

Resolution of the maintenance contract from the perspective of the new Romanian Civil Code

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***Abstract:** The comprehensiveness of the economic and social life occurring at the level of the contemporary society has determined the legislator to create new legal instruments, capable and able to regulate the legal nature of the maintenance contract. The express regulation of the maintenance contract is a natural consequence of the evolution of the civil law science that is called to respond to people's new social and legal commands.*

***Keywords:** resolution; maintenance; contract; debtor; creditor.*

***Framing subdomain:** Civil Law*

Introductory aspects

The changes that occurred both at the economic level and at the political and social level determined the civil society to create legal instruments capable of responding to the current needs of the contemporary society.

Thus, on the occasion of the entry into force of the new Romanian Civil Code, the legislature regulates for the first time both contracts that had previously been known only in commercial matters - the contract of transport, of consignment, of shipment – and contracts that previously belonged to the category of the unnamed [1], creations of judicial practice and specialized literature.

Although encountered in practice, developed by it, by doctrine and jurisprudence, but lacking rules to determine its definition and content, the maintenance contract has always raised problems in the jurisprudential practice.

Responding to the needs of the existence of a unitary system of rules applied to the maintenance contract, the new Civil Code, for the first time, redefines this notion by establishing the criteria that delimit it from similar contracts and determines its specificity both in terms of the conditions of existence and in terms of legal effects.

In the new Civil Code, the maintenance contract has its own regulation in Chapter XVIII - Maintenance contract, from Title II - Different special contracts, Book V - About obligations, art. 2254 - 2263 [2].

1. Considerations regarding the maintenance contract from the perspective of the new Civil Code

Prior to the entry into force of the new Civil Code, the maintenance contract did not enjoy its own legislative regulation, neither in the Civil Code of 1864 nor in any special law. However, it was frequently encountered in social life, being the creation of judicial practice and specialized literature, which applied the rules of the general theory of civil obligations, unless the parties provided for other rules.

At present, the express regulation of the maintenance contract is a natural consequence of the evolution of the civil law science, being called to answer people's concrete and current needs. As a result, the new Civil Code has responded to these social objectives, legislating the maintenance contract in Title IX (Different special contracts), Chapter XVIII, art. 2254-2263. In other words, the practice, doctrine and jurisprudence applicable prior to the entry into force of the new Civil Code is transposed today in articles 2254-2263.

According to the provisions of art. 2254 para. 1 of the Civil Code, the maintenance contract is „the agreement by which one party undertakes to perform for the benefit of the other party or of a third party the necessary maintenance and care for a certain period of time”. We note that the legislature imposed the obligation to conclude the authentic contract in authentic form, the sanction applicable for not respecting the condition regarding its form being absolute nullity.

With the conclusion of the maintenance contract, the rights and obligations of the parties arise. Thus, the party who is obliged to carry out the necessary maintenance and care services is called the maintainer (the maintenance debtor), and the party for whom these benefits are performed is called the maintained (the maintenance creditor).

We mention, with respect to those previously mentioned, that the maintenance right of the creditor is a strictly personal right, which is why it is extinguished at his death (it cannot be transmitted to his heirs by succession).

The maintenance contract can be constituted both onerous and free of charge. When the maintenance has been onerous, the maintained has obligations identical to those of the seller, mentioning here, as an example, the obligation to convey to the maintainer the ownership of the promised goods (movable or immovable).

In contrast, the maintainers' rights are correlative to the obligations assumed by the maintained. It is the maintainers' responsibility to provide maintenance mainly in kind, in accordance with the provisions of the contract.

2. The principle of contractual freedom

As a result of the above, under the principle of contractual freedom, the parties have the possibility to express in the contract the benefits in kind to which the maintenance debtor undertakes. In this case, the maintenance obligation will be executed according to the contractual stipulations.

As it has been emphasized in the legal literature, due to the predominantly alimentary character of the maintenance obligation, it must be executed permanently [3].

The debtor is obliged in particular to provide the creditor with food, clothing, footwear, housekeeping, and the necessary care and expenses in case of illness. In any case, the debtor's in-kind benefits, in order to be fair, must be in accordance with the maintenance creditor's material and spiritual needs and ensure to him a normal standard of living, at least equal to that had before the conclusion of the contract. During the execution of the maintenance contract, the in-kind benefits must be adapted and updated according to the age and the evolution of the health status of the maintained, his concrete needs and the cost of living.

Last but not least, the maintenance contract has an *intuitu personae* character, which is concluded considering the personal qualities of the contracting parties. Thus, the maintenance obligation is an obligation to do strictly personal and non-transferable [4].

Even if the maintenance debtor sometimes calls on other persons to fulfil, in part, the obligation assumed, it cannot be said that in this way the personal character of this obligation is defeated [5].

Thus, in the case of a litigation, the court will determine whether or not the debtor's actual benefits in kind were fair, depending on two criteria: the value of the capital transmitted to the maintainer (i.e. the value of the goods transmitted) and the previous social condition of this person.

We reiterate that the maintenance debtor is obliged to grant maintenance in kind under the conditions provided in the contract. As a rule, the debtor cannot relieve himself of the maintenance obligation no matter how onerous it would be for him (the creditor's long life) even though he would oblige himself to repay in the creditor's patrimony his good, the capital received, without demanding the restitution the value of the maintenance provided.

From this rule there is only one exception, when the maintenance debtor can only be released with the consent of the maintenance creditor, a situation that is hardly encountered in the practice of the courts.

The maintenance debtor has the obligation to perform the necessary maintenance and care services even if the maintained has sufficient material means. This is because, as stated in the judicial practice, in the

absence of an express clause, it has no relevance that the maintenance beneficiary has sufficient material means, because the conventional maintenance obligation should not be confused with the legal maintenance obligation, when granting the maintenance depends on the state of need of the right person to receive it [6].

The obligation of the maintenance debtor to provide the other party with maintenance in kind is an obligation to do, which must be performed daily, permanently and not periodically, until the creditor ceases to exist.

As the maintenance obligation has a predominantly “alimentary” character and must be executed permanently and daily, the debtor is legally late when he refuses or fails to perform his obligation repeatedly. As a consequence, the creditor may request, in this situation, the termination of the contract without prior delay of the debtor, the term of execution of the obligation being considered essential.

Art. 2260 Civil Code provides for a special case of revocation of the maintenance contract, this being revocable for the benefit of the persons to whom the maintenance creditor owes them food under the law if, by the effect of the contract, he lacked the means necessary to fulfil the obligation to provide food. The revocation can be requested even if there is no fraud on the part of the maintenance debtor and regardless of when the maintenance contract is concluded. It is important that the court can, even ex officio, but only with the maintenance debtor's consent, instead of having the contract revoked, force him to provide food to the persons to whom the creditor has such a legal obligation, without diminishing the benefits due to the maintenance creditor in this way.

At the same time, if the maintenance provision or receipt in kind cannot continue for objective reasons or if the maintenance debtor dies and there is no agreement between the parties, the court may replace, at the request of either party, or only temporarily, maintenance in kind with an appropriate amount of money. The lawmaker foresaw the situation in which the provision or receipt in kind of maintenance can no longer continue from the fault of one of the parties, so that, at that time, the court will increase or, as the case may be, reduce the amount of money that replaces the maintenance benefit.

The termination of the maintenance contract is stipulated in the content of art. 2263 Civil Code. As a rule, the maintenance contract concluded for a fixed period ceases upon expiry of this period, unless the maintenance creditor dies earlier.

However, when the behaviour of the other party makes it impossible to execute the contract under conditions in accordance with good morals, the interested party may request the resolution. It can thus be noted that with regard to the effects of the resolution of the maintenance contract towards the parties, common law applies. Thus, with the termination of the maintenance contract, the parties return to the previous situation also recognized as *restitutio in integrum*.

In the above case, as well as when it is based on the unjustified non-execution of the maintenance obligation, the resolution can only be pronounced by the court and any contrary clause is considered unwritten.

Particularly important is that when the resolution has been requested for one of the reasons previously mentioned, the maintenance offer made by the defendant debtor after the action has been introduced cannot prevent the resolution of the contract.

Last but not least, art. 2263 Civil Code enshrines the right of the heirs to be able to request the termination of the maintenance contract, this right being transmitted to them once the maintenance creditor dies.

Conclusions

Given that the maintenance contract has its own regulation, distinct only from the 1st October 2011, the date of entry into force of the Civil Code, we note that this contract was as used and present in the legal life as it was before the legislator gave it a special place within the named contracts.

If, before the entry into force of the new Civil Code, the lack of legal regulation of this contract was supplemented by the judicial practice and doctrine, which outlined its main and essential characteristics, at this moment this contract has its own distinct delimitation, being determined from the legislative point of view, all

the practice, doctrine and jurisprudence applicable prior to the entry into force of the new Civil Code being transposed today exclusively within the content of the articles 2254-2263.

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[2] The new Civil Code - Law no. 287/2009, as subsequently amended.

[3] F. Moțiu, Special Contracts, ed. VI, revised and added, Juridical Universe Publishing House, Bucharest, 2015, p. 336.

[4] F. Moțiu, Idem, p. 330.

[5] Ioana Nicoale, Universul Juridic Magazine - Short Considerations on the Maintenance Contract.

[6] The Supreme Court of Justice, civ., Dec. no. 2462/1992, in Law no. 10-11 / 1993, p. 110.

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