



Considerations Regarding the Legal Nature of the Maintenance Contract in the Law of Certain European States

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Abstract: Considering past issues regarding the qualification of maintenance contracts concluded free of charge - explicitly provided for in the current Romanian Civil Code - and regarding the application of norms from the field of life annuity contracts, as well as the “specific rules of the legal act of constitution” free of charge, we aimed to find another response to these matters in the legal systems of other European states, obviously belonging to the major continental legal system. Therefore, we focused on the classification of various “maintenance contracts” (the terms are not identical, sometimes not even similar, and terminological differences are inherent) into the category of onerous contracts—implicitly within the subcategory of aleatory ones—or gratuitous ones. We primarily considered French law, given its influence on the other analysed legal systems, including Romanian law, and also the fact that French doctrine and jurisprudence have given greater attention to aleatory contracts, implicitly to the one analysed. Furthermore, we also studied the legal norms, specialized literature opinions, and judicial practices of states with a tradition regarding the conventional obligation of maintenance.

Keywords: maintenance contract; onerous; aleatory; gratuitous; liberality

1. Romania

In Romanian legislation, the maintenance contract is regulated by Articles 2254-2263 of the Civil Code. Article 2254, under the heading “Notion” contains the legal definition of this contract in its two paragraphs. It stipulates: the obligation to provide

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maintenance and care, the possibility for the beneficiary of these services to be either one of the contracting parties or a third party, and the fact that this obligation may be established for a specific duration or, in the absence of such a provision or when only the lifetime nature is specified, that they are owed for the entire lifetime of the maintenance creditor.

Starting from this *ex lege* definition, it has been asserted that the mentioned provision applies only to the “contract in its gratuitous version” (Stănciulescu, 2017, p. 519).

However, paragraph (1) of Article 2257 of the Romanian Civil Code specifies that the welfare maintenance benefits owed are to be “equitably established, taking into account the value of the capital and the previous social condition of the creditor”. This provision, by establishing the equitable nature of maintenance benefits and the criteria for determining their extent (except for their duration), raises the question of how equity can be assessed in a gratuitous contract and how it can be determined in the absence of such capital. The sole element that could concern the maintenance contract in its gratuitous version would be the creditor’s prior social condition before the contract was concluded.

It should also be emphasized that paragraph (1) of Article 2256 of the Romanian Civil Code refers to provisions from the matter of life annuity contracts, including Article 2243 of the Romanian Civil Code, which in its first paragraph establishes that a life annuity can be established as onerous or gratuitous.

In any case, from the set of specific provisions applicable to maintenance contracts, it results that, as a rule, such a contract is an onerous one, and only exceptionally is it a gratuitous one. This led us, on another occasion, to seek an answer to the question of whether a gratuitous maintenance contract constitutes a form of liberality. The conclusion we reached is that it represents a *sui generis* contract, lying on the boundary between acts of liberality and disinterested acts. It has a specific legal regime, and in some cases, the rules from the area of acts of liberality are applied to supplement it (Iliescu, 2022, pp. 610-611).

Moreover, the definitions formulated in the specialized literature (Deak, 2001, p. 533; Stănciulescu, 2017, p. 518) pertain to the onerous version of the maintenance contract. That is, one where the maintenance debtor seeks a patrimonial advantage, which consists of the transfer of capital, in exchange for the services necessary for maintenance and care. These definitions are followed by explanations (Deak, 2001, p. 533; Berindei, 2015, pp. 764, 773-774; Stănciulescu, 2017, pp. 519-520; Moțiu, 2017, pp. 350-351; Marcusohn, 2018, p. 371) asserting that the contract is inherently

onerous, synallagmatic, and, when conventional maintenance is established gratuitously, the maintenance contract constitutes a form of liberality.

The aleatory nature of the maintenance contract is unanimously affirmed. However, the link between its onerous nature and its aleatory character is made either directly—stating that only the onerous maintenance contract is aleatory (Berindei, 2015, pp. 773-774)—or indirectly, referring to the existence of the chance of gain and the risk of loss for both contracting parties (Deak, 2001, p. 538; Moțiu, 2017, p. 351; Marcusohn, 2018, p. 371).

It should be noted, however, that the definition given to aleatory contracts in Article 1173(2) of the Romanian Civil Code may create confusion. This is because it provides that such contracts “offer at least one of the parties the chance of a gain and simultaneously expose them to the risk of a loss, dependent on a future and uncertain event”. Furthermore, in an isolated opinion (Dimitriu, 2011, p. 448), it was argued that the current classification of contracts into commutative and aleatory ones is not inherently or intrinsically connected to the group of onerous contracts; rather, it is a distinct classification. However, the majority opinion is that commutative and aleatory contracts remain subcategories of onerous contracts (for example, Chirică, 2015; Moise, 2019, pp. 1397-1398). Consequently, it is deemed necessary to amend Article 1173(2) of the Romanian Civil Code to read as follows: “An aleatory contract is one which, by its nature or by the will of the parties, offers each party the chance of a gain and simultaneously exposes them to the risk of a loss, dependent on a future and uncertain event”.

2. France

In French law, the maintenance contract is an unnamed contract, with “bail à nourriture” being a creation of doctrine and case law. It is defined as a contract through which one person agrees to provide another person with vital necessities (food, maintenance, shelter, and health-related needs) (Cour de Cassation, Chambre civile 3, du 26 novembre 1970, 69-14.338) in exchange for either a sum of money, periodic payments, or the transfer of property (Cour de Cassation, Chambre civile 1, 20 février 2008, 06-19.977) (Malaurie, Aygnes & Gautier, 2020, p. 625; Benabent, 2021, p. 661).

It is inherently aleatory, synallagmatic (Zenati-Castaing & Revet, 2014, p. 85), and onerous. Its aleatory nature arises from the uncertain duration and value of the maintenance obligations, influenced by the age and health of the person being

maintained, both variable factors (Cour de Cassation, Chambre civile 1, 20 février 2008, 06-19.977; Malaurie, Aygnes & Gautier, 2020, p. 625; Benabent, 2021, p. 661).

Certain circumstances, however, may eliminate the aleatory element, which must be proven (Cour de Cassation, Chambre civile 1, du 22 juin 1999, 97-12.112). Examples include imminent or rapidly occurring death caused by a known illness (Cour de Cassation, Chambre civile 1, du 16 décembre 1992, 90-17.345), known to the debtor at the time of contracting (Cour de Cassation, Chambre civile 1, du 30 mars 1999, 97-10.929), or the creditor having sufficient assets to cover maintenance expenses (Benabent, 2021, p. 662).

The absence of *aleatory nature* voids contracts that are inherently aleatory, as this imbalance between the chance of gain and the risk of loss invalidates the very cause of the contract (Cour de Cassation, Chambre civile 1, du 22 février 2000, 97-20.929).

3. Moldova

The “transfer of property with lifelong maintenance obligation” contract is regulated by Articles 1213–1221 of the Moldovan Civil Code¹. It is defined in Article 1213(1) by stipulating the obligations of the parties—the “beneficiary” of maintenance and the “acquirer.” The first is obligated to transfer ownership rights to a property, either immovable or movable, to the other party in exchange for the acquirer’s obligation to provide in-kind maintenance for the beneficiary throughout his lifetime. This includes housing, food, care, and assistance, as well as organizing and covering funeral expenses.

This contract has a clear legal qualification: Article 1213(1) (IInd thesis) of the Moldovan Civil Code specifies that it is onerous and aleatory. Thus, the contract cannot be gratuitous, and any clause stipulating otherwise typically converts it into a donation with encumbrances or a life annuity (Tălămbuță, 2022, p. 459).

The doctrine (Băncilă, 2024, p. 58) emphasizes that the onerous nature arises from both parties seeking a patrimonial advantage: one party transfers ownership rights in exchange for maintenance, while the other agrees to provide maintenance to gain ownership of the transferred property (Bălți Court of Appeal, Civil and

¹ Republished in the Official Monitor no. 66-75 of March 1, 2019, subsequently amended and supplemented.

Administrative Litigation Division, decision of 11 June 2020, case no. 2a-218/2020). Their obligations are interdependent, and the provided services must be balanced.

The aleatory character is determined by an uncertain future event—the beneficiary’s death—which establishes the contract’s term (Tălămbuță, 2022, p. 462). It also arises from the variability of the maintenance obligations’ value (Băncilă, 2024, pp. 58-59).

4. Switzerland

The “*Contrat d’entretien viager*” (lifetime maintenance contract) is governed by Articles 521-529 of the Swiss Code of Obligations. It is defined in Article 521(1) as a contract through which the maintenance creditor agrees to transfer an estate or specific assets to the maintenance debtor in exchange for the obligation to provide lifetime maintenance and care.

This contract involves three mandatory elements (Cour de Justice, Geneva, *Chambre des Assurances Sociales*, 28 November 2016, A/1105/2016; Tercier, Bieri & Carron, 2016, p. 992): the transfer of ownership rights to the asset(s), the maintenance obligations, and the aleatory nature of the contract.

The maintenance obligation is subordinated to the uncertain term of the creditor’s death (Carron & Wessner, 2024, p. 269), whether the creditor is a contracting party or a third party. In the case of multiple creditors, the obligation extends until the death of the last creditor, unless otherwise stipulated (Tercier, Bieri & Carron, 2016, pp. 993-994).

Doctrine classifies this contract as synallagmatic, onerous, aleatory, and subject to an uncertain term (Tercier, Bieri & Carron, 2016, p. 993; Muller, 2021, pp. 17-19, 24). It is inherently onerous (Muller, 2021, p. 25), with gratuitous maintenance obligations being specific to donations (Tribunale Cantonale delle Assicurazioni Tessin, 28 August 2019, 33.2019.9; Tercier, Bieri & Carron, 2016, p. 993).

5. Poland

The lifetime maintenance contract (“*umowa o dożywocie*”) is regulated by Articles 908-916 of the Polish Civil Code¹. Article 908(1) states that “if, in exchange for

¹ Available at <https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-cywilny-16785996>.

transferring ownership of a property, the acquirer agrees to provide lifetime maintenance to the transferor, unless otherwise stipulated, they must accept the transferor as a member of their household, provide food, clothing, housing, light, heating, appropriate care in case of illness, and cover funeral costs in accordance with local customs”.

The lifetime maintenance contract is an onerous contract (Radwanski, 2011, p. 618) because the transferor agrees to transfer ownership of the immovable property and usually hand it over to the acquirer, who, in turn, agrees to provide lifetime maintenance. It is also aleatory because the duration and scope of the acquirer’s obligations depend on the beneficiary’s death and personal circumstances (Woźniak, 2019, pp. 100-101).

The aleatory nature of this contract is emphasized, and the absence of these elements makes it impossible to qualify as a lifetime maintenance contract (Woźniak, 2019, pp. 109, 131).

A contract that includes maintenance obligations is classified as onerous, with the *aleatory element* determining the actual value of the obligations. Fixing the scope and value of maintenance at the inception of the relationship would contradict the essence of aleatory contracts (Woźniak, 2019, p. 111).

However, the value and scope of maintenance obligations are critical to qualifying the contract as aleatory. If symbolic, the contract would be gratuitous, raising questions about its qualification as a gratuitous contract with elements borrowed from others. However, the division between onerous and gratuitous contracts is binary. The existence of partly onerous or partly gratuitous contracts is impossible due to legal norms, such as Article 528 of the Polish Civil Code, which stipulate different consequences for these two contract categories (Radwanski, 2008, p. 206).

6. Spain

The “Contrato de alimentos” (maintenance contract) is regulated by the Spanish Civil Code¹ (Articles 1791-1797) and defined in Article 1971. Under this contract, “one party undertakes to provide another person with housing, maintenance, and any kind of assistance for their entire lifetime, in exchange for the transfer of capital consisting of any type of assets and rights”. From this, it follows that the contract is

¹ Available at <https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763>.

bilateral, onerous, and aleatory, with reciprocal obligations between the parties (Tribunal Supremo, Sala de lo Civil, sentencia num. 115/2022) and *intuitu personae* (De Rada, 2019, p. 3463).

The “Contrato de alimentos” adheres to the legal definition of onerous contracts (Tribunal Supremo, Sala de lo Civil, sentencia num. 115/2022; Vela Sanchez, 2023, p. 1022) found in Article 1274 of the Spanish Civil Code. The transfer of capital is matched by the provision of maintenance, with a balance between their values rather than an exact equivalence (De Rada, 2019, pp. 3471-3473; Calaza Lopez, 2016, pp. 262-264), as equal benefits would give the contract a commutative character (Tribunal Supremo, Sala primera de lo Civil, sentencia de 18 de Enero de 2001).

The absence of onerousness means the contract becomes a pure donation, either conditioned or remunerative (De Rada, 2019, p. 3472; Vela Sanchez, 2023, p. 1022), or an atypical gratuitous maintenance contract (Berenguer Albaladejo, 2012, p. 259). Therefore, the existence of a gratuitous maintenance contract is rejected (Berenguer Albaladejo, 2012, p. 258). Moreover, gratuitous maintenance cannot originate from a donation in the strict sense (Berenguer Albaladejo, 2012, p. 259).

The onerous nature of the maintenance contract is essential (Tribunal Supremo, Sala de lo Civil, Sección 1, Sentencia Civil num. 249/2007; Berenguer Albaladejo, 2012, p. 257; Vela Sanchez, 2022, p. 237), with the acquirer’s services constituting a corresponding counter-performance to the transfer of capital (Audiencia Provincial de Madrid, Sección 14, Sentencia Civil num. 429/2009).

Based on the legal definition of aleatory contracts, the “Contrato de alimentos” is argued to have a dual aleatory nature (Vela Sanchez, 2023, p. 1025), determined by its uncertain duration (Tribunal Supremo, Sala de lo Civil, Sección 1, Sentencia civil num. 159/2019) and the variability of maintenance obligations, which introduces the possibility of mutual gain or loss for the parties (Tribunal Superior de Justicia de Catalunya, Sala de lo Civil y Penal, Sección 1, Sentencia Civil num. 4/2008).

The absence of an aleatory nature invalidates the contract (Calaza Lopez, 2016, p. 268) due to the lack of cause, which is rooted in the aleatory element (De Rada, 2019, p. 3464; Vela Sanchez, 2023, p. 1026; Tribunal Supremo, Sala de lo Civil, sentencia num. 115/2022; Audiencia Provincial de Granada, Sección Quinta, Sentencia num. 119/2023).

7. Conclusions

Based on the analysis of the six legal systems, it can be concluded that Romania stands apart as the only exception.

In France, where the main obligation of maintenance arises from an unnamed contract, and in the legislations of the other analyzed states, the contract is always onerous and aleatory by nature, with no exceptions. Gratuitous contracts giving rise to similar maintenance obligations are never comparable to Romania's maintenance contract. They are generally donation contracts under which maintenance is provided gratuitously.

Furthermore, the absence of an aleatory element invalidates the contract due to the lack of cause, provided the parties understood that the contract involved a counter performance for maintenance obligations.

Assessing the *aleatory element* is not straightforward, but it remains a defining feature of the analyzed contract. It exhibits greater uncertainty than other aleatory contracts, stemming from both the lifetime duration of the maintenance creditor (which, in other legislations, is usually for life) and their specific needs.

Although the Romanian legislator has incorporated opinions from Romanian doctrine and practice into the norms governing maintenance contracts, a more appropriate solution would have been to dedicate special norms to gratuitous maintenance contracts. These norms would avoid referencing the regulation of other special contracts or partially applicable contractual categories that complicate the understanding of specific rules and are open to differing interpretations.

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