PRIVATE LAW

General Considerations on Simulation in the Civil Code
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Abstract: *There are certain situations in which third parties are entitled to ignore the existence of a particular contract, and thus the rights and obligations arising from it. One such situation is simulation, which is thus considered to be an exception to the enforceability against third parties of the contract. Simulation is the legal transaction consisting in the conclusion of a contract ostensibly intended to give the impression of creating a legal situation different from the real one and of another secret contract containing the true legal relationships which the parties intend to establish in reality. The general and abstract purpose of any simulation is to conceal the content or the existence of the real agreement of will from third parties. For the existence of simulation, it is sufficient that the secret act preceded the apparent act or was simultaneous with it, even if the document recording the secret act was drawn up after the apparent act was committed. It is essential that the agreement between the parties, i.e. the agreement in the sense of a legal transaction (negotium), predates or is contemporaneous with the apparent act.*

Keywords: *simulation, legal transaction, real agreement, third paties*

1. General Considerations

The institution of simulation exists because some people wish to hide their contractual relations from third parties, choosing to present them with a mere facade to mask their true intentions.

In other words, simulation is a legal operation whereby the parties conceal or disguise the truth. Simulation involves two acts: a lying public act and a hidden secret act. In a simulation, the real will of the parties is in the secret act and not in the public act.[2]

In a prosaic way, we can associate simulation with a lie. For example, a common sham is a sham sale with a disguised gift concluded in fraud of the heirs' interests. Another example is the simulation of the price in order to

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[2] E. Veress, *Civil law. General Theory of Obligations*, 5th Edition, Ed. C. H. Beck, Bucharest, 2020, p. 86.

pay lower tax. Sometimes the simulation is legal and noble (e.g., a person wants to do a charitable act and hides their real name)[1], but, most of the time, the simulation has an illicit purpose because the parties seek to avoid the application of certain laws or to circumvent prohibitive provisions relating to certain contracts.

Simulation is an exception to the enforceability of the effects of the contract. It applies to both contracts and unilateral legal acts. In Romanian law, simulation is governed by Articles 1289-1294 of the Civil Code. According to Article 1294, the provisions on simulation do not apply to non-patrimonial legal acts (e.g. adoption, marriage, recognition of filiation).

In doctrine, simulation has been defined as a legal transaction "*carried out by concealing the real will of the parties, consisting in the simultaneous conclusion and existence of two agreements or understandings: one apparent or public, which creates an apparent legal situation contrary to reality, and another secret, which gives rise to the real legal situation between the parties, nullifying or modifying the effects apparently produced under the public contract.*"[2]

2. Conditions of Existence of the Simulation

To exist, the simulation must cumulatively meet three conditions, as follows:

- there must be two legal acts, one public and one secret;
- there must be an intention on the part of the parties to simulate (simulatory agreement);
- the secret act must precede or coincide with the public act.

While the first condition is clear and unproblematic, the second condition - the existence of the parties' agreement to simulate - raises a number of questions which the doctrine has tried to answer.

Thus, 'the idea of a simulating agreement suggests a common representation of the parties, prior to the conclusion of the public act and the secret act, a common representation in which the parties [agree] to <<disguise>> the whole operation of simulation, i.e. to imagine all the manoeuvres by which the true relationship between them will be disguised from third parties. The simulatory agreement is synonymous with the intention of the parties to

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[1] C. Stătescu, C. Bîrsan, Civil Law. General Theory of Obligations, 9th edition, revised and added, Hamangiu Publishing House, 2008, p. 80.
[2] L. Pop, I.-F. Popa, S. I. Vidu, Civil Law. Obligations, 2nd edition, revised and added, Universul Juridic Publishing House, Bucharest, 2020, p. 179.

simulate and consists in their will that that legal transaction should produce all the legal effects specific to simulation".[1]

The third condition relating to simulation (the secret act must be prior to or concomitant with the public act) is necessary because if the secret act were subsequent, it would modify or revoke the public act and there would be no simulation.

3. Forms of Simulation and Methods of Implementation

As for the forms of simulation, the literature has started from the criterion of the element on which it bears the appearance and has been classified4 as follows:

- - **absolute simulation**, if the simulatory agreement relates to the existence of the public act, which is fictitious or
- - **relative simulation**, if the simulatory agreement relates to only one of the elements of the public act.

Relative simulation can also be subclassified into:

- - objective, if the simulatory agreement relates to an objective element and can be achieved by disguise (total or partial), and
- - subjective, if the simulatory agreement relates to the identity of the parties to the real legal act and can be carried out by means of a power of attorney without representation (loan of the name - prête-nom) or in the form of interposition of persons.

As regards the **procedures for implementation**, simulation is achieved by:

- - the fictitious public act procedure,
- - the procedure of disguising the secret act, and
- - the procedure of interposition of persons.

The fictional process. In this case, a public deed is concluded only by connivance, and the secret deed states that no public deed actually took place between the parties. Fictitious acts are therefore the only case of absolute simulation. For example, in the case of fictitious disposals (the public document provides for the conclusion of a contract of sale and the secret document provides that no legal relationship between the parties has arisen and therefore no effect has been produced).

Indeed, the parties completely disguise reality, and the sham agreement provides that the public document has no legal effect, as it does not exist (it did not occur between the parties). This procedure is often used either to

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[1] E. Veress, *op. cit.*, p. 92.

circumvent mandatory legal provisions or to harm the interests of others. There are many applications of the fictitious procedure in legal practice, such as fictitious donation, fictitious company, fictitious partition, etc.

Disguise process

In this case, the parties seek through the public document to conceal: either the legal nature of the secret document -total disguise- or certain elements of the secret document -partial disguise. Disguise also takes the form of an objective relative simulation. Disguise is total if it is intended to conceal the nature of the secret act, i.e.: the public act indicates a specific contract and the secret act indicates the true contract between the parties. For example, a gift is disguised as a fictitious contract of sale or maintenance).

The disguise is partial if it is intended to conceal certain elements of the secret act, i.e. the public act indicates a certain price (higher or lower) and the secret act shows the true price.

Interposition procedure

In this case, the public deed is concluded with a specific person and the secret deed states that the real beneficiary is another person. For example, a gift by interposition of persons for the purpose of gratifying a person incapable of receiving it. The public document will therefore take effect between the persons mentioned in the secret document. The parties to the public document intend its effects to be produced towards another, anonymous person. Also, the interposition of persons takes the form of a subjective relative simulation.

4. Effects of Simulation

The new Civil Code expressly regulates the legal effects due to the legal institution of simulation. The legal relationships deriving from simulation include effects between parties, vis-à-vis third parties and relationships with creditors.

4.1. The effects of Simulation in the Relations between the Contracting Parties

According to Article 1289 of the Civil Code, a secret contract will produce legal effects between the contracting parties as long as it meets the substantive conditions necessary for its valid conclusion. Thus, for the secret

contract to produce effects, the formal conditions do not have to be met. The following example has been given in the doctrine: "*For example, a donation is a solemn contract, and an authentic contract is required for its valid conclusion, according to Art. 1011 para. (1) Civil Code.*

A gift disguised as a contract of sale, on the other hand, is not subject to these formal requirements. A sham donation is in principle valid if it complies with the substantive conditions of validity of donations. In view of the concealed nature of the secret act, the requirement of solemn form is incompatible with this character. Thus, it is sufficient to comply with the conditions of validity [of] the apparent act (the contract of sale), the secret act is not subject to the solemnity specific to the donation".

4.2. Effects on third Parties

In relation to third parties, only the public document will be effective, as they are deemed not to have been aware of the hidden legal transactions drawn up by the parties. Therefore, the legal situation arising from the secret act is unenforceable against them and they can ignore it.

However, if third parties were aware of the existence of the secret act, they would no longer benefit from the specific sanction of simulation, i.e. the secret act would be enforceable against them.

In order to be able to invoke the unenforceability of the secret document against them, third parties must be acting in good faith at the time the simulation is concluded. Moreover, third parties may invoke the existence of the secret contract against the parties if it violates their rights.

Thus, all third parties, whether in good faith or not, may invoke the existence of the secret contract, by an action in simulation, when this secret contract violates their rights. However, while bad faith third parties can only invoke the secret contract to enforce their rights and interests, good faith third parties have a right of option. Thus, unlike bad faith third parties, bona fide third parties can choose between invoking the public contract or the secret contract.

4.3. Effects of the Simulation on the Creditors of the Parties (effects between third parties)

Simulation protects bona fide creditors in certain situations. Article 1291 of the Civil Code provides a measure of protection for creditors acting in good faith who are unaware of the existence of simulation and have noted the commencement of enforcement proceedings in the land register or have

obtained seizure of assets. Thus, Article 1291 provides that the parties may not oppose the existence of the secret contract to these good faith creditors.

5. Action in Simulation

An action in simulation or an action for a declaration of simulation is an action available to those interested in proving in court that a certain contract has been simulated, that it does not correspond to reality, and that it is a lie. Most often, the persons interested in proving that a contract is a sham are the very persons harmed by the act, but an action for simulation may be brought by any person interested in proving that a contract is a sham, provided that the person concerned can show an interest.

In the doctrine, the action in simulation has been defined as "that legal action which seeks to reveal the false character of the public contract and the existence of another contract, the secret one, which corresponds to the real will of the parties, and which thus remains the only applicable contract".

An action for a declaration of simulation of an act has as a consequence the establishment of the real, secret act and the non-existence of the apparent, public act. It is an action for a declaration that is not subject to limitation and may be brought by any person at any time by way of principal claim or by way of exception. This solution is in line with the principle according to which the appearance of law can be removed at any time, the simulated legal act not being susceptible of consolidation through the passage of time.

This action is often accompanied by a subsequent claim for recovery of rights or interests in connection with the secret contract, such as an action for reduction of excessive gifts, a declaration of nullity of the secret act, termination or rescission of the secret contract for non-performance, an action in revendication, an application for distraint on immovable property.

Although an action for a declaration of enforceability is not time-barred, actions ancillary to it, if they are for the enforcement of a property right, are time-barred within the statutory limitation periods. In this regard, the literature has argued that "an action for simulation is meaningless in itself, because the denunciation of the legal lie created by simulation is merely a necessary step towards ascertaining the true contractual reality, with a view to subsequently seeking its annulment or the enforcement of the obligations it has generated. For these reasons, an action in simulation always accompanies or is grafted onto another action, and the latter will impose both

the penalty and the general rules governing the admissibility of an action in action.[1]

As mentioned above, the apparent legal situation can be removed by means of a legal action, i.e. an action in simulation. If an action for a declaration of simulation is brought, third parties leave the passive situation and give an offensive attitude to the interpartes agreements.

An action for simulation may also be accompanied by an action for nullity in cases where the simulation is based on a breach of mandatory statutory provisions or by another action for performance or for termination of the secret contract for non-performance.

6. Proof of Action in Simulation

Article 1292 of the Civil Code regulates the proof of simulation as follows: "*Proof of simulation may be made by third parties or creditors by any means of evidence. The parties may also prove simulation by any means of evidence when they claim that it is unlawful*.".

The new Civil Code establishes the evidence differently with regard to the legal institution of simulation, namely:

- between the parties, simulation can only be proved by a counter-writing that would modify the public document (according to the rules of common law regarding the proof of civil legal acts).
- By exception, simulation may be proved, between the parties, by any means of evidence, if they claim that it is unlawful (e.g. it is intended to defraud the law, to violate mandatory legal provisions, public policy or if it was done by fraud or violence).
- by third parties and creditors, simulation can be proved by any means of evidence, being a mere legal fact.

In order to be covered by this exception, the interested party must prove both the case of moral impossibility of pre-creation of the document and simulation.

For the purposes of simulation, a secret document must be understood as a legal transaction between the parties in the sense of negotium. The secret act, by exception, may be proved by any means of evidence only in the following cases:

- if there is a moral impossibility of pre-constitution of the document;
- if there is a prima facie case of written proof;

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[1] P. Vasilescu, *Civil law. Obligations*, Hamangiu Publishing House, Bucharest, 2012, p. 500.

- if there is an unlawful pretence, the purpose of which is to infringe mandatory legal provisions of public policy;
- if the public document is fictitious, with the aim of neutralising the effects of the apparent document;
- if the secret act was concluded by fraud, deceit or violence.

7. Conclusions

From the terminology of the word, the name "simulation" is closely related to the intention to simulate. Simulation is thus presented as a chimerical appearance.

The notional legal regime was not expressly regulated by the legislator, but was the result of the preoccupation of doctrine with analysing and explaining the notion of simulation. Moreover, the purposes and limits of simulation have been usefully identified in order to strengthen the scope and effects of each individual case of simulation.

We also note that the new Civil Code has also dealt with the evidentiary regime of simulation in different ways, i.e. between the parties on the one hand and by third parties and creditors on the other. In addition, it was necessary to distinguish between the forms of simulation and the procedures by which it is carried out.

Lastly, the action in simulation has benefited from an in extenso analysis of its preferred regime, which is absolutely necessary in order to protect above all the interests of third parties whose rights have been damaged as a result of simulation.

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