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SIMULATION ACCORDING TO THE NEW ROMANIAN CIVIL CODE

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Abstract: *Simulation arises when for two parties and for the same legal relationship there are two legal acts (more precisely two variants of the same legal act) that have different contents, especially essential provisions. One of the two juridical acts is referred to as a public act or the apparent act (but, in fact, simulated), being stated as such by the parties and reflecting the "official"(but false) variant of the agreement between the parties, as it is, reached in front of the Notary, of the lawyer or a private signature act. The other mentioned act is the secret act (referred to as the secret agreement), which represents, in fact, the true agreement between the parties, but it is not included in an official act, being known only by the parties.*

Key words: *simulation, fictive act, disguise, public deed, apparent act.*

1. The meaning of simulation. The terms of public act and secret act

Simulation, however, assumes that the secret act is concluded, as constantly decided in the juridical practice, before or at least concomitantly with the apparent act [1].

Consequently hiding the truth does not automatically represent a fraud. The state tolerates the simulation provided that the secret act does not aim at eluding certain interdictions or at avoiding the payment of the taxes. This is the reason for which simulation is accepted, and moreover, its effects are regulated by the law, for avoiding all the doubts. We may state that in the Romanian law, all the persons have the right to simulate a juridical act, except for the case when the objective of the simulation is to fraud, to infringe (even if our personal opinion is that the law should not encourage any kind of simulation, annulling both the public act and also the secret act). The lawmaker is preoccupied with the protection of the rights and the interests of the good-faith third parties. According to the Canadian Law, for avoid the debates on this theme, the juridical literature refers to the simulation as *the legal simulation*, for the purpose of avoiding the difference between the cases when the simulation is used for fraud goals but also to emphasize that the simulated act is the one that observes the legal provisions [2].

According to the recent Romanian doctrine, simulation is regarded as a complex juridical operation that assumes the presence of three specific conditions: the existence of the secret act, the existence of the public act and the existence of the simulated agreement [3].

The author [3] speaks, concerning this aspect, also about the condition of the

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contemporaneousness that refers to the fact that the secret act already exists when concluding the public act or the two acts are simultaneously concluded and also about the requirement that the public act must be *ostensible*, respectively to allow the third parties to view the content of the act. We consider that the requirement of the simulated agreement is redundant in the simulation of the bilateral judicial acts, considering the fact that the simulation of truth represents the essence of this mechanism, the quoted author himself indicated this agreement within the definition of simulation. On the other hand, the requirement of the simulated agreement shall be fulfilled for the unilateral judicial acts, where, considering their judicial nature, it is obvious that despite an agreement between the issuer of the act and another person, we cannot talk about simulation (this requirement being, however, expressly provided by the law); the simulation of the unilateral judicial act shall be further debated below.

2. Legal regulation

At present, simulation benefits from a thorough legal regulation, The New Romanian Civil Code widely and unequivocally stipulating the effects of the simulation towards the third parties and also towards the creditors of the parties, aspects that were not found in the Old Civil Code. As we may remember, The Romanian Civil Code in 1864 that was abrogated in 2011, regulated the simulation within one article (art. 1.175), that provided that „ *The secret act that modifies a public act has legal effects only on the contracting parties and their universal heirs; such as an act shall have no effect against other persons".*

Six articles are consecrated to this juridical institution in the Romanian new civil code. The main inspiration sources of the New Civil Code– the Civil Code of Quebec and the Draft common frame of reference Regulations – comprise only two articles consecrated to simulation a reason for which we tend to believe that in this matter, the Romanian judicial doctrine but also jurisprudence played significant roles. The Civil Code in Quebec refers to the effects towards the third parties and the effects against the third parties of the simulated act and of the apparent act (art. 1.451, 1.452 of the Civil Code in Quebec).

Simulation represents *lex lata* comprised in art. 1.289 – 1.294 of the New Civil Code; the first three articles (1.289 – 1.291) expressly refer to the effects of the simulation, an article (1.292) regulates aspects concerning the simulation evidence, an article (art. 1.293) is dedicated to the simulation of the unilateral juridical acts and, finally, the last article (art. 1.294) excludes the application of the legal provisions concerning the simulation of the legal provisions concerning the simulation of the non-patrimonial juridical acts.

We must further mention that, from the point of view of applying the law in time, the provisions of art. 1.289 – 1.294 of the Civil Code concerning the simulation apply exclusively if the secret act is concluded after the effective date of the Civil Code, respectively after October 1st 2011 (Art. 109 of Law no. 71/2011 for applying the Civil Code).

3. Forms of simulation

We must firstly understand the concrete types of the simulation, taking into account, on one hand, the provisions of the New Civil Code but also the opinions formulated in the judicial literature, which are mainly grounded, on the Romanian and on the foreign jurisprudence. Simulation may be of three types, respectively the

fictive act, the persons disguise and interposition. The same three forms are constantly mentioned also in the French literature [4], and also in the Canadian literature [2].

We must understand, even from the beginning, that when we talk about a secret act or about a public act, we refer to the notion referred to as *negotium* not as *instrumentum*. No law stipulates that an act must be confirmed in writing, and in fact, this is frequently the purpose of the parties, respectively to hide the reality. However, hiding the truth may be achieved by a secret agreement, which is concluded verbally, moreover than in writing .This is the reason why, as we shall find out below, the simulation test is achieved by means of witnesses or by other evidence in many cases when the counter document respectively the secret act is not a true act.

The fictive act assumes that the parties *completely* hide the truth; the fictive act is achieved by the conclusion of a public act, by the parties (for instance, sale-purchase) that is simulated by a secret agreement, this act having no juridical effects (in the mentioned example, the sale-purchase shall not transfer the ownership right). The fictive act is used, more frequently, for bilking the creditors' interests (apparently, when different assets are sold to third parties, for avoiding the legal seizure, but, in fact, no transfer is being operated, the seller acting as a true owner) or for breaching the heirs' interests (to defraud the interests of the heirs, in order to circumvent the succession), a person sells the assets to another person, but, in reality, the assets are exclusively used by the „seller").

Disguise – more frequently met – represents the simulation form, by means of which, the parties hide the true agreement, namely that the public act is modified by the secret act, the act is not fictive, it exists, but it is frequently modified, in its essential parts.The simulation can hide the legal nature of an act, for example, the parties may enter into an act of public sale which is in reality a donation, the parties having agreed in a secret legal document that the buyer (in fact, the donor) not will pay any amount of money for the property that is subject to so-called sales This is referred to, in the specialty literature, as the complete disguise, there being simulated the cause of the juridical act [3].

We further exemplify by the case when the public act provides the sale of a certain asset by a sale-purchase agreement but, the secret act stipulates that in fact the right of use is transmitted and not the right of ownership. Another disguise situation is when by means of simulation, some of the essential elements or clauses of the agreement, as, for instance, the price, meaning that the parties stipulate in the sale-purchase agreement a lower price than the one that is paid, in reality. This is commonly known as the partial disguise and it is frequently used for the purpose of eluding the tax obligations. For instance, the parties of the sale-purchase agreement provide in the public act, apparently, that the sale price of the asset is in amount of 10.000 EURO, but, in reality, the same parties agree by a secret act (even if this secret act is not always written) that the real price is 50.000 EURO. In this case, the main purpose is the avoidance of the transaction tax provided by the Tax Code, the tax being calculated according to the asset sale value that is stated by the parties, in the sale-purchase agreement; at the same time, it is also aimed at reducing the notary fees, taking into account the fact that the public notary fee is set according to the value stated by the parties, in the contract.

We must make a statement. The Public Notary is protected up to a point against the effect of simulating the real sale price.

Thus, The National Union of the Public Notaries drafted a list of the fees, according to which, a real estate is assessed at a certain minimum value (according to several criteria, which are mainly urban), the transaction value is compared to this assessment and it must not be lower than the assessed amount. In other words, the parties, even if they agree that the land sale price is of 50.000 euro, they provide in the apparent act that the sale price is of 10.000 euro; however, that land is assessed by the Public Notary at the value of 30.000 euro, the fee of the Public Notary is calculated according to the amount of 30.000 euro, not according to the amount of 10.000 euro. The objective of the simulation is to elude payment of the tax obligations as there is no similar provision for the taxes (according to which, irrespective of the value stated by the parties within the act, the calculus basis of the transaction tax shall not decrease under a certain value).

Finally, the simulation can be achieved also by *interposition of persons* referred to in the comparative law as *prêt-nom convention* (translated from French as *name loan),* operation by means of which, for certain reasons, the beneficiary of a stipulation is simulated. For instance, in the case of a donation, the donation act provides that the asset is donated to a person, but, in reality, the beneficiary of the donation is another person, who for other reasons (the person does not want to reveal her/his identity, or the law does not allow her/him to receive the donation) does not conclude the act directly to the donor. The essence of this operation resides in the fact that it is necessary to prove that there are two contracts, a public one and a secret one and additionally, there existed a common will of the parties of the apparent convention, who consciously intended its effects to be for a third person who shall remain unknown, by simulating the person [5].

Within Romanian law, it was also considered that this prêt-nom convention is assimilated to a nominee agreement, according to the provisions of art. 2.039 of the New Civil Code (for this purpose, L. Pop, *quoted*, page 227). We do not agree, together with many other Romanian authors to this opinion; the nominee agreement is a judicial construction according to which a person concludes judicial acts on behalf of another person, while the prêt-nom convention (the so-called „name loan") represents a veritable simulation, by hiding the real beneficiary of such a transaction. The Canadian authors [2] reached the same conclusion.

4. Simulation effects between the parties

The basic principle that must be kept in mind is that in the case of two juridical acts, a public one and a secret one, the *secret* act is effective between the contracting parties; however, if the parties agreed otherwise, the *public act* may be effective, as any agreement represents the law of the parties. The same secret act is effective also between the universal heirs or for the universal title heirs of the parties except for the case when the nature of the contract or the agreement of the parties provide otherwise.

This is however another application of the principle of the obligation of contractual effects: if the parties agreed on certain aspects (respectively according to the provisions of the secret act), then these must be according to the provisions of this act, as previously mentioned, this represents their true will. Thus, simulation represents from the parties point of view, the recognition of the effects of contracting obligations; the secret act becomes mandatory for the parties, this not being *de plano*, sanctioned by nullity.

Despite all of these, the secret contract is not effective between the parties (and implicitly between their successors) if it does not meet the substantive conditions, provided by the law for its valid conclusion. In this case, the public agreement shall be effective. Consequently, when the secret act has an illicit or immoral purpose, when the secret act presents a severe vice of consent or when the secret act has an illicit object, the sanction consists in the absolute annulment, and consequently the secret act cannot be effective for the parties. However, frequently, the validity requirements may be breached, both at the level of the secret act and also at the level of the public agreement, when, obviously, the absolute nullity shall affect both acts, none being effective for the parties. We, consequently, deal in these cases with the *fraud*, which always causes the nullity of the secret act.

An express sanction is especially provided in the matter of the reduction of gifts in excess of the freely disposable portion of the estate. It is well-known that the Old Civil Code and also the .current Civil Code regulate the judicial institution referred to as reduction of gifts in excess of the freely disposable portion of the estate. This represents a specific sanction of the inheritance law, on grounds of which the heir who is entitled to a portion of an inheritance has the right to contest the deeds concluded by the deceased person, through gratuitous juridical acts (donation or legacy), if they affect the forced heirship. It is also known, in practice, that the nature of the juridical act is simulated, to avoid the reduction of the sanction, meaning that the parties conclude a public sale-purchase contract, but secretly, „the buyer" does not have to pay any amount of money, in other words, the parties agree to a donation. In this manner, the interested person (the heir who is entitled to a portion of the inheritance of the Seller, in reality, the giver) cannot demand the reduction, as formally, declaratively, it is not about a gift in excess of the disposable portion but about a gratuitous act, such as the sale-purchase contract. For the same purpose the beneficiary is simulated, when the gift in excess of the disposable portion is performed through an intermediary.

Both methods of simulation of reality in terms of inheritance are expressly sanctioned by law. Thus, according to art. 992 of the New Civil Code, any gift in excess of the disposable portion disguised as a gratuitous contract or concluded to an intermediary is sanctioned by the relative nullity. These are presumed up to the contrary evidence as being intermediaries, the ascendants, the descendents and the husband/wife of the incapable person to receive gifts in excess of the disposable portion, as the ascendants and the descendents of the husband/wife of that particular person.

The specific sanction of the nullity is resumed for the donation contract, in fact, also a gift in excess of the disposable portion. In this matter, the law provides an exception from the principle of irrevocability of donation, meaning that „*any donation concluded between the husband and the wife is irrevocable exclusively during the marriage*" (art. 1031 of the New Civil Code that stipulates the provisions of art. 937 paragraph 1 of the Old Civil Code). To avoid the revocability sanction and for the purpose of annulling other persons' rights to the inheritance, the husband and the wife frequently try to simulate donation, by concluding an interposed contract. According to art. 1.033 of the New Civil Code, the simulation is annulled if the donation represents the secret act for the purpose of eluding revocability between the husband and the wife. In this case there is also a legal presumption, according to which the

intermediary is presumed to be, until the contrary evidence, any relative of the donor to whose inheritance he may be entitled at the moment of the donation and that did not come out of the marriage to the donor.

Furthermore, if a partition was simulated between the co-owners (for instance, even if they concluded a partition act without balancing payment, in reality, secretly, one of the co-owners receives an amount of money as balancing payment or when the partition is mentioned however, secretly, the parties agree to a sale-purchase of the asset), the personal creditors of the co-owners shall be able to require the annulment of the act of the simulated partition , if they prove that they incurred damage by this act (art. 679 paragraph 2 of the New Civil Procedure Code).

Simulation may be also established as a consequence, the simulated act can be annulled in any circumstance, even when this is ruled by a Decision of a Court of Law, as in the case of the transaction. The transaction is a contract according to which the parties avoid or annul litigation by mutual concession or renouncement (art. 2.267 of the New Civil Code). The law expressly regulates the faith of the simulated transaction and of the one established by the Decision of the Court of Law, showing that this can be appealed by making the simulation public (art. 2.278 paragraph 1 of the New Civil Code).

The simulation effects for the parties are, in our opinion, correct and logical, being also recognized by the Romanian Old Civil Code (art. 1.175), but also by the sources of the New Civil Code. Thus, The Civil Code in Quebec provides that „*between the parties, the secret agreement prevails against the apparent one*" (art. 1.451 of the Civil Code in Quebec), and the Rules *Draft Common Frame of Reference* show that between the parties the secret act shall prevail respectively „*the parties can prevail over the act that represents their true will*" (art. II.-9:201 paragraph 1 of the *Draft Common Frame of Reference*, *Effect of simulation*); finally, the Principles of European Contract Law stipulate unequivocally that between the parties there prevails the act representing their true will„*as between the parties the true agreement prevails*" (art. 6.103 PECL, *Simulation*).

5. Effects of the simulation towards the third parties – protection of the procurement of good-faith rights.

Towards the third parties, the simulation effects are correctly based on the good-faith principle, more precisely, on the principle of protecting the assets acquired in good-faith. Consequently, towards the third parties, *the public act* produces full effects, as according to this act, the third parties acquired good-faith rights (being based, for instance, on the quality of apparent owner of the transmitter).

Towards the third parties, simulation can be considered an exception from the principles of the reversibility effect of the contract. For this purpose, the law establishes as a principle, that the secret agreement shall not be invoked by the parties, by their universal heirs, with universal or particular title, nor by the creditors of the apparent seller against the third parties who rely in good-faith on the public contract, acquired rights from the apparent purchaser (art. 1.290 paragraph 1 of the New Civil Code). The New Civil Code applies this principle, in the case of the simulated matrimonial agreement. Thus, according to art. 331 of the New Civil Code, the secret act, by means of which another matrimonial status is chosen or the matrimonial status is modified for which the publicity formalities provided by the law are fulfilled is effective only between the husband and the wife and it can not be opposed to the third parties in good-faith.

Contrarily, even if not opposable to them, the third parties may invoke against the parties the existence *of the secret agreement*, when this affects their rights. Consequently, according to the interest, the third parties can choose between the two acts, invoking the public act or the secret act.

Concerning the creditors, the existence of the secret agreement cannot be opposed by the parties to the creditors of the apparent purchaser, who in good-faith, registered the foreclosure in the Land Book or obtained the seizure of the assets that represented the object of the simulation. The same happens in the case of a creditor of the apparent owner, who has the right of claiming these goods even if in reality these belong to another person. Concerning this aspect, a relevant decision, in our opinion, to which we subscribe, was passed by a Canadian Court of Law in a case in which the owner of a vehicle (real owner according to the agreement of the parties) concluded a sale-purchase contract, according to which another person was registered in the official records as the owner of the vehicle. *According to a Court of Law decision passed against the apparent owner but that was registered in the Vehicle Registration Office, a third party obtained the enforcement of judgment of the vehicle, consequently the opposition of the true owner was rejected* [6].

If there is a conflict between the creditors of the apparent seller and creditors of the apparent buyer, the former are preferred, provided that their claim is prior to the secret contract.

Concerning the effects of the simulation towards the third parties, the comparative law and the codes of the European Private Law (that represented the inspiration source of the New Romanian Civil Code) have similar provisions, there being essential the *right of option of the third parties* to choose, according to the interest they have, between the public act and the secret one (art. 1.452 of the Civil Code of Quebec, art. II.-9:201 paragraph 2 DCFR that expressly refers to third parties who reasonably and in good-faith trusted the apparent act (however the, *Principles of European Contract Law* Regulations do not include express provisions for this purpose).

There is a difference between the provisions of the Canadian Law and the provisions of Romanian Law, respectively that according to the Civil Code of Quebec, the choice of one of the two acts depends on the *interest* of the third party (art. 1.452 the first thesis of the Civil Code of Quebec) while according to the Romanian New Civil Code, the third parties have the right to invoke the secret act (not the apparent one) only when this one *affects* their rights (art. 1.290 paragraph 1 of the New Civil Code).

Finally, what the Civil Code of Quebec provides and the Romanian New Civil Code does not is the situation of a contest between the third parties of the simulation and namely between the ones who invoke the public act and the one who invoke the secret act. The solution provided by the Canadian Law is right and logical, this being used in Romanian private law, as it is based on an old recognized legal principle, Romanian law also stipulating the theory of appearance of right. Thus, according to art. 1.452 of the second thesis of the Civil Code of Quebec: „*where conflicts of interest arise between them, preference is given to the person who avails himself of the apparent contract*".

6. Simulation evidence

Concerning the possibilities of proving the simulation, the current legal provisions are, in our opinion, too extensive. Consequently, according to art. 1.292 of

the New Civil Code, the simulation evidence may be achieved by *any* means of evidence. Thus, concerning this aspect there is no limitation, irrespective of the value of the simulated juridical act and irrespective of its nature, any kind of means of evidence being admitted that is allowed by the Civil Law. Concerning the object of the evidence, the legal practice in our country provided relevantly and constantly that: „*proving action of simulation means to prove: the public act, the secret act and the secret agreement. All the three components of the simulation are juridical acts that must fulfill the validity conditions provided by art. 948 of the Civil Code. The intention of the parties to simulate shall be proven by any means of evidence* " [7].

Any person can prove the simulation. Firstly, *the interested third parties* can do so ,then the *creditors* of the signing parties of the simulated juridical act. Finally, even *the parties* can prove the simulation by all means of evidence, but exclusively when they claim the simulation is *illicit*. Concerning this aspect, it is important to remember that simulation cannot be contested by a Court of Law upon the request of a contracting party, when a problem of the simulated act, that is caused by the claimant, is invoked (*nemo auditur propriam turpitudinem allegans*) and when the party that demands this cannot prove the existence of another agreement between him and the defendant. For this purpose, The Supreme Court of Law decided that, in one case, it was not proven not even by witnesses that the parties concluded another agreement, a secret one, that may certify that between the parties there is another legal relationship, the existence of the simulation cannot be admitted [8].

In matters of evidence, the legal provisions in force are similar to the Romanian direct source of inspiration, the Civil Code of Quebec, except for the matter concerning the proof of the juridical act between the parties, that, according to the Canadian Law cannot be performed by witnesses if the value of the agreement is higher than 1.500 dollars (art. 2.862 paragraph 1 of the Civil Code of Quebec) except for the case when the simulation was concluded for fraud purposes or if there are written pieces of evidence [9].

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