REFUSAL TO CONTRACT IN THE PRE-CONTRACTUAL STAGE

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1. Introduction

The specification of the content of refusal to contract and its effects requires the clarification of the concept of "pre-contractual period".

The used term suggests a preliminary stage of a particular contract which the parties want to conclude. The contract is an agreement between two or more manifestations of accord intended to create, modify, transmit or extinguish a legal relationship. This agreement is done by bringing a declaration of intent issued for this purpose. Everything related to the preparation of this agreement until the time of its effective conclusion, is a pre-contractual stage [1, p.32; 2, p.697]. This stage was less regulated and studied by both provisions of the old Civil Code of Moldova (1964) and by the provisions of the current Civil Code, where specific institutions of those periods are found, treated in the fractionated way, in the content of the civil code [3, p.289–311]. The starting point of the legislature was the moment of contract formation. This orientation was and is justified in terms of the period in which respective codes and the properly socio-economic relations of that time were adopted. Viewed in terms of content, the liability and costs they provoked, pre contractual works were insignificant [1; p.5–17]: counterparties were by rules in the same area, even locality, contracts stipulated by the Civil Code were few in number, simple and without problems on their conclusion. Classical theory of immediately and simultaneously change of consents was fully satisfying.

The formalism decline, economic expansion, the rapid development of trade, transport, continuous growth of the importance of advertising in economic relations imposed both a spatial expansion of pre contractual relationships and as their qualitative transformation [4, p.7]. Thus, the notion of trade is discarded by attributes such as the "local" or "regional" becomes increasingly accompanied by attributes like "international" "multinational" "global", etc. Also insignificant expenses which were recorded in the past within the pre relationships are becoming more significant, no longer matter for the parties to know who supports them and under what conditions. These problems have attracted attention of doctrine and jurisprudence and then, finally in sight between legislators.

2. The main material research

2.1. Refusal to contract

According to the principle of contractual freedom everyone has the possibility to conclude or refuse to conclude the contract. The positive expression of this principle states the possibility for anyone to sign any agreements. However, contractual freedom implies not only the ability to contract. It is manifested by their ability to deny its conclusion. If a person is free to sign a contract, that freedom implies the possibility of refusing and accepting its conclusion. The right to refuse may however be exercised in its sole discretion, it has certain limitations, restriction, observing certain conditions.

According to the Moldovan Civil Code these provisions are given in art. 667 paragraph 2 "Obligation to conclude a contract is prohibited, except where the obligation to contract is provided by this Code, by law or if it emerges from a voluntarily assumed obligation".

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So the contract is an agreement between two or more manifestations of accord. This agreement is done by bringing declaration of intent issued for this purpose. Refusal of contracting occurs in general as their refusal to give consent to the formation of this agreement.

Refusing to contract can take several forms; it can also arise in times, belonging to different periods of pre-contractual works. As a consequence, refusal to contract can produce different legal effects.

Refusing to contract may be constituted by a negative thing – the absence of offer's consignee, a positive fact – bidder' refuses to proceed at signing the contract and as was already stated in the doctrine – refuses to contract can also be manifested as a third form, intermediate between abstention and a positive act [4, p.7].

Considering these specifications, the refusal to contract is defined in the doctrine as: The attitude of a person who does not want to contract [4, p.7].

2.2. The legal nature of the refusal to contract

What is the legal nature of such denial? It may be noted that neither civil code nor commercial code does contain any explicit regulations concerning the refusal to contract. But it is noted that the refusal to contract is opposite to contract acceptance and the principle of contractual freedom [5, p.8–22] is a principle that underlies most legal systems. Therefore to contract or not to contract represents a positive and negative expression and the same principle – principle of contractual freedom. Even if the law does not regulate this principle in its negative form, it inferred it, protecting the freedom to contract and from this perspective, for example by regulating the flaw [6, p.6–13] that may affect consent of parties in the framework of a contract. The vices of consent touch the freedom to contract understood in the negative side, refusal to contract. Law assures party whose consent was vitiated the possibility of abolition of the contractual relationship, precisely because of the disregard freedom to refuse signing the contract in such circumstances. So, to contract or not to contract, constitutes general [7, p.24–26] freedoms of any person. Therefore we can say that the refusal to contract is a right [8, p.29–32] belonging to anyone.

The problem will arise if this right is likely to be exercised by any person in a sovereign way [9, p.82–83] if it can cause certain limitations or restrictions. We regard as affirmative the answer to this question. Nothing could prevent the law to restrict the exercise of this right. Also this right can be restricted, limited or annihilated by contractual way. Finally, this right can be controlled by jurisprudence, which can take an active role in this regard.

2.3. Conditions of refusal to contract

A single condition but essential identified by doctrine to recognize the existence of the right to refuse consent to contracting is *the absence of a contrary right that should belong to another person.* If a person has obtained, by virtue of a unilateral engagement, either by contract [9, p.82–83] or under a legal provision, the right to contract with a person, it can no longer enjoy this freedom understood as refusal to contract. So when someone gets about under a contractual or legal provisions the right to contract with a person under certain conditions the last can no longer enjoy that freedom to contract, understood as a refusal to contract. In this context we support the obligation incumbent upon that person to negotiate or obligation to contract. These two obligations are different in the fact that one is the result (obligation to contract), and the other is the diligence (duty to negotiate). We believe that seen in the broad sense, it includes the obligation to contract and the one to negotiate, so we refer to the obligation to contract integrates and that to negotiate, following to specify where it will be appropriate, as we talk about the obligation to negotiate.

Further we will analyze the hypotheses where the refusal to contract may be invoked.

a) Absent a unilateral commitment

It is envisaged the situation when exercising their right to refuse the signing of contract is restricted to the very will of the holder of this right:

- Offer to contract

From the civil code the offer produces legal effect since it reached to offer its recipient, the offer being part of communicative acts. If the offer comes to the recipient it will no longer be revoked discretionally. The impossibility to revoke the offer represents the direct expression of his inability to refuse the signing of the contract if the person concerned (recipient) has expressed willingness in this regard. Thus, refusal to contract in this situation will not be applicable because, by declaring the offer, the bidder assumes the commitment to contract with the recipient. Failure to refuse the signing of the contract involves only an offer, not provided that a recipient has already accepted it.

b) The absence of a contractual consent

In the situation when the parties are in the presence of a contract already formed, refusing to contract cannot be manifested, it merely assumes the form of a refusal to perform the contract, but it looks later on stage of concluding the contract. The problem arises only if there is agreement between the parties which arises for the future obligation to contract or authenticate.

- Engagement to contract

Unilateral promise to sell. Unilateral promise of sale is a contract whereby a person called promisor is bound by another person, called beneficiary to sell a certain thing at a price determined if this person decides in a certain term (definite or indefinite) to buy. Ending such a contract, promissory definitive undertakes to sell, while beneficial, if they're within such option may buy or not, as desired. Through such a contract in favor of the beneficiary an option right – a potestative right arises. The existence of this potentiative right in favor of the beneficiary restricts the promisor's power to refuse the signing of the contract promised.

As an exception, the promisor may refuse signing the contract promised if the option was built by the substituted or transferee of beneficiary of promise and contract (promise of sale) was *intuitu personae*. Also, the right to refuse may be exercised by promisor if the beneficiary doesn't have full capacity [10, p.39] to buy. If the option term is a suspension one the promissory may refuse the signing of the contract if the beneficiary has risen the option before fulfilling term.

Unilateral promise to buy. Symmetrical, conversely promise to sell, unilateral promise to buy is a willing agreement by which a person, promisor – future buyer agrees to purchase a property from another person, the beneficiary – future seller if it decides to sell. And in this case, by completing a promise, in favor of the beneficiary a potestative right appears, which restricts the promisor's power to refuse the completing of the designed object.

Reciprocal promise of buying-selling. The particularity of this promise consists in the fact that it is preparing another contract: it is an act of forecasting future projection, the organization in advance of projected future sales. Feature of the reciprocal promise of buying-selling represents the mutual ownership of the promissory seller and buyer of a specific obligation to do that in the future the conclusion of a contract [11, p.55]. However, any obligation of either contracting party has its symmetrical counterpart in a correlative right in favor of the other party contracted [10, p.19]. So the obligation to conclude the contract corresponds to the right to require its conclusion. In this case neither party shall refuse to conclude the contract just because the other party has the corollary right to ask for its conclusion, as that promise is based upon reciprocal sale and purchase, from which results the contract.

According to another view [10, p.41–51] refusal to contract in this situation cannot promise we make because after completion in the presence of a later stage of conclusion where we can speak only of failure to perform the contract. It objected, asserting that the consent cannot be subject to obligations, simple "to do" because it is a structural element of the contract pertaining to the formation of, while, obligation "to do" presupposes a contract format and keeps its execution [10, p.7].

This effect is provided, indirectly in Moldovan law. Thus although the legislature declared valid legal act in disregard of promise ended, however, it is the party that has concluded such an act of bad faith or third party will be obliged to pay damages to disregard the pact, precisely in order that haven't the right to conclude such an agreement. To have the right to conclude a contract and damage effects promise to be the payment of compensation for his exercise is a non-sense. Thus art. 703 of the Civil Code states that "The signed contract with breach of promise to contract data of other person is enforceable against the recipient of promise without depriving him of the right to demand promissory and the third party of bad faith who contracted with the latter the repair damage suffered".

There are situations where you may refuse the promise without seeing it to be committed without any liability in this regard. Such situation represents an exception and is justified by the financial, material or legal situation of the promisor. The contract of donation art. 830 par. 2 in the first sentence states that: "the donor is entitled to refuse the fulfillment of the promise to deliver a good if it is impossible, taking into account its other obligations, to fulfill the promise without thereby endangering his own appropriate maintenance or enforcement of its legal obligations of maintenance of other persons".

- Preference Pact

By its conclusion, the agreement gives rise to a right of personal preference – as a receivable in favor of the beneficiary, and the task of promissory an obligation not to do – not to sell to another person and not to obstruct the exercise of the preference rights of the beneficiary [10, p.31]. If the promissory decides to alienate the property, he could not deny the contract signed with the beneficiary of this pact if it was the intention in this case of the promisor. It should be noted that, in this case, the impossibility to refuse the signing of the contract has a field fairly restricted. This is because on the one hand the promisor has the power to sell or not to sell, and no obligation to do so, and on the other hand he is obliged would prefer the beneficiary only in the event of alienation of property by certain contracts as for example purchase and sale, lease, loan, deposit, etc. keeping the freedom to alienate anything you want in other ways stipulated by law, such as for example the donation, social contribution, giving in payment, linked etc.

Thus, in case the beneficiary found out that the promissory seeks to overcome what was the object of preference pact, the latter will not be able to refuse signing the contract with the beneficiary. It also cannot deny signing the promissory contract with the client if the property was alienated to a third party and it is of bad faith. If the promissory claims that he alienated the good in other way than selling, location etc., and the court admitted simulated action the beneficiary found that in reality was a sale, location etc., we consider that the promissory will not be able to refuse the conclusion of a contract for the beneficiary of this promise [10, p.33].

In the case of the beneficiary, he may refuse to conclude the contract if the promissory decides to sell the good without being committed to any liability.

c) The absence of legal provisions

Refusing to contract may be exercised also if there is any legal provision that would ban its exercise. The legal provisions that restrict the exercise of the right to refuse are the following:

- Retractable dispute

Pursuant to art. 802 paragraph 1, 2 C. civ., *"Where a litigious right was sold, one in which the advertisement is released if the sale price the buyer pays the expenses of sale and the price and expense Interest selling price calculated from the date when the expenses were paid".*

As a result of the sale of such a right, the assigned debtor has the opportunity to free from the obligation to face the assignee if he meets the conditions stipulated by the law without the court to challenge the substance of the process itself [12, p.82]. The way in which the assigned debtor

executes its litigation obligation and the impossibility of the transferee to oppose to such executions is legal expression of interdiction of the transferee to refuse the conclusion of such a contract. The assignee could not refuse the conclusion to such a contract by retrocession of the conflicting right by the assignor by prior cancellation of the sales contract of litigious rights. However, there are situations when the transferee will refuse the conclusion of such a contract. Thus according to art. 802 par. 2 of the Civil Code. Retractable dispute cannot be exercise when:

- the transferee is heirs or co-lender [12, p.82] with the transferor;
- the transferor is transferee creditor and the assignment was made for the payment of his claim;
- both transferor and transferee are merchants;
- the transferee has the right of first refusal, in which case the assigned debtor may not invoke the dispute retracted; [12, p.82]
- there is a court decision confirming this right;
- this law was established and the dispute is prepared for trial.

Right of pre-emption

In Moldovan law pre-emption right is regulated by art.793–797 Civil Code. Thus art.793 paragraph 1 of the Civil Code states that "holder of the pre-emptive right can make use of it if the person liable concludes sales contract with a third party". After receiving the offer for sale, the deadline for exercising the pre-emption right is a month when the sale of land and other property ten days if the contract if the parties have not provided such – art.795 paragraph 1 Civil Code. By exercising the right of option between the seller and the holder of the right of first refusal it arise a sales contract – art. 795 paragraph 3 Civil Code. Establishment by law or by agreement of the parties of the right of first refusal in favor of a person or persons make the liable person or the other not be able to sell the property to third parties until the refusal of the holder of the option right. The texts says of the Civil Code of the person liable being understood by this person who has assumed, whose task was established by law obliged to propose to offer for sale the persons benefiting from this right. In these conditions the person liable shall not refuse disclosure to the holder of the preemption intention of selling as refusing to offer is restricted either by law or by agreement by stipulating the right of first refusal fellowship.

The absence of the court decision

Validation of consignment the actual offer

The debtor is entitled subjective to pay if the lender refuses to receive it. This subjective right is materialized through the recognition by the law of the debtor a procedure by which it can be free of obligations as incumbent procedure comprising 3 phases (art. 645–650 Civil Code) [13, p.482]:

- offer real of payment by which the debtor summons the creditor through the bailiff to receive payment of any object keeps to the creditor;
- recording them in the creditor if he is not present or refuse further payment;
- if the creditor contesting its validation by the court by recording the final decision.

Pronouncing a final and irrevocable court decision is representing the way in which the creditor is forbidden by the opportunity to decline the offer [13, p.482] of execution of the obligations made by his debtor [13, p.482].

According to Moldovan law is possible if the creditor is placed in delay, when identity is not known or his home, by depositing money, jewelry, furniture or other documents at a bank or a notary – art. 645 paragraph 1 Civil Code. Thus recorded, the debtor's obligation goes off – par. 3 of the same article. After recording the offer, the creditor may challenge its validity. The appeal is made by application to the court, which by court decision will decide regarding its lawfulness. If recording is recognized valid, the creditor will not be able to refuse to accept them and no debtor will be able to seek restitution of the property recorded – art. 648, paragraph 2, point c, Civil Code.

3. Conclusions

To recognize the existence of the right to refuse the consent to contracting, in the specialized doctrine, it was identified a single condition but essential, and namely the absence of a contrary right that would belong to another person. If a person has obtained either by virtue of a unilateral commitment, either by contract or by virtue of legal provision, the right to contract with a specific person, it can no longer enjoy by this freedom understood as a refusal to contract.

So when someone has obtained by contract or under a legal provision the right to contract with a person under certain conditions, the last can no longer enjoy by contract freedom, understood as a refusal to contract. In this context we can state that this person incubates an obligation to negotiate or obligation to contract. These two obligations are different by the fact that one is the result (obligation to contract) and the other is diligent (obligation to negotiate), but basically, regarded lato sensu, the obligation to contract encompasses and the negotiate one.

Regarding hypothesis in which a refusal to contract would be invoked, these are: the absence of a unilateral commitment (offer to contract); the absence of a contractual commitment (contract promise and preference pact); the absence of a legal commitment (litigious retract, pre-emption right); the absence of a judgment (validation of consignment of actual offer).

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Summary

The pre-contractual term suggests the idea of a precursory stage of a certain contact that the parties want to conclude. Under the principle of contractual freedom everyone has the opportunity to conclude or refuse to conclude the contract. Refusing to contract may be constituted by a negative fact – the abstention of the offer's recipient or a positive fact – the offeror's refusal to proceed at signing the contract. A single condition, but essential, identified by doctrine, to recognize the existence of the right to refuse the conclusion of contract is the absence of a contrary right that would belong to another person. This could have as origin: a unilateral commitment, – offer to contract; a contractual commitment – the promise of contract and preferably pact; a legal provision – litigious retract and pre-emptive right; a judicial decision – validation of recording of the real offer.

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