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FACULTY OF LAW

SIMULATION IN THE NEW CIVIL CODE

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Bucharest

2020

”*Contract simulation*” exists because sometimes people who enter into certain agreements do not want to disclose before the general public the existence, the nature or even the parties who adhere to the respective contract. Thus, they choose to disguise their true intentions through the simulation of other contracts, by presenting them as true, while they are a simple façade.

This study into the nature of contract simulation engages this institution not only from a theoretical stand point, trying to ascertain the history of simulation in the Romanian law system, but also trying to present the way Romanian jurisprudence has looked upon simulation over the years, beginning with decisions from the early twentieth century and ending with the rulings of our present time.

Contract simulation is a complex mechanism, classically tolerated to a certain degree in Romanian legislation under the Old Civil Code, as well as under the New Civil Code.

However, the New Civil Code has departed from some old opinions of the Romanian courts or of the Romanian law literature and chose new remedies to try to bring order between the conflicting interests of the simulation parties as well as the third parties.

The New Civil Code is, without a doubt, an improvement concerning the regulation of simulated contracts, offering concrete stipulations and being careful not to harm the interests of third parties who acted in good faith, a lot more than the stipulations of the Old Civil Code.

We have also tried to present the many facets of this institutions, the types of simulation which are present in the civil circuit, which of these are most used by the general public as well as the manner in which the institution is present in the Romanian civil trial and its procedural implications.

We have tried to gaze upon the way this institution has been accepted in other legal systems especially the French and Italian ones which have, by traditions, been of great influence to the Romanian legislator.

The paper was divided into six parts, the first one being called "*overview of simulation*". The first chapter analyses the history of the institution.

Among the relevant aspects analysed in this part are those related to the terminology used in the simulation, given that, due to a brief previous legislation, it was the role of jurisprudence and doctrine to outline the terms used for each of the components of the simulation. Unfortunately, precisely due to the need for the intervention of doctrine and jurisprudence, the terminology was unstable.

Fortunately, the New Civil Code has resolved many of these inconsistencies, stabilizing the terminology in an attempt to prevent a non-unitary practice because of these issues.

In this first part, we also analysed the differences between simulation and other institutions that over time have been associated with this institution, trying to draw clear points of distinction so as to highlight, indirectly, the characteristic features of the simulation.

Trying to outline a new theory of simulation in the legal act, we acknowledged that simulation’s structure would be compatible with the unilateral act and the legal fact, but only the atypical simulation, a general structure in which we sought to include more forms of simulation that cannot fall within the narrow limits of art. 1 289. C.civ.

Our contribution, therefore, was the new category of atypical simulation.

Part II of the paper deals with the types of simulation.

We highlighted the illicit simulation, underanalyzed in doctrine and jurisprudence, in which we saw which types of simulations attract the sanction of nullity and which will be the components of the simulation affected by this sanction.

The third part of the paper tried to analyse the participants in the formation of the simulation structure, which highlighted the category of inappropriate participants in Chapter II, namely people who, although physically present, do not contribute legally to the formation of the operation.

Chapter IV analysed the much debated category of third parties, which over time has undergone dense doctrinal debate.

I considered, contrary to the majority doctrine, that the analysis of the participants deserves a legal "revitalization", considering, on the one hand, that in the category of parts we must include the so-called ”original parts”, those between which the simulation operation was originally concluded, and to include universal successors in the category of derivative parts - those that become part as a result of the continuation of the personality of their author.

As regards third parties, this category included private successors and unsecured creditors.

In the analysis made, we tried, therefore, to eliminate the category of ”având-cauză” for the simple reason that it introduces unnecessary complexity, without a theoretical or practical contribution.

The fourth part of the paper is dedicated to the effects of simulation, perhaps the most important part of the paper – here we find the biggest changes through the new provisions of the New Civil Code.

Also, we tried to analyse the theory of good faith, as well as the theory of legitimate error.

The effects of the simulation towards third parties - towards the private successors, were regulated by means of art. 1.290 of the Civil Code, and in the paper we tried a detailed analysis of this article, noting the prevalence of the private successor, who, in good faith, obtained the right from the apparent acquirer.

Note also art. 1,291 C.civ . where it is specified that, in order to obtain the benefit of non-enforceability against harmful legal acts, the creditor of the apparent acquirer must have noted, in good faith, the beginning of the forced execution in the land records or have obtained seizure of the assets subject to simulation. I distinguished between real estate and movable property.

Also, in light of art. 1.291 alin. 2 C.civ., the creditor of the apparent alienator is preferred against the creditor of the apparent acquirer who was based in the public deed, if the claim of the former is prior to the simulation.

In this case, the secret deed will have preference over the public deed, and the gain will be given to the creditors of the real owner, to the detriment of the creditors of the apparent owner who is based on the public deed.

Part V of the paper is of high importance, because, besides the examples used throughout the paper, we felt the need to analyse the institution as it becomes used the civil process.

The action in simulation is an autonomous, independent action, but when the action is filed in regard to another action which is the goal of the proceedings, it will be in a state of interdependence of that action and if that action cannot be analysed, then the action in simulation will be rejected.

The simulation can be invoked both as a main way, but also as an exception, as a defence, without the need to file a counterclaim.

Considering the forms of illicit simulation, the court will be able to invoke ex officio the simulation and the absolute nullity of its component elements.

I also pointed out the matter of proving simulation, where art. 1.292 C.civ. states that: by third parties the simulation can be proved by any means of proof, while between parties (original or derivatives) it can be proven under the rigors imposed by law to prove an act legal. The illicit simulation can be proved by any means of proof.

Finally, in the last part of the paper, Part VI, we addressed the issue of special applications of simulations in special matters, such as simulation in translative contracts, but also the simulation of civil and criminal proceedings.

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