GENERAL CONSIDERATIONS REGARDING THE PRINCIPAL LIABILITY FOR THE AGENT ACTIONS IN THE LIGHT OF THE NEW CIVIL CODE

Assistant Ph. D. Candidate **RAMONA DUMINICĂ**
Lecturer Ph. D. **DANIELA IANCU**
Faculty of Law and Administrative Sciences
University of Pitesti

Abstract:

The principals' liability for the agents' actions, although a classical theme, subject of debates, is still an actual subject by its practical issues. Though, the paper calls for an analyze of the fundament of this form of liability by a comparative approach of the legal provisions in the Civil Code in force and in the New Civil Code.

Given the fact that the source of the doctrinarian controversy related to the foundation of the principal responsibility has been, over time, represented by the legal gaps, we try to determine the way in wich the New Civil code will succeed in ending those debates.

Key-words: *liability, principal, agent, fundament, New Civil Code*

1. Preliminary considerations

The profound transformations supported by the Romanian society in the last years, the European integration, the commitment to the national legislation harmonisation, the existent will, at the European level, to achieve a New European Civil Code and, also, the impossibility of the Civil Code in force to regulate the new social, cultural, scientific and economic values, emerged from the natural evolution of the society, are only a few elements who have imposed the necessity to elaborate a new civil code.

Therefore, in 2009, the Romanian Parliament adopted the new civil code by the Law no. 287/2009. It was hoped that the new code will be a modern tool to regulate the fundamental aspects of the individual and social existence, including all the provisions regarding individuals, family relations, trade relations and even international private law relations, promoting a monistic conception in regulating private law relations. It remains to establish haw efficient is this approach.

However, in this article we aim to analyze, through a comparison with the regulations in force, the regulation, in the New Civil Code, of the principal liability for the agents' actions.

2. The regulation in force and the future one of the principal regulation for the agents' actions

At the present, the principals' liability for the agents' actions is regulated by the provisions of art. 1000, paragraph 3 from the Civil Code who provide: „Masters and agents are responsible for the damage caused by their servants and agents in the entrusted functions".

Also, the provisions of the Commercial Code are similar, article 393 providing: *„The employer is responsible for his agent... within the limits of the given assignment".*

The incomplete provisions of these texts have generated over time not only doctrinarian controversy, but practical difficulties in implementation.

It is well known that the legal basis of this liability form has raised many questions.

Obviously, it was expected that the New Civil Code end those controversies by indicating the basis of this liability. As it will be presented, the new provisions take a step forward comparing the incomplete article 1000, paragraph 3, but the expected specifications so necessary for the substantiation of this liability are still missing.

The New Civil Code regulate the principal liability in the IV-th chapter dedicated to the tort liability, section 4, entitled the vicarious liability, article 1373.

So, according to paragraph 1 of this article, "*The principal is forced to repair the damage caused by his agents every time when the agents' action is related to the attributions or the purpose of the functions entrusted".*

Still, the paragraph 2 provide: „*The principal is the one who, under a contract or according the law, is responsible with the direction, the supervision or the control over those complying with certain functions or assignments in his interest or of another."*

3. The controversy regarding the basis of the principal liability for the agents' actions kept by the New Civil Code

A first look at the new regulations leads us to assert that we are not in the presence of some provisions representing a real progress of the legal construction in this field.

First of all, formally, it must be underlined the lack of a minimum terminological constancy. Even though the principal liability is consecrated as a hypothesis of the vicarious liability, the terminology used by the article 1373 of the New Civil Code is "liability for agents".

In our opinion, among other theorists[1], that expression is inaccurate because nor every action of an agent induces the principal liability, as it may result from the legal regulation, but only for the damaging one committed under the entrusted functions. Normally, the two hypothesis of liability, subsumed to the vicarious liability, should be identically entitled, so the provision refers not to the principal

[1] See: *Sache Neculăescu*, Răspunderea civilă delictuală în Noul Cod civil. Privire critică, Dreptul Journal, no. 4/2010.

liability for agents but to the principal liability for damages produced by agents' actions.

On the other hand, it must be underlined the effort of the legislator in establishing in the content of the legal text the special conditions for inducing the principal liability: the existence of the relation between the principal and the agent and the presentation of the actions who induce the principal liability, precisely only those related to the attributions entitled or the attributions purpose.

Also, considering the doctrinarian opinions and jurisprudence over time, concerning the principal notion, the new regulations in paragraph 2, article 1373 outline a coherent definition for this concept and also determined the sphere of individuals responsible by indicating their most important attributions: *„The principal is the one who, under a contract or according the law, is responsible with the direction, the supervision or the control over those complying with certain functions or assignments in his interest or of another.*" These provisions have the merit to enlighten us also on the sources of the relation between the principal and the agent (the contract or the law), and the terminology used is specific to our times forgoing the notions "master" and "servant" used by the Civil Code in force.

Not least, paragraph 3 establishes a special cause of exoneration for the principal. The principal shall not be responsible if it will be proved that the victim knew or could known, at the moment of producing the damaging action, that the agent had acted unrelated to his entitled attributions or the attributions purpose.

Even those explanations bought by the New Civil Code, absolutely necessary in this field, must be outlined, we can not criticise the lack of interest of the legislator for the basis of this liability form, leaving the controversy on this issue still open.

We appreciate that a legal norm cannot be properly understood and applied if its foundation it's not known, in accordance with a renown author who considered that „the basis of the liability is a true „ *axiological summum*" of the whole juridical construction, respectively is that logical and juridical argument who generates the mechanism that triggers the obligation of the person responsible with the compensation of the victim, establishing the conditions of the reparation and re-establishing the situation prior to the loss situation."[2]

At the present, the Civil Code in force from 1985 does not include a disposition indicating the basis of the principal liability for the agent actions. That's the reason for the need felt by the doctrinarians to elucidate this aspect by formulating over time divers and contradictory theories.

The diversity of the opinions was generated by the difference between the principals' liability and other vicarious liability forms regulated by paragraphs 2 and 4 from article 1000. The difference consist in the fact that the parents, the teachers and the craftsmen can overturn the presumption of guilt placed on their charge „if they prove they couldn't prevent the damaging action" (paragraph 5, article Civil Code), the agents, on the contrary, doesn't have this possibility because the right to

[2] *E. Speranţia*, Principiile fundamentale de filosofie juridică, Cluj, 1936, p. 136.

prove the contrary is provided by the mentioned legal text only for the three categories expressly stipulated by the law, but not for the agents. So, once proved the agent fault, the principal cannot overturn the responsibility established by the law, because the cause of the prejudice being determined (the culpable act of the agent), every tentative to establish another cause (force majeure, the third party action, the victim action) remains without effect. Therefore, a contradiction appears between the principle according to which at the foundation of the whole system of vicarious liability is the fault (guilt), for his action and for the action of another (article 1000 paragraphs 2, 4, and 5), on one hand, and the inexistence of the possibility to overturn the principal liability by proving the lack of guilt, on the other hand.[3] That contradiction generated the diversity of foundations, who have proposed to explained and sustain the provisions of article 1000 paragraph 3 Civil Code.

Such theories could be grouped on two levels: one subjective conceptions, according to which the basis of the principal liability is his guilt (the theory of legal presumption of fault, the theory of assimilation between the agent fault and the principal fault, the foundation of principal liability on the idea of representation) and one objective conception according to which the principal liability is induced independently of any fault on his part (the theory of liability built on the idea of risk in the activity and the theory based on the idea of warranty).

According to the legal presumption of fault, the principal is presumed guilty because he made a wrong choice of his agents (*culpa in eligendo*) and he didn't supervised them correspondently (*culpa in vigilando*). Initially, it was asserted that we are in the presence of a relative presumption of guilt who can be overturned by the contrary prove. Then, noticing that in this case of vicarious liability there is not an express text of law who permits to the principal to prove that he was in the impossibility to prevent the damaging action and aiming to protect the victim interest to obtain the compensation for the suffered prejudice, it was concluded, unanimously, that it is an absolute presumption, considering that the contrary prove it's excluded.[4]

This theory was very criticised. First of all, the fact leading to the presumption of guilt for the principal, doesn't exist in most of the cases, because the principal doesn't have the practical possibility to supervise permanently his agents. Also, this explanation generates a contradiction who cannot be solved between his own fact of the principal who is presumed absolutely guilty and his right to the recourse action against the agent in order to obtain the compensation paid to the victim. The decisive arguments raised in supporting the rejection of this theory results from the conclusive character of the presumption of guilt of the principal because, on one hand, it cannot be included into the category of absolute presumptions provided by the article 1202 from the Civil Code, under which an act in cancelled or a court action is refused; and on the other hand, the inadmissibility of

[3] *C. Stătescu*, Răspunderea civilă delictuală pentru fapta altei persoane, 2-en edition, reviewed by C. Bîrsan, Hamangiu Publishing House, Bucharest, 2009, p. 155.

[4] *Liviu Pop*, Drept civil. Teoria generală a obligaţiilor, Lumina Lex Publishing House, Bucharest, 1998, p. 274.

the contrary prove remove the idea of guilt presumption, which is unacceptable, against the reality, because any presumption implies the prerogative to prove its opposite.[5]

However, to explain the principal liability based on guilt, it was argued that, for the third party, the proved guilt of the agent is transmitted to the principal, the last one replacing the agent so that the agent guilt became the principal guilt. This theory was based on the concept according to which, by fulfilling the entrusted function, the agent extends the principal activity, the last one working through his agent.[6] Obviously, such a theory is against the reality, identifying the agent with the principal means that the principal is responsible for his own act.

Another theory is the one who considers that the agent acts, in the entrusted function, as the legal representative of the principal, the principal activity being materialised by the achieved assignment of the agent. He acts, in relation with the third party, on behalf and for the principal, so, as his legal representative, his guilt passing on the principal.[7] This theory was also criticised. The representation is a specific institution for legal acts and not for legal facts. In other words, it is impossible to sustain that someone guilt became automatically the guilt of another person, because the guilt is personal.

On a totally different position are the objective theories, independent of any guilt of the agent, who considers as basis of the liability "the risk in business" or the "warranty".

We must underline the constant orientation[8] from the last decades of our doctrine and jurisprudence to the objective basis, independent of any guilt of the principal for the damaging action of his agent committed in the entrusted functions. This conception considers the fact that trough the power of direction, control and supervision of the activity of his agent, the principal takes also the risk of supporting the eventual damaging consequences. In this context, the principal liability for the agent action has the role of ensuring the payment of the damages, ensuring a fair compensation, given the fact that he initiated, organised and led a dangerous activity. Only if the agent action exceeds the limits of the entrusted attributions, he will be held as the only responsible for the damage caused, according to articles 998-999 from the Civil Code. But if the agent has respected the given assignments and, in those conditions, the damage occurred, he cannot be responsible of the consequences. In this situation, the principal will be held responsible, his liability being considered as a direct, principal and independent one.[9]

---

[5] See *A. Ionaşcu*, "Răspunderea comitenţilor pentru repararea prejudiciilor cauzate de prepuşi"in Contributia practicii judecatoresti la dezvoltarea principiilor dreptului civil roman, IInd volume. Academy Publishing House, Bucharest, 1978, p. 98.

[6] *H. and L. Mazeaud, J. Mazeaud*, Leçons de droit civil, tome II, Paris, 1969, p. 434.

[7] See: Trib. Supr., col. civ., dec. nr. 1061/1966, in R.R.D. nr. 2/1967, p. 160, quote by *Liviu Pop*, *op. cit*., p. 275.

[8] *Lacrima Rodica Boilă*, Răspunderea civilă delictuală obiectivă, C. H. Beck Publishing House, Bucharest, 2008, pages 290-306.

[9] *Lacrima Rodica Boilă*, Fundamentarea obiectivă a răspunderii comitentului în Noul Cod civil, Dreptul Journal, no. 2/2010, p. 49.

The dominant opinion[10] from the last years considers the principal liability as an accessory liability, an indirect one, engaged from another person actions, contingent on meeting the elements of the agent liability and sustaining the objective foundation of the liability on the idea of the guaranty of the principal solvency to the victim,provided by the law, who depends on the valid existence of the guarantee debt, respectively of the agent obligation, as author of the damaging action, to repair the prejudice.

If the Civil Code draft from 2004 provided under article 1111 paragraph 1 „The principal is held to repair the damage caused by his agents fault, fulfilling the entrusted functions", establishing as a condition of the principal liability „the agents' fault", without distinguishing the personal guilt and the service guilt, by the regulation from 2009 this aspect is reconsidered. The agent guilt is not mentioned anymore, which is a real advantage for the damaged persons in theirs step to obtain the compensations.

As we already assert, the new code leave unsolved the problem of the basis of this liability form. We consider, among other authors[11] that it must be started with the provisions of article 1459 N.C.C in order to solve this problem: "If the obligation is incurred jointly in the sole interest of the one joint debtor or it results from one of them action, he will be the only one held for the entire debt to the others co-debtors who, in this case, are considered, in relation whit this one, personal guarantors." Relying on those provisions, we can consider the idea of warranty and the equity and the business risk as the basis of the principal liability for the agent.

In conclusion, the legislator effort to improve the regulation in the principal liability for the agent actions field must be underlined even if not every problem is solved and the doctrinarian debate is still open.

Bibliography:

Treaties, courses, monographs:

1. *Boilă, Lacrima, Rodica*, Răspunderea civilă delictuală obiectivă, C. H. Beck Publishing House, Bucarest, 2008.
2. *Eliescu, M*., Răspunderea civilă delictuală, Academy Publishing House, Bucharest, 1972.
3. *Ionaşcu, A*., "Răspunderea comitenţilor pentru repararea prejudiciilor cauzate de prepuşi" in Contributia practicii judecatoresti la dezvoltarea principiilor dreptului civil roman, IInd volume, Academy Publishing House, Bucharest, 1978.
4. *Mazeaud, H. and L., Mazeaud*, J., Leçons de droit civil, tome II, Paris, 1969.

[10] *M. Eliescu*, Răspunderea civilă delictuală, Academy Publishing House, Bucharest, 1972, p. 286.

[11] *Emilian Lipcanu*, Unele reflecţii asupra reglementării răspunderii comitenţilor pentru prepuşi în noul Cod civil român, "Dreptul"Journal no. 1/2010.

5. *Speranţia, E*., Principiile fundamentale de filosofie juridică, Cluj, 1936.
6. *Stătescu, C*., Răspunderea civilă delictuală pentru fapta altei persone, 2-nd edition, reviewed by C. Bîrsan, Hamangiu Publishing House, Bucharest, 2009.

Articles in law journals:

1. *Boilă, Lacrima*, Rodica, Fundamentarea obiectivă a răspunderii comitentului în Noul Cod civil, Dreptul Journal, no. 2/2010.
2. *Lipcanu, Emilian*, Unele reflecţii asupra reglementării răspunderii comitenţilor pentru prepuşi în noul Cod civil român, Dreptul Journal, no. 1/2010.
3. *Neculăescu, Sache*, Răspunderea civilă delictuală în Noul Cod civil. Privire critică, Dreptul Journal, no. 4/2010.