The Peculiarities of Risk in Aleatory Contracts

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Abstract: The contract risk is one of the specific effects of the bilateral contracts, beside the exception of non-compliance of the contract and its resolution/cancellation. Both the *lege lata*, and in the light of the new Civil Code, in the area of the main aleatory contracts (the insurance contract, the maintenance contract, the perpetuity contract, the gambling and wager contract), the risk has some peculiarities, which we intend to point out in this work. The essence of this category of contracts is the chance of gain or the risk of loss for both contacting parties.

Key-words: chance of gain, risk of loss, insurance contract, perpetuity contract, maintenance contract, gambling or wager contract.

1. General considerations regarding the contract risk

The bilateral contracts generate, as specific effects, the exception for non-compliance, the resolution or the cancellation and the risk of the contract.

The issue of the contract risk is raised in the assumption in which one of the parties is precluded to execute its assumed responsibility, by a major force or a fortuitous event. Therefore, the non-compliance with the contractual responsibilities arises, in the contract risk, independent from any fault of the debtor.

Under this consideration, we can distinguish the contract risks from the resolution or the termination of it, whereas the first specific effect of the bilateral contracts arises as a consequence of the non-compliance of the contract, independent from any fault of each one of the parties, and the second specific effect of the bilateral contract is generated by a non-compliance attributable to one of the parties [1], [2], [3], [4].

So, if the fault for the non-compliance of the contractual obligations by one of the parties cannot be accepted, cannot be questioned the promotion of any legal action for compensations for non-compliance, but only the situation of assuming the contract risk.

As a general rule, the contract risk is assumed by the debtor of the obligation that is impossible to be ran (*res perit debitori*), i.e. by the party who's obligation can no longer be enforced, due to a major force or a fortuitous event. This rule, proposed by the doctrine and upheld by the jurisprudence, but which has no general formulation in the Civil Code, signifies the fact that the debtor of the obligation impossible to be ran cannot pretend to the other part to ran his correlative obligation, also the other party cannot pretend compensations for non-compliance from the debtor of the impossible to be ran obligation [1], [2], [3], [4].

The legal foundation of the *res perit debitori* rule is found, as with the other specific efects of the bilateral contracts, in the reciprocity and in the interdependence of the obligations, in the fact that each of the mutual obligations is the legal cause of the other one [1].

Thus the actual Civil Code does not explicitely devote the res perit debtors' rule, it contains some aplications of this rule in the matter of the lease contract (Art. 1423), the entreprenorship contract (Art. 1481) and the society contract (Art. 1515).

Also, the actual Civil Code contains [in Art. 971, Art. 1074 Para 2 and Art. 1156 Para 2] provisions regarding the assuming of the contract risk in the translation propery contracts. Therefore, in the area of this category of contracts, the risk is suported by the party that has the quality of the owner at the moment of the fortuitous loss of the good (*res perit domino*)[1]. Or, in the area of the property translation contracts, the property of certain goods is transfered concomitantly with the signature of the contract, independent by the delivery of the good and the payment of the price. Thus, the risk in the sale-purchase agreement area, for example, is assumed by the buyer, as it has become, by the effect of the selling, the owner of the good. As a consequence, the buyer will be required to pay the price, even though the seller cannot render the good.

Such an approach, enshrined by the lege lata was

qualified by the literature as being „too severe" and was proposed, by the lege ferenda, the attenuation of its rigor[1].

The Law n°. 287/2009 regarding the Civil Code, published in the Official Gazzette N°. 511/2009, has the same option, as the actual Civil Code, regarding the settlement of the contract risk. Thus, the new Civil Code, without offering a general formulation for the rule the governs the assuming of the contract risk, is limited only at the settlement of the issue of the risk in property translation contracts, also in the matter of other contracts, in which the risk presents some particularities (i.e. in the case of the entrepreneurship contract, of the insurance contract or in the maintenance contract). Applications of the *res perit debitori* rule, we meet in the light of the new Civil Code's provisions, in the matter of different types of contracts.

Accordingly, as well as the *lege lata*, as a rule, the property translation contract risk is imposed to the debtor of the render obligation, as long as the good is not rendered, even if the property was translated to the creditor. In the case of a fortuitous loss of the good, the debtor of the obligation of rendering loses the right to a counter-performance, and if he has received it is obliged to give it back [Art. 1274 Para 1]. This rule has, in the light of the new Civil Code, as well as the *lege lata*, the folowing exception: the creditor put in delay takes over the risk of the fortuituos loss of the good [Art. 1274 Para 2]. The new provision in the civil matter provides that, in contradistinction to the actual Civil Code, the creditor put in delay cannot release himself, even if he would prove that the good was lost and if the rendering obligation would have been performed in time [Art. 1274 Para 2]. Thus, it is taken by the new settlement in civil matter the proposal of the doctrine to attenuate the severity of the *res perit domino* rule.

In the situation of the property translation contracts, having as object goods is gender, as *lege lata*, the risk is supported by the debtor of the impossible to be ran obligation, namely the seller, because the transfer of the property right over this category of goods operates only from the date of their rendering to the buyer [1], [2], [3], [4].

The contract risk will be assumed also by the seller in the situation in which, even if it is about certain goods, the transfer of the property right does not occur at the moment of signing, but subsequent, and the good is lost before the transfer was fulfilled [1].

In the case in which the transfer of property is affected by a condition and the good is lost *pendente conditione*, the risk of the contract is assumed by the party that is the owner under a resolutory condition [1].

2. The peculiarities of risk in aleatory contracts

2.1 The risk – a definitory element of the aleatory contract

In the area of the aleatory contracts, the risk presents some peculiarities, generated bu the fact that the essence of this category of contracts is represented by the opportunity of a gaining or by the risk of a loss (*alea, -ae, lat*. – dice, chance, risk, danger).

The actual Civil Code, in its Art. 1635, defines the aleatory contract as "the mutual convention whose effects on benefits and losses for all parties, just for one or for some of them, depends of an uncertain event".

Criticizing the definition given by the legislator, the literature [5] defines the aleatory contracts as representing the burden-some agreements in which the extension or even the existence of the obligation for one of the parties or for both of them, it is not known in the moment of concluding the contract, depending on a certain and future event. The uncertainty which characterizes the aleatory agreements regards the compliance or non-compliance of a condition, or the moment of compliment. Thus, the aleatory contracts are characterized, first by the uncertainty on the existence and limitation of the obligations which may aim even just one of the contracting parties.

Together with this uncertainty, the aleatory contracts are characterized by the chance of a gain or the risk of a loss for both contracting parties, each of them pursuing to gain and to avoid the risk of a loss. The chance of a gain or the risk of a loss can be evaluated only at the moment when the event interferes independent from the will of the parties.

Thus, the two features of the aleatory contract must not be mixed up: the uncertainty and the chance. The uncertainty regards the existence or the limitation of the obligation of one or both contracting parties, while the chance, which includes also the risk of a loss, regards both contracting parties.

Therefore, while uncertainty can be unilateral, the chance must always be bilateral.

Nor the new Civil Code defines properly the aleatory contract, creating the same confusion which is being pointed out by the legal literature. The only merit of the new Civil Code in defining the new Civil Code is that of using an actual terminology. According to Art 1173 Para 2 of the Civil Code, the aleatory contract is the contract that "by its nature or by the will of the parties, offers to at least one of them the chance of a gain and also exposes her to the risk of a loss, depending on an uncertain and future event."

Analyzing the definition given to the aleatory contract by the new civil settlement we observe that the legislator, once again, overlaps the two features of this

type of contract: the uncertainty and the chance. Though the legal literature has pointed out the possibility of creating such confusion, the legislator does not prove receptivity and defines improperly the aleatory contract. In these conditions, we remonstrate to the new civil settlement the inaccurate definition of the aleatory contract, distorting its essence, equalizing the uncertainty, which should regard the existence and limitation of the obligations to one or more of the parties and the chance (*alea*), which regards the final result of the contract and must always have a bilateral character.

The French legislation, which has always been for the Romanian legislator the main source of inspiration, properly defines, in Art 1104 and 1964 of the Civil Code, the type of contract subjected to our analysis. Thus, the aleatory contract, variety of the burden-some contract, is the agreement in which the existence and the limitation of the obligation that is imposed to one of the parties, depends on hazard. Each of the contracting parties has the opportunity of a gain and the risk of a loss, between them being mutuality [6]. Thus, the French legislator succeeded to maintain, in the definition of the aleatory contract, both elements that define its substance, the uncertainty and the risk, without overlapping them.

Thus, we can say that, unfortunately, our legislator was not influenced by its French homologue, which would have had positive effects over the quality of our national civil legislation. The French doctrine draws attention on the fact that the particularization of the aleatory contracts is rebounding [6], [7].

2.2 The main consequence of the aleatory feature of the contract

Regarding aleatory contracts, the parties have agreed knowing the chances of gain-loss, therefore, in case of loss, they cannot take legal actions in annulment for damages (action in rescission), even if the damaged party has a restrained exercise capacity. From here it arises, as a rule, that fact that the annulment action for damages is not applicable in the area of the aleatory contracts [5].

The same solution of inadmissibility of the action in rescission in the area of the aleatory contracts is held and motivated in the French legal literature [6].

2.3 The main aleatory contracts

The legal literature and national legislation analyzes, mainly, in the category of the aleatory contracts, the insurance contract, perpetuity contract, the maintenance contract, gambling and wager contracts. In this work, we will point out the features that risk has in the area of these contracts. We state that the number of the aleatory contracts is unlimited, together with the four contracts mentioned having the aleatory feature other types of contracts, i.e the selling of a future good, the selling of a nude property or of the beneficial interest's profit, the selling of litigation rights, bank credit contract [10], [11] etc.

2.4 The peculiarities of risk in the insurance contract

Though the actual Civil Code states, in its Art 1635, the insurance contract regarding aleatory contracts, some of the doctrinaires states some reserves regarding its aleatory feature. Disputing this feature of the insurance, it was stated that, on the one hand, the insured person has the certainty that he will receive an amount of money if the risk insured by him occurs and, on the other hand, the insurer has a certainty over the possibilities to pay the insurance indemnity, because he calculated the premiums to cover these possibilities.

Among with other authors [5], [8], [9], we believe that the insurance has an aleatory feature, because, at the moment of its closure the parties have no certainty over the occurrence of the insured risk or at least they do not know its time. It is true that the insured has the safety of receiving an amount of money, but this amount can only be paid, *only if* the insured risk occurs. Also, we can state the aleatory feature even in the case of person's joint insurances (for infirmity or death), because these events may occur very fast from the moment of closuring the contract, that the insured paid few premiums to cover the indemnity paid by the insurer. In this case the insurer is in a certain disadvantage, being subjected to a loss.

The insurance is an aleatory contract and its essence is the probability of happening of the insured risk [9]. Its lack (the inexistence or the impossibility of occurring of the insured risk) is sanctioned with the legal cancellation of the contract.

In the area of the insurance contract is used the term *insured risk*, having another meaning from that of the common risk. Thus, by insured risk we designate a future event, probable, but uncertain to happen, to which the goods, life of health of a person are exposed to [9]. As an example, the insured risk in the case of insuring goods can be an event such as earth quakes, fire, flood, theft etc. In the case of persons insurance, the insured risk is represented by fizical harming, infirmity or death of the person. The insured risk, in the situation of liability insurances, is the producing of a car accident causing damages to third parties.

When the insured risk has occured it becomes an insured case. Thus, the distinction of the insured risk by the insured case is that the first one is an event that occurs, and the second one is an event that has already occured.

We conclude that in the area of insurances, the risk is the esence, and the uncertainty can regard the occurence or

the failure of happening of the event or only its time of happening.

Unlike the actual Civil Code, which does not settles the insurance contract, specifying that is an aleatory contract, but is the object of the commercial law, the new Civil Code gives a proper and extended settlement to this contract, in its Chapter XVI.

Defining the insurance contract, the new Civil Code in Art 2199 refers to the insured risk, showing that the obligation of the insurer to pay an indemnity to the insured, the beneficiary of the insurance or the prejudiced third party arises in the moment of happening of the insured risk. From here it follows that the essence of the insurance contract is the existence of risk.

The new Civil Code creates in the responsibility of the purchaser the obligation to give complete information regarding the insured risk. Thus, according to Art 2203 Para 1, the insurer must answer in writing to the questions of the insurer and to declare, at the moment of closuring the contract, any information or situations known to him and essential to the evaluation of the risk.

Even more, if the essential circumstances regarding the risk modify in the time of the contract, the purchaser has the obligation to communicate in writing to the insurer the modification. The same obligation also has the insurer, in the manner in which he has acknowledged the modification [Art. 2203 Para. (1) of the new Civil Code].

The new Civil Code sanctions by annulment the insurance contract, in the situation of an inaccurate or of mala fides reticence declaration made by the purchaser regarding the insured risk, even if the situation had no influence over the occurring of the insured risk. If the mala fides of the purchaser or of the insurer could not be established regarding the inaccurate or reserved declaration, it will not interfere the annulment of the insurance (Art 2204 of the new Civil Code).

As *lege lata*, in the light of the new Civil Code's disposals (Art 2205), the insurance contract is legally cancelled in the absence of the insured risk (the insured risk occurred or its occurrence has become impossible before the obligation of the insurer begin to produce effects or the risk has become impossible after the obligation of the insurer began to produce effects).

Also, in relation to the insured risk the new Civil Code, by the provisions of Art. 2207, establishes the responsibility of the purchaser to notify the insurer of the insured risk occurrence in the period covered by the insurance contract.

In the presence of the legal disposals regarding the insured risk, we firmly sustain the existence of the aleatory feature of the insured contract. We specify that the risk in the area of this contract has some particularities in relation to the risk in common law.

2.5 The peculiarities of risk in perpetuity contract

Being an aleatory contract, the perpetuity contract is characterized by the existence both of an uncertainty and of a chance. Thus, the debtor does not know at the beginning the existence and the limitation of his obligation, depending on the occurrence of an uncertain and future event, raising the chance of a gaining and the risk of a loss for both parties [8], [9].

Therefore, unlike other aleatory contracts, in the area of the perpetuity contract, the uncertainty regards only the limitation of the annuitant's obligation, thus being unilateral. By the perpetuity contract, the annuitant binds himself to pay to the creditor, periodically, an amount of money, unlimited, until the death of the last one. On the contrary, the creditor obliges to alienate a certain good or a sum of money, thus we can surely state that the existence and the limitation of the creditor's obligation are known at the moment of concluding the contract.

In exchange, the chance of a gain and the risk of a loss exist for both parties. Thus, if the creditor has a long life, the winning is on his side and the loss is on the side of the debtor. Contrary, if the creditor's life is short, he will be disadvantaged, and the debtor will be in gain. Thus, the future and uncertain event (*alea*), in the area of the perpetuity contract, is represented by the creditor's death. The death of the creditor is a certain event to occur, but the moment of it cannot be known at the time of closuring the contract.

The chance pursued by parties at the moment of signing the perpetuity contract is the stream of the assumed obligations, its absence entailing the nullity of the contract [5]. So, if the life annuity was created for a deceased or sick person at the moment of concluding the contract, with the consequence of death in 20 days from conclusion, the lack of the cause attracts the nullity of the parties' agreement.

We specify that only the aleatory feature of the perpetuity contract as an instrument for consideration cannot be doubted, this type of contract being characterized by risk [5]. The opposite cannot be sustained, being without motivation.

The new Civil Code expressly provides, in Art 2246 that is absolutely null the contract that states a rent based on the life of a person, who was deceased at the moment of conclusion. Similar, does not have legal effects the contract as an instrument for consideration based on a life annuity for the period of life of a person who, at the moment of conclusion, has a deadly disease, in at least 30 days from this date on (Art 2247 of the new Civil Code). Comparing the two correspondent legal texts from the two normative acts, we ascertain that the only difference is given by the duration of time from the moment of concluding the contract and the time of the

creditor's death.
In the perpetuity contract and the translation of property contract are applicable, among with special rules regarding the risk, also general rules. Thus, the contract risk regarding the good or the sum of money given by the creditor is supported according to the *res perit domino* rule, and the contract risk regarding the payment of the annuity is supported according to the *res perit debitori* rule.

2.6 The peculiarities of risk in the maintenance contract

The maintenance contract is similar, under various aspects, to the perpetuity contract, reason for which the risk in this area has the same features as in the so-called contract.
The maintenance contract has an aleatory feature, because the maintainer does not know, at the moment of concluding the contract the existence and the limitation of his obligations, depending on a future event, whose date of happening is unknown. Thus, also in the area of the maintenance contract, the uncertainty has a unilateral feature, aiming only the maintainer. The maintained, in exchange, knows at the conclusion moment both the existence, and the limitation of his obligation. Thus, under the contract, the maintained binds himself to convey a good or a sum of money to the maintainer. The last one owes to the first maintenance, consisting in food, clothes, shelter, medical assistance, funeral or funeral repast expenses etc, mainly, during the period of his life. Hence, the maintainer cannot know at the moment of concluding the contract what kind of expenses are needed for the maintenance of his co-contractor, what amount of money and for how long he will be owing it.
The second element, the chance, which characterizes the aleatory contracts exist for both parties. Thus, also the maintainer and the maintained are aimed by the chance of a gain or by the risk of a loss. The chance in the area of this contract depends on the moment when death of the maintainer occurs. In this way, the unknown element (*alea*) is represented in maintenance by the moment of the death of the maintainer happens.
As in the area of the perpetuity contract, also in the area of the maintenance contract we have, besides the specific risk to aleatory contracts, the common law risk.
Naturally, the new Civil Code offers the legal settlement to the maintenance contract whose practical utility cannot be denied, transforming it in a named contract.
In the light of the new Civil Code, the maintenance contract can be limited, thus lacking its aleatory feature.
According to Art 2257 Para 4 of the new Civil Code, the maintenance continues to be payable, even if in the performance of the contract the good which was the capital was totally or partially destroyed or has diminished its value, from a cause in which the maintenance creditor is not bound to respond. Thus, the new Civil Code applies, in the area of the maintenance contract, the general rule regarding the contract risk.

2.7 The peculiarities of risk in gambling and wager contracts

Gambling and wager are the contracts in which the parties agree to mutually pay a sum of money to the winner, in case of occurring or not of an event, which happening does not depend by the force, ability, knowledge etc. of certain persons or hazard and in which are chances of wining or loss for both parties [8], [9].
In the area of the gambling contract, the parties have an active role in occurrence of the event, the gain or loss depending on their force, ability, knowledge etc. In the situation in which the chance of a gain and the risk of a loss exclusively depend on hazard, we are in the presence of a gamble. In the situation of a wager, the parties directly participate on the event.
Part of the legal literature questioned the aleatory feature of gambling contract (lottery), based on the consideration that, for the organizer, the game has no aleatory feature, paying the winnings from the sums effectively cashed, from which beforehand he kept the expenses and profit shares.
In fact, even this contract has an aleatory feature, because is characterized by the existence of the *ale* element. Thus, in the theory in which the event occurs, the organizer pays to the winner a totally disproportioned sum from the sum he cashed, and in the contrary situation does not pay anything [5]. Accordingly, the gambling contract has an aleatory feature for both parties, the same event determining the gain or loss for them. As in all aleatory contracts, the chance has a bilateral feature even in this type of contracts.
In the area of gambling and wager contracts, if one of the parties has used the misrepresentation, removing the chance of gain for the other party, the loser may ask for the restitution of the initial payment (Art 1638 Civil Code).

3. Conclusions

In the area of aleatory contracts, the risk presents some peculiarities, determined, mainly, by the fact that its existence is the very essence of this type of contracts. The inexistence of risk in the content of contracts equalized to the inexistence of their cause and attracts their absolute nullity. In the area of the insurance contract, we met the insured risk, whose occurrence generates the payment obligation of the insurance

indemnity by the insurer and is different from a category of insurances to another one. In the perpetuity and maintenance contract, the insured risk is represented by the duration of the creditor's life, namely the extension of the maintenance. Equally, the gambling and wager contracts are characterized by the chance of a gain or the risk of a loss for both parties, thus having an aleatory feature.

In the area of these contracts, though the risk has some particularities, are equally applicable the general rules regarding the contract risk's bearing.

The same aleatory features are kept by the above-mentioned contracts in the light of the new Civil Code, which does not bring special innovations regarding the subject of our analysis.

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