the substitution have not been authorised by the assignor, the assignee himself shall be liable;
- should the substitution have been authorised by the assignor, the assignee shall be liable only for the diligence employed in selecting the substituting party to whom such assignee provided the instructions for the performance of the assignment.

4. The direct action of the injured person against the insurer under a civil liability insurance (art. 2.224 NCC).

Another case when the law provides expressly for the right to direct action is in the matter of the civil liability insurance [3]. Although such action was regulated by the French Civil Code, our civil code that was abolished in 2011 had not taken it over; on the other hand, such action was regulated by Law no. 136 / 1995 on insurance. Currently, the new Romanian Civil Code legislates the direct action in art. 2.224, which sets out as a principle that, naturally, the rights of injured third parties shall be exercised against the parties liable for damage (par. 1). Nevertheless, an insurer may be sued by the injured parties within the limits of his obligations under the insurance agreement (par. 2).

Therefore, the right to direct action in this case consists of the injured party (for example, following a car accident) being able to act both against the party having caused the damage (the person guilty for the accident resulting in material damage) by virtue of tort liability (a natural thing, as the party causing damage must also give remedy) and *against the insurer* (and this is the exception from the principle of relativity), who, to the victim, is a complete third party; this latter action is, beyond any doubt, a direct action regulated as such by law (currently also by the Romanian Civil Code). Therefore, this is another exception from the principle of relativity in terms of the effects of an agreement, because, although the insurance agreement is concluded between the insurer and the insured (the person making the accident in our example), a third party, completely alien to the insurance agreement can sue directly the insurer [4].

5. The action of the lessor against a sublessee (art. 1.807 NCC)

Finally, the last case of direct action provided for by the Civil Code may be found in the matter of leases. Our old civil code did not have any provision thereto, although the French Civil Code (the source of inspiration for the Romanian Civil Code abolished in 2011) provided and still provides expressly for the right of a lessor to act against a sublessee for the payment of the rent owed by the lessee (art. 1.753 the French Civil Code). By comparing the wording of this article in the French law and taking into consideration that the Canadian law does not provide for such a circumstance of direct action [5], we may conclude that our new civil code was inspired by art. 1.753 of the French Code. Thus, according to art. 1.807 NCC, called „ *Effects of sublease. Actions against the sublessee* ", for the failure of payment of the rent required under the lease, the lessor can sue the sublessee until the rent the latter owes to the main lessee is recovered (the law also states that the payment in advance of the rent by the main lessee cannot be opposed to the lessor). However, unlike the French Civil Code, our new civil code gives the lessor the possibility of acting *directly* against the sublessee not only for failure of payment of the rent by the main lessee, but also to force the performance of the *other* obligations undertaken under the sublease (art. 1.807 NCC).

6. The direct action of the user under a leasing contract (O.G. nr 51/1997)

Although not regulated by the civil code, a user's direct action against the provider is a real exception from the principle of relativity of the effects of an agreement, set out by art. 1.280 NCC a provider, who is not part of a leasing agreement, may be sued directly by a user by virtue of the latter's right provided by law [6]. According to art. 12 letter. a) of the Government Order no. 51/1997, by virtue of the leasing agreement, the user has the right of *direct action* against the provider, in the case of complaints concerning delivery, quality, technical support, servicing during the warranty and after warranty [7].

Furthermore, in other legal systems, by means of the action filed by the user against the provider, the former may claim damages for the failure of delivering the goods or for lack of conformity, as well as the termination of the sale agreement concluded between the provider and the financer [8]. For instance, this was the solution unanimously acknowledged both by the French legal cases [9], and by the legal literature [10] with the exception of the case where the user has committed fraud in the rights of the financer.

In terms of the legal nature of the direct actions the user may take against the provider, the foreign legal literature and case-law have not been consistent, because they are not regulated as *legelata* in certain legislations. Thus, the assignment of receivables [11], the stipulation for a third party [12] or the delegation [13], was claimed, and no consensus was reached, but the possibility of exercising these actions was unanimously recognised, provided that they are provided for in the leasing agreement [14].

In the Romanian legislation, the legal nature of direct actions for the delivery and quality of goods filed by the user against the provider is not a matter of concern, as such actions are based on the law, being expressly provided for by art. 12 of the Government Order no. 51/1997. Therefore, this is another case where one may exercise direct action against a party that did not take part in the conclusion of an agreement, along with the cases described above, in the matters of assignment, contracting, insurance and lease.

References

[1] We hereby emphasize that, to rise beyond any doubt, the law itself uses in the side heading of the article 1.856 NCC, the wording "direct action", which one could not find in the old civil code (the old civil code abolished in 2011 provided for the direct action of the labourers under a contractor agreement in art. 1.488 : „ The masons, wood workers and other labourers used for the erection of a building or the performance of any works under contract, may claim their payment from the principal to the extent of the latter's debt to the contractor at the time of claim").

[2] Only when unforeseen circumstances prevents him to fulfill the assignment and to inform the lessor in advance about such circumstances and provided that one may assume that the assignor would have approved the substitution should he have known the circumstances justifying it.

[3] In civil liability insurances, the insurer undertakes to pay compensation forthe damage for which the insuree is liable according to the law before third parties injured and for the expenses incurred by theinsuree during the trial (art. 2.223 NCC).

[4] It is important to remember the resolution ofthe supreme court on the capacity of the insurer in a criminal trial, where the civil action is trialled along with the criminal act. Thus, the Decision no. I / 2005 passed in appeal in the interest ofthe law by the Joint Departments of the High Courtof Cassation and Justice stated that the insurance company takes part in the criminal trial in its capacity civil liability insurer and not as a liable party in a civil matter or a guarantor of payment of damages. Therefore, the legal nature of this direct action in question here is different from the direct action of subcontractors, but it is, beyond any doubt, a direct action.

[5] The Civil Code of Quebec has no mention of this action, so we infer that it is not allowed in the Canadian private law. On the contrary, the Civil Code of Quebec entitles the sublessee to act against the main lessor when the sublessor does not fulfill his obligations: „Wherea lessor fails to perform his obligations, the sublessee may exercise the rights and remedies of the lessee to have them performed" (art. 1.876 C.C.Q.).

[6] The UNIDROIT Covenant on international financial leasing provides that theprovider's obligations arising from the provision agreement concluded with the financer may also be claimed by the user, as if the former were part of the provision agreement [art. 10 par. (1)]. Paragraph (2) of the quoted article states however that although the user may claim the delivery of goods to the provider, such user does not have the right to terminate or cancel the provision agreement without the financer's consent.

[7] For more details on the user's direct action, on the relation between the legislation on leasing and relevant provisions in the laws on consumer (including for a point of view on the opportunity of lege ferenda, of ajoint liability ofthe financer and provider in cases of complaints concerningthe quality ofthe goods) and, generally,for other details related to leasing agreements and theirbinding effects, see G.Tiţa-Nicolescu – Leasing, C.H. Beck, Publishing, Bucharest 2006, p. 186 and the following.

[8] As far as we are concerned, we have serious reservations regarding this way of remedy, but we will not elaborate on it, as it is not part ofour study.

[9] C. Cass. Com., 25. 01. 1977, in Bull. civ. IV, no. 28; C. Cass. com., 08. 12. 1992, in Bull. civ. IV, no. 396.

[10] A. Jaufret, Droit Commercial, Ed. LGDJ, Paris 1995, p. 465.

[11] See M. Giovaneli, Credit bail in Europe. Litec Publishing, Paris 1980, pp. 239-248. Also see C. Cass., 26.01.1977, in J. Nestre, E. Putman, D. Vidal, Grands arręts du droit des affaires. Dalloz Publishing, Paris, 1995, p. 420. The supreme court alsostated that the assignment of such actions from the financer touser may be recognised as valid by virtue of art. 1719 and 1721 of the Civil Code, on the lease agreement, as these regulationsare not for public use.

[12] Trib. Cant. Vaud, 17. 11. 1978, în *** Centre du droit de l'entreprise de l'Universite de Lausanne, Le leasing industriel, comercial et imobilier. Ed. CEDIDAC, Lausanne, 1985, p. 40, and C. Cass, 23.11.1990, in J. Nestre, E. Putman, D. Vidal, op. cit., pp. 422-424.

[13] C. Cass., 23. 11. 1990, in J. Nestre, E. Putman, D. Vidal, op. cit., p. 422 424. The court considered that the financer is a delegator, the provider-seller is a delegatee, and the user is obligee, with the remark that the perfect delegation is not presumed, it implies novation, so that the user waives to exercise the action against the financer-delegator

[14] R N. Schutz, Les recours de credit-preneur dans l' operation de credit bail. Ed. PUF Paris 1994, p. 102. The author shows that the direct actions have alegal basis only for theleasing agreement that were concluded by virtue ofthe law of 1978, where they are expressly stipulated, so that for otherleasing agreements, they may be exercised provided that they were stipulated in the agreement.