Reception of Contract Group Theory in European Contract Law

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Abstract

The relationship between the contract group theory and the principle of the relative effect of conventions is, in the civil law of obligations, an actual Strait of the Danaids. Developed in French doctrine, the theoretical construction of contract groups is seductive and, above all, controversial. Recognized as a legal reality only in French, Belgian and Luxembourg law, the formula of contract groups remains for other national legislators only an economic reality whose challenges are most often manifested, in legal terms, regarding the nature of liability between the group's partners, respectively the contractual or delictual nature of the direct action of the sub-acquirer against the original producer-seller of the goods. The study begins with the description of the contract group categories popularized by Prof. Bernard Teyssié, who differentiated between i) chains of contracts with linear (homogeneous and heterogeneous) structure or with radiant structure and ii) contractual (interdependent and divisible) sets (I). Subsequently, with specific reference to direct action in international chains of contracts, we will proceed to analyze the determination of judicial competence in case of i) the absence or existence of a clause conferring jurisdiction or ii) by applying the rules established by the Brussels Convention of 27th September 1968, respectively Brussels I and Brussels I bis (II) Regulation and legislative competence with regard to the law applicable to (i) the action arising from a transferring ownership chain, respectively (ii) the action arising from a non-transferring ownership chain (III). Finally, we will identify the contract group approach in i) the jurisprudence of the Court of Justice of the European Union (CJEU), more precisely the refusal of the contractual qualification of direct action from the well-known Jakob Handte and in ii) consumer directives, respectively in European contract law instruments, such as Draft Common Frame of Reference (DCFR) and optional sales instrument (IV).

Keywords*: contract chain, linked contracts, direct action, competent jurisdiction, applicable law, autonomous qualification, ancillary contracts.*

JEL Classification*:* K11, K34

1. Preliminaries on contract chains and contract groups (linked contracts)

The crisis of the contract's classical conception meant not only the decline of autonomy of will as the exclusive foundation of the contract, but also the end of the isolationist vision of the contract, making possible the arising of the contract group theory, a theory that induced the principle of the relative effect of conventions not less than the principle of the obligatory force of conventions, being put to test by the theory of contractual solidarity.

In the formula theorized and popularized by the French doctrine[2], a distinction

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[2] See Bernard Teyssié, *Les groupes de contrats*, L.G.D.J., Paris, 1975, p. 328 ; S. Pellé, *La notion d'interdépendance contractuelle. Contribution à l'étude des ensembles de contrats*, Paris, Dalloz, 2007, p. 572.

is made between two categories of contract groups: chains of contracts and sets of contracts.

Contract chains have been characterized by **an object identity**, grouping contracts on the same good. *Linear structure* chains differ from *radiant structure* chains; the former may be *homogeneous* (in the case of successive sales of the same good), or *heterogeneous* (sale-contractor-sale). The contract radiant structure group supposes a main contract and one or more ancillary contracts (other subcontractor agreements are inserted in a main contractor agreement).

Unlike contract chains, the contractual sets involve several contracts linked to an identity of cause (or to common purpose), being about conventions that, although formally distinct, compete to achieve the same goal and sometimes even give expression to a complex economic transaction or operation. For example, it is the case of an *agreement for the sale - purchase of goods accompanied by the loan* concluded for financing the purchase of those goods, of *the contractual sets resulting from a framework contract organizing a distribution network/application contracts) of the leasing operation* (resulting from the juxtaposition of financing the acquisition, renting for exclusive use, promise of sale at residual value, insurance of the goods).

By an extensive interpretation of the notion of the indivisibility of the obligations which it transposes on contracts[3], French case-law establishes as indivisible contractual sets those made up of interdependent contracts when contracts of a different legal nature are concluded for the same purpose without any interest to parties, independently of each other. Following such reasoning and taking into account this unity of cause basis, the French Court of Cassation once ruled the obsolescence of a loan contracted for financing a sale as a result of the sale resolution[4] or the nullity of a supply contract concluded in the application of a franchise agreement consecutive to the nullity of the latter[5].

Moreover, relying on an objective approach to indivisibility, the French Court of Cassation ruled more recently that in the case of concomitant or successive contracts, but contributing to the same operation, *clauses contrary to this interdependence[6] should be considered unwritten, thus removing the divisibility clauses*. Subsequently, the Ordinance (No. 2016-131) of 10th February 2016 which reformed the law of contracts and the general regime of obligations „has improved" this recognition of the contract

[3] Under French law, the adoption of Law No. 78-22 of 10th January 1978 on consumer information and protection in respect of certain credit operations has meant a change of perspective in favor of admitting the contract group theory; subsequently, the consequences of this theory were extended to case law level and beyond the scope of consumer credit agreements. Applying the theory of contractual indivisibility, several legal foundations have been circulated in French case law, such as i) the rule of ancillarity expressed by the Latin adage *Accesorium sequitur principale*, please see Cass. com., 7th April 1987; ii) the theory of condition in the Sedri decisions of 4th April 1995 according to which the effectiveness of each contract would be subordinated to the achievement of a suspensive condition which would consist in the full execution of the other legal acts; iii) the basis of the indivisible obligation in the decision of 13th March 2008; iv) the basis for the notion of cause: the cause of a contract belonging to a contractual set would be to conclude other contracts to which it is closely linked so that the annulment of one of the legal acts of that set would lead to the disappearance of the cause of the others; please see Cass. civ 3, 3rd March 1993, Cass. Civ. 1, 1st July 1997, Cass. com., 25th February 2000.

[4] Cass. civ., ch. civ. 1, 1st July 1997, n° 95-15.642.

[5] C.A. Caen, 4th May 2005, Juris-Data n°282521.

[6] Cass., ch. Mixte, 17th May 2013. For a similar approach, please see also the previous jurisprudence – Cass. com., 15th February 2000.

groups[7].

Finally, sets of interdependent contracts are distinguished from the sets of contracts with a so-called unilateral dependency (the case of the loan contract whose termination will also justify the cancellation of the guarantee provided for its repayment).

The disputes over the nature of liability - contractual or delictual - between group participants or over the admissibility of direct action are those that usually separate the upholders of a rigorous application of the principle of the relative effect of conventions, such as Ariadne's only thread, which has to direct concrete solutions from the upholders of the contract group construction seen as a "*hyper-space* of the contract, its other dimension, similar to the virtual space of the internet (which is a non-place, since it is everywhere and nowhere). If we traditionally look at the bilateral contract in its three spatial dimensions (freedom of contract[8], binding force and relativity of effects) and in its temporal dimension (contract risk), its integration into a group of contracts makes it rise, upload in a virtual, partially incomprehensible fifth dimension" [9].

The subject must be approached with caution so as not to interfere with the legal security and, with specific reference to direct action (mechanism that allows the creditor to act on the subdebtor[10]), we must keep in mind that it cannot be considered admissible in any group of contracts, but only in two special situations:

i) when the law expressly provides;

ii) when the direct action is related to the transfer of a right or is ancillary to the transfer of an asset (transmission to successors with particular title of the rights and obligations closely related to a good provided by Article 1282 paragraph 2 New Civil

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[7] According to the provisions of art. 1186 French Civil Code (as amended) *„(1) A valid contract becomes obsolete when one of its essential elements disappears. (2) If the execution of several contracts is necessary for the performance of the same operation and one of them would disappear* (they would be terminated, emphasis added), *the contracts whose execution has become impossible by this disappearance and those for which the execution of the missing contract* (terminated/canceled, emphasis added) *was a determining condition of the consent of one of the parties would become obsolete*. (3) ...". Of course, the provisions of the Ordinance (no. 2016-301) of 14th March 2016, by which the provisions of the former art. L-311-20 of the Consumer Code became art. L-312-48 of the French Consumer Code according to which "*the obligations of the borrower take effect only from the delivery of the asset or the provision of the service. In case of a sale contract or a providing services contract with successive execution, the obligations (of the borrower, emphasis added) shall take effect upon the delivery or supply of the service and shall cease in the event of its interruption*".

[8] For a multidisciplinary perspective on freedom of contract, see Corina Petică-Roman, *The object of civil action*, in vol. *Libertatea contractuală. Limite legale și garanții procesuale/Legal limits and procedural guarantees*, coord. Irina Sferdian, Florin Mangu, Universul Juridic Publishing House, Bucharest, 2013, pp. 195-201.

[9] Please see Gheorghe Piperea, *Grupul de contracte. O teorie a haosului/Contract group. A chaos theory*, available at https://www.juridice.ro/268408/grupul-de-contracte-o-teorie-a-haosului.html. For doctrinary contributions in the area, please see also I. Deleanu, *Grupurile de contracte și principiul relativității efectelor contractului – răspunderea contractuală pentru fapta altuia/Contract groups and the principle of relativity of contract's effects - contractual liability for the act of another*, in *Dreptul/Law* no. 3/2002, p. 15 and the following., L. Pop, *Răspunderea civilă contractuală pentru fapta altuia / Contractual civil liability for the act of another*, in *Dreptul/Law* no. 1/2003, p. 66 and the following. With punctual reference to the contractual liability for other in the transport law, please see Gina Orga-Dumitriu, *Răspunderea juridică în contractul comercial de transport de mărfuri/Legal liability in the commercial contract of transport of goods*, *Publishing House* CH Beck, Bucharest, 2008, p. 115-134.

[10] For developments regarding the direct action in Romanian law, see Călina Jugastru, *Drept civil. Teoria generală a Obligațiilor/Civil Law. General Theory of Obligations*, Universul Juridic Publishing House, Bucharest, 2017, p. 54-55.

Code - exception from the relativity of the contract effects). Applying this connection to the transferred asset, the French case law admits in the translational ownership chains the contractual character of the sub-acquirer's action towards the first link of the chain, which means the admissibility of direct actions, while in non-transferring chains, direct actions are rejected, the eventual claims being able to be capitalized only in the field of delictual liability.

2. Determination of judicial competence in the case of direct action arising from an international chain of contracts

If there is a direct action, the notified judge has 2 possibilities at its disposal, in order to verify its competence: either it uses its own conflicting rules of jurisdiction (2.1), or it considers the conventional law in the matter (2.2).

2.1. Designation of international jurisdiction by recourse to conflicting rules of jurisdiction.

It is necessary to distinguish between the situation in which there is no clause conferring jurisdiction in the chain of contracts **(2.1.1)** and the situation characterized by the existence of one or more clause conferring jurisdictions **(2.1.2)**.

2.1.1. The case when there is no clause conferring jurisdiction in the contract chain.

The court competent in the case of direct action varies according to whether it is a transferring ownership contract chain or a non-transferring ownership contract chain.

A. The hypothesis of transferring ownership contract chain

French case law has admitted since 1991 the contractual qualification of the direct action existing in the transferring ownership contracts chains. Thus, the contractual action being transmitted incidentally to the object, the courts acknowledged that the sub-acquirer enjoys all the rights and actions attached to the work that belonged to its author. As the intermediary seller has a contractual-like action against the manufacturer and the sub-acquirer benefits from the same action against the manufacturer. If the French judge operates the *lex fori* qualification of the direct action, it will resort to the conceptions retained in its own law. Qualified as contractual by the French judge (the judge of the forum), in the case of direct action exercised within a group of contracts under the incidence of art. 46 French Civil Procedure Code, the plaintiff could refer to the court at its choice, i.e., the court near the defendant's domicile, the court at the place of actual delivery of the good or at the place of execution of the provision of services[11]. Will the place of actual delivery by the original manufacturer-seller or the place of actual delivery by the intermediate seller be taken into account? In

[11] Please see Pikol Sieng, *Action directe et groupe de contrats internationaux*, p. 3, available at https://www.memoireonline.com/08/08/1471/action-directe-et-groupe-de-contrats-internationaux.html, consulted on 1.10.2021.

application of the same legal text, the contractual action of the sub-acquirer against the manufacturer must be brought before the court of the place where the defendant had to perform its obligation towards the original acquirer (the intermediate seller). Only in case the manufacturer would have commited towards the original acquirer to deliver the product directly to the sub-acquirer, the court from its domicile could be competent.

B. The hypothesis of non-transferring ownership contract chain

Qualified by the French tort case law, in the case of the final creditor's action against the debtor of its own debtor, the plaintiff can refer, in addition to the court at the defendant's domicile, to the court at the place of the damaging act or to the court in whose area the damage occurred. As it has been well noted in the doctrine, while the location of the defendant's domicile does not raise specific issues, it is not the same in the case of the other two situations[12]. The damage is often sustained in several states due to the frequent internationalization of the manufacturing process - in a case decision, the valve whose defect was at the origin of the damage suffered by the aircraft can be composed of several elements, one of which is manufactured in one country X and another in a country Y[13]. We are witnessing, practically, a tendency to multiply the competent courts, which causes serious probation difficulties and is a factor of altering the legal security. In order to overcome these inconveniences, it was proposed to take into account the place wherewith the tort has the closest links or the place of putting the product into circulation.

2.1.2. Case where there are one or more clauses conferring jurisdictions in the contract chain

Whereas the opposability of the clause within a non-transferring ownership chain seems to be excluded, not the same solution is adopted within the transferring ownership contract chain. In the latter hypothesis, when the plaintiff acts based on the liability of the defendant, it practically puts a derived law to motion.

A. Introduction of the clause conferring jurisdiction in the initial contractual relationship

In view of French doctrine, the clause conferring jurisdiction should "migrate" without too much difficulty downstream of the contracts chain. Nothing precludes *a priori* that this clause may be transmitted by successive operations or by the effect of law or convention of the parties. The clause conferring jurisdiction is considered to be transferred to the final contract provided that the direct action in question is of a contractual nature. We have already seen that, according to the French concept, the action of the sub-acquirer against the manufacturer is classified as contractual. Indeed, the jurisdiction clause attached to the contract between the manufacturer and the intermediate acquirer is transmitted, by applying the effect of ancillarity to the sub-

[12] Please see P. Sieng, *op. cit*., p. 4.
[13] Cass., 1ère civ., 21 juin 1988, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000007021075, consulted on 1. 10.2021.

acquirer.

The Luxembourg Court, which refused to classify the action of the sub-acquirer against the manufacturer as contractual in *Jakob Handte*[14] decision, did not acknowledge the same interpretation. Accordingly, the Court has ruled that this clause conferring jurisdiction inserted in the original contract cannot oppose to the sub-acquirer, third party to the contract; such a clause should be binding only for the parties whom it has been agreed to. The decision was surprising, as the Court acknowledged exactly the opposite in its previous decision, *Tilly Russ*[15], where it admitted that a clause contained in a bill of lading is opposable to the third party bearing the bill of lading.

Like the clause conferring jurisdiction, the arbitration clause will follow the fate of the other rights and obligations stated in the main contract in which it is inserted, in the situation of successive resales of the asset.

B. Introduction of the clause conferring jurisdiction in the final contractual report

In the latter case, the answer that emerges is negative. The notion of contract chain is based on an extension of the contractual link that becomes possible through the circulation of rights and actions attached to the asset that passes from the initial link to the final link of the chain through successive transferring ownership contracts. It is practically impossible for this to be done in reverse, which means that the final link cannot activate the jurisdiction clause inserted in its contract against the original link. The clauses inserted in the contracts constituting the downstream of the chain cannot therefore "earn" its upstream[16].

2.2. The international jurisdiction of direct action in dealing with the Brussels Convention of 27th September 1968, the Brussels I and Brussels I bis Regulations

2.2.1. Preliminary details

The adoption in 1968 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and subsequently the 1980 Rome Convention on the Law Applicable to Contractual Obligations was only the preamble that opened the odyssey of the cohabitation between Union law and private international law. Subsequently, the entry into force of the Treaty of Amsterdam on 1st May 1999 (and the acquisition by the Community under Article 65 TEC of a competence on judicial cooperation in civil matters having cross-border implications) is the historical threshold which gives rise to an inevitable movement[17] of communitization of private international law. As a result of the transfer of the field of cooperation in civil matters

[14] CJEC, 17th June 1992, C-26/91, *Jakob Handte*, ECR 1992, p. I-3967.
[15] CJEC, 19th June 1984, C-71/83, Tilly Russ, in ECR 1984, p. 02417.
[16] See P. Sieng, *op. cit.*, p. 9.
[17] See Anne-Julie Kerhuel, *La place du droit international privé dans la construction européenne* [*What Place for Conflict-Of-Law Rules in The Construction of European Community Law*], Georgetown Public Law and Legal Theory Research Paper No. 10-74, p. 16, available at http://scholarship.law.georgetown.edu/fwps_papers/137.

from the former Pillar III of the Union (according to the architecture established by the Maastricht Treaty) to the first pillar, the acquisition of these new powers allows the lawmaking by the regulation technique of the matter regulated until then by resorting to international conventions; consequently, the relevant international conventions have been communitized by their transformation into regulations, as instruments specific to the legislative method of Pillar I. Thus, "from national and praetorian," private international law has become increasingly "European and legislative"[18].

2.2.2. Competence in contractual matter

It was regulated by art. 5 point 1 of the Brussels Convention and subsequently by art. 5 point 1 of the Brussels I Regulation, respectively by art. 7 point 1 of the Brussels I bis Regulation, provisions which can only be applied if the dispute concerns the contractual matter. In the mission of interpreting private international law, the qualification operation will increasingly become the "work" of the Luxembourg Court, which will popularize the autonomous qualification postulated by Rabel. The Court must determine this notion of an **autonomous** manner[19], in the sense that it must be interpreted not by reference to the law of a Contracting State but to the *objectives* and *system* (emphasis added) of the Convention and, subsequently, to the Brussels I and Brussels I bis Regulations.

Thus, Union law, under the auspices of the Court of Justice, becomes fertile ground for "autonomous" concepts, especially in contractual matters[20], which serve the overriding interest of the coherence of an area which is the subject of intense legislative activity. The autonomous qualification of more general notions such as contractual matter [21] or contractual obligation is also complemented by the interpretation of connecting criteria, such as the place of execution of the obligation, the jurisprudential developments favoring the identification and overcoming gaps from one normative instrument to another.

Jakob Handte decision is particularly relevant for the introduction in the interpretation grid of the contractual matter notion of the criterion regarding the existence of "a commitment freely assumed by one party towards the other." In the case, being about (as we have seen) the action of the sub-acquirer of a merchandise purchased from an intermediate seller against the manufacturer to repair the damage caused by the hidden defects of the sold good, it is found that there is no contractual connection - and no contractual obligations between the sub-acquirer and manufacturer, the latter not assuming any contractual-like obligation towards the sub-acquirer; therefore, art. 5,

[18] See Gwendoline Lardeaux, *Droit international privé des obligations contractuelles*, Éd. Larcier, 2016.

[19] For developments on autonomous qualification, see C. Jugastru, *Calificarea în conflictele de legi și în conflictele de jurisdicții/Qualification in conflicts of law and in conflicts of jurisdictions*, in *Revista Universul Juridic/Legal Universe* Journal no. 6/2016, available at http://revista.universuljuridic.ro/ calificarea-conflictele- de- legi-si-conflictele-de-jurisdictii/8/.

[20] G. Busseuil, *Contribution à l'étude de la notion de contrat en droit privé européen*, L.G.D.J., Paris, 2009, p. 299, n° 284.

[21] For developments on the extensive and restrictive interpretation of the contractual matter notion, the established criteria and relevant case law examples, see Gina Orga-Dumitriu, *Europeanization of Private International Law. Autonomous Interpretation of "Matters Relating to a Contract" - a Test of Coherence*, in C. Jugastru, G. Orga-Dumitriu, N.-C. Aniței, *Exploring the Boundaries of International Private Law. International Perspectives on Law, Policy and Practice*, Symphologic Publishing, 2016, p. 14-21.

point 1) of the Convention is interpreted as not applying to the disputed report.

2.2.3. Jurisdiction in matters relating to tort

After the rule of autonomous interpretation of civil and commercial matters has been established by the *Eurocontrol* decision and confirmed by the *Arcado* decision with reference to the contractual matter, in the *Kalfelis* decision, the Court will acknowledge the autonomous qualification of the matter relating to tort. The Court points out that "the notion of delictual or quasi-delictual matter within the meaning of art. 5 point 3 of the convention must be considered an autonomous notion comprising any claim which seeks to call into question the liability of a defendant and which does not arise from the <contractual matter> within the meaning of art. 5 point 1"[22]. The *residual* definition of the delictual matter will be resumed *tale quale* and under the incidence of art. 5 point 3 of the Brussels I Regulation in *Brogsitter*[23] case law. The mentioned texts give the plaintiff an option of competence, allowing it to bring the defendant not only before the court of its domicile, but also before the court of the place where the harmful event occurred (according to the Convention), adding to this assumption the place where there is the risk that the prejudicial act might occur (according to the Regulation).

2.2.4. A supplementary contribution of *Jakob Handte decision:* the Luxemburg Court's refusal to acknowledge the contractual character of the direct action

Is a direct action, arising from an international contract chain, part of the Brussels Convention or Brussels I/Brussels I bis Regulation's scope? We have shown that a contractual-like direct action exists but only in the transferring ownership chain, which is the case with French law unlike most national laws which do not receive the contractual qualification of direct action. Strictly applying the principle of the relative effect of the conventions, any action brought by the final link in the chain of contracts against the original one will be considered delictual for the simple reason that the plaintiff is not a party to the contract concluded with the original acquirer.

Considering that the direct action of the sub-acquirer against the original seller was of a delictual nature, the Court implicitly rejects the idea of a direct action arising from the chains of contracts, more precisely from its contractual source. Thus, the application of art. 5 point 1 of the Convention is rejected, considering that the direct action of the sub-acquirer against the original seller can only be of a delictual nature.

3. Determination of the law applicable to direct action in contract groups

In establishing the law applicable to direct action, we will observe the same distinction between i) the action resulting from a transferring ownership chain and ii) the action arising from a non-transferring ownership chain.

[22] CJEC, 27th September 1988, C- 189/87, *Kalfelis*, in ECR, 1988, p. 5565, par. 17.
[23] CJEU, 13th March 2014, C-548/12, *Brogsitter*, available at curia.europa.eu.

3.1. The law applicable to direct action arising from a transferring ownership contract chain

Where there are two or more contracts forming a transferring ownership chain, French law has raised the issue of determining the law applicable to the direct action of the sub-acquirer against the manufacturer: will it be the law governing the initial contract between the producer and the intermediary seller or the law governing the contract between the intermediary and sub-acquirer? By applying the principle of ancillarity on which the theory of the contract group is based, the sub-acquirer will be able to invoke against the manufacturer the rights initially born in the patrimony of the first acquirer (intermediate seller), which means that the rights of the last acquirer find their source in the initial contract. In other words, the applicable law is that which governs the contract concluded by the manufacturer (the defendant in direct action) with the original seller[24], but only in legal systems that admit the theory of contract groups and qualify as contractual the action of the sub-acquirer against the manufacturer.

The analysis calls for a subsidiary differentiation between the situation where:

i) the initial contract is one of domestic law and the situation where;

ii) the initial contract has an international character.

Insiders[25] generally tend to appreciate that the recourse to the mechanism of conflicts of laws is excluded in the case where the initial contract is one of domestic law. We point out that the applicable law will not always be the national law of the parties, as they have the possibility to designate a foreign law other than their national law. Of course, this freedom to choose the applicable law will take into account the provisions of art. 3, para. (3) of the Rome I Regulation which provides that, "*Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement*".

In the event that the original contract of sale is of international, the notified court will have to investigate, in the absence of an *electio juris* clause, the instruments of uniform law in international sales: The Hague Convention of 15th June 1955 on the law applicable to international sales of goods and the Vienna Convention of 11th April 1980 on the International Sale of Goods. The first contains rules of private international law, namely conflicting rules on determining the law applicable to sales contracts falling within its scope, while the second contains rules of substantive law, establishing a true substantially uniform regime applicable to the international sale of goods.

If the initial contract of the contract chain is an international sale of a tangible movable asset, art. Article 3 of the Hague Convention 1955 designates, in the absence of a choice by the parties of the applicable law, the law of the seller's habitual residence at the time when it receives the order; however, as an exception, the sale will be governed by the national law of the country in which the buyer has its habitual residence if in that country the order was received by the seller or by its representative. In the application

[24] In the sense that direct action is inadmissible when the *lex contractus* of one of the contracts making up the links in the chain does not recognize it, see Frédéric Leclerc, *Les chaînes de contrats en droit international privé*, *Journal du Droit International* Clunet, no. 2, 1995, p. 310.

[25] Frédéric Leclerc, *op. cit*., p. 243.

of art. 21 of the Rome Convention of 19th June 1980 on the law applicable to contractual obligations[26], the Hague Convention is the lex *specialis* to the Rome Convention and will therefore provide the solution for determining the applicable law.

Signed by 94 states and enjoying great success, the Vienna Convention contains rules on the formation and execution of the international sale of goods. The question is whether the sub-acquirer can promote, on a contractual basis, the direct action against the original seller when the initial sale is governed by the Convention. Interpreting the provisions of art. 4 of the Convention according to which it "*governs exclusively the formation of the contract of sale and the rights and obligations arising from such a contract between the seller and the buyer*" (emphasis added), it would result that only *inter partes* ratios falls within the scope of Convention, not the direct action of the sub-acquirer against the original seller. The issue has been brought to the attention of the French Court of Cassation since 1999 concerning the damage suffered by a French buyer of a product which had been purchased by a French intermediary from an American manufacturer[27]. Although the Court explicitly rejected the applicability of the Vienna Convention to the direct action brought by the French sub-acquirer against the US manufacturer based on a contractual guarantee, the solution has been received differently[28] and a Pandora's box appears to have been opened in a legal order that admits the theory of the group of contracts.

3.2. The law applicable to direct action arising from a chain of non-transferring property contracts

Under French law, the direct action[29] of the final link in a non-transferring ownership chain against the original link is delictual, with all the consequences arising from that classification as regards the determination of the applicable law. In Romanian law, does the subcontractor have a direct action against the beneficiary of the work? Unlike the system of the old Civil Code where the direct action of the workers regulated by art. 1488 Civil code could not be used by the subcontractor-legal entity[30], the provisions of art. 1856 NCC (despite the imprecision of the marginal name of the article) provide that the direct action also belongs to the subcontractors, i.e., those companies that have been subcontracted by the main contractor, for the execution of the works[31].

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[26] This convention is not detrimental to the application of international conventions where a contracting party is or becomes a party.

[27] Cass. 1ère civ., 5th January 1999, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000007039995, consulted on 1.10.2021.

[28] To detail the doctrinary trends of interpretation on this decision, see Pikol Sieng, *op. cit*., p. 22.

[29] For a contribution on comparative law in the matter of classification of civil actions see Corina Petică-Roman, *Acțiunea civilă. Perspectivă comparativă/Civil action. Comparative perspective*, Ed. Universul Juridic, Bucharest, 2017, p. 172-212.

[30] High Court of Cassation and Justice (HCCJ), Division II of Civil Court, by decision no. 3741 of 25th November 2014 ruled in Case no. 10779/63/2013; on the contrary, see dec. 79/2014 of Craiova Court of Appeal.

[31] Gabriel Tita-Nicolescu, *Noul Cod civil. Acțiunile directe/The New Civil Code. Direct actions*, Acta Universitatis George Bacovia. Juridica, Volume 5 Issue 2/2016, available at https://www.ugb.ro/Juridica/Issue10ROEN/14._Actiunile_directe_conform_NCC.Tita_Nicolescu.UTBv.RO.pdf, consulted on 1.10.2021; Dominic-Alexandru Gidro, *Acțiunile directe în contractele civile reglementate de noul Cod civil. Elemente de drept comparat/Direct actions in the civil contracts regulated by the New Civil Code. Comparative law elements*, Ed. Universul Juridic, Bucharest, 2018, p. 363.

We have seen how the Luxembourg Court did not want to qualify, in the *Jakob Handte* decision, the action of the sub-acquirer against the manufacturer as contractual and refused to apply art. 5, point 1 of the Brussels Convention. However, European Union law has not remained indifferent in the circumstances where the link between two contracts is close enough to be liable to legal consequences and several provisions on the legal fate of linked contracts appear first in consumer contracts in the context of regulating the right of withdrawal of the consumer through consumer directives, we then find them in the Draft Common Frame of Reference (DCFR) or in the proposal for a regulation on a Common European Sales Law (CESL).

4. Linked contracts in the consumer directives, DCFR and the proposal for a regulation on a CESL

4.1. Linked contracts in the Consumer Directives prior to the new Directive on Credit Agreements for Consumers. Preamble

The first generation of consumer directives is a mixture of a variety of measures regarding either particular sales methods or atypical contracts and reflects the interest of the European legislator for the stage of contract formation, being activated preventive means of protecting consumer consent through the obligation of pre-contractual information, legal term of reflection and the right of withdrawal. In the context of exercising the latter, there will be a need to clarify the legal consequences of linked contracts.

4.1.1. Doorstep-Selling Directive 85/577/EEC

Of 20th December 1985 to protect the consumer in respect of contracts negotiated away from business premises was the first European directive to grant the right of withdrawal to the consumer who purchased goods or services from a trader in the situations provided for in Art. 1 para. (1), but this did not include any provision on linked contracts.

In *Schulte* and later in *Crailsheimer*, the German courts asked preliminary questions as to whether the Directive on doorstep-selling should be construed in the sense that the withdrawal from the credit contract concluded for the purchase of a property would automatically cause a withdrawal from the procurement contract. The Court ruled that art. 3 para. (2) (a) of Directive 85/577/EEC explicitly excluded the contracts of sale related to immovable property even if they are part of a financial investment whose financing is provided by a loan and whose contractual negotiations take place both in respect of the real estate sale contract and the loan contract serving exclusively for financing in a situation of doorstep-selling [32]. The Directive does not preclude national rules which provide that the sole consequence of withdrawing from a loan agreement is its cancellation even in the case of financial investments for which the loan would not have been granted in the absence of the purchase of a real estate or that the consumer using its right of withdrawal must immediately reimburse to the money-

[32] CJEC, 25th October 2005, C-350/03, *Schulte*, in ECR 2005, p. I-9215, para. 81.

lender the borrowed amount, as well as the interest charged on the market[33].

In other terms, in the doorstep-selling situations, it is up to the national law to decide if there is or not an effect on the linked contract. This means that these jurisprudences seem to prove that in the absence of explicit provisions in a directive, in principle, the general concept of efficiency cannot be the foundation based on which the destiny of the linked contracts can be determined[34].

4.1.2. Linked contracts in the Timesharing Directive 94/47/EC

On the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis[35]. The first explicit provision on the fate of some distinct contracts in respect of their legal nature in the context of the withdrawal right was art. 7 of Time-sharing Directive mentioning that the scope of these provisions is very limited; *only the credit agreements related to the contract on the usage on a limited period of the immovables (although the "linked contracts" term itself is not used)* are taken into consideration. Accordingly, in case the acquirer exercises the right to cancel the contract on the usage on a limited period of the immovables or to withdraw from the contract, the credit agreement will be cancelled without penalties[36]. It shall remain in the responsibility of the member states to establish, according to art. 7, para. 2 of the Directive, the ways of cancelling the credit agreements.

4.1.3. Linked contracts in the Distance Selling Directive 97/7/EC

O*n the protection of the consumers in respect of distance contracts*. The legal fate of linked contracts as a result of exercising the right of withdrawal was subsequently regulated by the Directive 97/7/EC on distance contracts, art. 6 para. (4), taking over the wording used by art. 7 of the Directive 94/47/C on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. In case i) the price of the goods or services is wholly or partly covered by a credit granted by the supplier or in case ii) this price is wholly or partly covered by a credit granted to the consumer by a third party, based on an agreement between the third party and the supplier, *the credit agreement is terminated, without penalties, when the consumer shall exercise its right of withdrawal from the*

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[33] *Schulte*, para. 103. See also Cristina Elena Popa Tache, *Legal treatment standards for international investments. Heuristic aspects*, Adjuris – International Academic Publisher, 2021 (E-Book), pp. 5 to 38.

[34] See Tâm Dang Vu, *Linked contracts in the DCFR, The Consumer Rights Directive and The Draft Optional Instrument*, in *Linked Contracts*, eds. Ilse Samoy, Marco B.M. Loos, Intersentia, Cambridge, 2012, p. 121; Cristina Elena Popa Tache, *Introduction in International Investment Law*, Adjuris – International Academic Publisher, 2020, pp. 120-129.

[35] The Directive 94/47/EC (of the European Parliament and the Council of 26th October 1994) on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis was replaced by Directive 2008/122/EC of the European Parliament and of the Council of 14th January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

[36] The provided condition is that the price is partially or totally covered by a credit granted by the seller or by a credit granted to the acquirer by the third party based on an agreement between the third party and the seller.

distance contract.

4.1.4. Additional contracts in the Distance Marketing of Financial Services Directive 2002/65/EC

Concerning the distance marketing of consumer financial services. The terminology used by art. 6, para. (7) from the mentioned directive, for the case where to a distance contract for financial services is attached another contract on the services provided by a supplier or a third party, is a source of uncertainty, the used term being that of additional contract and we do not know if additional is more than ancillary. In the Dutch translation is used the word "bijkomend", the German translation uses "Zusatzvertrag", the English one uses "additional contract", the French one uses "contrat additionnel". Of course, if it is meant that the scope of Directive 2002/65/EC is limited to contracts with an ancillarity connection, why are the following terms not used: in English "ancillary", in French "accessoire", as it was done in the Directive 2008/48/EC on credit agreements for consumers?

Instead, we can notice a consolidation of the regime of these contracts, as the text includes additional clarifications regarding its scope in the sense that the application of art. (6) para. (7) is limited to distance contracts for financial services which are not covered by the corresponding articles of the two previous directives.

4.2. Linked contracts in the Consumer Credit Directive 87/102/EEC and in the Directive Consumer Credit Directive 2008/48/EC

4.2.1. The contribution of the Consumer Credit Directive 87/102/EEC and transposition differences

It was the merit of the Directive 87/102/EEC (*of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit)* to establish rules incidental to linked contracts independently of the right of withdrawal.

Under what conditions are considered linked contracts a contract for the supply of goods or services and a credit contract? The conditions are listed by art. 11 para. (2) letter a)-c): the consumer must conclude a credit contract with *a person other than* the supplier of the goods or services; there must be a *prior contract* between the grantor of the credit and the supplier of the goods or services under which the credit is offered *exclusively* by the grantor of the credit to the customers of the supplier concerned in order to purchase goods or services from that supplier; finally, a more restrictive condition, *the consumer must have obtained the credit under that prior agreement* [in case the supplier of the goods or services cooperated with several credit institutions, art. 11 para. (2) not being applicable]. The doctrine received the latter condition with reservation, appreciating as more relevant the criterion of economic unity between the trader (supplier of goods or service provider) and the creditor.[37]

[37] See Peter Rott, *Maximum Harmonisation and Mutual Recognition versus Consumer Protection: The example of Linked Credit Agreements in EC Consumer Credit Law*, in *The European Legal Forum 2006*, p. I-62, available at http://www.simons-law.com/library/pdf/e/677.pdf, consulted on 1.10.2021.

Although it did not provide for the right of withdrawal in favor of the consumer, the Directive contains rules of protection for the situation where the goods supplied or services provided are not compliant: when the consumer claimed damages from the supplier without obtaining the compensations entitled to, the consumer is entitled to claim damages from the grantor of the credit[38] (of course, subject to the fulfillment of the threefold requirement referred to above). The extent to which and the conditions where the right to compensation could be exercised was to be detailed by the Member States.

The technique of minimum harmonization traditionally used in the first generation of consumer directives is also maintained on this occasion[39] and is the explanation of the differences found between national laws regarding the transposition and implementation of art. 11 of Directive 87/102/EEC. While some have literally transposed art. 11, *other Member States have agreed to be stricter, exceeding the minimum level of protection required by the Directive. This is the case in France, the United Kingdom and Germany, whose approaches were later a source of inspiration for the revision of the consumer acquis and the new consumer credit directive.*

In France, a credit agreement concluded by a consumer is automatically terminated or canceled when the financed contract is terminated or declared invalid by a court decision (art. L 311-21 of the Consumer Code). The jurisprudence reflects the increase of the concept of interdependence between two contracts in the French legal doctrine[40] and the Preliminary reform project on the law of obligations and prescription[41] provided by art. 1172-3 that when one of the interdependent contracts is invalid, the parties of the contracts forming the same set can take advantage of their obsolescence.

The United Kingdom even established a system of joint and several liability in its Consumer Credit Act of 1974. In accordance with Article 75 of this Act in certain cases of debtor-creditor-supplier contracts, if the creditor is closely associated with the supplier of goods or services and if the consumer has a complaint against the supplier in connection with a false statement or breach of contract, it has a similar action against the creditor who, together with the supplier, is jointly and severally liable to the debtor.

Germany introduced the concept of linked contracts (*verbundene Geschäfte*) and the economic unity principle (*wirtschaftige Einheit*) in paragraph §9 of the Consumer Credit Act (*Verbraucherkreditgesetz*), which was later replaced by §358 and 359 BGB (German Civil Code). In accordance with § 9 para. (1) of the *Verbraucherkreditgesetz*, a purchase contract and a consumer credit agreement were considered linked if the credit was used to finance the purchase and both contracts could be considered as an economic unit. It was assumed that there was an economic unit if the supplier was involved in the preparation or conclusion of the credit agreement. *No pre-existing agreement or long-term relationship between the supplier and the creditor is required*. Exceptions are made

[38] See art. 11 para. (2) of Directive 87/102/EEC.

[39] According to art. 15 of Directive 87/102/EEC, it "shall not preclude Member States from retaining or adopting more stringent provisions to protect consumers consistent with their obligations under the Treaty".

[40] See S. Pellé, *op. cit.*, p. 572 and, more recently, F. Houssais, Interdépendance des contrats: la nouvelle donne depuis les arrêts du 17 mai 2013, available at https://www.village-justice.com/articles/INTERDEPENDANCE-DES-CONTRATS,18195.html, consulted on 1.10.2021.

[41] The entire Catala Reform Project text can be accessed at https://archive.org/stream/AvantProjetDeReformeDuDroitDesObligationsEtDeLaPrescriptionEtExposeDesMotifs/Avant-projet_de_reforme_du_droit_des_obligations_et_de_la_prescription_et_expose_des_motifs_djvu.txt., consulted on 1.10.2021.

for credit agreements intended for the purchase of real estate, in which case stricter requirements apply: an economic unit is presumed only if the creditor and the seller are the same person or if the creditor was also involved in the purchase of the property, in collaboration with the seller[42].

4.2.2. Linked credit agreements in the new Consumer Credit Directive 2008/48/EC (CCD)

In an attempt to close the transposition gaps in the laws of the Member States, the new Directive 2008/48/EC (*of the European Parliament and of the Council of 23rd April 2008 on credit agreements for consumers*) has proposed a more coherent regime by introducing specific criteria for qualifying linked credit agreements and by using two conceptual categories: linked credit agreements and service contracts ancillary to a credit agreement. While the linked credit contracts are treated in **art. 3 letter (n) and in art. 15,** the service contracts ancillary to a credit agreement are subject to art. 14 of the CCD.

Definition of the linked credit agreement. Within the meaning of art. 3 letter (n), a linked credit agreement is a credit agreement whereby: „i) the credit in question serves exclusively to finance an agreement for the supply of specific goods or the provision of a specific service, and ii) those two agreements form, from an objective point of view, a commercial unit; a *commercial unit* shall be deemed to exist where the supplier or service provider itself finances the credit for the consumer or, if it is financed by a third party, where the creditor uses the services of the supplier or service provider in connection with the conclusion or preparation of the credit agreement, or where the specific goods or the provision of a specific service are explicitly specified in the credit agreement".

The influence of German law is clear: the credit must contribute to the financing of the acquisition *and* both contracts must be a business unit. The use of the term "commercial" instead of "economic" seems to be a concession to the UK approach, or the result of a desire to comply with EU terminology. The term "commercial" is a term often used to refer to business relationships, so the emphasis is on the *subject* of the obligations. On the other hand, economic seems to refer to the reason, in other words, to *the objective cause, quid pro quo, do ut des* or the concept of reciprocity between obligations, thus being related to the object of the obligation. The presence of an economic unit can be, inter alia, deducted from the commercial relationship between the subjects of the obligation. Unfortunately, the scope of art. 3 (n) of the CCD is more restricted than in the case of German law because it is necessary that the sole purpose of the credit is to finance the acquisition. On the other hand, the added value is the abolition of the prior agreement required by the Consumer Credit Directive 87/102/EEC, the mere participation in the conclusion or preparation of the credit being sufficient.

***Which are the effects* of linked credit agreements in the CCD concept?** A first consequence concerns the right of withdrawal: *if the consumer has exercised its right of withdrawal from a contract for the supply of goods or services, it shall no longer be bound by a linked credit agreement*. This consequence seems to be inspired by 358 BGB.

[42] See C. Möller, *§358 Verbundene Verträge*, în *Kommentar zum Büegerlichen Gsetzbuch: Band 2*, eds. H.G. Bamberger, G. Roth, C.H. Beck, Munich, 2008, p. 1683.

The second consequence concerns the subsidiary right recognized to the consumer to file appeals against the creditor established by art. 15 para. (2) CCD: "Where the goods or services covered by a linked credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract for the supply thereof, the consumer shall have the right to pursue remedies against the creditor if the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction to which he is entitled according to the law or the contract for the supply of goods or services. Member States shall determine to what extent and under what conditions those remedies shall be exercisable."

Finally, art. 15 para. (3) is symptomatic of the reluctance of Member States at that time to the method of maximum harmonization of EU consumer credit law. Thus, the text specifies that art. 15 is without prejudice to any national rules according to which the creditor is jointly and severally liable in respect of any claims which the consumer may have against the supplier, where the purchase of goods or services from the supplier has been financed by a credit agreement.

4.2.3. Ancillary service contracts in the new Consumer Credit Directive

Linked contracts vs. ancillary contracts. The provisions of art. 15 relating to linked credit agreements are not the only references to contracts constituting a commercial unit within the CCD. The provisions of art. 14 para. (4) governs the ancillary service contracts related to a credit agreement, the services provided by the creditor or by a third party under a contract between the third party and the creditor. The establishment of the dynamics between these two contracts is also done in the context of the right of withdrawal. Therefore, if the consumer exercises its right of withdrawal from the credit agreement, it no longer has the obligations arising from the contract for the provision of the ancillary service related to the credit agreement.

The ancillary contract term (*Nebenleistung* in German, *contrat accesoire* in French, *nevendienst* in Dutch) differs from the linked (credit) agreement term used in art. 3 (n) and 15 of the CCD (*Verbundene Verträge, contrat lié, gelieerde overeenkomst*) and from *additional contract* of art. 6 para. (7) of the final thesis of the Directive 2002/65/EC concerning the distance marketing of consumer financial services (*Zusatzvertrag, contrat additional, bijkomend contract*). Did the EU legislator want to avoid confusion between the two phrases? Article 3 letter (g), which defines the total cost of the credit to the consumer, seems to confirm this, noting that the costs of ancillary services related to the credit agreement, in particular insurance premiums, are also included if the credit is obtained subject to the conclusion of a service contract. However, this interpretation seems to be contradicted by the definition of ancillary contracts provided by the Time-Sharing Directive and by the Consumer Rights Directive.[43]

4.3. Ancillary contracts in Timesharing Directive 2008/122/EC

Article 11 para. (1) regulates the termination of ancillary contracts and provides that Member States shall ensure that, in the event of the consumer exercising its right of unilateral termination of the contract for the timeshare or of the long-term holiday

[43] See Tâm Dang Vu, *op. cit.*, p. 131.

product contract, *any exchange contract* depending on it or *any other ancillary contract* will be automatically terminated at no cost to the consumer. The definition of the ancillary contract can be found in art. 2 letter (g) of the Directive, being about that "contract under which the consumer acquires *services linked* (emphasis added) to a timeshare contract or long-term holiday product contract, these services being provided by the trader or a third party on the basis of an arrangement between that third party and the trader".

It is surprising that a contract is to be considered ancillary when the services are *linked* to the timeshare contract. Basically, despite the use of the word ancillary, no ancillarity link is required. Using the analogy procedure, is the meaning of the notion of linked contracts going to be extrapolated to linked services as well? Or, on the contrary, does the EU legislator intend to deviate from the business unit criterion set out in the CCD, which would mean that instead of forming a business or economic unit, the services should be linked? As the criterion of a business or economic unit is based on a jurisprudential and doctrinal recognition, we tend to appreciate that the Union legislator did not really want to abandon it when using the term linked services. One argument is that this ancillary contract must cover goods or services provided by the trader or a third party *based on an agreement* between that third party and the trader which coincides with the presumption of economic unity of § 358 (3) BGB[44].

The regime of contracts joints by a common economic purpose (one of which is a credit agreement) is also supplemented by rules on the conflict between the provisions belonging to different directives. According to art. 11 para. (2) of the Directive 2008/122/EC on Time-Sharing, *without prejudice to Article 15 of the Consumer Credit Directive*, "where the price is fully or partly covered by a credit granted to the consumer by the trader, or by a third party on the basis of an arrangement between the third party and the trader, the credit agreement shall be terminated, at no cost to the consumer, where the consumer exercises the right to withdraw from the timeshare, long-term holiday product, resale or exchange contract". Interpreting this text, we find that priority is expressly given to the provisions of art. 15 of the CCD which recognize to the consumer a subsidiary right to compensation. One difference is worth noting: unlike CCD, in the concept promoted by the Directive 2008/122/EC on Time-Sharing, it is not necessary to finance the contract exclusively by credit: partial coverage is sufficient.

4.4. Doctrinarian "codifications" and linked contracts

4.4.1. Context

The body of consumer directives and the instruments of European private international law relevant to the field of contracts (Rome I Regulation, Brussels I and Brussels I bis Regulation) represent the contribution of the Union legislator to the European private law by releasing what we now call the European contract law built mainly by the sectoral approach method. To counter-weight, in an effort to unify or at least to harmonize contractual matters, academic research groups have proposed various tools in the form of true "doctrinarian codifications" that externalize a so-called

[44] *Ibid*, p. 132.

"scholarly right" [45] : Principles of European contract law drafted by the Lando Commission (Principles of European contract Law - PECL), the European Code of Contracts drafted by the Academy of European Privatists in Pavia at the initiative of Prof. Giuseppe Gandolfi, Draft Common Frame of Reference - DCFR) proposed by the Study Group for a European Civil Code chaired by Prof. Ch. Von Bar and the Community Private Law Research Group and the Common Contractual Principles and Common Contractual Terminology drafted by the French research group of the Henri Capitant des Amis de la Culture Juridique Française Association and the Paris Society of Comparative Legislation. Of these, only DCFR contained provisions on linked contracts, which can only be salutary, all the more so as neither the Vienna Convention of 11th April 1980 on the International Sale of Goods (CISG) nor the Unidroit Principles (1994, 2004, 2010, 2016 editions) includes provisions regarding groups of contracts / linked contracts.

4.4.2. Linked contracts in DCFR

Most likely the formula of art. II-5: 106 DCFR - the last in the DCFR chapter on the right of withdrawal - was inspired by § 358 BGB and Art. 3 CCD and regulates only the consequences of linked contracts in the context of the right of withdrawal by a consumer. Art. II-5: 106 DCFR does not apply when one of the linked contracts is terminated by a means other than withdrawal (for example, for the rescission or termination of the contract for non-fulfillment of obligations or for invalidity).

While the Consumer Credit Directive 2008/48/EC defines linked credit agreements, DCFR wanted to be more innovative, considering also other types of linked contracts [art. II-5: 106 (1) DCFR]. Whereas the criteria for determining when contracts are linked are provided only for credit agreements, it is created the false induction that the linked contracts are limited to this particular category, which is a deviation from Article II-5: 106 (2) ACQP, which contains an additional phrase stating that contracts are linked if they objectively form an economic unit. Comments on DCFR[46] also provide that the linked contracts will most often be credit agreements, but it is not excluded that other contracts, e.g., maintenance contracts or insurance contracts, could be linked contracts.

However, Art. II-5: 106 (2) does not provide a clear definition of the term linked contract. Where a contract is financed in part or exclusively by a credit agreement, they shall form linked contracts, in particular:

- if the seller finances the consumer's execution Art. II-5: 106 (2) a);
- if a third party financing the execution of the consumer uses the services of the undertaking for the preparation or conclusion of the credit agreement (Article II-5: 106

[45] See Bénédicte Fauvarque-Cosson, *Droit européen și international des contrats: l'apport des codifications doctrinales*, Dalloz, 2007, p. 96. For additional provisions on these academic inspiration projects, please see Gina Orga-Dumitriu, *Dreptul european al contractelor. Realități. Influențe. Domeniu de aplicare / European contract law. Realities. Influences. Scope*, Ed. C.H. Beck, Bucharest, 2013, p. 29 and the following

[46] Available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EN_EPL_20100107_Principles__definitions_and_model_rules_of_European_private_law_-_Draft_Common_Frame_of_Reference__DCFR_.pdf, consulted on 1.10.2021.

(2) (b));

- if the credit agreement relates to specific goods, assets or services to be financed by this credit and if this connection between the two contracts has been suggested by the supplier of the goods, of other assets or services or by the credit supplier (Article II - 5: 106 (2) c); or

- if there is a similar economic link (Article II-5: 106 (2) (d)).

An exception will be made for speculative contracts. Art. II-5: 106 (4) DCFR provides that a consumer may withdraw from a credit agreement linked to a contract for the supply of goods, other assets or services whose price depends on the fluctuations in the financial market which are out of the supplier's control and which may occur during the withdrawal period, but the withdrawal from the credit agreement will not affect the speculatively linked contract.

Where a contract falls under Article II-5: 106 DCFR, the effects of the right of withdrawal shall extend to any linked contract. According to art. II-5: 105 DCFR, the obligations to execute the linked contracts are terminated, and both parties must return what they received through the linked contract [Art. II-5: 105 (1), (2) and (3) DCFR]. It should also be noted that the termination of the linked contract is not optional: the linked contract automatically shares the fate of the other contract.

4.5. Ancillary contracts in the Consumer Rights Directive from 2011

4.5.1. Preliminary explanation of the history of the adoption of the Directive

If minimum harmonization allows Member States to adopt provisions to ensure a degree of protection higher than the minimum provided for in directives, the maximum (or full) harmonization technique assumes that the States lack this margin of appreciation, not being able to introduce in the national legislation provisions different from the standards imposed by the directive. Although the method promoted after the Single European Act was that of minimum harmonization, we subsequently witnessed a change of perspective on the part of the Union's legislator by encouraging full harmonization; the e-commerce directive, the directive on distance marketing of financial services, the directive on unfair commercial practices, the consumer credit directive and the current directive on time-sharing are illustrative of this approach. The October 2008 Proposal for a Directive on Consumer Rights (pDCR) sought to fully harmonize aspects of the content of the contract in the relations between professionals and consumers, through a horizontal instrument - unfair clauses and the guarantee of conformity in the case of the consumer goods sale - and those concerning contractual practices specific to contracts negotiated off-premises and distance contracts. Reference the political reluctance of the Member States towards the method of full harmonization and competition between the pDCR and the optional instrument preliminary project found in the Feasibility Study (prepared by the group of experts charged to assist the Commission in order to propose an instrument of European contract law), the Directive 2011/83/EU (*of the European Parliament and of the Council of 25th October 2011 on Consumer Rights*) entered into force with a visibly narrow scope[47]; Consumer Rights

[47] The entry into force of the Directive has diminished the competition with the optional sales instrument; in practice, the loss suffered by the directive was an additional regulation for the Commission's legislative

Directive achieves complete harmonization (only) regarding the contractual practices of distance contracts and contracts negotiated off-premises, a welcome contribution being the regulation of a longer period in which the right of withdrawal can be exercised by the consumer (14 days).

4.5.2. Resumption of the terminological phrase of "ancillary contracts"

When art. 2 point 15 of the DCR [48] defines the notion of ancillary contract, the Union's legislator does nothing but take over the definition of the ancillary contract established in art. 2 para. (1) letter g) of the new Directive 2008/122/EC on Time-Sharing. In the context of the Commission's stated objective of revising the consumer contract acquis, the terminology option for ancillary contracts to the detriment of linked contracts (defined by the Consumer Credit Directive) seems rather a step backwards.

Under the aspects of the effects of exercising the right of withdrawal, the provisions of art. 15 para. (1) of the DCR provide that, "without prejudice to Article 15 of Directive 2008/48/EC (...) on credit agreements for consumer, where the consumer has exercised its right of withdrawal from a distance or an off-premises contract, any *ancillary* contract shall be *automatically terminated*, without any costs for the consumer, except for the cases provided in art. 13 (2) and to art. 14 of this Directive". In interpreting this rule, we will note that those *contracts linked to consumer credit* will continue to be subject to the rules established by the CCD. The automatic termination of the ancillary contract will have effects only for the future, finding here the same conception proved by the DCFR editors regarding the question of whether the ancillary contract ceases to have retroactive effect or only for the future. This provision seems, at least at first sight, to strain the provisions of art. 15 para. (2) of the DCR according to which Member States will lay down detailed rules on the termination of such contracts.

4.6. Prospective dimension: ancillary contracts in the Proposal for a Regulation on a Common European Sales Law

4.6.1. Short history

After the unrealistic draft for the adoption of a European Civil Code was replaced by the adoption of a Common Framework of Reference for Contracts (allowing the drafting of the academic projects referred to above), the Commission's Green Paper of 1st July 2010 on policy options for progress towards a European Contract Law (ECL) for consumers and businesses has repopulated the legislative method of the optional instrument: a regulation for creating an instrument of ECL was the option no. 4[49] out of

initiative on the proposal for a regulation on a common European Sales Law; in a freer expression, where the directive loses, the optional instrument gains; for a comparative view and developments, see Gina Orga-Dumitriu, *op. cit*., p. 324-328.

[48] For the purposes of the Directive, "ancillary contract" means a contract whereby the consumer obtains the goods or services which are the subject of a distance contract or an off-premises contract, and those goods or services are delivered or provided by the trader, or a third party based on an agreement between that third party and the trader.

[49] We show that we also expressed our opinion in favor of option 4 during the public consultation (in one of the 3 responses from Romania), see Gina Orga-Dumitriu, Laurenţiu Sorescu, Luminiţa Tuleaşcă, Ramona

the 7 proposed by the Green Paper, agreed by the European Parliament in its resolution of 8th June 2011 and supported, with a limited scope to the contract of sale, by the Commission through the Proposal for a Regulation on a common European Sales Law of 11th October 2011.

4.6.2. Ancillary contracts in the Common European Sales Law (CESL)

Ancillary contracts are regulated in the usual context of exercising the right of withdrawal. According to art. 46 CESL, in the event that a consumer withdraws from a distance contract or from a contract negotiated off-premises, any ancillary contracts shall be automatically terminated, without incurring any costs for the consumer, except as provided in the norms on the withdrawal from the main contract. According to art. 46 point 2 of the CESL, the provisions of art. 43-45 regarding the effects of withdrawal and consequent obligations shall apply accordingly also to ancillary contracts if these contracts have been governed by CESL. For ancillary contracts not regulated by this instrument, the obligations of the parties in case of withdrawal have been regulated by the applicable law (art. 46 point 3).

Finally, for reasons of ensuring a high standard of protection, art. 47 CESL provides that the parties may not rule out the application of the withdrawal chapter or derogate from it or alter its effects to the detriment of the consumer. In other words, when the buyer or customer is a consumer, the application of art. 46 is mandatory.

What is an ancillary contract in the conception of the proposed regulation on a CESL? The final thesis of the above-mentioned legal text answers us: it is a contract by which the consumer acquires goods, digital content, or related services *in connection with a distance contract or an off-premises contract*, and these goods, digital content or related services are provided by the trader or a third party based on an agreement between that third party and the trader.

We consider that the use of the term trader instead of professional is the result of superficiality in expression, of terminological inaccuracy rather than a real intention of the Commission to limit the personal scope of the proposal. The ratio between professional and trader is the one from gender to species, and the traders represent only one category of professionals. The fact that the definitions of the CESL trader and of the enterprises in the Feasibility Study are quasi-identical: "a trader" (and here we must correct the term and read "a professional") means any natural or legal person who acts for purposes linked to its commercial, industrial, craft or professional activity art. 2 (1) FS, respectively art. 2 letter (e) of the CESL.

An additional clarification can be found in art. 147 (2) of CESL where it is shown that in the situation of the termination of a contract of sale or a contract of supply of digital content, any related service contract will also be terminated.

Mariţiu, *Răspuns la „Cartea Verde a Comisiei privind opţiunile de politică în perspectiva unui drept european al contractelor pentru consumatori şi întreprinderi"/Response to the "Commission's Green Paper on policy options for the European contract law for consumers and businesses"*, in *Revista Română de Drept European/The Romanian Journal of European Law* no. 1/2011, pp. 163-190; the study (version in English language) was communicated and published (displayed) on the Internet page of the European Commission at the address http://ec.europa.eu/justice/news/consulting_public/news_consulting_0052_en.html consulted on 1.10.2021.

A careful reading of this provision allows us to make two findings:

i) firstly, we note the contribution of CESL in the matter of contracts constituting an economic unit: practically, we see regulated the relations between two contracts in hypotheses that go beyond the actual perimeter of exercising the right of withdrawal. Moreover, unlike the incident rules on withdrawal, this provision applies not only to contracts between enterprises and consumers but, in relation to the *ratione personae* scope indicated in art. 7 of the proposed regulation on a CESL and contracts between professionals in which at least one of the parties is an SME;

ii) secondly, we note that the text makes express reference exclusively to the related service contracts defined in art. 2 letter (m) of the proposal for a Regulation on the CESL[50].

7. Conclusion

Although the recognition of the concept of linked contracts is welcome, the issue has been generally addressed in the context of the right of withdrawal and with some terminological inconsistencies. The Directive on Consumer Rights has a limited scope and the proposed Regulation on CESL brings novelty elements without becoming a legal reality so far. The doctrine has already noted that the phenomenon of linked contracts is much broader than the cases covered by EU law and raises the legitimate question of whether it is really the mission of the Union's legislator to resolve this issue[51]. We can answer in the affirmative to the specific question concerning the effects of exercising the right of withdrawal, which is a prerogative recognized in the context of consumer protection policy under European Union law. Instead, the subject becomes much more delicate regarding other applications of linked contracts/groups of contracts likely to "irritate" the framework of the principle of the relative effect of conventions, all the more so as it resurrects the dilemma of competence, namely the legitimacy of the Union legislator's interventions in contract law.

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[50] "Related service" means any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or by the supplier of digital content under the sales-purchase agreement, the digital content supply contract or a separate contract for related services that was concluded at the same time as the sales-purchase agreement or with the contract for the supply of digital content, excluding: transport services, training services, telecommunication assistance services and financial services.

[51] See Tâm Dang Vu, *op. cit.*, p. 144.

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