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THE SCOPE OF THE ASSIGNMENT OF CONTRACT

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Abstract
This paper seeks to analyze the scope of the assignment of contract, fixed since the beginning of art.1315 Civil Code, according to which the contract substitution can occur in contracts where benefits have not been fully executed.
As a rule, the assignment of contract is applicable to the contracts of successive performance, but the view was expressed that included within the scope of the assignment the contracts with immediate execution, whose effects have not been fully depleted, this opinion being supported by recent reports in the Italian law .
Although the Romanian Civil Code does not contain provisions on the transmission of unilateral and bilateral contracts, the rule is that typical assignment is considered a bilateral contract, without excluding the possibility that atypical transfers may be considered unilateral contracts, although this situation is hard to imagine, given mainly because the underlying conclusion of such contracts.
An entire legal dispute was created upon the situation of intuitu personae contracts, the authors who have treated the subject claiming that these types of contracts can be transferred by the mechanism of the assignment of contract when it is an "objective intuitu personae".

Keywords: assignment of contract, scope, *intuitu personae*

1. Preliminary considerations regarding the sphere of action of the assignment of contract

By domain of action or sphere of applicability of the contract assignment, one may understand the general frame constituted of the typology of contracts that may be the object of the contract assignment and the conditions that a contract must fulfill in order to be assignable.

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Besides legal provisions enforced by articles 1315-1320 of the Civil code within the matter of the assignment of contract, there are also contracts that are declared assignable expressly by the Romanian legislator, known by doctrine as legal contract assignments, such as the lease contract, the farming contract, the insurance contract, etc.

As a general rule, the contract assignment may have as object any type of contract, as long as contractual benefits have not been completely fulfilled and if, by law or party volition, a certain type of contract has not been declared non-assignable yet.

The contract assignment, as a legal autonomous operation, expressly acknowledged by the current Civil Code, supposes the substitution of one of the contractual parties with a third which overtakes the entire legal complex of rights and obligations that are a result of the assigned contract.

Such an operation has been made possible due to an objective visualization of the contract, imposing an accentuated "patrimonial transformation", without a complete abnegation of the subjective vision, which emphasizes the personal character of the contract, that of relation based on an agreement of will of two or more parties.

Therefore, the acknowledgement of the possibility to assign a contract in its entirety is tied to the agreement that must be given by the assigned party, in order to have a continued contractual report with a third, different from the contractual partner initially chosen (the assignor), in which a certain degree of trust would have been invested and was chosen for the existing contractual relation.

For this reason, specialty doctrine has excluded, as a rule, the *intuitu personae* contracts, from the sphere of applicability of the assignment of contract.

In an opinion presented by the sustainer of the monistic theory, L. Aynes, it is appreciated that generally a contract is assignable with the exception of the situation which would present a non-assignable clause, or a strong *intuitu personae* character (Aynès, 1998).

There have, of course, been different opinions, belonging to authors who were against the idea of reducing a contract to a simple patrimonial element, detached by the persons of its contractors, in the sense that a contract is not just a sum of patrimonial obligations, being withal a promise of efficacious and loyal behaviors. In relation to this statement, we point

out that there are contracts regarded by law as being assignable, such as the lease contract, provisioned by article 1418 of the Civil Code, situation which does not impose any authorization to allow the contract to be assignable (Mestre 1997).

2. Domain of applicability of the assignment of contract

Within French law, such as well as within the Romanian one, there are legal provisions acknowledged by doctrine, as legal assignments of contract, as well as types of contracts that are imposed by law as non-assignable.

In what regards the conventional assignment of contract, the domain that may support such an operation has been a vast subject of debate for the French doctrine.

The most important debates started from the suggestion to remove from the sphere of applicability of the conventional assignment the unilateral contracts, contracts with instantaneous execution and the *intuitu personae* contracts.

a. In what concerns the **unilateral contracts**, French doctrine authors F. Terre, P. Simler, Y. Lequette, seconded by C. Larroumet, argued to remove them from the domain of applicability of the assignment of contract, with the following argument: since unilateral contracts do not suppose mutual claims or debts, the assignment contract may only be a debt assignment or claim assignment, but not a real contract assignment.

Such an assignment of a unilateral contract, often met within legal practice is the assignment of a promise to sell.

The criticism brought to the above theory has been argued based on the idea according to which a unilateral contract is not composed only of rights and obligations, but also of potestative rights, and thus an assignment of a unilateral contract would also assume an assignment of all potestative rights born in connection to that contract.

b. In what regards **contracts with immediate execution**, doctrine excluded them from the domain of applicability of the assignment, starting from the premise that the specificity of this type of contract is

within the sudden execution of the benefits, and if benefits were executed, the assignment would have no object, thus it could not exist.

Some authors promoted the idea that an assignment of *uno ictu* contracts would only be possible if the execution of benefits was delayed, therefore before the main effects of the contract should have been produced.

It has thus been stated that the assignment may have as object, in the above hypothesis, the entire contractual situation of the assignor, "a conglomerate", formed of the potestative right of option (main purpose of the assignment, for the assignor), the accessory claim and the obligation to pay a fee to immobilize the asset, if required (Goicovici 2007).

c. The **intuitus personae contracts** are the third category of contracts, reticently regarded by the specialty doctrine, whose general tendency is to exclude them from the sphere of applicability of the assignment, based on the fact that their existence is due to considerations of the parties that contracted the assignment.

L. Aynes argued in favor of removal of this type of contract from the sphere of applicability of the assignment of contract, based on the fact that in this specific case the party is confused with the object (example: a painting ordered from a painter can only be painted by that painter) or with the cause of the contract (as is the case with the donation contract).

French jurisprudence[1] allowed this type of assignments in cases as: IT maintenance (Com. 7 janv. 1992 no 90-14.831), concession contracts (Com. 6 juill. 1999, no 96-20.459, RJDA 1999, no 1197), mandate contracts (Civ. 1re, 6 juin 2000, no 97-19.347) etc.

By ruling no. 97-19347 of 6th of June 2000 of the French Court of Cassation, the 1st Chamber[2], annulling the ruling of the Bordeaux Court of Appeal nr. 1997-07-07, established that "the fact that a contract has been perfected taking into consideration the party of the contractor does not

[1] 8/28/2014 Dalloz.fr http://www.dalloz.fr/documentation/Document?id=ENCY%2fCIV%fRUB000060%2fPLAN008%2f2010-06&ctxt=0_YSR0MT1jZXNzaW9uIGR1IGNvbnRyYXTCp… 3/6.

[2] Publication : Bulletin 2000 I N° 173 p. 112 Le Dalloz, 2001-04-26, n° 17 p. 1344, note B. BEIGNIER. Le Dalloz, 2001-04-26, n° 17 p. 1345, note D. KRAJESKI. Décision attaquée : Cour d'appel de Bordeaux, 1997-07-07.

constitute an obstacle to transfer contractual rights and obligations to a third, since the other party involved (n.a. the assigned) consented to it".

The ruling of the case analyzed the following state of facts: a client, M.V., hired for its legal assistance a lawyer, M.G., member of a professional civil society, the retainer being split into a base fee plus a success honorary. After the mediation session, the hired attorney, M.G., was substituted by another lawyer, an associate of his, who took part in the perfection of the transaction which the client M.V., following the advice from the substituting attorney, signed.

The First court appreciated that the honorary convention is not applicable, since the initial attorney, M.G. did not personally defend his client, and established the retainer according to the common civil law.

The Cassation Court appreciated though that the interpretation given by the Appeal Court of Bordeaux was wrong, since the client, M.V., agreed to be assisted by the substituent lawyer, consenting thus that the co-contractor would be replaced.

French doctrine also decided that a tacit agreement of the assigned should suffice for an *intuitu personae* contract to be assigned.

We appreciate that our legal jurisprudence, considering dispositions of articles 1315-1320 of the Civil Code, will not be able to assume a tacit agreement, but only an express one, may it be given previously, by contractual clause, the assigned being later notified of the assignment, or may it be expressed at the time of the agreement between the assignor and the assignee.

What is, though, an *intuitu personae* contract?

The definition given by *Vocabulaire juridique sous la direction de G. Conue* (Garron 1999) refers to contracts in which "the personality of one party is regarded as essential from the perspective of its particular aptitudes", including here competencies, qualities of the party that recommend it to become a contractual partner.

In regard to the meanings associated with the notion of *intuitu personae*, the doctrine reached a dilemma: is this an intrinsic element to the contractual clause or a different element, external to the clause?

Could it have gradual limitations or, in a different manner, may there be and absolute *intuitus personae* and a relative one?

In this context discussions dealt with the existence of different stages in regard to how a party would be considered: either the party would not have perfected a contract, should a specific co-contractor have not existed (1), or it have perfected the contract, but would have always chosen the contractual party that fitted best its expectations (2). It has been stated, that phrased like that, the *intuitus personae* element would be nothing else then the cause itself of the convention, at one of the possible levels: consideration of the party – as it determinates and circumscribes the consent to contract – should it be more a characteristic of the contractual cause, than an essential element (Garron 1999).

If the *intuitus personae* element was an intrinsic component of the cause, or even the object of the act, the proposed solution in the case of disappearance during the contract execution would be caducity (Goicovici, 2007).

We appreciate that an **absolute** *intuitus personae* may exist when the contracting party cannot be replaced at all, even with an existing agreement from the assigned party, meaning that any convention of the above type would embrace the form of a new contract.

In this case, we consider that the assignment of contract could not subsist within a contract with a determining *intuitu personae* character, which would constitute the actual cause of the contract.

We might choose as an example the donation contract on behalf of the single son of the donor, appreciating that this contract cannot be assigned, the donation being made with exclusive consideration of the receiver.

Taking into consideration the objective characteristics, usually professional ones, of the contract, the contractor has the possibility to choose the party that he considers most capable to reach the purpose of the contract. As a consequence, we appreciate that a **relative** *intuitus personae* may exist, such a contract enabling an assignment, if an agreement with the party of the assigned contractor has been reached.

In the above sense, doctrine appreciates that a difference may exist between objective and subjective qualities that a party can "search" for when considering the party whom it wishes to contract with.

Thus, the objective qualities regard, *stricto sensu*, the capacity, aptitude of the debtor to execute – alone – the assumed contractual obligation, as is the case of the mandate contract (Goicovici 2007).

The subjective qualities are those that begin out of feelings, passions, friendship or family relationships, based on profound feelings, qualities that are more often, but not exclusively, met within the category of contracts with a free title, liberalities or impersonal acts.

As such qualities suppose the impossibility to change the parties that converge them, respectively the impossibility to switch feelings for one person, with feelings for another, the assignment of a contract perfected upon subjective qualities is impossible.

This should not be the case of an objective *intuitus personae* contract, case in which a "fungibility" of the parties would exist, creating the possibility to continue this type of contracts in case of death, legal incapacity or physical incapacity of obligations by the initial debtor with another party that presents, by hypothesis, the abilities/qualities shown by the first (Goicovici, 2007).

Another difference presented by the already quoted doctrine, between the relative and the objective *intuitus personae*, has in mind the possibility of the court to exercise a certain control upon the agreement consent emitted by the assigned party, control that resides in a censorship applied to the right of choice, an option of the assigned to refuse the party of the assignee, option that would have to be respected only in the case of proven solid motifs.

By contractual clause, parties may limit the field of applicability of a perfected contract assignment, configuring thusly the law of the parties.

The parties may insert within the contract prohibitive clauses, forbidding an assignment, either by denying one of the parties the possibility of substitution, or by prohibiting both parties to substitute.

A clause of the above type may establish an *intuitu personae* character to a contract that regularly would not have involved a personal consideration of the parties.

By such a clause the parties understand to engage into a contractual relation in an exclusive manner, removing the possibility for one or both to continue the legal contractual report with another party, alien at the moment of the perfection.

The parties may phrase the prohibitive clause in an absolute manner, forbidding the assignment of the entire contract, or in a relative manner, nuanced, allowing for a substitution of contractors by other parties, but which should meet certain criteria, set in a common agreement by the original parties.

In virtue of the contractual freedom principle, the parties may choose *agreement clauses*, giving the possibility to the assigned party to only agree to certain types of assignees, identified based on certain criteria even within the original contract, or allowing the assigned to have the choice of a discretionary refusal of agreement.

Such a clause, used by contracting parties with a highly developed contractual sense, in a preventive manner, introduces the possibility of amicable resolve of any litigation that may appear among them, since the limits of the refusal of agreement are expressly drawn, or they may help a court to have a correct ruling, the latter being only held to identify and interpret if the refusal of the assigned party to consent to a third is, or not, a breach of the contractual criteria.

Therefore, by the simple existence of agreement clauses, a much easier path opens in solving the problem of law abuse, problem heavily debated by doctrine.

Thus, French doctrine and some of the Romanian authors (Juanita Goicovici) speak of a potestative right – the right of the assigned to refuse the assignee party, and thus the assignment of contract to the latter – but not of a discretionary right, with possibility of censorship by court, when the judge appreciates that no solid reasons exist for the assigned to refuse the assignment, the latter being culpable of a law abuse.

It is obvious that if the parties have established through the original contract the right of the assigned to refuse in a discretionary manner a substitution of the assignor by a certain assignee, an abuse of law would not exist anymore, even if the reason of the refusal was not be solid, but purely subjective, as, in the end, the law of the parties is the existing contract.

The parties may also stipulate within the contract *resolutory clauses*, which give the possibility to the assigned party to demand an annulment of the contract if it does not agree to the assignee chosen by the assignor.

Also, the parties may expressly stipulate that, in case of death, the contract may not be passed to the rightful successors of a party, but it should cessate.

Conclusions

In conclusion, the parties may resolve, by various stipulations, certain situations of conjuncture and also the means of resolution, avoiding thus long trials, that would imply vast amounts of time and money.

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