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Codrin CODREA

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Stipulatio Alteri – the Roman law Construction and the Contemporary Structure in European Legal Systems

Codrin CODREA[1]

Abstract

The Roman law institution stipulatio alteri, introduced as an exception to the unyielding contractual principle Res inter alios acta, aliis nec prodesse, nec obesse potest, can be found in most of the contemporary European legal systems, in the same legal position, as an exception to the principle of contracts taking effects only between parties. This principle, which takes its unaltered substance from the Roman law, is differently referred to in continental and common law legal systems – if in the first legal family it is referred to as the relativity of contracts, the equivalent notion applied in common law legal systems is the privity of contracts. All contemporary European legal systems, however, recognize both the overarching principle of contracts producing binding effects only between the parties and the exception to this principle, the contract in favour of third parties, as it is provided in the French Code Napoleon of 1804 and in its Romanian acculturation, the 1864 Civil Code, just as it is in the contemporary French and Romanian Civil codes, articles 1121, respectively articles 1284-1288, in the Bürgerliche Gesetzbuch, the German private law code, § 328 I, and in common law legal systems as jus quaesitum tertio. This article investigates the structure stipulatio alteri had in Roman law, the arguments and debates surrounding this institution as an exception to the inter partes effects of contracts, and the legal configuration it has in some contemporary European legal systems.

Keywords: *stipulatio alteri, contract in favour of a third party, relativity of contracts, privity of contracts, Roman law.*

[1] Assistant Lecturer PhD., Faculty of Law, `Alexandru Ioan Cuza` University, Iasi, Romania, codrin_codrea@yahoo.com

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Corresponding Author: Codrin CODREA
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1. Introduction

Stipulatio alteri is a legal institution for which the European law, in the contemporary civil codes of continental European legal systems or through the 1999 *Act to make provision for the enforcement of contractual terms by third parties* in English common law legal system, reserves specific provisions, recognizing it as an exception to the *inter partes* effects of contracts. Since it is explicitly regulated, for most of the legal doctrine of each legal system, when analysing this institution there is a temptation to elaborate only on the legal text, leaving aside or briefly mentioning the intricate arguments in other legal systems which led to the express recognition of *stipulatio alteri*. A smaller fraction of the legal doctrine of each legal system addresses the evolution of the institution, but insofar as it is the evolution internal to that specific legal system. This may be justified by a strict legal positivist perspective, which is primarily concerned with the law in force, and only secondarily, for mere ornamental purposes, with the doctrinal disputes behind a certain legal option, especially if these disputes were held in different legal systems. From this perspective, the contemporary relative uniformity at the European legal families regarding the recognition of the contract in favour of a third party as a benign exception to the *Res inter alios acta, aliis nec prodesse, nec obesse potest* hides complex legal debates around this institution, debates which took place in every legal system.

2. Argument of the paper

If for a severe legal positivist endeavour it may either not seem wise to stir old demons, or completely irrelevant to dwell on past disputes, for a comparative analysis it is of utmost importance to reveal and recognize the differences in these complicated processes of regulating *stipulatio alteri*, even those differences which were eventually surpassed. A certain contemporary legal institution may have similar configurations and may work in a similar manner in different legal systems, but as a result of different debates – it is this distinct *telos* and genealogy of *stipulatio alteri*, specific to each legal system, that most of the legal doctrine of each legal system leaves aside and which this article intends to reveal.

The debates surrounding *stipulatio alteri* started in Roman law, but different arguments were brought in the foreground in continental European and common law legal systems and the controversies regarding the recognition of this institution were concluded in favour of *stipulatio alteri* at different times in each legal family – one of the latest and probably most

notable recognitions of the contract in favour of a third party is the one that took place in English common law legal system, where a first proposal to reform the doctrine of privity, which held a strict approach on *inter partes* effects of contracts, was made in 1937, and only in 1999 the Parliament passed the *Act to make provision for the enforcement of contractual terms by third parties*, which got the Royal Assent in 11 November. Specific justifications for and against *stipulatio alteri* were employed in each legal system.

3. Distinct approaches on Stipulatio alteri

3.1. Stipulatio alteri in Roman law

The contract in favour of a third party appeared in the Roman legal realm as an exception which gained structure and importance only on the background of an increasing wave of recognized exceptions to the *inter partes* effects of contracts. The legal construction was simple and it is similar in all European law – through a stipulation, the *promittens (promisor* or *performing party*) assumed a performance to the *stipulans (promisee* or *anchor party*) in favour of a *tertium (third party* or *beneficiary)* which was not part of the agreement between the stipulans and the promittens. Since this operation was in direct conflict with *res inter alios acta* principle, it implied, firstly, that the stipulans was not recognized a legal action against the promittens in case the latter failed to perform his duty and, secondly, that the beneficiary who was not part of the agreement between the stipulans and promittens was not recognized any legal means to demand the performance from the promittens. If the Early and Classical Roman law held a very strict approach on *Res inter alios acta* principle, from which derived the equally strict *nemo alteri stipulari*, in Postclassical Roman law there were recognized several means for both the stipulans and the third party to legally attack the contract between the stipulans and promittens.

The stipulans could have resorted to two legal means in order to act against the promittens – the first one consisted in the possibility for the former to justify an interest [1]. The issue of the justified interest of the stipulans was also at the core of French legal debates regarding *stipulatio alteri*, as it is stated by Pothier, and also through the specific French legal contractual notion of cause. However different in terminology, the solution grounded on interest is similar in Roman and French law – if the stipulans was able to prove a personal interest, even a moral one, he could have sued the promittens for performance of the stipulation or damages for non-performance. The second means available to the stipulans was a contractual one – the parties, stipulans and promittens, could have included in the

contract a *stipulatio poenae*. This provision presupposed that if the promittens failed to perform his obligation in favour of the third party, the stipulans can demand the sum of money specified in the contract. Usually, the sum of money was considerably more onerous than the performance of the obligation, thus, *stipulatio poenae* worked as a guarantee that the promittens will fulfil his obligation in favour of the beneficiary instead of paying the onerous sum of money to the stipulans.

The beneficiary could have resorted to four legal means in order to demand the performance of the contract between the stipulans and promittens. The first one has a contractual nature – it presupposed that the stipulans concludes the contract with the promittens and simultaneously designates the beneficiary as his agent in fulfilling the same obligation as the promittens. Through this contractual operation, the third party had a double quality – a beneficiary of the *stipulatio alteri* and an agent of the stipulans. If the promittens failed to perform his obligation in favour of the beneficiary, the latter could have used all the contractual means the stipulans had from the stipulation against the first. This agency contract was usually followed by a remission of debt, through which the stipulans gave up his right to demand from the beneficiary whatever he obtained from the promittens in the exercise of the actions derived from the quality of an agent of the stipulans. The second means which allowed the third party to act against the promittens was the hypothesis of a *post-mortem* provision in the stipulation through which the promittens assumed an obligation in favour of a third party in the hypothesis of the death of the stipulans. The third means available to the beneficiary was the institution of *adjectus solutionis gratia*, which presupposed that the promittens promises to the stipulans to fulfil the obligation in favour of both the stipulans and the third party. The fourth means presupposed that the parties concluded a *donatio sub modo*, which implied that the donation from the stipulans-donor to the promittens-donee was made under the condition of the promittens performing an obligation in favour of a third party [2]. Specific to this Post-classical Roman law institution was that the beneficiary was recognized an action to enforce the stipulation between the donor and donee [3]. Both *adjectus solutionis gratia* and the donation under condition or charge were also introduced in French law through article 1121 of Code Napoleon as exceptions to the relativity of contracts

All these means the Roman law allowed to enforce *stipulatio alteri* can still be used in contemporary European law. However, one of the particularities of *stipulatio alteri* as an exception to *Res inter alios acta* consists in the fact that the third party has a direct right deriving from the contract between the stipulans and promittens, and on this basis alone, without any

other contractual provisions, he can act against the promittens. Most of the means provided in Roman law could not account for this direct act of the third party, even though it provided ways for the third party to avoid the strict prohibitive principle of *Res inter alios acta*.

3.2. Different applications in contemporary European law

Under 1804 Code Napoleon there was a strict reference to *stipulatio alteri* in article 1121 as an exception to relativity of contracts stated in article 1119. The accepted forms of *stipulatio alteri* under article 1121 were considered to be *donations avec charges* and *adjectus solutionis gratia*. However, due to its utility, the mechanism provided by *stipulatio alteri* was extended to cover different operations. This situation was somehow familiar in Romanian law under 1865 Civil Code, which, although did not have an equivalent of the French article 1121, managed to extend the application of *stipulatio alteri*. The areas in which the mechanism was used in both legal systems was the insurance contracts, however in French legal system it got extended to any operations in which one of the parties was considered to ensure a third party. As such, in French law *stipulatio alteri* was used not only for life insurances, where the mechanism presupposes that the insured-stipulans pays a sum of money to the insurer-promittens so that the latter, in the case of the former's death, would give the indemnity to a third party nominated by the insured, but also for transport contracts, in which the transporter insured whoever would have been the owner in the moment of the risk [4]. Some of the modern applications of *stipulatio alteri* are specific to the French legal system and are considered by some voices in the French legal doctrine as artificial extensions of this institution: in the case of a passenger transport contract, it is considered that the passenger implicitly stipulates in the benefit of his relatives for the hypothesis in which he suffers an accident; also, in a contract between a hospital and a transfusion centre, where the latter guarantees the purity of the blood in favour of the beneficiaries. Apparently, the courts have decided that whenever the result of considering a certain operation as *stipulatio alteri* is advisable or relevant it would do so even if it would overlap with other legal institutions – such as the implied stipulation in the enterprise contract, which overlaps with the direct action the workers of the entrepreneur have against the beneficiary in case of enterprise contracts [5].

4. *Nemo alteri stipulari* and *Res inter alios acta* in European law

4.1. Rejection of Stipulatio alteri in Roman law

The Roman law principle governing contracts *Res inter alios acta, aliis nec prodesse, nec obesse potest*, which is recognized as the relativity principle in continental European legal systems or the privity of contracts in common law legal systems, stated that the binding effects of contracts should take place only between the contracting parties. This principle was rephrased by Julius Paulus as *Verborum obligatio inter praesentes, non etiam inter absentes contrahitur*, a Roman jurist who was also in favour of *stipulatio alteri* as an exception to this principle [6]. However, during Early and Classical Period, Roman law gave full sovereignty to the *inter partes* effects of contracts and, as such, *stipulatio alteri* was not recognized. As Reinhard Zimmermann notices, it would have been unconceivable for a Roman jurist to accept that an agreement between two parties could generate rights for a *tertium* who was not part of the contract between the first two [7]. The interdiction of a contract in benefit of a third party was famously summed up by Ulpianus, *Alteri stipulari nemo potest, praeterquam si servus domino, filius patri stipuletur* [8]. The Roman law rejection of *stipulatio alteri* was grounded on three reasons, two of which rely on the personal character of obligations and contracts.

A first reason for the strict compliance with the *inter partes* effects of contracts, which excluded *stipulatio alteri*, was based on the Roman idea that the *obligatio* which derived from an agreement was a strictly personal bond. *Obligatio* was at first considered a *vinculum corporis*, a personal bond between the *obligee (creditor)* and the *obligor (debtor)*, which allowed the obligee to resort to private revenge measures in case the obligor did not perform his duty [9]. It is the case of the Early Roman law procedure recognized by *Lex Duodecim Tabularum* of *manus injectio judicati*, through which the obligee was recognized a complete power over the obligor in the case the latter was insolvable. Through *manus injectio judicati*, the obligee was able to capture the obligor in a public place, imprison him in a private cell of the obligee, *carcere private, ergastulum*, and eventually sell the obligor as a slave *trans Tiberim* [10]. Only later *obligatio* turned from *vinculum corporis* into *vinculum juris*, a legal, abstract bond which allowed the obligee to appeal to the state in order to constrain the obligor. This perspective on *obligatio* as *vinculum juris*, which is accepted even in contemporary legal systems, was given by Justinian in *Institutiones*, Book 3, section 13: *Obligatio est juris vinculum quo necessitate adstringimur solvendae rei secundum nostrae civitatis jura. (An obligation is a legal bond, with which we are bound by necessity of performing some act according to the laws of our State).* Therefore, a first reason for the reluctance in the Roman law towards a contract

between two parties which would benefit a third party can be found in this personal nature of *obligatio* [11].

A second reason derives from the fact that agreements, through the mere manifestations of will, were not considered valid contracts. In Early and Classical Roman law it was considered that *Ex nudo pacto actio non nascitur*, which meant that a plain agreement of the parties, *consensus*, was not recognized legal effects without respecting certain formalities. Even though the parties agreed on specific duties and rights, this simple understanding was not enough to legally conclude a valid contract. However, at the end of the Classical Period, besides three types of contracts which required certain formalities for their validity, there was also recognized a fourth. The three types of formalist contracts were the verbal contracts, *verbis*, which implied the presence of witnesses and certain verbal formalities for their valid conclusion, e.g. *sponsio, stipulatio*; the contracts that were concluded through the material conveyance of a certain thing e.g. *comodatus, pignus, depositum*, and the contracts that were concluded in writing, *litteris*, which presupposed for their validity a prior inscription. A fourth type of contracts was the consensual ones, which were validly concluded through the mere agreement of the parties, *solo consensus*. This latter category was only emerging at the end of the Classical Period, but it grew in importance by the end of Postclassical Period during Justinian [9]. However, for most of the contracts there were required specific formalities in order to be recognized legal effects, formalities which were supposed to be accomplished by the parties themselves. With this regard, in the context of an agreement in favour of a *tertium*, the third party could not have gained a right from the contract of the first two parties, since he did not take part himself in the formalities required for the validity of contracts.

A third reason against *stipulatio alteri* derived from the fact that the stipulans lacked an interest in contracting with the promittens for a third party [7]. In Roman law it was considered that since any legal trial had to involve a specific sum of money, then every obligation should be monetarily evaluable. The notion of interest consists of this pecuniary value, which had to be able to be ascertained by a judge in every obligation. With this regard, it was considered that, in the case of *stipulatio alteri*, if the promittens failed to perform his duty towards the beneficiary, the stipulans would have no interest. It would have had an interest only if the promittens failed to perform the duty towards him, not when the duty was not performed for a third party. A couple of immediate consequences were drawn from this: firstly, since the stipulans had no interest, he could not have been recognized a legal action against the promittens; secondly, since the stipulans had no

legal means to enforce the agreement with the promittens, he was considered to have no right out of the contract.

4.2. Similar doubts in continental law

The problem of a contract between two parties that would benefit a *tertium* was inherited by the contemporary French law from the law of *Ancien Régime*, which followed, mostly, the legal Roman tradition. Before 1804, the year Code Napoleon came into force, different French territories were subjected to different laws – in the south there were regions subjected to written law, *pays de droit écrit*, which followed Roman law, and in the north there were regions subjected to customary law, *pays du coutume*. Although until the 10th century Roman law has gone through a regression phase, from the 11th century, due to the glossators of Bologna, who rediscovered the Justinian codex *Corpus juris civilis*, Roman law grew in importance in France [12]. Zimmermann notices that until the 17th century and partially until the 19th century the *nemo alteri stipulari* rule was generally applied, in spite of the Post-classical Roman law configurations of *stipulatio alteri* [13].

The Roman interdiction *nemo alteri stipulari* was widely respected in *Ancien Droit*, due to its force in both Roman and customary law, and this is the reason why article 1119 of Code Napoleon recognizes it in a formulation which remained unchanged in the contemporary French Civil Code: *On ne peut, en général, s'engager, ni stipuler en son propre nom, que pour soi-même.* Code Napoleon also recognized the Roman *res inter alios acta*, the relativity principle, in article 1165: *Les conventions n'ont d'effet qu'entre les parties contractantes ; elles ne nuisent point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121. (Conventions have effects only between the contracting parties; they cannot harm nor profit a third party unless in the case of article 1121).* The situation is similar in the 1865 Romanian Civil Code, inspired by the Napoleon Code, which recognizes the principle of relativity of contracts, stating in article 973 that *Conventions have effects only between the parties* and, in a similar formulation, in article 1280 of the Civil Code in force – *The contract produces effects only between the parties, if the law does not state otherwise.*

The strict interdiction of article 1119 Code Napoleon was alleviated by article 1121, which article 1119 expressly refers to: *On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut plus la révoquer si le tiers a déclaré vouloir en profiter.* Therefore, as exceptions to *res inter alios acta*, the French law explicitly recognizes *adjectus solutionis gratia* and *donations avec charges* [5].

This first operation presupposed that the promittens, in exchange of a counter-part obligation assumed by the stipulans, agrees to an obligation which may be performed simultaneously in the benefit of the stipulans and of a third party. The problem which concerned the restrictive interpretation of articles 1121 and 1119 was the interest of the stipulans – if the Code explicitly recognizes this exception to the *res inter alios acta* principle, it does so only if the stipulans and promittens simultaneously agreed in favour of both stipulans and third party and never only in favour of a third party. If the stipulation was made only in favour of a third party, such a contract would not have been valid since it lacked any interest on the part of the stipulans [14]. If the stipulation, along with the beneficiary, is also in favour of the stipulans, the *stipulatio alteri* is valid. In this case, the *adjectus solutionis grtaita*, the third party, was recognized an action against the promittens [5].

The second operation which is articulated on *stipulatio alteri* is a form of donation in which the donor, with *animus donandi,* disposes irrevocably of his property in favour of the donee who, in return, assumes a duty to the donor in favour of a third party. The validity of this operation was criticised also on grounds of lack of interest: the promittens as a donee, in exchange for assuming a duty for a third party, has as an interest the obligation of the stipulans as a donor; however, the stipulans has no interest in the contract since he receives nothing in return from the promittens. The argument against *donations avec charges* is that, since the stipulans has only a moral interest, not evaluable in monetary terms, it is not enough for the validity of the contract. Once it was accepted that the interest of the donor-stipulans may be only a moral one, it allowed the recognition of an action in favour of the donor-stipulans for donation revocation against the donee-promittens who failed to fulfil his obligation towards the beneficiary, and also an action in favour of the beneficiary against the promittens for fulfilling the obligation. This solution was gradually extended to gratuitous contracts towards *adjectus solutionis gratia* [5].

In Romanian Civil law, under the 1865 Civil Code, *stipulatio alteri* was not explicitly regulated like in 1804 Code Napoleon, although the French legal document constituted the fundamental source of inspiration for the Romanian legislator. As mentioned above, the 1865 Civil Code only states the relativity principle in article 973, without any reference to the contract in favour of a third party, similar to the article 1121 of the Code Napoleon. The reason behind this omission is that, before adopting the Romanian Civil Code, the destiny of articles 1119 and 1121 of Code Napoleon was observed with concern by Romanian jurists – those provisions were considered to be the root cause of the fragmentary and divergent French legal practice and doctrine over the *stipulatio alteri*. Thus, the Gordian knot of *stipulatio alteri* and

Res inter alios acta was untied by simply abandoning the inclusion in the 1865 Romanian Civil Code of a provision equivalent to article 1121 Code Napoleon [14]. In spite of a the absence of specific regulations regarding *stipulatio alteri,* the legal doctrine, special legislation and the courts have generally recognized the application of this institution in certain areas which were somewhat similar to those in French law. Besides the donation with charges, which was grounded on article 829 and 832 of the 1865 Civil Code, an institution identical to the *donations avec charges* in French law, there were also insurance contracts explicitly regulated by 136/1995 Law, the contract of life annuity grounded on article 1642 of the 1865 Civil Code, and transport contract regulated in the former Commercial Code which were using the mechanism of *stipulatio alteri*. Contemporary Romanian Civil Code explicitly regulates *stipulatio alteri* in articles 1284-1288 as a general institution and as an exception to the relativity of contracts.

The justifications for *stipulatio alteri*, before it was recognized as an autonomous institution, were similar in both legal systems and were elaborated by 19th century jurists. These theories were either relying on the mechanism of the offer, on the one of *negotiorum gestio*, or on the unilateral commitment of the promittens. Laurent explained the fact that the third party gained a direct right from the stipulation in terms of an offer from the stipulans to the beneficiary. This theory, however, could not account for the fact that the beneficiary was gaining his right before any acceptance of the stipulation, unlike the receiver of an offer, who gains the right only at the moment he accepts it; it was also the problem of the beneficiary and the creditors of the stipulans who were supposed to compete in case of the insolvability of the stipulans [5]. Thaller explained the right of the third party in terms of an offer, but not from the stipulans, but from the promittens. Although he managed to offer grounds for an action of the beneficiary against the promittens, his theory could not account for the hypothesis of the death of the promittens, and also introduced an unjustified possibility for the promittens to revoke the stipulation [5]. The explanation of the direct right of the third party through the mechanism of *negotiorum gestio* implied that the stipulans was considered a *gestor* of the beneficiary, who was considered the *dominus negotii*. Through the ratification of the *negotiorum gestio*, this operation turned into an agency: the beneficiary confirmed the right that existed before his acceptance through the contract between the stipulans and promittens and gained through the agency an action against the promittens. However, through ratification, the stipulans was substituted by the beneficiary in the contract the stipulans concluded with the promittens; as such, the ratification mechanism mystified the specific relations between the beneficiary and the stipulans of the *stipulatio alteri*, since the stipulans had

specific actions against the promittens, for performance of the obligations or rescission, actions which were still available to him even if the beneficiary accepted the right [5]. Another theory which failed to explain *stipulatio alteri* added to the contract between the stipulans and promittens the unilateral commitment of the latter to perform the obligation in favour of a third party. This theory failed to explain the role of the stipulans in the mechanism of the contract and his right to revoke the right in favour of the beneficiary [14].

4.3. Jus quaesitum tertio – common law dismissal of Stipulatio alteri

The severe Res inter alios acta can be found in the English common law prior to the 1999 Act to make provision for the enforcement of contractual terms by third parties. The rejection of jus quaesitum tertio, of a right of a third party deriving from a contract between two other parties, was grounded on privity of contracts and consideration doctrines. If the first rule of privity implies that a contract cannot impose an obligation onto a third party, the second rule of privity is concerned with a right that may accrue from a contract in favor of a third party. The privity of contracts is the common law equivalent of the relativity principle in continental legal systems, with the similar effects of preventing a third party who was not part of a contract from suing on the contract [15]. For a valid contract in common law the existence of consideration is necessary, which implies the existence of two conditions – a loss assumed by each party (legal detriment condition) and the existence of a negotiation (bargain condition). The first condition is fulfilled if the promise assumed by each party presupposes a benefit to the other party and a loss (detriment) for the promisor, and the second condition is fulfilled if the promise of each party is the result of a negotiation (bargain). A performance is bargained for if it is sought by the promisor in exchange for the promise he assumed and is given by the promisee in exchange for that promise [16]. In case of a stipulatio alteri the consideration condition could not have been fulfilled by the third party, and therefore he could not have been recognized a right deriving from the contract.

There were several ways to elude this rule by assignment, agency, also trust law [17]. The most important one was the trust, on which the privity rule did not apply, and the existence of consideration was not required, since it was governed exclusively by equity law. The trust is an operation involving three persons – a settler, who transfers property to another, trustee, who is in charged with the administration of that property in favor of a third party, the beneficiary [18].

4.4. Similar contemporary structures in continental and common law

Stipulatio alteri is widely recognized across European legal systems and the legal structure is fundamentally similar: through the contract between stipulans and promittens, the third party gains a direct right. The regime of *stipulatio alteri* derives either from explicit provisions in the civil codes like in the French, Romanian or German civil codes, from legal doctrine and legal practice as it is in French legal system for the cases in which *stipulatio alteri* was extended beyond the cases explicitly stated in the Code, or in the special legislation, as it is the notable case of the English common law *Contracts (Rights of Third Parties) Act 1999*.

The stipulans has an action against the promittens for performance of the contract or for rescission. If the third party accepts the right, he is recognized an action against the promittens for performance of the contract, but he has no action for rescission of the contract since he is not a part of it. If the beneficiary sues the promittens, the latter can use all the defences he had against the stipulans deriving from the contract.

For the validity of the operation identical conditions are required in both continental European law and common law: a clear intention that the contract benefits the third party and also that the beneficiary is determinable.

5. Distinct genealogies in European law

Although Roman law allowed for parties to resort to different means to validly conclude and enforce a *stipulatio alteri*, classical notions cannot completely explain this *sui generis* institution, which fundamentally expands the effects of the contract by giving a right to a third party from a contract he is not part of. With regard to the contemporary structure of *stipulatio alteri*, the Roman law can account for the mechanism, the questions regarding the interest of the stipulans, but not for the existence of the right in favour of the third party. Also French and former Romanian legal doctrine, which tried to explain the institutions through means offered by the mechanisms of an offer to the beneficiary, either from the stipulans or from the promittens, through the means of *negotiorum gestio*, or through the means of the unilateral commitment of the promittens, failed to provide a reasonable ground for all the effects *stipulatio alteri* has.

The adequate theoretical explanation of the institution came from the German legal doctrine, which explicitly recognized it as an original institution and as an exception to the relativity of contracts in the 1900 Bürgerliche Gesetzbuch, the German private law code, § 328 I: *Durch Vertrag kann eine Leistung an einen Dritten mit der Wirkung bedungen werden, dass der Dritte*

unmittelbar das Recht erwirbt, die Leistung zu fordern. (Performance to a third party may be agreed by contract with the effect that the third party acquires the right to demand the performance directly.). This legal and doctrinal solution has a history of its own and it traces back not directly to Roman law as it was widely perceived in that day, but to the legal practice of 17th century Netherlands, which stood aside from the Roman *nemo alteri stipulari* widely embraced in France, Italy or Germany [13]. Due to its economic emergence, the Dutch legal system had to embrace *stipulatio alteri* and abandon the Roman rule of rigid *inter partes* effects of contracts. One of the first legal scholars to account for *stipulatio alteri* as an exception fully justified to *Res inter alios acta* was the Dutch Johannes Jacob Wisseiibach and, prior to the Dutch divergent opinions on the matter, the natural law theorist Hugo Grotius ascertained the fundamental incongruity between *Nemo alteri stipulari* and natural law. On this background, *stipulatio alteri* became visible for a legislative inclusion into Prussian, Bavarian and Saxonian codifications in the configuration the institution has nowadays, unbound by the restrictive *Res inter alios acta* [13]. With regard to the German regulations of *stipulatio alteri*, the modest proposals of Pothier to include in the 1804 Code Napoleon article 1121 as an exception to article 1119, with its two applications of *stipulatio alteri* in the forms of *adjectus solutionis gratia* and *donation avec charges*, seem like a more distant relative to the contemporary recognized institution than it is to the Postclassical Roman law recognition of *stipulatio alteri* in the form of *donatio sub modo*. With this regard, the Romanian regulation of *stipulatio alteri* in articles 1284-1288 of the contemporary Civil Code is more similar to the German regulation than to the French expansion in judiciary practice and legal doctrine of the particular cases expressed in article 1121.

The debates around *stipulatio alteri* in English common law were primarily concerned with the second rule of the privity of contracts, which had divergent interpretations in the judiciary practice. Until the 17th century, the decisions given in matters regarding *stipulatio alteri* were in favour of a right of a third party derived from a contract to demand the performance of the contract from the promittens. However, this approach changed, and for the next two centuries decisions regarding the issues of *stipulatio alteri* were contradictory. In 1861 the debate was settled in favour of *nemo alteri stipulari* with Tweddle vs. Atkinson [1861] 121 ER 762, opinion which was confirmed by the House of Lords in Dunlop Pneumatic Tyre vs. Selfridge and Co Ltd [1915] AC 847 in 1915. On the background of this strict approach regarding the privity of contracts, which excluded the possibility for a right of a third party, and on the background of multiplying exceptions to this rule passed by the Parliament, the *Contracts (Rights of Third Parties) Act 1999* was passed [15].

6. Conclusions

Although the configuration of *stipulatio alteri* is similar in different European legal systems, each legal system carried his own internal battles with the Roman law principles of *Res inter alios acta aliis nec prodesse, nec obesse potest* and *Nemo alteri stipulari*, including the Roman jurists themselves. If the general approach in the Roman law was against recognizing this institution, it allowed for certain contractual mechanisms to avoid the *inter partes* effects of contracts and recognized both an action for the stipulans against the promittens and an action for the third party against the promittens. However, the idea of a distinct right that accrued for the third party as an effect of the contract between the stipulans and promittens could not have been explained in Roman legal terms. The same endeavour was pursued unsuccessfully by the French doctrine when resorting to the mechanisms of offer, *negotiorum gestio*, or unilateral commitment of the promittens. Even though the strict application of *nemo alteri stipulari* was attenuated by the inclusion in the 1804 Code Napoleon of article 1121, which allowed *ajdectus solutionis gratia* and *donations avec charges* as forms of *stipulatio alteri*, it was the judiciary practice and legal doctrine that expanded the application of *stipulatio alteri* in other fields, beyond the strict interpretation of the provisions in the Code. In the Romanian legal realm, *stipulatio alteri* was perceived through the conflicting decisions the French courts were giving in matters regarding this institution, and, as a consequence, the 1865 Civil Code does not contain an explicit provision regarding *stipulatio alteri*. Also, following the French model, it was the legal doctrine and judiciary practice that gave shape to the contract in favour of a third party, with the inspiration of Roman and French justifications for the direct right of the beneficiary. The German codifications were the first to recognize the *sui generis* nature of *stipulatio alteri* and to avoid the logical and juridical trap of trying to explain the original right of the third party into classical legal institutions. The English common law had a particular trajectory, bound by the particular effects the judiciary practice has in this legal system, by a particular history regarding the application of the privity of contracts and by the late intervention of the Parliament with the *Contracts (Rights of Third Parties) Act 1999*.

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