

COMPARATIVE ANALYSIS OF THE MAINTENANCE CONTRACT AND ITS LEGISLATIVE EVOLUTION

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Abstract:

Although not covered by the Civil Code in force, the maintenance contract was recognized by the judicial practice and legal literature specialist, is widely recognized that apply the general principles of contract law and obligations. Starting from the legal reality of the new Civil Code established the legal status of the maintenance contract.

Key words: maintenance contract; civil code; concept of support; creditor of support; debtor of support; duration of support

1. Introduction

The maintenance contract represents a legal reality and even though unregulated legislatively

Albeit the temptation exists to assimilate it with the life rent contract, which is regulated in the Civil Code, the specialized literature succeeded in tracing the essential distinctions between the two contracts, especially ensuing out of the fact that while the rent contract comprises the obligation “to give”, the maintenance contract comprises the obligation “to do”, an essentially personal obligation, which cannot make the object of a cession.

In default of its own regulation, the maintenance contract raised, in front of the judiciary practice, a series of problems, whereof one of the most controversial is the contract resolution / and especially the effects of the resolution, or the possibility to substitute the maintenance through the payment of a pecuniary equivalent.

Likewise, the aleatory character of the maintenance contract had to be analyzed in the light of the provisions of the art. 947

it represents an undeniable existence both by its doctrine as well as its legal practice.

2. Maintenance contract

paragraph 2 and 1635 paragraph 1 Civil Code; there being obvious that, for the transmitted value, the debtor of the maintenance binds himself to successive conscriptions, which do not present a certain equivalent, depending both on the evolution of the maintained person’s needs, and especially on the duration of his life. [1]This way, as regards the debtor, the risk exists for the maintenance to exceed the received value, as well as for the creditor, the risk exists for the overall conscriptions, which he will benefit from, to be reduced, in relation to the value transmitted to the debtor. Amidst the manifold discussions occasioned by this situation, mention should be made of the one whether there could or not be applied, through similitude, those imperative provisions within the matter of the life rent, through whose intermediary there was attempted to avoid the situation that the transmission of the asset or of the sum of money by the creditor, should not constitute, for the debtor of the rent, an integral

earning; there being considered null, the contract concluded under the conditions in which, the creditor of the rent being sick at the moment of clinching the contract, he dies within less than 20 days since its concluding. The judiciary practice and the specialized literature were inclined towards the application, also for the maintenance contract, of the articles 1644 and 1645 from the Civil Code (which are the translation of the articles 1974 and 1975 from the French Civil Code).

The fact was natural that, in the new Civil Code, beside the regulation of the life rent, the maintenance contract should be particularly regulated in its turn; because, if the life rent creates for its debtor the obligation to give, the maintenance contract creates for this one the obligation to do, as the maintenance contract, unlike the life rent one, is an “*intuitu personae*” contract and because, in the main, the creditor of the life rent may transmit it, the one of the maintenance contract cannot do this.

To a first significant observation, we are urged by the definition given to the contract that we analyze, by the article 2254 from the new Civil Code: “Through the maintenance contract, a part binds itself to effect, to the benefit of the other party or of a third party, the conscriptions necessary for the maintenance and care, over a certain period.

If, through contract, the duration of the maintenance was not stipulated or was only stipulated its lifelong character, then the maintenance is due over the entire duration of the maintenance creditor’s life.”

First and foremost, out of this definition, we retain that the maintenance contract, which was enacted as “lifelong” in the article 1720 from the Project of the new Civil Code: “The life maintenance contract is the one through whom a part binds itself to transmit to the other one an asset, in exchange of the obligation of maintenance and care during his entire life”, therefore always lifelong, was

modified, having thereby the possibility to clinch maintenance contracts over a limited time. This change of attitude as regards the duration of the contracts that will be clinched after the entrance into force of the new Civil Code had, we dare say, in view, the fact that both the judiciary practice and the specialized literature have been inclined so far to accept the existence of maintenance contracts clinched over a certain time, as well as the existence of the contracts concluded for the maintenance creditor’s period of life.

Under another aspect, the lifelong character of the contract emphasizes its aleatory character, as in the situation wherein it is clinched over a limited time, a series of authors, especially within the French juridical literature, underlined the fact that its specificity to be aleatory is “narrowed”, as the maintenance debtor knows the duration of the conscriptions he bound himself to. Ultimately, through the provision from the paragraph 2 of the art.2245 from the new Civil Code, the aleatory character becomes conspicuous. [4]

Secondly, it is necessary to note the manner in which the parties’ conscriptions are regulated, through the definition that we presented. As regards the obligation that is incumbent on the debtor, there should be retained that the formula “maintenance obligation” was replaced with the phrase obligation of “maintenance and care”, there being thereby underlined in the very definition of the contract that the debtor’s conscription likewise implies the maintained person’s care. We will not insist here upon this aspect, as the conscription that the debtor is bound to is resumed in other articles of the new Civil Code, through provisions with explicatory role, for better outlining its content – art.2257 from the new Civil Code.

We stop however upon the maintenance creditor’s conscription, as it was defined in the Project of the new Civil Code,

which had to fulfil the obligation (with instantaneous execution) to transmit the other party, in ownership, “an asset”. The strict interpretation of the text led us to the conclusion that the maintained person could not execute his obligation, transferring the creditor a certain sum of money, as in the case of the life rent. Likewise, there could be deduced that the transfer of a debt was excluded. We wondered then if the formulation would not be more appropriate that the debtor should transfer a certain value. But, perhaps, the authors of the project wanted to separate, also this way, the life maintenance contract from the life rent.[3]

The transferred asset could be mobile or immobile, but, of course, the debtor should be able to dispose of it, should be in the civil circuit and should be determined or determinable. In the case of the immobile assets, their identification can be done through the land register and in the case of the mobile assets, through their detailed description.

The question that might arise is whether the maintenance creditor could transmit to the debtor, a future asset. We deem not, even if that asset is in an almost finalized production process or, let us say, if the crop has grown ripe and is ready to be harvested; as whatever the case, the existence of a future asset presents an uncertainty degree. The acceptance of a future asset would mean that carrying out the conscription whereto the maintained person is bound is under a pending condition – which would be hard to admit, as clinching the life maintenance contract should be delayed until the fulfilment of the pending condition. We may ask ourselves a similar question, whether the future asset stands for the share of a co-property, whose division is in development, when, likewise, the perfection of the contract can only be done after the materialization in the respective asset, of the maintenance creditor’s share. [2]

The formulation from the art. 1720 of the Project, in the sense that the maintained person transmits the maintainer “an asset” was replaced through the art.2256 of the new Civil Code, wherein the application of the rules from the life rent is stipulated. This way, the dispositions of the art.2243 may be applied to the maintenance contract. The art.2243 stipulates that the life rent (maintenance in our case) may be constituted with pecuniary title, in exchange of a capital of whatever nature, or with gratuitous title; and is subjected, under the reserve of the present chapter dispositions, to the rules proper to the juridical act of constitution. Consequently, the authors of the new Civil Code noted the limitation brought through the formulation of the art.1720 from the Project of the new Civil Code and which they thereby removed. According to the art.2256, related to the art.2243 in the new Civil Code, the maintenance creditor’s counter-conscription may consist in a capital of whatever nature, meaning both mobile or immobile assets, and sums of money. [5]

3. Civil code and maintenance contract

In the present Civil Code, in default of a regulation of the maintenance contract, the judiciary practice and the specialized literature deemed this contract as consensual, the document which acknowledges it having proving role. In the Project of the new Civil Code, the life maintenance contract became a solemn contract, the authentic form being required “ad validitatem”, its absence entailing the absolute nullity of the contract, as in the art 1721 there was stipulated :”The life maintenance contract must be clinched in authentic form, under the sanction of the absolute nullity”. This stipulation was resumed in the art.2255 of the new Civil Code, obviously removing the phrase

“life” from the formulation of the art.1721 from the Project. Consequently, a nullity that may be invoked by any interested person, inclusively the prosecutor or the instance ex officio and which cannot be “covered” through the parties’ assent. There should be retained that in the legislations of the European States, such a provision is not encountered, referring to the compulsory form of this contract. We deem it however a modality for the protection of the parties, especially of the maintained person, who, many times, is a single, elderly person; and during clinching the contract in authentic form, he may be notified by the notary public upon the consequences entailed by concluding the contract.

Conclusion

The legal forms were informed for the necessity of the regulation of these kinds of contracts, case where I proceeded to its development.

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