

# CONTRACTUL DE RENTA VIAGERA

Drd. Alexandru Serban

- rezumatul tezei de doctorat

The thesis has been structured into five chapters, having as a purpose to express the specifics of the legal institution analyzed by highlighting the characteristics of the life annuity contract and by integrating it in the category it belongs to.

In Chapter I, the characteristics of the elements of the aleatory contract are subject to analysis. Thus, distinct sections concern: classification of contracts; characteristics of the legal relations as a result of the aleatory contract; essential conditions of the aleatory contract (the consent of the parties, the ability to conclude aleatory contracts, the object of the aleatory contract, the reason of the aleatory contract); the aleatory obligation and liability in terms of aleatory contracts; the principles of will; the notion of aleatory contract.

In analyzing the notion of aleatory contract the starting point was its regulation in the French legal system, as well as in the Romanian one, taking into account the fact that our civil regulations have as a basis the French system. First of all, pursuant to art. 1964 of the French Civil Code, “le contrat aléatoire est une convention réciproque dont les effets, quant aux avantages et aux pertes, soit pour toutes les parties, soit pour l’une ou plusieurs d’entre elles, dépendent d’un événement incertain” (the aleatory contract is a mutual convention the effects of which, as far as advantages and losses are concerned, either for all the parties, or for one or several parties, depend on an uncertain event). Pursuant to the dispositions of art. 1104 of the French Civil Code, in order that a contract be part of the category of aleatory contracts, the advantages or losses should depend on an uncertain event for each party.

On the other hand, pursuant to the dispositions of art. 947, paragraph 2 of the Romanian Civil Code, “the contract is aleatory when the equivalent *depends, for one or all parties, on an uncertain event*”. Pursuant to art. 1635 “The aleatory contract is the mutual convention the effects of which, concerning benefits and losses for all parties, or for one or several of them, *depend on an uncertain event*”. In the latter text, the aleatory contracts are enumerated: the insurance contract, the nautical loan, gambling and betting and the contract of life annuity.

The paper presents the doctrine opinions concerning the notion of aleatory contract. Thus, in the French doctrine (G. Baudry-Lacantinerie, Albert Wahl, *Traité théorique et pratique de droit civil*, 12-ème éd. Librairie

de la Société du Recueil, Paris, 1900, p.2) it has been explained that only the definition of art. 1104 of the French Civil Code reflects reality because the fact that one of the parties can lose or benefit is valid to the same extent for the other party. In our doctrine (Rossetti Bălănescu, Al. Băicoianu, Drept civil român. Studiu de doctrină și jurisprudență, vol. II, Ed. SOCEC, București, 1943, p.385) it has been explained that the common element of aleatory contracts is the more or less distant occurrence of the uncertain event, which will have as a consequence the benefit of each party. It is about a variable benefit, according to the fact that the event takes place sooner or later. On the other hand, the problem of the validation of the aleatory contract was conceived as follows: the aleatory contract comes into force as soon as it has been concluded.

In either legal systems the aleatory contract is different from the contract affected by modalities – suspensive condition or term – because the latter is executed when the term has been reached or the condition has been met.

So, the aleatory contract is an onerous contract . When it has been concluded, *the parties do not know the existence or exact amount of the patrimonial advantages that will result out of the contract for them*, since they have understood they have obligations in accordance with a future uncertain event (considering its occurrence or/ and considering the moment when it takes place), named *alea*, which involves a chance of benefit or the risk of loss for each party.

Chapter II, deals with aspects such as: the identity and regulations of the institution; historical considerations; the legal characteristics of the life annuity contract.

One can notice that the life annuity was already known in the Roman law, having as a source the will or stipulation and being constituted as a gift or for valuable consideration. But the life annuity contract in modern law stems in the old French law, where it was regulated in order to replace the interest loan which, although allowed since the time of Roman law, is prohibited by the canon law because of the abuses of the usurers, being considered a sin. As a matter of fact, although prohibited and considered as having an immoral reason, the interest loan, which met some social needs, continued to be practised under the guise of some sale and purchase contracts which fulfilled the function of an interest loan. In this context, in order to replace the loan contract, the legal advisers – and first of all Loysel – drew up the life annuity contract by which a person binds himself/ herself to pay to another a rent in exchange for a capital which was optionally refundable. In reality, the transferred capital was the loan, and the sums paid

as a rent constituted the interest and the capital depreciation. The debtor could pay off by giving back the capital to the creditor, without the creditor's possibility to claim it. The contract was conceived as a sale, the rent was the sold item, and the capital was the price of the sale, the difference from sale being the fact that it was a real and unilateral contract, not a consensual and synalagmatic one. Eventually, the French Civil Code of 1804 regulated the interest loan contract, so the rent was not different from a loan or similar to a sale; the life annuity contract is also regulated under the same section as the loan contract.

In the old Romanian law, the Calimach Code had specific dispositions concerning life annuity in chapter XXVI "About chance negotiation" after "gambling and betting", in art. 1719-1721, reproducing the dispositions of art. 1284-1286 of the Austrian Civil Code. Thus, pursuant to art. 1719, chance negotiation refers to a contract concluded by someone who lent money or things to someone else, contract by which he/she will get an annuity until his/her or the borrower's death or until the death of someone else. Pursuant to art. 1720, the annuity terminates at the death of the person to the life of whom it was restricted.

Nowadays, the life annuity contract is regulated under the dispositions of art. 1639-1651 of the Civil Code, chapter III entitled "On the life annuity contract" of title XIII "On aleatory contracts" of Book III "On different ways of obtaining property". This chapter is divided into two: "On the nature of the life annuity contract" (art. 1639-1645) and "On the effects of the life annuity contract between the contracting parties" (art. 1646-1651).

The thesis states the fact that in the Project of the Civil Code, the life annuity contract is regulated under art. 710-719 of chapter XII "Life annuity and the contract of life maintenance" of Book V "The obligations", title VII "Different special contracts", dispositions that regulate aspects such as: constituting the annuity, cancelling the contract, unpayment of the due installments, interest, immunity from seizure.

Thus, the life annuity is a contract by which a person alienates some goods or pays a sum of money in exchange for a regular benefit under the form of money which is to be paid until his/ her death.

As for the legal characteristics of the life annuity contract, the paper presents it as: an aleatory contract; basically a synalagmatic contract; basically a contract for valuable considerations; basically consensual; an entitled contract; a main contract; a negotiated contract; a contract of successive performance; a contract of property transfer. The legal consequences of these characteristics are distinctly examined.

In Chapter III, one can find an analysis of the specifics of consent, capacity, cause and object of the life annuity contract, as well as aspects concerning the form of this contract.

As for consent faults, the life annuity, which is an aleatory contract, excludes the possibility of applying the damage fault, taking into account that damage is seen as a clear value disproportion between the obligations the parties have.

As far as the form of the life annuity contract is concerned, it has been noticed that the principle of consensualism is applicable. On the other hand, in case property of land is transferred by a contract, the authentic form is necessary, taking into account that land alienation is valid by such acts in our system. When the annuity comes out of a donation, the authentic form is necessary, or when it comes out of a will, it has to observe the form conditions under the specifics of the will.

In Chapter IV, the paper analyzes aspects such as: the person who benefits from the life annuity contract; the obligations of the life annuitant towards the payer of the annuity, as well as towards third parties; the obligations of the payer of the annuity.

The thesis examines the situation in which the annuity contract is concluded for the benefit of several persons who decease at different times. The life annuity constituted in favour of a deceased person is null, both in the French system and (under art. 1794 of the Civil Code, any life annuity contract for the benefit of a person who deceased on the day of the contract, has no effects), and in our system (under art. 1644 of the Civil Code, any life annuity contract has no effects if the person favoured by the contract is already dead when the contract is concluded).

The case when the annuity is constituted for the benefit of a sick person is dealt with separately. When it is about an ordinary, passing disease, the life annuity contract is valid, but if the disease is serious which causes the person “to be dying” such a contract is not valid, falling under the life annuity contract concluded in favour of the deceased. Thus, pursuant to art. 1645 of the Civil Code, the life annuity contract for the benefit of a person affected by a disease he/she died of *20 days* since the date of the contract, *is null* (so are the dispositions of art. 1975 of the French Civil Code). The solution is right if one takes into account the *aleatory* character of the life annuity contract, so that when the death of the person is certain and will take place immediately, the contract is no longer an aleatory one. It is mentioned here that in the Project of the Civil Code it is stipulated that there is no effect of the contract by which a life annuity for valuable consideration was established for the life of a person who, at the date the

contract was concluded, suffered from a disease of which he/ she died *60 days* after this date.

The paper proves that the dispositions of art. 1645 of the Civil Code containing *an absolute presumption of cause lack* is not applicable to annuities as a gift which, by hypothesis, have no aleatory character.

The last chapter – **The legal nature of the life annuity contract** – analyzes the similarities and differences between the life annuity contract and other similar contracts.

Thus, first of all, the life annuity contract is compared to the maintenance contract, by which one party alienates some goods or pays a sum of money, a capital, and the other party binds himself/ herself to assure the maintenance in kind during the life of the person and to bury him/ her on death.

Similar to the life annuity contract, the maintenance contract is an aleatory contract for good consideration, the aleatory character being even more distinct, since the obligation of the debtor of maintenance depends not only on the uncertain life length of the creditor, but also on his/ her daily needs or other factors that can influence the performance of duties, such as the health of the creditor, costs of living, the place where he/ she lives etc.

Starting from the doctrine opinions according to which this contract should be legally regulated, taking into account the fact that it is largely used in practice, the thesis supports the proposal by which this contract in the Project of the Civil Code should be regulated. Thus, in this normative project in chapter XII of title VII, Book V, art. 1720-1729, the life maintenance contract is regulated. The maintenance contract will thus find full legal acknowledgement after a long period during which only the rules of general obligations and the innovations resulted from the practice of the courts or promoted in the doctrine have been applied.

Taking into account the doctrine and jurisprudence opinions, the thesis focuses on the fact that both contracts – of maintenance and life annuity - are aleatory contracts of successive performance. Yet, the two contracts are not identical, the difference being *the nature of the obligations of the successive performance debtor*. Thus, the maintenance contract comprises the essentially personal obligation to do, whereas the life annuity contract comprises the obligation to give. Moreover, it is explained that the regulation in the Project of the Civil Code concerning the *replacement of maintenance by life annuity* is welcome and removes some doctrine and jurisprudence disputes regarding the change into money of the maintenance obligation resulting from a maintenance contract. Thus, the consequence would be that the court should replace, at the request of either party,

maintenance in kind on annuity of equal value, in the following situations: a) the performance or benefit of maintenance in kind or cohabitation of creditor and maintenance debtor cannot continue for objective reasons; b) the maintenance debtor dies. In all cases in which maintenance was replaced by life annuity, the dispositions regulating the life annuity contract become applicable (art. 1729 of the Project).

The thesis analyzes the similarities and differences between life annuity and: life insurance, legal maintenance obligation, natural maintenance obligation, alimony, the obligation to remedy the damages caused by illegal acts (under the form of a monthly rent in case the person is not totally or partially fit for work), drawing the conclusion that life annuity is similar to other legal institutions with a similar purpose, but they do not overlap, life annuity having a particular profile.