CONSIDERATIONS REGARDING THE CONDITION, AS A MODALITY OF THE LEGAL ACT

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Abstract

The provisions of the new civil code did not bring significant changes to the matter of modalities, instead they clarified some aspects, which in the past, due to lack of legislative clarification, could spark controversy. Nevertheless, for an accurate understanding of the condition as a modality of the legal act an analysis is still necessary, particularly regarding the role of the parties' will and their conduct in relation to the condition included in the contract.

Keywords: *condition, the realization of the condition, the will of the parties, abuse of right, obligation*

1. Introduction

The herein article's purpose is not to present the issue of condition as a modality of the legal act. For the most part, looking at practice and specialized doctrine, this issue does not raise special problems. However, there are a few aspects, mostly related to the role of the parties' will, which have been neither sufficiently analyzed in juridical literature, nor encountered in litigation brought before courts. These aspects will be subject to a, far from exhaustive, analysis in the study hereunder.

Firstly we shall take on the matter of the distinction between condition and the obligation pertaining to one of the contractual parties, a distinction which not always is easy to make.

Secondly, we shall emphasize the role that the parties' will plays in the qualification of a provision regarding a modality of a legal act, specifically in the correct assessment of its nature in relation to what the parties envisioned upon conclusion of the contract.

Finally, we shall analyze the effect that the parties' conduct has in establishing if the condition has realized or not, the limitations of their freedom to act related to the type of condition provided in the contract.

These issues have been summarily treated in specialized literature, therefore the idea of this study. Pretending to neither present new aspects, nor to give definitive verdicts in issues hereunder, the article presents the author's opinion, making propositions for ways to look at and solve possible situations which might occur in practice and in which contractual provisions including conditions would need a more detailed analysis, one that exceeds the standards in the matter.

Thusly, we shall not include aspects related to condition as a modality of the legal act which have already been treated by both doctrine and practice, but we shall only touch issues which might raise controversy, establishing guidelines which could be used to clarify them.

2. Content

The condition as a modality of the legal act, represents a future and uncertain event upon the happening of which the efficacy or abolition of a subjective right and its corelative obligation depend.[1]

Previously, according to the old regulation, the condition was defined as the future event upon which the creation of the subjective right and its corelative obligation depended.

The wording chosen by the lawmaker in the 2009 Civil Code (art. 1399 – "affected by condition is the obligation whose efficacy or abolition depend on a future and uncertain event") raised, however, the issue of the validity of the old definition[2].

Some authors considered that the old definition remains valid, the lawmaker's reference to the efficacy of the obligation having no significance[3]. Others felt the need to note the terminology change, without analyzing its meaning[4].

Finally, other authors correctly noted that, without bringing a new solution, we are witnessing a change in terminology which much better reflects the regime and effects of suspensive condition[5], as the obligation affected by it exists but is not effective.

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[1] E. Chelaru, The General Theory of Civil Law, C.H.Beck Publishing House, 2014, page 150.

[2] G. Boroi, Civil Law Lecture. The General Part, 2nd Edition, revised and completed, Hamangiu Publishing House, 2012, page 192.

[3] L.Pop, I.F. Popa, S.I. Vidu, Civil Law Lecture. The Obligations, Universul Juridid Publishing House, 2015, page 433; C.T. Ungureanu, Civil Law. The General Part. The Persons, Hamangiu Publishing House, 2012, page 190

[4] E.J. Prediger, Introduction to the Study of Civil Law. The Civil Legal Relation, the Legal Act and the Statute of Limitation, Hamangiu Publishing House, 2011, page151; T. Prescure, R. Matei, Civil Law. The General Part. The Persons, Hamangiu Publishing House, 2012, page 178.

[5] Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei. The New Civil Code. Comments by Article, C.H. Beck Publishing House, 2012, page 1478; E. Chelaru, op.cit. page 150

This is how one can explain the fact that the creditor under suspensive condition has the possibility to take action in order to preserve their right or that the acquirer under suspensive condition of a real estate right can make a provisional note in the land registry. The same way, this is the justification for the possibility of estranging the conditional right and, also, for the creditor's possibility to ask and obtain warranties for their claim.

Finally, even the retroactive effects the happening of the suspensive condition has find a better justification in considering the affected obligation as existing from the very signing of the legal act, but as lacking efficacy until the happening of the condition.

Beyond this, ultimately terminological, issue, the matter of condition is treated similarly in specialized doctrine. Therefore, we shall not reiterate general aspects, instead we shall jump right to the ones targeted by the herein study.

2.1. The qualification of a contractual provision as being a condition or as establishing an obligation incumbent on one party.

Surely, this issue can only regard the mixed condition or the one entirely dependent on the will of the obligor, on principle resolutive (because it could be mistaken for an obligation whose failure to fulfill could result in termination, leading to the retroactive annulment of the legal act's effects) and only when the wording of the contractual provision is not clear.

For an event to be qualified as a (resolutive) condition it needs to be external to the legal relation generated by the act, different from the execution of the benefit intrinsic to the legal relation created by the respective act. If one of the parties of the legal relation undertakes an obligation, this cannot be deemed as condition as a modality, even if the failure to fulfill it leads to snactions, including, as the case may be, the lack of effects of the legal act.

As far as it can be deduced from the wording of the contractual provisions, the consequence agreed upon by the parties for the happening or not-happening of the respective event (obligation) is also relevant. If this gives the other party the option of asking for termination of the legal act, then we shall, clearly, be talking of a simple obligation. The appearance of the possibility to ask for termination or resolution of the contract cannot be the effect of a resolutive condition, but it is specific to the culpable failure to fulfill the counterparty's obligations.

A resolutive condition would have a different consequence, respectively the by-law, automatic dissolution, as soon as the condition would happen (without any other manifestation of will being necessary) of the right affected by it.

An important role will surely be played by the rules of interpretation of the legal act, which will serve to establish the real will of the parties.

A greater difficulty would appear when qualifying a provision in a concession which would regard a certain conduct on behalf of the beneficiary. Respectively, the issue would rise of qualifying that provision as either a burden or a condition.

The difficulty rises from the fact that, usually, the burden establishes an obligation which is also exterior to the basic relation regarding the transmittal of the right from the one that disposes to the beneficiary.

Aside from the interpretation of the parties' will, including assessing the consequence they projected in case of failure to fulfill the requirement set in the contract regarding the action or inaction of the beneficiary, we can imagine criteria which, under no pretense of infallibility, could help clarify the respective provision.

Thus, we think it should be deemed as a condition and not as a burden the provision establishing a certain conduct for the beneficiary which will not exclusively depend on his own will. The patrimonial criterion can also constitute a clue, meaning the possibility of pecuniary evaluation of the conduct set for the beneficiary is suitable rather to a burden than a condition.

2.2. The distinction between term and condition, in relation to the will of the parties.

At first sight, the distinction between the two modalities of the legal act raises no difficulty, the criterion being the certainty of the future event's happening.

However, we must not forget that the matter of the legal act is governed by the principles of the juridical will, respectively the one of free will and that of real will.

Thusly, the parties will be free to choose the legal regime to govern the contractual provision regarding a future event, notwithstanding the degree of certainty of its happening.

But even when the choice of the parties was not direct or if it was not clearly stated, it is necessary to establish the way they foresaw the future event. Meaning, if the parties envisioned that event as certain to happen, then it would be deemed as a term, even if in reality the happening is not certain.

This solution was expressly provided by the 2009 Civil Code, under art. 1420, thus consecrating once more the principle of the real will of the parties.

Thereby, art. 1420 of the Civil Code provides that "if an event which the parties deem as a term does not happen, the obligation becomes due on the date the event should have normally happened". Also, it specifically states that, in such case, the legal regulations regarding term are applicable.

The assessment of what the parties thought regarding the respective event must not be made objectively, meaning we should not take into account if the parties had the possibility of observing that the event was not certain. What matters here is just the way the parties assessed the event upon conclusion of the contract. Notwithstanding of the fact that they knew or could have known that the event was uncertain to

happen, the only relevant fact is the way they assessed it.

For example, if the contract concluded between the parties included a provision which established that an obligation would be executed on the day of a certain concert, which is settled and public, one can assess that the parties deemed the happening of the concert as being certain event and, therefore, qualify the respective provision as containing a term and not a condition, although, objectively, the event was not certain to happen.

2.3. The relation between the parties' conduct and the happening or not happening of the condition.

We shall not reiterate here the basic rules, set by the legal dispositions and not challenged by doctrine.

We shall only refer to special situations related to mixed or potestative conditions.

Art. 1405, par.1 of the 2009 Civil Code provides that, if the obligor under condition prevents the its happening, then the condition will be deemed as having happened. And the second paragraph states that, should the party interested in the happening of the condition, ill-fatedly determinate such happening, the condition will be deemed as not having happened.

The text must be understood as regarding both the suspensive and the resolutive condition, as the case may be. We must not omit the fact that, if for one party the condition is suspensive, for the other it can be viewed as resolutive, and the other way around. Thusly, we must not fail to observe the symmetry of the two types of conditions. The resolutive condition sets a situation opposite to that resulting from the inclusion of a suspensive one. In the case of a rights translative act, for example, should the acquirer receive the right affected by a resolutive condition, then the transmitter could be seen as having the respective right under suspensive condition. (consisting of the same event which constitutes the resolutive condition).

However, what we need to establish regarding article 1405 of the 2009 Civil Code is the reason it was adopted. The purpose was to avoid situations in which the one profiting from the happening or not happening of the condition would act in order to determinate or, respectively, prevent the happening of the event established as such.

This purpose is found both in the hypothesis of suspensive condition and in that of the resolutive one. And where the same purpose exists we must apply the same rule (*ubi eadem est ratio, ibi eadem solutio esse debet*), we must give the same solution.

The principle of good-faith, however, bounds us to analyze the legal disposition from a broader perspective. Thus, it must be considered that the provision sets a general rule, that which imposes verifying the parties' conduct regarding the event stated as being a condition (and, of course, the intent of the parties).

The law moralizes the situation, by sanctioning the lack of loyalty of the party which stands to profit from the happening or not happening of the condition and acts ill-fatedly to that purpose[6].

One might object that, when the condition is entirely dependent on the will of the obligor, the party upon whose will the happening of the condition depends has the freedom to act as they wish, however, only if their conduct is not abusive.

There is no issue in the hypothesis in which the party acting towards the happening or not happening of the condition is not the one of whose will the happening of the event depends on, as per contract. In such case, the dispositions of art. 1405 of the Civl Code would apply.

The necessity for sanctioning such conduct in the event that the condition was not agreed on by the parties as being dependent of the will of the party acting towards the happening or no happening of the condition is evident.

Let's take a classic example. The hypothesis in which Primus sells to Secundus a certain good under the condition that the later gets married. It would obviously be a potestative condition on behalf of Secundus. In this case, should Primus act (for example, by spreading depreciating rumors regarding Secundus) towards preventing (or enabling – insomuch as the condition was suspensive or resolutive, positive or negative) the happening of the condition (at any rate, towards the outcome which would profit them), their behavior would represent abusive conduct, which must be sanctioned, as it is unequivocal that the parties did not intend for the fate of the contract to depend on the will of Primus.

We also consider that, in the event in which the conduct chosen by the party upon whose will the happening of the condition depends, as per contract, is an obviously abusive one, by which, without any justification, failing to abide by legal dispositions, acting towards the happening or not happening of the condition, the aforementioned legal dispositions are also applicable.

Moreover, we think that, without a breach of legal provisions being necessary, insomuch as the parties conduct meets the requirements to be qualified as an abuse of right, the same solution must apply[7]. Naturally, the interested party must prove that the requirements for abusive conduct qualification were met.

In other words, it is exactly in this type of situations that lies the reason for the adoption of article 1405 of the Civil Code, respectively that of preventing the beneficiary of the happening or not happening of the condition (weather it was not deemed to be potestative as far as they were concerned or, being

[6] Ph. Malaurie, L. Aynes, Ph. Stoffel-Munk, Civil Law. The Obligations, translation into Romanian, Wolters Kluwer Publishing House, 2007 page 745.

[7] To the same purpose, also see E. J. Prediger, op.cit., page 154

potestative, their conduct is abusive) from acting towards the prevention or, respectively, the realization of the event.

We must also observe the provisions of art. 1404, par.1 of the 2009 Civil Code, which state that the happening of the condition is assessed in accordance with the will of the parties[8]. And we do not think one could allege that by the happening of the condition the parties would have envisioned a situation in which one of them, even the one on whose will the realization of the event depended, would act ill-fatedly, securing for their own the benefit of a right as a result of committing an abuse of right.

This conclusion we deem valid not only with regard to the mixed condition, but also for the simple potestative or purely potestative one.

The only case in which this solution might not apply is the one of an obligation undertaken under a purely potestative, resolutive condition on behalf of the obligor. Here, the validity of the obligation is acknowledged[9], resulting from a per a contrario interpretation of art. 1403 of the Civil Code, but the same applies to the obligor retaining the right to end the obligation whenever they may wish.

We consider that we must not exclude in such case either, the solution of deeming the condition as not having happened, insomuch as the obligor's action towards the happening of the event could be qualified as abusive. However, in such a hypothesis, proving the abuse would be extremely difficult.

Otherwise, the purely potestative condition raises no particular isssues, given that, if it is a suspensive one and depends on the will of the obligor, the conditional obligation would not be valid, on the other hand, should it depend on the will of the creditor, art. 1405 of the Civil Code would not apply, as the creditor has no interest in acting for precluding the suspensive condition from happening or for enabling the happening of a resolutive condition.

Finally, we consider that a distinction must be made between the stipulation of the condition in the sole interest of one of the parties and the case in which the happening of a condition depends on the will of one of the parties, therefore we reached the conclusion that giving up on the condition, possible as per art. 1406 of the Civil Code as far as the condition has not happened yet, will not fall under the rules of art. 1405, as the requirement regarding interest is not met[10].

Conclusions

As we have previously shown, the herein study did not intend to analyze the entire problematics of the matter of condition, but only some aspects, prone to raise difficulties in practice.

We particularly targeted the role the will of the parties plays in qualifying a contractual provision regarding a future event and as a way of assessing the happening or not happening of a condition.

Surely, we do not pretend to have solved the difficulties which will probably appear while applying the legal dispositions regarding the condition as a modality of the legal act, nor do we assess our proposals as being absolute. This article is an attempt to support practitioners, courts and the involved parties' representatives, who will be put in the position of answering the aforementioned questions.

Naturally, this issue will make for much ampler analyses in specialized literature and the advanced solutions will either be confirmed or rebutted by the courts' practice.

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[8] P. Vasilescu, Civil Law. Obligations, Hamangiu Publishing House 2012, page 405
[9] G.Boroi, op.cit., page 194
[10] For an analysis on giving up on a condition, see Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, op.cit., page 1483.