THE PRINCIPLE OF RELATIVE EFFECT OF CONTRACTS - A HISTORICAL VIEW AND ASPECTS OF COMPARATIVE LAW

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Abstract

The contract shall take effect only between the Contracting Parties; it does not in any way affect third parties, unless the law otherwise provides. This is the principle of the relativity of the effects of the contract, a rule established since Roman law.

In Romans, the principle developed in close connection with the formalism of the contracts, but also with the personalist concept and the individualistic spirit of law, with exceptions to the rule being admitted initially.

Over time, the relative effect that the contract has produced has become a basic principle in the law of many countries, some legislations devoting it express text (such as French law, Spanish law), others recognizing its existence from the interpretation of legal texts for example, German and Swiss law).

The article aims to deal briefly with the origins and the emergence of the principle of relativity, its development and exceptions to the rule, starting from the Roman law and passing through the French, Swiss, German and, of course, the Romanian civil code.

In this latter approach, the material proposes a brief review of the relative effect, as regulated in the previous civil code, in art. 973, with references to the exceptions established by the literature, so-called real exceptions (the stipulation for another) and the apparent exceptions (port-fort convention, representation, direct actions, etc.).

Keywords: *relativity of contract, comparative law, roman law, res inter alios acta.*

The principle of *res inter alios acta* has its roots in Roman law, when the legal relations were characterized by extreme personalization.

According to the definition we find in Justinian's Institutes, obligation[1] was seen as a chain of law (*vinculum juris*) under which we are necessarily compelled to make a certain supply in accordance with the legal prescriptions of the fortress[2].

In the Roman primitive conception, obligation was conceived in the image and resemblance of the property right, in the sense that the holder of the right of claim can dispose of the person of his debtor in the same way as the owner of the good that forms the object of his property. In this conception, obligation could not but produce relative effects, thus creating a personal bond between the creditor and the debtor, the claim giving the former a direct power over the latter's physics[3].

This close relationship between the subjects of the judicial report can be explained if we consider, on the one hand, the way of concluding the contracts, and, on the other hand, the different types of contracts.

Thus, in the old Roman law, in order for a contract to produce legal effects, it had to respect certain forms, it was necessary for the parties to use certain gestures or certain words, and the presence of the parties at the moment of the will expression was mandatory [4].

Obligations, once born, produced two effects, a normal effect, on the one hand, and an accidental effect, on the other, in the event that the normal effect did not occur first[5].

The normal effect of the obligations lies in the debtor's act of executing the obligation assumed by the contract so that the creditor can use its debt rights. The obligation was enforced according to the principles of the civil procedure, at the place specified in the contract or in absentia, at the place where the creditor can bring the action.

From the point of view of those who could bind, we speak of aliens iuris or sui iuris persons, meeting three cases: when pater familias, as a sui iuris person, took part in the contract; when a slave or a person under the power of pater familias took part in the contract, and finally, when another family pater took part in the conclusion of a contract[6].

The principle of relativity, expressed by the rule of *res inter alios acta, aliis neque nocere, neque prodesse potest*, used to find application when pater familias participated in the contract. That principle essentially implied that the effects of the contract were made only in respect of the persons who participated in

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[1] For a brief overview of the origins of the obligation, see, E. Molcuț, *Drept roman*, Edit Press Mihaela SRL, București, 1999, p. 155-158, nd the authors cited in the footnote.

[2] V. Hanga, M.D.Bocșan, *Curs de drept privat roman*, ed. Rosetti, București, 2005, p. 161; M.V.Jakotă, Dreptul roman II, Editura Fundației Chemarea, Iași, 1993, p. 378.

[3] See in this respect, C. Firică, *Excepții de la principiul relativității efectelor contractului*, ed. CH Beck, București, 2013, p.12.

[4] For a classification of contracts, see Valerius M. Ciucă, *Lecții de drept roman*, vol. III, ed. Polirom, Iași, 2000, p. 789 și urm.

[5] Ș. Cocoș, *Drept roman*, ed. ALL BECK, București, 2000, p. 183.

[6] Idem, p. 184.

the conclusion of the contract, to their heirs and their creditors who are not holders of a real right[7].

From the strict personal character of the object of the contract[8], from which also derives the principle of relativity of the effects of the contract, there were developed other basic principles of the Roman law, namely the principle of nullity of stipulation for another, the principle of nullity of promise for another and of non-representation in legal acts, which, over time, have lost their original character, the latter being even removed[9].

The rule according to which the validly concluded contracts take effect only on the parties, not affecting parties foreign of the contract, namely third parties, has been taken over and is recognized today by all European laws.

The Napoleonic Civil Code assigns to this principle art. 1165, in the following terms: Les conventions n'ont d'effet qu'entre les parties contractantes; elles ne nuisent point au tiers, et elles ne lui profitent que dans le cas prevu par l'article 1121.

Therefore, contracts only have effect between parties whose wills have been expressed for the purpose of concluding the convention, by the parties being understood both those present at the time of the consent of wills and those who have been represented legally or conventionally. As a result, third parties will not be able to take advantage of, or suffer from the conclusion of the contract between the parties. However, alongside the parties, the contract will also influence the inheritors, including the chirographic creditors, the universal and private successors.

From the principle of relativity, the French law, doctrine and jurisprudence see as true exceptions the stipulation for another, as it is mentioned in art. 1165, which refers to the provisions of art. 1121 French Civil Code, the promise of another's deed, the transfer of contracts concluded in relation to a good (in the matter of the lease agreements - Article 1743 of the Civil Code, insurance and labor contract), and direct actions.

French law recognizes direct actions in favor of the lessor against the Sublessee (Article 1753 French civil code) in favor of the principal against the sub-agent (Article 1944 French civil code) in favor of the victim against the insurer of the person responsible for the insured event[10].

The Swiss Code of Obligations does not contain a provision similar to that in Art. 1165 French Civil Code, however, in Part I, Title II, Chap. III, under the title *Effects of obligations on third parties*, we find legal figures such as the stipulation for another, the subrogation and the porte-fort convention (articles 110-113).

The Italian Civil Code took over, in art. 1372, the rule on the relative effect of conventions, providing that *Il contratto non produce effetto rispetto ai terzi che nei casi previsti dalla legge.*

The Italian doctrine has argued that the foundation of the principle of *res inter alios acta* must be sought in the "protection that law must accord to contractors who, as a rule, do not consent that others may benefit from legal relationships at the formation of which they were wholly foreign and were not targeted[11]".

In principle, the contract is considered to be ineffective to third parties, but at the same time it is recognized that a contract may have direct effects on them in the circumstances where the contract is the necessary instrument to prevent the performance of another contract. These situations, defined in the past as *contracts to the detriment of third parties*, are now legal figures that recognize the possibility of an "aquile tutelage" of the contract or non-contractual liability derived from the contract[12].

The civil code of the province of Quebec recognizes, in Art. 1440, the same principle of relativity of the contract, without, however, indicating, as an exception, the stipulation for another, but showing that a valid contract concluded takes effect only between the parties, except in the cases provided by the law.

The aforementioned principle is no longer an absolute principle after the reform of the civil code of the province of Quebec, but has become a temperate rule of the requirement of good faith, which applies to both parties and third parties.

In reality, although it is acknowledged that a contract is effective only between the parties, it is impossible, in the context of the present law, to allow third parties to ignore this legal fact and behave in a manner contrary to the requirements of good faith[13].

Like other systems of law, thecivil law of the province of Quebec also knows exceptions to relativity; the direct action of the sub-lessee against the lessor is such an exception[14], the liability of the manufacturer for the defects of the good sold, to the buyer, the sale of an enterprise, the direct recourse of the victim against the insurer, the collective labor contract, all represent recognized derogations from *res inter alios acta*.

The German Civil Code (BGB) does not contain any provision similar to Art. 1165 French Civil Code,

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[7] Ibidem.

[8] For developments see, V.M. Ciucă, *op.cit.*, p. 740 et seq.

[9] For the evolution of these legal figures in Roman law, seeV.M.Ciucă, *op.cit., 742 și urm.,* , Ș.Cocoș, *op.cit*, p. 184-185, E. Molcuț, *op.cit.*, p. 172-174.

[10] P.Malaurie, L.Aynes, P.Stoffel-Munck, *Les Obligations*, Defrenois, 2007, Paris, p. 447.

[11] Tartufari, *Dei contratti a favore di terzi,* p.304, apud A.Circa, Relativitatea efectelor convențiilor, Editura Universul Juridic, București, 2009, p. 44-45.

[12] M. Franzoni, La Rilevanza del Contratto Verso i Terzi, pe http://www.ildirittodegliaffari.it/upload/articoli/20130531012521_Inserito-Franzoni.pdf , site consultat la data de 01.03.2018.

[13] K. Vincent, *Les obligations*, vol. I, Wilson et Lafleur, Montreal, 2015, p. 882.

[14] For an overview of this exception and its evolution, see K. Vincent, *op.cit.*, p. 899-909.

but it has been judiciously argued that there is a principle relating to the relativity of the judicial report that can be deduced from the interpretation of two articles relating to the content of the judicial report, 241 and 311 BGB[15].

A special situation is encountered in English law, where the relativity of the effects of the contract (called the privity of contract) is very limited. Most of the time, this principle is expressed in a procedural manner: the third party has no action based on a contract to which he is not a party[16]. It may be in favor of a third party, but the court can not oblige the promisor to respect his promise. His engagement is devoid of what is called *consideration* because the beneficiary generally does not bring anything in consideration.

Privity of contract implies that a contract can not, as a general rule, confer rights or impose obligations on a person outside that act.

The principle has been interpreted in common law in close connection with two rules: *only a promisee may enforce the promise*, that is if a third party is not also a promisor, then he can not be related to the contract and *consideration must move from the promisee*, that is a third party that does not offer *consideration* can not claim anything to the parties.

It has been argued in the doctrine that the rule according to which only parts of a contract can be held liable under that contract is fair and equitable. However, the rule that no one except the parties can enforce the contract can cause inconvenience in the sense that it prevents the person concerned in concludind the contract from doing this. The many exceptions to the privity doctrine make this rule tolerable in practice, but have raised the question of whether it is more useful to modify it or even wholly abolish it[17] .

Among the exceptions to this doctrine are the collateral contracts; thus the contract concluded between two parties may be accompanied by a collateral contract concluded between one party and a third person in close connection with the original contract. For example, in *Shanklin Pier v Detel Products (1951),* the applicants contracted a number of people to paint a pontoon, forcing them to buy the paint from the defendant. He assured them that the purchased paint has a lifetime of 7 years, but it has lost its property after just three months. The court ruled that the applicants could bring an action against the defendant on the basis of the collateral contract concluded, considering that there was also a *consideration* on their part.

Another exception is the agency contract. Through this contract, the agent contracts on behalf of the principal with a third person and forms a binding relationship between the principal and the third person.

Other exceptions include trust contracts, servitudes closely linked to land, and so-called *statutes*, respectively legal provisions expressly setting exceptions to privity[18].

Romanian law embraced the principle of relativity of the effects of the contract, expressly acknowledging it in art. 973 Civ. Code 1865, the following: *Conventions shall have effect only between the Contracting Parties.*

As has been consistently stated in the Romanian doctrine, the effects of contracts and, consequently, of the obligations arising from the contract do not regulate and concern only the relations between the contracting parties, as well as between persons who, although they have not personally participated in the conclusion of the contract, however, will be considered to be represented and bound by the act of will concluded, in such a way that the act is regarded as theirs and that the rights and obligations recognized or transmitted by act are also acknowledged and transmitted to them also[19].

Thus, the scope of this principle has been outlined, to the parties, to their universal or private successors (subject to certain conditions) and to the chirographic creditors of the parties, considered to be in an intermediate situation between the universal successors and the parties[20].

It has also been argued that the relative effect of the mandatory force of legal acts is explained and grounded in the nature of the legal act. Being essentially volunteer, it is only natural for the legal act to be binding on those who have given their consent at its conclusion, and not for third parties who have not expressed their will to acquire any right or to assume obligation through it[21]. However, it is only the internal, binding effect of the contract, in that it only gives rise to, amends or extinguishes legal ties or relationships between the Contracting Parties, which become creditors and debtors to each other; the other persons, by whom are understood the third parties, can not become debtors and, as a rule, no creditors by contract to which they are foreign[22], but are bound to observe the legal reality born of the valid contract concluded between the parties.

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[15] A. Circa, *op.cit.*, p. 29.

[16] M.Oudin, Un droit européen ... pour quel contrat ? Recherches sur les frontières du contrat en droit comparé, în Revue internationale de droit comparé. Vol. 59 N°3, 2007. p. 488.

[17] GH Treitel, *The Law of Contract*, Sweet & Maxwell/Stevens & Sons, London, 1995, p.588, pe https://www.lawteacher.net/PDF/contract-law/Privity%20Lecture%20&%20Cases.pdf .

[18] Pentru dezvoltări, a se vedea https://www.lawteacher.net/PDF/contract-law/Privity%20Lecture%20&%20Cases.pdf ., M.Oudin, *op. cit.,* p. 488 și urm.

[19] M.B.Cantacuzino, *Elementele dreptului civil*, Editura ALL , București, 1998, p. 450.

[20] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol.II, Editura All, București, 1998, p. 522.

[21] D.Cosma, *Teoria generală a actului juridic civil*, Editura Ştiinţifică, Bucureşti, 1969, p. 381.

[22] L. Pop, *Tratat de drept civil. Obligaţiile. Volumul II: Contractul,* Editura Universul Juridic, Bucureşti, 2009, p. 560.

As regards the exceptions to this principle, the doctrine before 2011, was unanimous in recognizing this character only to the stipulation for another, although the Romanian legislator did not take over the legislative solution presented in art. 1119-1121 French Civil Code referring to this legal institution, while in the category of apparent exceptions several legal figures were included: the promise of the other's deed, the direct actions, the representation, the assignment of the debt.

The current civil code took over this principle in art. 1280 Civil Code, which states that the *Contract shall take effect only between the parties, unless otherwise provided by law.*

Conclusions

As can be seen from this brief incursion into the origins and evolution of the principle of relativity, the rule res inter alios acta has largely retained its essence, but the importance that Roman law has recognized, most of the European laws adopting this principle as law.

If in what regards the principle, its content and its scope, there are no major differences between the laws of the European States, as regards the exceptions to this principle, the opinions expressed differ even now, more than 200 years after the adoption of the Napoleonic Civil Code, the precursor of modern European civil codes. But this discussion goes beyond the scope of this material, whose purpose was merely a brief review of the principle of relativity, from a temporal and spatial point of view.

References

- E. Molcuț, *Drept roman*, Edit Press Mihaela SRL, București, 1999
- V. Hanga, M.D.Bocșan, *Curs de drept privat roman*, ed. Rosetti, București, 2005
- M.V.Jakotă, Dreptul roman II, Editura Fundației Chemarea, Iași, 1993
- C. Firică, Excepții de la principiul relativității efectelor contractului, ed. CH Beck, București, 2013
- Valerius M. Ciucă, *Lecții de drept roman*, vol. III, ed. Polirom, Iași, 2000
- L. Pop, Tratat de drept civil. Obligaţiile. Volumul II: Contractul, editura Universul Juridic, Bucureşti, 2009
- Ș. Cocoș, *Drept roman*, ed. ALL BECK, București, 2000
- M. Planiol, Traite elementaire de droit civil, tome deuxieme, Librairie Cotillion, Paris,1900
- M.B.Cantacuzino, *Elementele dreptului civil*, Editura ALL , București, 1998
- C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol.II, Editura All, Bucureşti, 1998
- M.Oudin, Un droit européen ... pour quel contrat ? Recherches sur les frontières du contrat en droit comparé, în Revue internationale de droit comparé. Vol. 59 N°3, 2007
- D.Cosma, *Teoria generală a actului juridic civil*, Editura Ştiinţifică, Bucureşti, 1969
- K. Vincent, *Les obligations*, vol. I, Wilson et Lafleur, Montreal, 2015