

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

Assistant Professor Diana DEACONU-DASCĂLU, PhD.

“Titu Maiorescu” University of Bucharest (ROMANIA)

diana.dascalu@gmail.com

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 acceptance, 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 chooses 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 left 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 *intuitu 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 Resources Development 2007-2013

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