CONTRACTUAL LIABILITY FOR OTHER'S ACT

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Civil liability is divided in two: civil liability in tort and contractual civil liability. These are devided also in tort liability for its own and liability for other's act or liability for things. Civil liability in tort occurs when it have been cased an injury by wrongful act non-contractual. But as tort liability for its own act is not enough in all cases, to protect the person's interests wich have suffered damage, where covered in Civil Code in article 1000 al.2-4 three cases of tort liability for others deeds. The other form of liability contractual liability arising from total or partial non-fulfilment of obligations asumed by contract is a personal liability for its own with contract as a source. The concept of contractual liability for other's act appered in France only in XXth century Curently in France the majority doctrine recognizes the existence of a principle of contractual liability for other's act, while in Roumania most doctrine as wel as tort liability for other's act belives that also contractual liability for other's act exist only in special cases, derogating from common law. The contractual liability authonomy for other's act was underlined also by the non-overlapping principle. This principle means there is no option between contractual or tort liability. Judicial practice has concluded that the victim doesn't have the right, in respect of the same unlawful act, to obtain repairs on two bases, repairs wich overlapped would exceed the total amount of the prejudice suffered

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Civil liability is divided in two: civil liability in tort and contractual civil liability. These are devided also in tort liability for its own and liability for other's act or liability for things.

Civil liability is different from a legal system to another even in the same country from one era to another. In the roumanian civil system civil liability have as main principle the idee of fault but there are cases of objective liability without the fault. There are two kinds of liability: the liability in tort (art.998-999 Civil Code) under which each person is responsable for its own facts, liability considerated by the most authors as direct[1]. So the article 998 Civil Code states „each human deed wich causes to another injury, compell the one that had caused to repair it" and article 999 Civil Code underlining the aplicability of 998 states that „the human it's responsable not only for the injury caused by its tort but also the one caused by his negligence or his imprudence". Civil liability in tort occurs when it have been cased an injury by wrongful act non-contractual. Wrongful act non-contractual is in the first place a conduct that violates the general duty not to offend the rights and legitimate interests of others, in second place means the non-performance of obligations

arrising from a lawful act and an unilateral act.[1] Before creating the prejudice there is no link between the victim and the person responsable for the damage.

These kind of liability suposes cumulatives conditions: prejudice, wrongful act, causal report between wrongful act and the damage, fault or guilt[2]. The prejudice represent the effect of the infrigement of rights or legitimate interests with harmful results. If there is no damage it can't be engaged the liability even if it comitted an unlawful act.[3] The causal report between the deed and damage is an objective condition of civil liability and the criteria by which is assessed the amount of the repair. In the case of majeure force, unforesseable circumstances the act of a third person or victim do not exist causal report, causation wich eliminate the liability.[4]

But as tort liability for its own act is not enough in all cases, to protect the person's interests wich have suffered damage, where covered in Civil Code in article 1000 al.2-4 three cases of tort liability for others deeds: parental responsability for injury caused by their minor children; the employer responsability for the wrongful act of their employees and craftmen and teachers responsability for the damage caused by the students or aprentices. These cases are considered by the most roumanian authors as strictly interpreted and aplicated although like the french doctrine should be allowed a general principle of liability for others deeds.

Since a pearson may suffer a loss because a thing, animal or ruins, the law has stated in Civil Code article 1000 al.1 the final part the liability for things that we have in our juridical care; in article 1001 the liability for damage caused by animals that have to be in our legal security and in article 1002 the liability for ruins. The tort liability is a legal obligation that arises from the delict.[5] This kind of liability is considered by the majority of the roumanian doctrine as indirect liability wich completes the direct liability of the injury author.[6]

The other form of liability contractual liability arising from total or partial non-fulfilment of obligations asumed by contract is a personal liability for its own with contract as a source.[7] In a minority opinion this concept of „contractual liability" having to repair the damage unfair caused absolutely opose Code doctrine that interests due for non-performance of contract are a result of contractual obligations and are replacing the execution by equivalent; the classical doctrine states in the sense that the non-performance of the contract doesn't represent the cause for a new obligation because the interests's cause exist in the contract The moderne doctrine presents a non-execution as a deed that generates responsability; so a source for a new obligation different from the one asumed. Such non-executing the contract should extinguish the initial obligation, it is considerated a civil delict.[8] In the roumanian doctrine the majority statues that in case of non-executing the obligations contractual asumed it engage the contractual liability.[9]

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[1] L.Pop-Teoria generală a obligaţiilor, Editura Lumina Lex, Bucureşti, 2000, p.193-194
[2] Ibidem. P.198
[3] Ibidem. P.199
[4] Ibidem. P.217-218
[5] Ibidem. P.194
[6] I. Lulă-Observaţii asupra răspunderii pentru fapta altuia reglementată de art.1434 al.2 din Codul Civil, Dreptul 7/2001, p.66; M.Eliescu-Răspunderea civilă delictuală, Editura Academiei, Bucureşti, 1972, p.252-253
[7] I.Deleanu-Părţile şi terţii. Relativitatea şi opozabilitatea efectelor juridice, Editura Rosetti, Bucureşti, 2002, p.42, I. Deleanu- Grupurile de contracte şi principiul relativităţii efectelor contractului. Răspunderea contractuală pentru fapta altuia, Dreptul 3/2002, p.10
[8] P. Remy-La responsabilité contractuelle, histoire d un faux concept, Revue Trimestrielle de Droit Civil, 1997, p.323-326.
[9] L. Pop-op. cit. p.336

Both the contractual and the tort liability are considered institutions of the same kind because examining the constitutive elements we can see that in the both fields it is necessary some conditions: a damage; an illegal and unlawful act; a causal link between the act and the damage, but altough the two institutions are distinguished so the contractual liability apears as an aplication of the tort liabilitily wich is the rule for the civil liability[10]. The contractual liability sugests that the non-execution of the contract produces the same legal consequences as a crime that requires to repair the demage caused. So by tort and contractual liability it repairs the injury caused by personal acts.[11]

In the doctrine the contractual liability represents the debtor's obligation to repair the prejudice caused by non-execution, inadequate or delayed execution of the obligations arising from a valid contract.[12] And non-execution of obligations arising from pre-contract attracts contractual liability for those who refuze enforcement. This is understood like reparing the damage caused by non-execution of the contract and not to extend enforcement of the existing contractual obligation, like execution by its equivalent.[13]

Legal rules concerning contractual liability are of two kinds: rules who aplies to contractual liability in general and specific rules of each contract.[14] This kind of liability is covered along with the contract, unlike tort liability wich is covered in a separate chapter. In the new Civil Code the liability tort or contractual is covered in a distinguish chapter.

The article 969 Civil Code establish the rule that the convention represent the law between the contracting parties. According to Civil Code the contract is opozable to third parties as a legal fact wich seems to exclude from the content of contractual liability the asumption of contractual liability for the act of another, but the legal problems of life seems to be more prolific than legal solutions preelaborated in a philosophical, political and economical environment.[15]

Unlike article 1000 Civil Code wich lists several cases of tort liability for other's acts, general texts both in roumanian Civil Code (art.1073-1090) and french Civil Code make not even an allusion to the liability for others. In other legal system such Germany (art.278-BGB) or Switzerland (art.101-Suiss Code of obligations) they have rules that defines the contractual liability for other's act. Art.278-BGB provides that the debtor is responsable for the fault of his legal representative and the people he uses to execute his commitment and the art.101-Suiss Code of obligations states that the one who lawful charge people who are in household with him or workers to performe an obligation or exercising a right deriving from an obligation is responsable to the other party for the damage they have caused in carrying out their work.[16]

The concept of contractual liability for other's act appered in France only in XXth century Curently in France the majority doctrine recognizes the existence of a principle of contractual liability for other's act, while in Roumania most doctrine as wel as tort liability for other's act belives that also contractual liability for other's act exist only in special cases, derogating from common law. After the french law roumanian law should have a general principle for the contractual liability for other's act because the majority of

[10] I. Anghel, Fr. Deak, M. Popa-Răspunderea civilă, Editura Ştiinţifică, Bucureşti, 1970, p.37
[11] L. Leturmy-La responsabilité délictuelle du contractant, Revue Trimestrielle de Droit civil, 1998, p.867.
[12] L. Pop-op. cit. p.336.
[13] D. Tallon-L inexecution du contract: pour une autre presentation, Revue Trimestrielle du Droit civil, 1994, p.226
[14] L. Pop-op. cit. p.337
[15] I. Deleanu-op. cit. p.11
[16] L. Pop-Răspunderea civilă contractuală pentru fapta altuia, Dreptul 11/2003, p.66-67, G. Vinez, P. Jourdain-Traité de droit civil. Les conditions de la responsabilité, 2-eme edition, Librairie Generale de Droit et de Jurisprudence, Paris, 1998, p.907-908

romanian Civil Code provisions regarding contracts are inspired from the french Civil Code.[17] The expresion „responsable for other's act" may leed to the idee that the person bound to repair the damage didn't participate to it realization.[18]

Although contractual liability for other's act has a special importance theoretical as wel as practical in french doctrine some continue to ignore it[19], while others criticize it. Was ignored because the french courts aplied maybe excesively art.1384 al.2 Code Civil (art.1000 al.4 Civil Code roumanian) regarding the employer liabiliby for the employee act to contractual matters wich masked the deficiences in this area. In a minority opinion contractual liability for other's act and the one for things are unnecessary processes if taken acount the classic doctrine wich sttates that a person is not responsable contractual speaking for other's act or things, the interests are dued because he is the debtor of contractual obligation non-performed and it doesn't matter if the contract non-performance is dued to other's act or thing. The debtor due intersts without establishing the cause that may elibarate him or other person act introduced by the debtor in contract execution like auxilary or sustitute will not meet only by exception the conditons for the majeure force. To build a contractual liability for other's act is unnecessary as long as it remain the system of contract non-execution so as conceived by the code: not responsable for the other's act when is paid what is due.[20] This opinion is reported at the clasical doctrine to show the futility of contractual liability for its own act, for other's act or for things, but it doesn't take into acount the society development wich brough the diversification of case-law solutions.

The contractual liability authonomy for other's act was underlined also by the non-overlapping principle.[21] This principle means there is no option between contractual or tort liability. Judicial practice has concluded that the victim doesn't have the right, in respect of the same unlawful act, to obtain repairs on two bases, repairs wich overlapped would exceed the total amount of the prejudice suffered.[22]

Giving the increasingly need to protect the persons and the goods and also more convincing arguments of the french doctrine for the acceptance of a contractual liability principle for other's act, this principle should impose it self in roumanian doctrine also.

The number and diversity of these particular number of texts shows that the liability for other's act is far to be unknown in contractual area but nevertheless these special provisions are not enough by its self to prove the existence of a general principle comparable with the one in German Civil Code.[23]

A case often met in practice of contractual liability who deserves attention is the contractual liability of the employer for the employee's act. This kind of liability should not be confused with tort liability of employer for employee's act set in art.1000 al.3 Cod Civil because the tort liability of employer arises when it have been caused a prejudice to a third by unlawful act non-contractual.[24]

The liability is contractual because the victim claim to the debtor to repair the prejudice born from non-executing a contractual obligation and is for the other's act because a third had executed the obligations not the debtor. [25]

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[17] L.Pop-op. cit. p.67.
[18] H. L.et J. Mazeud-Leçons de droit civil, tome II, Editions Montchrestien, Paris, 1969, p.419.
[19] MM Roland şi Boyer în Stark-Roland-Boyer Obligations, 2 contract, 4-eme edition, nr.1759 (citat după G.Viney, P. Jourdain-op.cit. p.909)
[20] P.Remy-op. cit. p.346-349, D. Tallon-op. cit. p.228-229
[21] G.Viney, P. Jourdain-op.cit. p.909
[22] L. Pop- Teoria generală a obligaţiilor, Editura Lumina Lex, Bucureşti, 2000, p.356
[23] G. Viney, P. Jourdain-op. cit. p.912
[24] L. Pop-op.cit. p.77
[25] H. L. et J Mazeud-op.cit. p.428

To engage the contractual liability for other's act it has to be fulfilled several conditions: the debtor sought for the other's act has to be taken personaly by the asumed obligation but wich was entrusted to another for execution; the appointment by the debtor of a person to execute its contractual obligation; the creditor should not be absolved the debtor by responsability for non-performance by other person of its contractual obligations; the third unlawful act consist of non-execution of obligation arising from the contract between creditor and debtor.[26]

The obligation should be performed by other impose the existence of a legal relationship with the one who execute the obligation who can be either an auxiliary, a subsitute or employee.[27]

If the debtor didn't engage personaly, but only he promised other's services to the creditor, the debtor is an intermediary and he can't be responsable for that person. The person doesn't assume the responsability for non-performance of the contract between consumers and other service providers.[28] If the initial provider guaranteed explicitly the execution of those contracts it will be engaged his liability.[29]

If the debtor asumed a determinated obligation specified in the contract and wich was trasmited to the substitute, it will be responsable for substitute's act in the base of quilt presumed by the lack of result. It is an objective liability and the debtor can't exempt by citing the contract non-performance.[30]

The second condition requires the appointment of the person who will execute the contractual obligation. The third is appointed voluntary by the debtor, without the creditor agrement or the third's who has the quality of auxiliary, substitute or employee.[31]

If the non-execution author of the contractual obligations wasn't implicated in the contract execution by debtor wish, person's act would be considered the third person's act wich will exonarate the debtor.[32]

Regarding substitutes wich execute the obligation instead of the debtor and concludes with a subcontract, the debtor is personaly hold to the integral execution of the contractual obligations assumed. In case of non-executing the contractual obligations it engages the debtor's responsability for the substitute's act.[33]

The person who execute the obligation has to be appointed voluntary. The debtor doesn't respond when a third come spontaneousoly and voluntary or involuntary creates obstacles in performing their contractual obligations. This intrusion irressistible and unpredicitable represents a foreign cause wich exempts the debtor from liability. The debtor's liability doesn't engage neither when the third is appointed by the creditor.[34]

If a person concludes contracts with a number of debtors to perform a work, each contractor is responsable for its share of work. Each entrepreneur is third regarding the contracts concluded with the others and doesn't exist contractual liability. It's difficult to delimitate the subcontract from the co-contract in the case in wich a person concludes a contract with an entrepreneur and appoint him to conclude contracts with others

[26] L. Pop-Răspunderea civilă contractuală pentru fapta altuia, Dreptul 11/2003, p.70; G. Viney, P. Jourdain-op. cit. p.917; I. Deleanu-op.cit. (Dreptul 3/2002) p.15-17; I. Deleanu-op.cit. p. 47-48; I. Lulă, I.Sfredian-op.cit. p.94
[27] I. Lulă, I.Sfredian-op.cit. p.94
[28] L. Pop-op.cit. p.71
[29] G. Viney, P. Joudain-op.cit. p.918
[30] I. Deleanu-op.cit. p.16
[31] I. Lulă, I.Sfredian-op.cit. p.94
[32] I. Deleanu-op.cit. p.17
[33] G. Viney, P. Joudain-op.cit. p.923-925
[34] L. Pop-op.cit. p.72; G. Viney, P. Joudain-op.cit. p.925

entrepreneurs. In such a situation the first entrepreneur represent the creditor wich excludes the subcontracting.[35]

This kind of difficulties exists in medical field also for example the surgeon isn't responsable for the anesthesiologist's act contracted by the patient. There are two different contracts.[36]

In a point of view the two conditions are necessary but also sufficient to engage the contratual liability for other's act.[37]

The creditor should not absolve his debtor of responsability in connection with the execution by other. If eventualy the debtor was absolved the question is in lenght with contract's assignment wich can realize a novation by changing the debtor.[38] This juridical operation can be qualiffied as a debt assignmet.

If the creditor accepts the third but doesn't eliberate the initial debtor we are in the presence of the imperfect delegation and both debtors will be responsable for the contract non-performance. Neither in this case can't exist contractual liability for other's act. The initial debtor's freedom has to be made expressly, the simple accord for appointing a substitute isn't enough to eliberate the initial debtor.[39] In other point of view consider that in the case of imperfect delegation the contractual liability for other's act will continue to exist because the principal debtor wasn't elibarated for responsability and the juridical accessory report wasn't abolished not even modified. The simple acceptance by the debtor of the debtor to execute the same contractual obligations can't modify another jurical report concluded before between the debtors since would violate the principle of relativity effects of legal civil act. Such the debtor would have a double contractual liability for its own acts and for the others.

Subcontracting can't be confused with contract assignment because in the first case are juxstaposed two contracts: the main contract between creditor and debtor and an accesory contract between the debtor and a subcontractor. In the assignment case it is realised a replacement of the initial contract wich may desappear.[40]

In other point of view it is considered this negative condition isn't necessary but in reality is an effect being understandable that if the pricinpal debtor was exempted of liability there's no group of contracts.[41]

If the creditor has agreed that the debtor doesn't respond for the substitute's act in can't arise the contractual liability for other's act or for personal act because the obligation was displaced in the third patrimony with the creditor's consent.[42]

If the non-execution of the contractual obligation is dued to debtor's act it will be engaged his direct liability for its own act.

Is it necessary the debtor's quilt what about the third's who executed the obligation? In case of result obligations the responsability is objective without the quilt because the debtor is the guarantor to obtain the result. It isn't necessary the debtor's quilt or the third who execute the obligation, the creditor has to prove only the lack of result. Regarding the care and diligence obligation it is considerated that the obligation can be only direct, not for other's act even if the unlawful was comitted by a third party. The creditor has to prove the

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[35] G. Viney, P. Joudain-op.cit. p.926
[36] Ibidem p.926-927
[37] I. Lulă, I. Sfredian-op.cit. p.94
[38] I. Deleanu-op.cit. p.17
[39] G. Viney, P. Joudain-op.cit. p.928; L. Pop-op.cit. p.73
[40] G. Viney, P. Joudain-op.cit. p.928
[41] I. Lulă, I. Sfredian-op.cit. p.94
[42] Ibidem p.94-95

debtor's quilt, not the one of third party who executed the obligation. It isn't necessary the prejudice author's identification while it was proved the debtor's quilt.[43]

In other point of view neither this condition has to be distinguished formulated because it is a logical consequence of the first condition. If it demands that the obligation should be executed that means that also execution as the non-execution of the obligation is a third's act and not of principal debtor.[44]

If the four conditions are met the creditor has against the debtor an action in contractual liability for other's act, but not against the thirds placed by the debtor in performing his contractual obligations only in the cases expressly provided by law.[45]

To try to escape the consequences of contractual liability for other's act, the debtor can claim an exemption issue, legal or conventional limitations of the right to compensation or to persue a recorse action against the direct author of the prejudice or to rely on an insurance of civil liability.

To escape the contractual liability for other's act, the debtor may claim exemption only those cases that could be invoked to escape liability for its act. Third party intervention must not agravate or diminuate the debtor's obligations.[46]

As regarding foreing act as majeure force or fortuitous event, the victim's act or a third act must be external, unforeseeable and iresistible to remove the debtor's liability.

Regarding the term „majeure force" is considered in the french doctrine as being synonymous with the expresion fortuitous event and it means the event wich had a decisive influence on the prejudice occurance and wich made imposible the obligations execution by the debtor.[47] In roumanian doctrine majority opinion is in the sense that the majeure force and fortuitous case are different terms.[48] The majeure force can be a natural event or an anonymous one or other events that meet its conditions.[49] The majeure force has to be unpredictible, compelling and external.

In contractual field the majeure force existence doesn't exclude the liability in following cases: when the majeure force occurred after the formal becase if the debtor would have executed at time the obligations, the case of majeure force would be found in execution,[50] when the law imposes to the debtor or he concluded a convetion by wich he had committed to respond even in case of majeure force or fortuitous event.[51] The agreement may permit the exemptions of debtor's liability for events that doesn't present the characters of the majeure force of fortuitous event.[52] Where there is a partial impossibility of obligation's execution, the debtor would not be exempted totaly by the execution, only partialy based on impossibility.[53] If the impossibility is only temporaly it doesn't exist a foreign case wich will exempt deffinitively the debtor. The execution is only suspended and may be resumed aftel the obstacle's disapearance.[54]

Regarding the victim's act the debtor has to prove that the creditor's act was the act who generated the non-performance. The creditor's act may be lawful or unlawful. If the

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[43] Ibidem p.74
[44] I. Lulă, I. Sfredian-op.cit. p.94
[45] L. Pop-op.cit. p.74; G. Viney, P. Joudain-op.cit. p.931
[46] G. Viney, P. Joudain-op.cit. p.935
[47] G. Viney, P. Joudain-op.cit. p.230; H, J et L Mazeud-op.cit. p.531
[48] L. Pop-op.cit. p.369
[49] G. Legier-Droit civil les obligations, 17-eme edition, Dalloz, Paris, 2001, p.109
[50] Ibidem
[51] R. Savatier-op.cit. p.457
[52] H, J et L Mazeud-op.cit. p.535
[53] R. Savatier-op.cit. p.457
[54] Ibidem

act presents the characters of majeure force so unpredictible, compelling and external leed to total exemption of debtor's responsability.[55] If the quilt is presumed, the victim has a more advantage situation because he doesn't have to prove the quilt. May exist total or partial exemption as are any characters of proven majeure force.[56] In this case the debtor is required to obtain a certain result not only to act with prudence or diligence. In certain means obligations the responsability is accentuated or reduced for example when by a contractual provision the debtor is required to respond for some majeure force cases.[57]

Regarding the third's act like victim's act must meet the majeure force conditions. The third doesn't have to be legal or conventional representative, employee, auxiliary or substitute, engaged to execute the contractual obligations for the debtor.[58] It can't be considered that the person's act introduced by the debtor to execute the contractual obligations is a foreing element to the debtor. So the employer can't invoke the employee's act to escape the liability.

In contractual field doesn't matter if the third is known or not, important is that the debtor shouldn't provoke the third's act.[59] In obligations case the debtor's quilt isn't presumed and if it's proven by the creditor, the debtor couldn't totaly exempt by liability, only partialy if he proves the participation of the third at the prejudice provocation. The debtor and the third will respond solidary.[60] If the quilt is presumed the debtor can escape responsability all or partialy if he proves that the prejudice dues to the third's act. The debtor will be exempted by liability only in the situation in each the third's act presents the majeure force characters as: unpredictible, compelling and external.[61]

The contractual liability for other's act is derogatory from common law regarding the definition of the foreing cause exempting by liability, but it aplies the same way like personal liability.[62]

The particularity of liability for other's act, in general and the contractual one in special, is the fact that to be exempted by liability the debtor has to prove the characters of majeure force and also that the prejudice isn't from a person wich is responsable that he has voluntary entered in execution of his contractual obligations. It may be an employee, a substitute or a person for wich the debtor is responsable in the bases of legal provisions. The debtor isn't responsable for the persons imposed by the creditor or by a third person.[63]

The debtor sentenced to repair the victim's prejudice caused by the persons introduced in executing contractual obligations, has a recourse action against the prejudice's direct author. The direct author may be called in guarantee in the trial against the debtor. The confusion between the debtor and the person introduced in executing the contract is only in victim favour and the relationship between the debtor and the prejudice's direct author are subject to their joining.[64]

Regarding the conventional limitations it has to be admited that a lawful provision wich limitate the liability covers not only the cases of liability for its own act but also the one's for other's act, even if the contract doesn't provided expressly. In the case in wich the

[55] R. Savatier-op.cit. p.459
[56] L. Pop-op.cit. p.379-380
[57] R. Savatier-op.cit. p.453
[58] R. Savatier-op.cit. p.458
[59] L. Pop-op.cit. p.378
[60] Ibidem
[61] Ibidem p.378-379
[62] G. Viney, P. Jourdain-op.cit. p.936
[63] P. Jourdain-op.cit. p.115
[64] G. Viney, P. Jourdain-op.cit. p.936

convention expressly provides the limitations of the liability only for other's act, without saying about for its own act, it is considered that it aplies also to the one for its own act.[65]

If the liability for its own act can't be limitated conventionaly, after long hesitations, concluded that the liability for other's act can't be limitated.[66]

In the case in wich the insurance contract provides expresly that covers the situations of contractual liability for other's act, there is no doubt regarding its admision.[67]

If the insurance contract doesn't cover expresly the contractual liability for other's act is it have to be extended the insurance to this hypothesis? In tort matter the guarantee aplies also at the hypothesis of liability for other's act. These have to be the solution in contractual field because if the insurance contract's object concerns the contractual liability in general, it includes the contractual liability for other's act. In the both fiels the executant' s act is considared the insured act.[68]

[65] Ibidem p.939
[66] Ibidem p.940
[67] Ibidem p.941
[68] Ibidem