Approach on the Settlement of Labor Conflicts in Labor Jurisdiction

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Abstract:
Individual or collective labor conflicts can be triggered when one of the partsdoes not honour certain rights or does not fulfill certain obligations established by law or by the terms of the collective or individual labor agreements.
In order to settle, if the mediation has not succeeded, the certain conflicts can be subjected to the settlement procedures before the court.
Labor jurisdiction is an attribute of the courts and has the purpose of solving labor conflicts regarding the closure, execution, modification, suspentionn and termination of the individula labor agreements or, as appropriate, collective labor agreements provided by the code in force as well as the requests regarding the judicial relations between social partners.
Keywords*: labor conflicts, mediation, labor jurisdiction, arbitration, the settlement of the labor conflicts procedure*

Peliminary considerations

The labor relation is a social relation and as in every social relation the parts can have both convergent and contrary interests.

Mainly, both the interest of the employers and the one of the employee is performing an activity within those certain units. Thus, employees want to obtain profit therefore they are obliged to pay the employees and to offer them work conditions in order for them to work for the bennefit of the certain units. In return, the employees want to obtain some benefits in order to satisfy certain social needs, thus they are obliged to perform labor in order to receive, mainly, their rightful remuneration.

However, within the labor relation there can occur certain tensions determined by the opposite interests of the parts, tensions that, if an agreement is not reached, expressly or tacitly, can lead to the triggering of labor conflicts.

According to the definition given by art. 248 align (1) Labor Law, the labor conflict is reprezented by any disagreement that interferes between social partners within the labor relations.

Labor conflicts can be triggered when one of the parts does not honour certain rights or does not fulfill certain obligations established by law or by the clauses of the collective or individual labor agreements. The labor conflicts thus triggered can be individual or collective. If the parts do not reach an agreement regarding the labor conflict, the interpretation of the applicable judicial laws is necessary for their

settlement so that the court can issue an obligatory solution for the part that does not honour the legal or contractual provisions. Accordingly, the certain conflicts can be subjected to the settlement procedures before the court. These types of conflicts have been identified by the legislation, jurisprudence or doctrine of many states as conflicts of rights.

On the other hand, without considering the obligatoriness of the judicial laws and the observance of the rights and obligations provided by them, it is possible that one of the parts to want a future modification of them (employees to want the regulation of some rights or some new wider rights or the employers to want the restriction of some rights of the employees) while the other part to disagree with the certain modifications. The law exclusively being the attribute of the statal authority, of course that these conflicts can occur only during the collective negocitations[1] or in relation to them.

The collective negociation has appeared due to the necessity of continuous adaptation of the judicial laws that regulate labor relations to its dynamic character, to the different economic and social situations, satisfying both the interests of the national economy and the specific interests of every patronal and professional cathegory. Likewise, the possibility of a separate negociation of the rights of different cathegories of employees allows an appropriate approach on their judicial regime as well as detailed regulation of their certain rights, for the interest of the employees, aspects that the law can hardly satisfy due to the general character of the legal norms.

Since these conflicts do not have as object the observance of some rights and obligations provided by the judicial laws but the eventuality (interest) of a certain regulation of some rights and obligations the legislation, jurisprudence or the doctrine of many states has identified them as conflicts of interests. Considering that the settlement of such conflicts does not require the interpretation of some judicial laws in order to apply them, it cannot be the attribute of the court, certain special procedures of settlement provided by law being applicable in this case.

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The history of the labor conflicts regulation [1, 253-256], [2, 770-772]

Labor conflicts have been regulated for the first time in our country at the begining of the XXth century when the workers had began to organize their fight for obtaining and protecting their professional rights and the labor conflicts had become a social reality and the necessity of regulating these conflicts had occured.

In 1902 the law for the organisation of jobs, credit and worker's social ensurance founded the arbitrators committee that had the attribution to reconcile the employee and employer in the case of a conflict. If the committee could not reconcile them the judgement of the labor conflict was made by the court of law.

Amongst the laws that were addopted from the begining of 1909 within a social politics programme promoted by the minister of industry of that time, Mihai Orleanu there was also the law against unions, professional associations of the statal, county, commune and public establishments addopted in 1909 through which the association ad strike of all workers and clerks, employees of the state,counties, communes and all public establishments with industrial, economic or commercial character was prohibited.

During the following years Romania has registered a considerable evolution in the regulation of social labor relations domain. In thiscontext, ou country has participated as a founding member to the constitution of theInternational Labor Organization in 1919 and has integrated in the international tendencies regarding the regulation of labor relations both individual and collective. The most important normative acts addopted in this domain were the Law for regulating collective labor conflicts of 1920 and the Law for labor agreements of 1929, regulations that were old in the regulations of the employee – employer relations domain although, at that moment, they represented a debut in approaching collective labor relations and labor conflicts.

The law for regulating collective labor conflicts of 1920 [3], or the Trancu – Iaşi Law, after the name of its author, truly is the first normative act of this domain. The law regulated both the triggering of collective labor conflicts and the collective termination of labor and their solutions. Thus, aspects of great interests and actuality for that time have been approached: freedom of labor, collective labor termination, conciliation, arbitration, sanctions, sabotage, general dispositions of procedure.

The notion of collective labor conflict was not defined by law. However, the procedures regulated by law were applied, according to art. 7, in the case of the occurance of „a litigation refering to the labor conditions, susceptible of causing a collective labor termination".

The domain of law applicability was expressly limited. Thus, according to art. 6, the law was applied to the „industrial and commercial establishments, of any kind, that usually use a number of at least 10 employees".

Likewise, the causes of collective labor termination and, implicitly, the oblject of the collective labor conflicts were limited. Art. 4 align (2) provided that any collective termination of labor for causes foreign to those refering to labor conditions was prohibited.

Although chapter II of the law that regulated the trigger, developement and settlement ofthe collectivelabor conflicts was entitled „collective labor termination", under the form of strike or lock-out[2], the termination of labor was regulated asa final stepwith extreme character within this process.

Thus, the law regulated in detail the reconciliation procedure that was obligatory for the parts of the conflict. If there occured a litigation refering to labor conditions susceptible of causing a collective labor termination the representatives of the employees along with the owner of the enterprise or his representative andin the presence of a delegate from the Ministry of Labor were obliged to find solutions for settling the conflict through reconciliation [4, 77-83].

From the way in which the reconciliation procedure is regulated as well as from its obligatory character it can be observed that the legislator of that time has not given priority to the regulations regarding the solutions of the collective labor termination (strike) but to the amiable settlement of any collective labor conflict.

If the reconciliation led to an agreement it was registered in the official report and the decision registered in the official report was obligatory for the period on which it was given in all the enterprises touched by conflict both for the owner or the owners and for all the employees from the cathegory represented by the litigation. The law expressly provided the obligativity of displaying the closed agreement in all the interested establishments.

[2]Lock-out consists of the closure of an establishment, workshop or a service, due to a collective conflict. It represents the employer's refusal to offer employees conditions to perform labor or to pay them.

According to law, if through the reconciliation attempts a settlement is not reached „an official report of non – reconciliation" and the parts could refer the judgement of the litigation to an arbitration committee. Thus, usually, the arbitration procedure had a facultative character.

As an exception, the arbitration was compulsory and any collective labor termination was forbidden in all the enterprises and institutions of the state, county or commune, of any nature, as well as in the enterprises expressly listed by law „that function for the public interest and if stopped they can jeopardize the existence and healthof thepopulation or the state's economic and social life".

The arbitration procedure was expressly regulated by law. The decision pronounced by the arbitration committee was compulsory for the time it was pronounced in all the enterprises participationg to the conflict both for the owner or owners and for all the employees of the cathegories presented or interested in the litigation.

Therefore, if a collective labor agreement occured the parts were obliged to firstly go through the reconciliation procedure. If the parts reached an agreement the conflict stopped. If the parts did not reach an agreement they could either resort to the arbitration procedure, case in which the decision of the arbitration committee ends the conflict, being compulsory for both parts, or they could move to the collective labor termination.

By collective labor termination it was understood, according to art. 5 of the law „ the termination of labor of at least 1/3 of the total number of employees of the industrial or commercial establishment or of the number of employees occupied in one or more sections of that establishment"3.

The law regulated in a different chapter „the sabotage". There were „sabotage offenses" destruction, deterioration, theft, falsification, fraudulent fabrication by deliberate errors, fraudulent maneuvering or manipulation of the machinery, instalations, labor instruments, materials, merchandise and products, completely or partly when the offender was bound by a labor ageement to the person that owned

[3]The law also includes provisions regarding the protection of the employee's delegates. Thus, the employees delegated either by the reconciliation committee or by the arbitration one were entitled to miss work in oder to execute their mandate and this could not constitute for the employer or the owner of the establishment a reason to terminate his labor agreement. In all this period the employer or owner of the establishment were obliged to pay the delegated employees a daily salary equal to the average salary („medium salary") of the last 7 worked days as well as the other rights.

the certain objects. „The sabotage offense" was also represented by „ the passive resistance that paralyses production preventing the eneterprise from working normally" if the offender wasbound by a labor agreement to that certain enterprise. These offenses were punished by prison and committing the sabotage during and because of a collectivelabor termination was forbidden by law and represented an aggravating circumstance.

The law for the labor agreements of 1929 [5] contained some dispositions refering to the settlement of the labor conflicts, completing the provisions for regulating the collective labor conflicts of 1920.

The law guaranteed labor freedom for every person, „the right to work at will". Thus, there was incriminated the act of any person that „through serious, immediate and direct threats or through factual violence will prevent or oblige or try to prevent or oblige somebody to work during or with the occasion of acollective labor termination".

Thus, according to this law, strike or lock-out were not valid motives of terminating the individual labor agreement. The individual labor agreement was suspended in all its effects during the strike or lock-out with the exception of „benefits in kind" that the employee currently had. However, the refusal of one of the parts to resort to the reconciliation or arbitration procedure in the case ofr a collective labor conflict, if the arbitration procedure was obligatory, represented a valid motive of terminating the individual labor agreement.

However, The Law for the labor agreements of 1929 also contained derogatory dispositions in relation to the law of 1920. Thus, for settling „the actions that occur from the collective ageement" there was provided a procedure different from the one provided in the prior law for settling the collective conflicts.

According to these new regulations, contractual or adherent associations, with judicial personality, could introduce actions in damage interest for any prejudice caused to the professional interest by violating the provisions of the collective labor agreement.

Likewise, these associations could exercise in the name and benefit of their members, individually or collectively, actions caused by the collectiveagreement, without needing a special warrant from the members, with the condition that the member or members in the benefit of whom the action is exercised to be notified and to not object to it in term of 3 fee days from the first notification.

Law no. 13/1933 for the foundation and organisation of the labor jurisdiction has given to the competency of the labor judges the settlement of the collective labor conflicts if the parts have not chose the facultative arbritraton and the arbitration panel has not been constituted. Through this law there has also been regulated the settlement of the individual labor conflicts by the labo judges founded in addition to the labor chambers by panels formed by a judge and two assessors, one of the owner and the other of the employees.

By the Decree-Law of July 24th 1940 [6] for establishing the laborregime in exceptional conditions, strike and lock – out, provided by the Law for regulating the collective conflicts, were forbidden. Any challenge of collective labor termination was punnished by the double of the sanctions provided by law.

There was provided the possibility of the Ministry Council to, in case of collective labor termination in any commercial, industrial or transport enterprise, decide the confiscation of the premises, materials, managing and executing personnel, as well as everything necessary for ensuring the function of those enterprises.

Triggering a collective labor conflict was not forbidden but these, if not solved by reconciliation, were going to be obligatorily solved by arbitration, the collective termination of labor being forbidden to the parts.

The Decree-Law no. 2741 of October 2nd 1941 regarding the labor regime in war time [7] has repealed the Law for the regulation of collective labor conflicts. According to the new regulation any termination of labor, individual or collective, was prohibited without the advance permission of the military commander of the militarized enterprise, the military supervisor or the director of the militaryestablishment of the army and in the caseof the otherenetrprises without the advance permission of the Labor inspectorate, given with the approval of the management of the enterprise, with the exception of the force majeure cases.

Consequently, this Decree-Law hasinstituted the obligatoy arbitration and strike and lock – out were forbidden, being considered „sabotage crimes”.

Law no. 711/1946 [8] for the reorganization of labor jurisdiction has constituted theonly regulatuion egarding the settlement of labor conflicts of that period.

The law regulated two types of labor conflicts: labor litigations that were individual conflicts, and collective labor conflicts. According to the provisions of the Title II, entitled „the settlement of the collective labor conflicts”, the labor conflict was

defined as „a dispute that collectively regards the labor conditions of an enterprise, a goup of enterprises or their sections or branches only if at least 10 employees are interested". Labor conflicts were of two types, namely: „the ones where the employees want to fulfill some collective claims, born from the performed labor" and „the ones where employees want to change the existent labor conditions or to form new ones". There is observed the tendency of the legislator of that time to separate the conflicts related to the rights of the employees from the legislation or the collective agreements and the conflicts related to the negociation of the labor conditions.

The competency of solutioning the individual labor litigations belonged to the union committees of research and arbitration, to courts and to the courts of appeal.

In the case of collective labor conflicts if the parts had not reconcile after the reconciliation conducted by the labor inspector the conflict was obligatorily subjected to the arbitration procedure of the committee of collective arbitration4 that functioned near every county court. In the case of collective conflicts where the employees desired the change of the existent labor conditions or the establishment of new ones the arbitration committee established the labor conditions „according to equity, social necessity of labor protection and economic necessity of production promotion".

The labor code of 1950 had abrogated [9, art. 139] Law no. 711/1946 for the reorganisation of the labor jurisdiction and the Law regarding the labor agreements of 1929. Both the Labor Code of 1950 and the one of 1972 [10] had not contained any dispositions regarding the collective labor conflicts. Besides, all the provisions of the labor legislation of 1950-1990 contained only dispositions regarding the settlement of the individual labor litigations or refering to the collectivelabor agreements. Thus, in this period strikes were implicitly forbiden, their trigger not being possible within law provisions.

The competence of settling individual labor conflicts has been given, by the coming into force of the Labor Code of 1950, to the committees for settling the labor litigations, formed by members designated by the unit's management and the union's

[4]The collective arbitration committee was composed of: the president of the courtl's labor section(who was also the chairman of the committee), a delegate of the labor unions of the professional cathegory, a delegate of the professional organizations of the owners, a delegate of the employees in conflict, a delegate of the owner or the owners in conflict.The decisions of the committee were enforceable, but could be appealed to the Labor Appeal Committee near the labor section of the Court of Appeal of Bucharest.

committee. The decisions were unanimously taken and in case of divergence the competence of settling the cause firstly belonged to the court. The decisions of the committees could be fought by appeal to the public court.

By Law no. 59/1960 the judgement committees have been founded as organs of labor jurisdiction with plenitude of competence. They settled any labor litigations that were not given by an express disposition of the law to the competence of the courts or other organs. The decision of the judgement committee could be fought by a complaint to the court.

In this period the judgement committees usually had competence in settling the labor litigations and, in situations expressly provided by law, with exceptional character, the courts, administrative organs hierarchically superior, collective management organs, disciplinary councils, other organs with jurisdictional attributions.

After 1990, the liberalization of economy and the essenial changes that took place in the social life of Romania had determined radical transformations[11] in the labor relations field as well. Labor relations had begun to be characterized by a free and real evolution and manifestation. The occurance of collective conflicts between the social partners whose manifestations were no longer subjected to any social and political constraints, besides the individual labor conflicts, was imminent. While the individual labor litigations were settled by courts, acording to the dispositions of the Code of Civil Procedure and the Law nr. 92/1992 for judicial organization, with the exception of situations expressly provided by special laws, regarding the settlement of collective labor conflicts there was adopted a special law.

Law no. 15/1991 regarding the settlement of the collective labor conflicts has defined labor conflicts as „conflicts regarding professional interests with economic and social character of the employees, organized or unorganized into unions, resulted from the developement of labor relations between the unit, on one hand, and its employees or their majority, on the other.”

The law regulated [12, 3-14], [13], [14, 411-447], [14, 411-447], [15, 298], the obligatory reconciliation procedure of the conflicts ofinterests in two steps: direct reconciliation and the reconciliation organized by the Ministry of Labor and Social Protection, through its territorial ogans. The direct transition to the collective termination of labor (strike) without going through the procedure of reconciliation was illegal.

If after the reconciliation the parts reached a total agreement regarding the settlement of the collective labor conflict this was obligatory throughout the established period and for all the conflictual parts.

If after the reconciliation the parts reached a partial agreement in the official report were recorded both the claims agreed upon and the ones remained unsellted along with the point of view of every part regarding them. Triggering a strike for settling the claims that were solved through reconciliation was illegal.

Only after going through both steps of the obligatori reconciliation procedure the strike could be declared. The strike was no longer prohibited but the law expressly provided the conditions of its triggering and it could be developed as a final stage of the collective labor conflict.

The law regulated two cathegories of strikes: the actual strike and the warning strike. The content of the law did not also refer to lock – out. There has been appreciated that without some express legal dispositions the lock – out was inadmissible [17, 27].

The law expressly enumerates the cathegories of poeple that could declare strike as well as the situations when strike could be declared with the condition of ensuring some essential services.

During the developement of the strike, its organizers and strikers had a series of obligations established by law in order to protect the general interest as well as the rights and interestsof the other employees.

The law expressly provided the procedure according to which the unit's request to declare the strike illegal as well as the request to suspend it was settled.

The strike could be terminated in one of the following situations: if a certain number of strikers give up the strike, if the parts agree, if the strike is declared illegal by the competent court, is noticed to be illegal or if the arbitration decision is pronounced after subjecting the conflict to an arbitration committee.

Labor jurisdiction.

Acording to art. 281 of the Labor code the labor jurisdiction has the object of settling the labor conflicts regarding the closing, execution, modification, suspension and termination of the individual labor agreements or, as appropriate, the collective labor agreements povided by the prezent code as well as the requests regarding the judicial relations between social partners.

The labor jurisdiction represents [18, 302], [19], [2, 798] the entire settlement activity made by certain organizations of the labor conflicts and other requests regarding the labor relations and all the relations connected to them, including the regulations regarding the organs competent to settle these conflicts and demands as well as the applicable procedural rules.

The labor jurisdiction is an attribute of the courts. As an exception, labor conflicts and the other requests regarding labor relations and the relations connected to them can also be settled by other organs expresslyprovided by law, after a special procedure.

The settlement procedure of the labor conflicts

Represents all the rules based on which the competent courts solve the disagreements born from the judicial labor relations.

The main procedural rules applicable tolabor conflicts refer to [20]:

1. the referral act: the courts can be reffered to through a petition of the employee or the employer;
2. terms of refferal: the labor code establishes different terms, depending on the nature of the litigation that is to be subjected to settlement to the competent organ; the petition can be formulated within:

— 30 calendar days from the date of communicating the unilateral decision of the employer regarding the closure, execution, modification, suspension or termination of the individual labor agreement;

— 30 calendar days from the date of communicating the decision of disciplinary sanction;

— 3 years from the date of issuing the right toaction if the object of the individual labor conflict consist of paying some salary rights that were not granted or some compensations to the employee as well as in the caseof patrimonial responsibility of the employees towards the employer;

— the period of the agreement's validity, if there is solicited the establishment of the nulity of the individual or collective labor agreement or of some clauses of it;

— 6 months from the issue of the right to action if the collective labor agreement or some clauses of it are not respected;

— 3 years from the issue of right in any other situations.

The terms of refferal to the organs of labor jurisdiction are prescripted terms; for objective motives, the interested part has the possibility to solicit the reinstate in term;

3. the material and territorial competence: the judgement ofthe labor conflict is the competence of the established institutions according to the Code of civil procedure; in terms of the territorial competence the the petitions related to the labor conflicts are given to the court that is closer to the plaintiff's home or,as appropriate, headquarters;

4. the evidence task: in labor conflicts the the employer evidence task; the rule is traditional and practical since the employer is the most able to prove the legality and rationality of the decisions or measures taken;

5. exemption from the payment of judicial taxes of stamp and of judicial stamp: in front of the labor jurisdiction organs all petitions and procedural documents are exempted from the payment of stamp taxes;

6. judgement terms: labor conflicts are settled in emergency regime; the judgement terms cannot exceed 15 days; the citation procedure of the part is legally considered fulfilled if it is made with at least 24 hours before the judgement term;

7. administration of evidence: the administration of evidence is made respecting the emergency regime the court being entitled todecline part of the benefit of the admitted evidence if its administration is inexcusably delaid;

8. the regime of the decisions: the pronounced decisions, in this matter, are final and rightly enforceable.

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The Refusal of the Assigned to Consent to the Substitution of the Assignor in the Contract Assignment

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Abstract
The new Romanian Civil Code assumed from the Italian Civil Code the requirement that the assigned party would have to consent in order for the assignor to be able to substitute within the contractual relations a third party, called assignee, third party that would assume the contract in its integrality, namely both the active side as the passive side. The consent of the assigned becomes thus an essential condition in order to have an operational assignment of contract. But what will happen if the assigned refuses to consent to the assignor? The hereby paper is trying to present the judicial nature of the right of the assigned to refuse a new contractual partner and thus also to refuse a transfer of contract from the assignor to the assignee.
Keywords: *assignment of contract, refusal of the assigned, free of will*

1. Some preliminary considerations regarding the consent of the assigned to the contract assignment.

The national Civil Code, which started its existence at 1.10.2011, assumed from the Italian Civil Code, almost completely, the provisioning of the assignment of contract.

Article 1315 of the current Civil Code states that: "A party may be substituted by a third within reports born from a contract only if the benefits have not yet fully been executed, and the other party consents to it".

The condition of consent given by the assigned party becomes an essential legal condition to allow the substitution of the assignor with the assignee it wishes to bring in his place within the original contract.

We previously stated, in a different paper, that article 1315 of the Civil Code would impose the consent of the assigned as a validity requirement of the contract assignment, being that which triggers the permutation between the assignor and the assignee.

The Italian doctrine, that has the same provisioning of the contract assignment, has known the same kind of controversy regarding the role of the consent with the assigned party. The majority of Italian doctrine and jurisprudence adhered to the thesis according to which the consent represents a constitutive

element of the assignment that is thusly presented as a plurilateral convention with a translative effect [1].

There have been voices within the French doctrine that, embracing the subjective conception which regards the consent of the assigned as a validity element of the assignment, have explained the mechanism of the assignment as being one specific to the birth of a contract. The offer of the assignee to contract with the assigned expressed within an assignment agreement perfected with the assignor is followed, or preceded, by the acceptance of the assigned [2].

The French doctrine also expressed the contrary of the above, stating that the consent appears as an authorization from the assigned party with a liberator purpose towards the assignor.

Thus the consent of the assigned is not to transform the latter in a party to the assignment convention but to avoid an obstacle that may stand in front of the assignment. It is an authorization which does not entirely create a new prerogative and which only completes the use through the possibility of exercise. This authorization, which may be general (being specified within the main contract) or special (being given at the moment of the assignment), makes a contract assignable. If such an authorization would not have been given within the initial contract, it was appreciated that the refusal of the assigned may be subject to the control of the Courts [3].

As an argument against the need of the consent, it has been underlined within a dualist approach, that the assignment of contract should be considered as beyond an opposability towards the assigned, producing actually a real effect in what regards the latter. The consent of the assigned is only needed to release the assignor. Also within contracts that present an *intuitu personae* character in the benefit of the assigned, its consent is necessary, but not as a validity condition of the assignment, but to deny its injunction [4].

Within judicial doctrine a distinction has been proposed between the *consent creating deed*, which is identified with the classic consent notion, namely the manifestation of will that leads to the creation of a legal act, and the *effectual consent*, through which the legal deed produces specific effects. The issuer of the latter is not a party of the deed itself, but only “triggers”, through its will manifestation, the effects – to self, generated by that type of contract. In the category of consent that creates contracts, diverse types of consent have been identified: a. the consent

of the original parties of the contract (validating consent), b. the empowerment consent – being represented by the consent of the legal guardian that empowers and "completes" the consent of the person with a limited exercise capability and c. the gratification consent – which has as a field of action the credit agreements, gratification clauses and the conventional assignment of contract [5].

We also appreciate, along other authors [6], that we find ourselves in the presence of a consent that enables an assignment whenever we have the consent of the assigned within an assignment of contract.

The role of the consent given by the assigned party is exactly pointed to transfer the contract from the assignor party to the assignee party, freeing the assignor being not a purpose of the operation but merely an effect. It is the case, of course, of the perfect contract assignment, as with the imperfect contract assignment, the assignor will still be responsible within the contract, along the assignee.

The consent of the assigned is itself the element that validates this exercise of the free will, giving the assignability character to a contract.

In French jurisprudence, the consent of the assigned party validated itself the assignment of a contract with an *intuitu personae* character, with the assignee, getting thus the character of an element that forms a conventional assignment of contract.

In that acceptation, there was expressed the opinion according to which the contract "becomes an assignable asset only when both parties (trust presumes at least two parties) are in complete agreement with the substitution of the assignee in the place of the assignor party" [7].

Within specialty doctrine the question has been asked if the consent of the assigned represents a discretionary or non-discretionary potestative right, which may allow the intervention of a judge in order to limit its exercise.

2.The Judicial Nature of the Refusal

The refusal of the assigned to consent to the assignment is, actually, a refusal to contract.

The contract represents, as it appears within the texts of the new Civil Code, an agreement of will which births, modifies or depletes judicial reports between the contracting parties.

With this definition of the contract, we appreciate that the refusal to contract represents the other side of the consent, namely the option of the bearer (of consent) to not contract.

The refusal to contract may be constituted from a negative fact – the abstinence of the recipient of the proffer, a positive fact – the refusal of the offerer to proceed to a closure of contract and an intermediary form between the abstinence and the positive fact [8]. An example to illustrate the third option is the case of the offerer which includes in its offer the refusal to contract with a certain category of parties.

To contract or not contract represent the positive and negative expressions of one and the same principle – the principle of free contracting. Even if the law does not regulate this principle in its negative meaning, it is implied, protecting thus the freedom to contract understood from its negative side – the refusal to contract, through for example, the regulating of consent vices, legally sanctioned by the nullity of the contract [9].

The refusal of the assigned to consent to the contract assignment represents a potestative right, the assignor having the possibility, but not the obligation, to consent to the contract assignment and thus to a change of contractual partner.

The judicial doctrine has not stopped to establish the judicial nature of the refusal of the assigned as being a potestative right, but withheld the question if weather it is a discretionary right.

It is true that the practice from most national Courts doesn't help us provide an answer to the above question, this due maybe to the recent entry of the conventional contract assignment within the national legislature.

But, unlike our national practice, the French jurisprudence considered that even the category of the potestative rights should be exercised in good-faith, the Court having the possibility to intervene in order to sanction an exercise beyond its natural limits, stepping thusly on the grounds of legal abuse.

By discretionary rights, the contemporary literature understands the rights who's exercise – even founded on dishonesty – may not be sanctioned, either because it has no real sanction or because the law or the judge considers it futile or out of place, in the specific case, of a supplementary protection brought by a censorship of the exercise of a given right [10].

And then, is the right of the assigned to refuse an assignment a discretionary right as it is a part of the potestative category of rights?

We appreciate that the answer to the above question is not necessarily simple to give and it may be different based on the thoughts of the author upon the mechanism of the assignment of contract.

Thus, we believe it would be much easier that the refusal of the assigned to be considered a non-discretionary right by the authors that perceive within the consent of the assigned party a simple authorization to the purpose of the effects of the assignment, then by the authors that regard the requirement of consent as a validity condition of the assignment.

Within the first category presented above we present Philippe Malaurie and Laurent Aynes [11] which begin from the idea that the consent of the assigned to the contract assignment refer only to the objective elements of the contract, namely the cause and object, and not to the party of its co-contractor. Beginning from this hypothesis, since the object and cause remain the same, there would be no reason for the assigned to oppose the assignment of contract. But if the assigned should oppose to the replacement of its co-contractor that would mean a breach of the principle of the compulsory force of the contract.

From our point of view, this theory is debatable, starting from a strictly objective conception of the contract, contract which is brought to its objective elements (object and cause), with no consideration towards the subjective element, given by the contracting party and the element of trust that is established between the contractual partners.

The argument brought by the above French doctrine members, namely that the opposition of the assigned would be a breach of the compulsory force of the contract, also gives the possibility of debating.

Which would be the elements that would create a compulsory force within a contract?

It is true that, by assigning the contract, its object and cause remain the same, but one of the contractors is different. By changing the party does that not bring consequences to the force of the initial contract?

In the end, the compulsory force of the contract assumes exactly that – conventions that are legally drafted have the power of law between its parties.

Or, the assigned is tied through its agreement by the assignor, that which calls for a reiteration of the agreement, meaning a consent to change the assignor, a party to which it has agreed, with the assignee, a third to the initial contract.

We appreciate that this reiteration of the agreement represents the foundation of the compulsory force of the assigned contract, compulsory force that will bind, from the moment of the assignment, the assigned and the assignee.

L. Aynes [12] regards the consent of the assigned as a simple authorization that may also be given previously, and not the expression of a will manifestation in order to create a new contract with the assignee. From that, the author deduces that the refusal to give consent may be overpassed by an order of the Court, which should appreciate the benefits of the parties and decide.

But who's benefits? The benefits of the assignor, as the party that choses to abandon the contract, from maybe purely subjective reasons, the benefits of the assignee, a third that wants to intervene within a contract, or the benefits of the assigned, as an initial party that will have to continue a contract with an assignee it does not know, has not chosen and does not agree?

Of course, the reason to recognize, as autonomous, the conventional assignment of contract is to perpetuate the existence of the contract until it would have been fully accomplished, videlicet until the considerations of its purpose have been met.

But if we affirm that the consent of the assigned represents a potestative right, but not a discretionary one, it means that the Court may appreciate the refusal to agree with the assignee would be an abuse, and as a consequence to pronounce a decision through which the assignment would be validated, without the consent of the assigned.

Proceeding thusly, is it not a change of the assignment from conventional to judicial, as the refusal of the assigned to consent to the contract assignment is overpassed or replaced by the Court who declares it abusive and as a consequence the assignment is stated as valid?

The internal legislation could have settled this dispute easily by stating expressly that the Court of Law may decide if the refusal to agree a certain assignee is abusive and thusly to decide to replace it.

In the lack of such provisioning, all is let at the will of judicial practice, to offer an answer in situations due to be settled in Court, having as object the refusal of the

assigned to agree with the assignee from subjective reasons, that may be appreciated as abusive.

The legal abuse intervenes, in general, as a sanction in the case in which a party may exercise its rights outside the internal and external boundaries, causing damages to other parties.

Within national doctrine, even the adepts of the theory of consent as a validity condition with effect of creation of the assignment appreciate that the refusal of the assigned to agree with the assignee is a clearly potestative right and not a discretionary one too, and may and should be censored by the Court of Law when drawn by low morale considerations [13].

Such examples of Court intervention in censorship of the refusal have been given by the French jurisprudence: intent to prejudice the assignor, racial or religious discrimination towards the assignee [14].

French jurisprudence admitted even the assignment of a contract completed *intuitu personae* as the agreement of the assigned party was given. Starting from the analysis of this solution, the French doctrine started a debate regarding the legal nature of the *intuitu personae* character of a contract, creating thus two parties: those whom sustained the subjective theory according to which the *intuitu personae* character is founded on a feeling of affection or trust and those that would propose an objective conception founded on a feeling or a risk.

This subjective conception has been considered objectionable, as the control of the Court upon this character would be very limited if not non-existent. Regarding the objective conception it has been sustained that when founded on an emotion, it would constitute the cause of the legal document, being in the presence of an act with free title, and when being founded on a risk, we would be in the presence of an onerous act. The risk is perceived as the eventuality of an event tied by the legal operation and that raises the finality problem of this operation. Taking into account of the party, being part of the stipulations that have as a purpose the indemnification of contractual finality, it brings a solution to the contractual risk. The solution would be subjective when the risk is attenuated because of human qualities (ex: the contract between the attorney and client), also the solution would be objective when the risk is attenuated by the objective qualities of the party, as such are technical abilities, experience, competence. The objective vision would lead to the parties' substitution between themselves when they present the same amount of qualities. If the

requirement of the consent of the assigned has been extended to all existing contracts, it has been stated that it is no longer a part of only the *intuiu personae* contracts, but the objective conception would impose a distinction. The consent of the assigned would no longer be necessary when the taking into consideration of a party would be an objective risk, the assignor being capable to determine the profile of its substitute without the help of the assigned. At the same time it has two obligations, first to assign the contract to a third, at least as capable as itself and second to inform the co-contractor of the substitution. If taking into consideration of the party is the subjective solution of a risk, then the consent of the assigned is necessary, as only it may decide if the qualities of the assignee satisfy its interests [15].

National doctrine also, in what regards *intuitu personae* contracts, stated the opinion according to which in the case of assignments based on an objective *intuitu personae* character, the right of the assigned to agree the party of the assignee – although potestative – is not discretionary, its refusal being subject to control from the Court of Law. The explanation consists in the fact that reiterating the professional qualities presented by the assignor in the party of another specialist in this filed is possible, and appreciation of those competences by the new-comer is, if needed, subject to Court control [16].

3. Conclusions

The problem of consent of the assigned, to the assignment represents a controversial element not only within national doctrine, but within the Italian and French also, having opinions expressed both towards considering it a validity requirement of the assignment, but also that it would represent only an authorization which has as effect the liberation of the assignor.

The problem of the refusal to consent to the assignment as a potestative and discretionary – or non-discretionary right has only been discussed adjacently.

In principle, the authors that presented a point of view in this way, have sustained that the non-discretionary character of the refusal, and as a consequence the possibility of the Court of Law to intervene and decide through a civil decision as being abusive a refusal to accept an assignment and as such stating the assignment completed even in the absence of the consent of the assigned.

Acknowledgements

This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013

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