

ADAPTATION OF CONTRACT IN CASE OF VICE OF CONSENT BY ERROR. APPLICATION BEFORE THE COURT OF ARTICLE 1213 CIV. C.

Emilian-Constantin MEIU*

Abstract

We propose further brief analysis of the substantive conditions that should be met in order to be covered by the contract adaptation regulated by the Romanian Civil Code art. 1213 Civ. C. By virtue of the novelty of this institution in the Romanian legislation could be some practical difficulties before the court that we briefly consider in our work and propose possible solutions.

Keywords: error, nullity, contract adaptation, consent.

1. Introduction

In regulating the error as vice of consent the Civil Code introduced by art. 1213 a new institution, namely adaptation of contract, as an alternative for voidability.

Usually, violation of a condition provided by law for the validity of the document is sanctioned by nullity. But nullity, although limited the application of the principle of contractual freedom, it must be exceptional, so it shall not work unless the law provides another remedy to cover the deficiencies underlying the regulated condition that is not observed by the parties. Also, in case that the nullity protects a private interest, the protected person may cover it.¹

Contract adaptation provided by art. 1213 of Civil Code seems to have its origins in the Italian Civil Code², but is very similar with the suitable regulation of the UNIDROIT³ Principles. The new institution is part of the modern orientation expressed by the phrase *favor contractus*, according to which nullity shall not operate to the extent that there is the legitimate interest of one of the parties under the contract as it was understood by the mistaken party⁴.

The contract adaptation in case of error occurs by exercising a right of potestative of errans' contractual party to deliver the declaration of

performance of the contract or to simply execute the contract as it was understood by the errans. The mechanism of this institution does not involve a process of renegotiation of the contract, but rather, that the contractual party adheres to how the errans has represented the contractual relationship at the time of its conclusion, in order to protect the free consent form.⁵

Given the novelty of the institution of contract adaptation governed by art. 1213 of the Civil Code, we propose below a detailed examination of how the adaptation of the contract may operate, focusing on the procedural means by which the court hearing an action for annulment for error could follow the will of the defendant to adapt the contract as it was understood by the party who is entitled to invoke the nullity.

2. Content

From the regulation provided by art. 1213 Civil Code results that to adapt the contract in case of error vice of consent is required to meet the following conditions:

a) to be fulfilled the conditions of error vice of consent for one of the party. There is no requirement that the error must be common⁶. Regarding the conditions of error as vice of consent, these are the following: the error must be essential; the error must

* Emilian-Constantin Meiu, PhD Candidate, Faculty of Law, „Nicolae Titulescu” University of Bucharest (e-mail: meiuemilian@yahoo.com).

¹ G.A. Ilie, Considerații asupra posibilității aplicării adaptării contractului în cazul dolului în lucrarea *In honorem Corniliu Bârsan*, Editura Hamangiu, 2013, p. 244-245.

² „Art. 1432, Mantenimento del contratto rettificato, La parte in errore non può domandare l'annullamento del contratto se, prima che ad essa possa derivarne pregiudizio, l'altra offre di eseguirlo in modo conforme al contenuto e alle modalità del contratto che quella intendeva concludere.”

³ „Article 3.2.10 (Loss of right to avoid) (1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance. (2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective.”

⁴ M.W. Hesselink, G.J.P. Principles of European Contract Law, Ed. Kluwer, Deventer, 2001, p. 91.

⁵ C. Zamșa, în Noul Cod Civil. Comentariu pe articole, Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordonatori), Ediția a II-a, Ed. C.H. Beck, 2014, p. 1281.

⁶ Idem.

be excusable; the element on which bears the false representation to have been decisive for the conclusion of the legal document, so if it had known the reality the party would not have contracted; for the onerous bilateral or plurilateral legal documents, it is necessary that the contractual party to have known or should have known that the misrepresented item was crucial for the conclusion of the respective civil act⁷.

The question is what happens if one of these conditions is not met or is not considered met by the contracting party that even so understand to declare that it agrees to perform the contract as it was understood by the mistaken party. According to grammatical interpretation of the expression of art. 1213 Civil Code. "If a party is entitled to invoke voidability of contract for error" results that in order to follow the request of the defendant contractor of errans, to the adaptation of contract, the court must prior consider whether the requirements consent vice error are met. It would follow that the court shall examine in substance the action for annulment and thus to administer the necessary evidence, and finally to establish the conditions to take note of the adaptation of the contract in the sense that it was understood by the errans⁸.

It must also be established which shall be the solution of the court if the evidence applied results that there are not satisfied the rules in order that the error be vice of consent. It shall reject as unfounded the action for annulment and it shall find out that there are not met the requirements to ascertain adaptation of the contract under art. 1213 Civil Code? We are inclined to this solution, and if the defendant intends to execute the parties may eventually sign a new contract.

Besides logical and grammatical interpretation, a justification for analyzing the error conditions as vice consent is that by adapting the contract is aimed at maintaining a vitiated consent

agreement affected by error and not a contract modification unaffected by this vice consent.

b) The contract has not been executed yet. This condition appears to result from the first paragraph of Article 1213 Civil Code. But it is not explicitly mentioned. Thus, in the event that one party has understood that it has completed a sale of a property with usufruct life contingency, and the other party a maintenance contract, if the Party shall notify the contractor of error in which it is, it may give its consent to adapt contract.

It is essential for this condition that the mistaken party has not accepted its contractual partner's execution. The mere fulfillment of contractual obligations does not prevent the adaptation of the contract. The final moment of this view is that in which the errans accepts the contractual obligations of the contractual party. In the given example above contractual execution time of acceptance of the contractual party would be the payment of the price that is subject to the sale⁹. After that, it would be a new contract accompanied by any resolution or termination of the first.

We also believe that in order to perform the contract adaptation is necessary only that the counterparty of the errans not to have executed its contractual obligations. The errans can execute at any time its own benefit while it is assumed to have vitiated consent and performs the contract as it was understood, so in the form that it could be adapted.

It was stated in the doctrine¹⁰, that failure to execute the contract, involves the necessity of lack of any damage caused by spontaneous errans' error. Does it refer to damage caused to it's contractual partner or to errans or both? If it comes to a damage caused to the errans contractual party, it can declare that it doesn't want the adaptation. Instead if we discuss about the damage suffered by the errans, the situation is different. Our Code does not provide such a condition, although it appears in similar institutions existing in the Italian and the Dutch¹¹

⁷ For a detailed analysis of these conditions please see Gabriel Boroi, Carla Alexandra Anghelescu, *Curs de drept civil. Partea generală*, Editura Hamangiu, București, 2012, p. 147.

⁸ But what happens if the adaptation of the contract under Art. 1213 Civil Code occurs without court intervention, if the contracting party of the errans is notified by the latter and not later than 3 months it says it agrees with contract execution or executed without delay, as it was understood by the mistaken party? If the requirements for error as vice of consent are not met it shall not intervene the adaptment of the contract, but possibly it might be concluded a new contract or could be a novation by change of object, of course, subject to the conditions provided by law for signing of a new contract or for novation.

⁹ But even if it receives the price, if it is much lower than the price of the property, it is alleged that the errans accepts it only on the basis that the difference shall be covered by the maintenance provided by the contractor. In such situation, the errans receives the price much lower than the value of the property, just because it is convinced that it signed a mainenance contract and not a sale contract. For a detailed delimitation of the maintenance contract to the sale contract please see Fr. Deak, *Tratat de drept civil. Contracte speciale*. Ediția a III-a, Ed. Universul Juridic, București, 2001, p. 536.

¹⁰ C. Zamșa, *op.cit.*, p. 1281.

¹¹ The Dutch Civil Code: "Article 6:228 Fundamental mistake

1. An agreement which has been entered into under the influence of a mistake with regard to the facts or legal rights and which would not have been concluded by the mistaken party if he would have had a correct view of the situation, is voidable:

a. if the mistake is caused by information given by the opposite party, unless this party could assume that the agreement would be concluded even without this information;

b. if the opposite party, in view of what he knew or ought to have known about this mistake, should have informed the mistaken party about his error;

c. if the opposite party, at the moment on which the agreement was entered into, had the same incorrect assumption as the mistaken party, unless he could have believed that the mistaken party, if this party had known the mistake, still would have entered into the agreement.

Civil Code. We may consider implicit that requirement? It is also the question of how shall proceed the court within the action for annulment the defendant declares that he is willing to execute the contract as it was understood by the errans instead the latter declares that the execution would not be useful as it is too late to prevent occurrence of the damage or the damage has already occurred.

May the court continue the trial of the action for annulment or it is obliged to take account of the defendant agreement regardless of the existence or imminent damage in errans' patrimony and ascertain adaptation of the contract, and errans would be directed against the other contracting party with an action for damages?

In this respect, in the Italian¹² doctrine it was shown that if the elapsed time or the circumstances caused the mistaken party a damage, not necessarily patrimonial, in the presence of which it can be assumed that the party would not be interested in adapting the contract, it can not be held .

We believe that in the absence of such a provision in the regulation of Romanian Civil Code, the court may not refuse to declare adaptation of the contract for this reason that the time elapsed between the moment of signing the contract and agreement of the errans co-contractor occurred a damage or the circumstances have changed such that the mistaken party would not be able to gain from the signing of the contract the benefits that it would be gained if the contract had been signed from the beginning as it was understood by the errans.

In this regard, the only condition that the court is obliged to review is that the agreement on adaptation to have occurred within the three months stipulated in art.1213 par. (2) Civil Code, the co-contractor's agreement of errans having a potestative character.

c) A final condition for adapting the contract is provided by par. (2) art. 1213. The errans is obliged to inform the contractual partner about the way he understood the contract. Depending on how it is carried the notification we may have two situations: informing takes place before bringing an action for

annulment or informing by even the notice of the writ of summons.

From this moment the law provides a respite of 3 months in which the contracting party has the option either to declare that he agrees with the execution of the contract actually in the way that it was understood by the mistaken party. Where the notification occurs through notice of the writ of summons it also occurs the additional default condition that within 3 months it won't be resolved the action for annulment. If the action for annulment was resolved, then the contract adaptation can no longer take place.

If the conditions listed above are accomplished, the contract adaptation shall result in considering the contract as being signed retrospectively as it was understood by the mistaken party. On the other hand, the errans' right to obtain the cancellation of the contract is extinguished by adapting the contract, as required by art. 1213 par. (3) Civil Code.

We shall further analyze how the court shall proceed to adapt the contract and possible practical problems which may arise in implementing judicial mechanism to adapt the contract provided by art. 1213 Civil Code.

If there is already an action for annulment of the contract for error and the agreement comes after communication to contractor within no more than three months, there may be two situations: the opposing party agrees with execution or executes without delay the contract as it was understood by the mistaken party. According to par. (3) art. 1213 Civil Code. in both cases the right to obtain the cancellation is extinguished.

From a procedural standpoint, when we are dealing with the effective execution of the contract in the form understood by the errans, the court shall regard the opposing party to submit evidence of obligation fulfillment (eg payment receipt price, the official report of hand over- take over.).

In case of the mere execution, it could take place even during the hearing, in which case it shall be recorded in the minutes of the hearing or outside

2. A nullification on the ground of a fundamental mistake cannot be based on a mistake which is exclusively related to a fact that, at the moment on which the agreement was entered into, still had to happen (fact in future) or that should remain for account of the mistaken party in view of the nature of the agreement, the general principles of society (common opinion) or the circumstances of the case.

Article 6:229 Agreement based on a non-existent legal relationship

An agreement which necessarily implicates to elaborate on an already existing legal relationship between parties, is voidable if this legal relationship does not exist, unless the nature of the agreement, the general principles of society (common opinion) or the circumstances of the case imply that the non-existence of that legal relationship should remain for account of the person who appeals to its non-existence.

Article 6:230 Right of nullification ends when the disadvantageous effects of the voidable agreement are removed

- 1. The right to nullify a voidable agreement on the basis of Article 6:228 or 6:229 ceases to exist when the opposite party timely makes a proposal to change the effects of the voidable agreement in such a way that the loss, which otherwise would be suffered by the party with the right of nullification, is sufficiently removed.

- 2. Upon the request of one of the parties, the court may furthermore, instead of nullifying the voidable agreement, change its effects in order to remove the loss which otherwise would be suffered by the party with the right of nullification."

Italian Civil Code: "Art. 1432 Mantenimento del contratto rettificato, La parte in errore non può domandare l'annullamento del contratto se, prima che ad essa possa derivarne pregiudizio, l'altra offre di eseguirlo in modo conforme al contenuto e alle modalità del contratto che quella intendeva concludere."

¹² Cesare Ruperto, La giurisprudenza sul codice civile. Coordinata con la dottrina. Libro IV - (art. 1754-1822) Delle obbligazioni, Milano, Dott. A. Giuffrè Editore, 2012, p. 116.

the procedural framework, when the defendant from the action for annulment shall have to submit the document evidencing the agreement¹³.

In both cases described above, whether when obtaining the consent or when it is proven the effective execution of the contract as it was understood by mistaken party, the court shall have to ascertain the extinguishes right to request cancellation of the contract for error under art. 1213 par. (3) Civil Code.

Another problem is knowing when there are producing the effects of adaptation of the contract under Art. 1213 Civil Code: retroactively from the date of signing or rather from the date on which the contractor performs or states that it agrees to perform the contract as it was understood by the mistaken party? By the wording of the last sentence in par. (1) of the text of the law cited above, results that the effects of adaptation are retroactive, since the text speaks of the contract, which is deemed to have been concluded as it was understood by the mistaken party. So there is no reference to a subsequent legal act, but to the initial contract that is changed by potestative agreement of the contracting party in the form understood by the errans.

Another important aspect is the mentions that the court must make in the recitals and in dispositive fact regarding the adaptation of the contract? Since the adaptation of the contract takes place before the court it is mandatory to examine the institution conditions of art. 1213 as it was listed in the preceding, and then in the dispositive fact to ascertain the adaptation of the contract in the sense that it was understood by the mistaken party.¹⁴

3. Conclusions

The case of adapting the contract provided by art. 1213 Civil Code. is different from other

situations of adapting the contract, in that the court only notes the potestative right of the opposing party to that who fell into error to execute or declare that executes the contract as it was understood by the errans.

For example, in case of lesion, according to art. 1222 par. (1) Civil Code. the adaptation may be undertaken by the party whose consent was vitiated by reducing its obligations to the amount of damages to which it was entitled or according to par. (3) the court may uphold the contract if the other party provides equitably, a reduction of its own claims or, where applicable an increase in its obligations. Also, in case of unpredictability, court may, pursuant to art. 1271 par. (2) Civil Code, dispose the contract adaptation if execution has become excessively onerous because of an exceptional change of circumstances which would obviously unjust the debtor to comply with the duty. According to para. (3) thereof, in order to be adapted the contract it must be cumulatively met a number of conditions.

When during a litigation occurs adaptation of the contract for error it requires that the court must verify certain conditions: to be executed the conditions of error vice of consent for one of the party; the contract not to have been executed yet;

Compliance with the protocol of information/ acceptance provided by par. (2) of art. 1213, manely that within 3 months of receipt of writ of summons the contractual party declare that it agrees to contract execution or execute effectively the contract in the manner in which it was understood by the mistaken party. If these conditions are met, the court shall ascertain the contract adaptation and the right to request cancellation of the contract for error has been extinguished.

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- M.W. Hesselink, G.J.P, Principles of European Contract Law, Ed. Kluwer, Deventer, 2001.

¹³ In case that the consent was verbal out of the litigation framework, this consent shall be reiterated before the court and recorded during the minutes of hearing.

¹⁴ For example to ascertain that it operated the adaptment of the contract signed between the parties in the sense that it is a maintenance contract and not a sale contract.