RESTRICTING CONTRACT RIGHTS IN THE NAME OF GOODWILL

MIRCEA NOSLACAN, Ph.D. student
WEST UNIVERSITY OF TIMISOARA
FACULTY OF LAW AND ADMINISTRATIVE SCIENCES

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In general law theory, according to their degree of precision and accuracy, legal standards classify as, on the one hand, strict law standards, and, on the other hand, regulations or standards. If the first ones are precise, accurate, rigid, not being submitted to any interpretation, with legal standards the legislator uses much more accurate notions, leaving to the magistrate the wide possibility to appreciate whether the right subject fits the standard.

The notion of goodwill is such a standard, turned to real law principle, the content of which is given by the fact of always being presumed and protected in legal civil relations.

The entire edifice of subjective civil rights and correlative obligations performance is seated on the postulate of goodwill, which starts from the assumption that people are, within civil law relations, driven by the honest and loyal intention to behave honestly. Abuse of right happens when subjective civil law is performed without the goodwill, without observance of law and ethics, its limits or against their economic and social purpose.

The purpose of judicial intervention is to watch that the dominant party should not abuse of its position. In the name of a contract law, goodwill becomes the barrier against abuse of powers successively hold by the parties.

Recognising the ability of a judge to reject abuse and adapt services in the name of a contract, justice should be very cautiously performed. With all judicial systems, the governing principle is and stays that of strict performance of contract clauses, namely the pacta sunt servanda principle.

1. The goodwill of performing contract rights

1. Goodwill has to be at the base of performing any civil rights, to the extent that they should be performed with good intention, faithfully, diligently and prudently.

Performing subjective civil rights upon compliance of goodwill as judicial standard/behaviour direction in legal relations protects the holders from the risk of damaging other real subjects. In legal relations of mutual and profitable tolerance, subjective rights are both legal methods of bordering the other people's behaviour towards their owners and behaviour limits of the holders of subjective rights towards the others.

Consequently, subjective right constitutes both a reason to require certain behaviour from the others, and a limitation to the behaviour of its holder.

2. The difficult condition for the theory and practice of a right is to know the limit up to which somebody performing a right should be considered of goodwill. Detouring a right from its intrinsic reason expressed to the purpose to which it was recognised and guaranteed or, otherwise said, using a right to other purposes than those considered by the legal standard standing at its base, purposes incompatible with the social standards of living, represents not right use but right abuse, the right exercise becoming from normal abnormal, its taking out of the legal protection and exposing it to penalties. It is the phenomenon designated by the concept of right abuse.

A person acting with fraudulent intention or committing a fraud or even a severely faulty action standing for wilful misrepresentation, he/she is of ill will. In such case, the goodwill is defined by its antithesis: anytime the subject uses fraudulent or wilful misrepresentation manoeuvres, as well as with intentional omission related to the fraud, we are in the presence of ill will and in the absence of goodwill. Where the action is committed by neglect or carelessness the person is responsible for his/her fault, but they may not be considered of ill will, as ill will may not be but intentional.

3. The theory of right abuse holds a high moral meaning. As aforementioned, it would be intolerable that legal prerogatives should serve as weapons of ill will, meanness, dishonesty. The fraud vitiating any documents, stopping the enforcement of all legal rules, should not act freely under the too benevolent protection of civil rights; it must be mercilessly fought, otherwise the actual right would risk perishing under the powerful blow of this profanation.

The main meaning of the moral idea of right abuse is that no subjective right is absolute; on the contrary, it confers the holder a limited power as for its content and exercise. The circumstance awarding a subjective right may not exempt the holder of an honest will; moral conscience can never be denied, as there are duties towards the others that no right may violate. Moral performance of

subjective rights within the limits conferred by law and social cohabitation rules means performing them good-willingly, outlawing any abusive attitude.

4. Goodwill is an important criterion of appreciating civil relations, regulated as such, as a legal supposition relative both to our legislation and many other legislations (for e. g. item 2 & 3 of Swiss Civil Code). Currently acknowledged as a constitutional principle, by the text of art. 54 of the Constitution, goodwill has become a legal value, omnipresent with law provisions. In spite of the text reference to constitutional rights (and freedoms) *a fortiori*, it must be clearly understood that the principle of goodwill governs the application of all subjective rights, the abusive application of such being unconceivable.

6.2. Abuse of a right as far as contract matters are involved

1. The right of contracting is abusively performed where one of the parties sets as its unique purpose causing prejudice to the other party. Contractual liberty has been thus deterred from its purpose and against the spirit that has established it. Any violation committed by any of the parties to contract liabilities or legally provided liabilities in fact constitute violations to the party's rights performance, according to contract clauses. Thereby law violation and right abuse greatly overlap.

The oldest decision quoted as for the theory of right abuse was given under the protection of canonical right by the Parliament of Ajax, on 1st February 1557 (a wool comber used to sing the whole day long in order to disturb his lawyer neighbour), and after the Civil Code has become due, the first decision was uttered on 2nd May 1855 by the Court of Appeal in Colmar (somebody built a chimney intending to deprive his neighbour from light).

2. French doctrine, by L. Josserand, has thoroughly approached the theoretical analysis of right abuse. He developed the idea according to which subjective rights have their own role and exerting them become abusive when infringing upon this role.

The most famous opponent of this theory was M. Planiol, who asserted that the theory of right abuse was a "logomachy", as rights are essentially paramount and cannot be abuse-susceptible. By a rhetorical pirouette, he states a famous phrase: "*a right is over where abuse starts"*, intending to prove the internal and indissoluble contradiction enclosing this theory.

Where French doctrine invokes right abuse, it is presumed that enforcement of art. 1134 line 3 of French Civil Code is a natural consequence of not allowing the Court to control the abuse of exerting rights ensuing from the contract relation.

It was therefore asserted that goodwill served as a support for jurisprudence construction, which introduced right abuse, on the one hand and, on the other hand, is evoked as a criterion of right abuse.

4. With the recent jurisprudence of the Court of Cassation, right abuse is applied to the extent of contract performance. Under the principle of contract liability non-accumulating over criminal liability, it has become impossible that right abuse be based on 1382 Civil Code. Goodwill provided by art. 1134 line 3 of French Civil Code is nowadays the most frequently invoked to allow abuse punishment. On the same line is included the jurisprudence of Quebec. Therefore, in a decision solved by Quebec Court of Appeal on 3rd May 1990, the Court noted that: "right abuse is the situation where a bank clears the patrimony of a debtor company without granting it a reasonable term to return the granted loan, in spite of the company patrimony constituting the credit guarantee. Right abuse concerning rights ensued from a contract is part of civil right in Quebec. Ill will or malicious intention to accomplish contract rights do not currently represent the only criteria on which it can be asserted that a *right has been abused of*. The pattern or notion of prudent individual and diligence may, under the current circumstances, make the basis of instituting a responsibility on the assumption that an abuse is proved to exist as long as contract rights are performed. A right abuse may take place any time a contract right is not reasonably performed, in accordance to equity and fair play rules. Right abuse to the matter originates contract responsibility.

5. German jurisprudence has constantly linked the theory of right abuse to goodwill, especially § 242 BGB. It has been thought that only the notion of goodwill was able to include all events where jurisprudence applied the right abuse: "where § 246 would not be possibly involved due to its too narrow provisions, the intention to harm, and as § 826 BGB would not include all the cases, particularly that of objective right abuse and also as any right abuse is just a violation of good morals and manners, § 242 BGB was considered to be the only legal basis for the punishment of right abuse, as a limit to rights performance."

Interfering in the contract, the judge has not in this case the duty to restore the balance of unbalanced economic relations and ensure social justice is done. This is why the prerogative attributed to the judge is not controlling contract equilibrium, but the goodwill between the parties. Goodwill becomes the barrier against abuse of power successively hold by the parties.

It is only such an adaptable, flexible and with moral connotation, hence moralizing obligation that can constrain the dominant party to comply with its commitment, despite its discretionary power or contract gaps. It has been however long stated that: "if one is allowed to look for their own interest, one must not look for it by abusing the other people's interests".

Goodwill thereby involves not trying to take advantage of the other party's vulnerability. In such a framework, goodwill, with its strictly moral connotations, has to be expressed in rigorous, reliable and accurate, almost mathematical terms. The need of reliability is acute with establishing opportunism according to the complexity of situations. Therefore, goodwill needs to be strictly limited in order to not lead to excessive hazardous and irrational jurisprudence for the judges of background court and for contract partners looking for behaviour rules. French doctrine stated that: "the obligation for the contract partner to heed the interest of the dependent partner in exerting the powers conferred by the dependence relationship, finally finds support in the obligation to perform trust-based conventions". Goodwill is endowed with the peculiarity of being a moral concept. To this extent morality, by the finality expected, is respect for the word given.

6.3 Cancelling abusive clauses in the name of goodwill

1. Economic and social transformations at the end of the 19th century and the beginning of the 20th century have revealed that contract liberty and security specific to the will autonomy principle, based on which the conceivers of the Civil Code have established the contract, is not to the profit of all contracting parties; contract security to the profit of the creditor most often becomes injustice to the debtor. What is provided by contracts, namely free balance of individual wills is not necessarily just and does not always lead to justice.

These inequities have, among others, led to the phenomenon of the so-called contract standardisation, especially between dealers and consumers, which has made useless if not impossible any discussion and negotiation between future contracting parties; the weaker party has no other choice but choose between altogether acceptance or refusal of contract clauses that have already been established by the strongest. To express this situation, legal doctrine invented the expression designating the category of so-called adhesion contracts.

The specific of these contracts, in utter contradiction to the autonomy of will theory, is that the role of the individual will is small or even extremely small, their clauses being imposed by either of the contracting parties, a third party, or even directly by the imperative law.

Balancing these unbalances was imposed as objective necessity; therefore both the legislator and judicial practice felt the need to act, being strongly opposed by the concept of absolute freedom of the individual, transmitted to contract liabilities by theory of will autonomy, and which with contracts urged the compulsoriness to strict observance of contract clauses in any event whatever.

2. Famous authors of French literature have nonetheless expressed real reserve and harsh critique related to the theory of autonomy of will and its

consequences, particularly the absolute character of compulsoriness of contract clauses.

On the philosophical point of view it was stated that freedom is not, and neither can it be absolute; the individual is bound to respect the others' liberty or freedom, to (paradoxically!) his/her own good. Without underestimating the part of will with interdependence reports among people, it was esteemed that individual will misses the power to engender rights and liabilities; it may acquire this power only from law, so it has been stated that "Law should serve right and not right should serve will".

On the economic grounds, autonomy of will and limitless freedom may lead to anarchy in production and the process of wealth allotment. This is why under the latest circumstances it is appreciated that nobody protects liberal economy in its pure form. In spite of the fact that individual interest as a determining factor of economic activity cannot be denied, guiding the economy seems an objective necessity. This guidance is in the first place ensured by the state and is translated by laws directing the economic activity impeding it run according to anyone's will and fantasy. Economic orienting or, otherwise said, economic directing, is not intended to suppress or annihilate the individuals' will. On the contrary, will actually stays as the central element or the main factor of the contract and any human activity. The role of the state and, implicitly, objective law, is to direct and guide it so that freedom should not degenerate in anarchy and any sort of abuse.

3. Since the end of contract individualism era, neither the legislator nor the judge has ceased to interfere more and more often to the creation and existence of contract liabilities. The legislator goes on adopting and putting in practice more and more imperative regulations, waiving, partially at least, at the traditional role of replacing the will of the contracting parties by imperative regulations.

Legal provisions, on punishing abusive clauses for example, lead to the conclusion that where certain clauses could not be negotiated by a consumer, and by them a significant imbalance is therefore created, by violation of goodwill, they do not incur effects upon the consumer. Exceptional regulation be it, it legislatively states the idea that in the event of a significant economic and informational imbalance, the system of civil code is no longer even, and the weaker party must be protected.

As we have already mentioned it, French doctrine displays a certain tendency to rediscover contract as a compulsory justice instrument, unless it should be just. Distributive justice, an element of contract justice, makes the legislator use goodwill in order to protect certain categories of individuals, particularly exposed because of their position. Contractual justice is the one guiding the

protection of consumers and impaired. Goodwill request is imposed to parties and courts play an important role in the contract life.
This is why, with these contract relations that mostly exclude communication between contracting parties and implicitly negotiation of contract terms, goodwill has the meaning of objective behaviour standard, to the extent of not harming the other contracting party. This contract report, the content of which is the exclusive work of the expert's will, involves an absolute supposition of parties' unevenness, and the contract validity, which particularly intends to obtain profit, gives birth to simple abuse presumption. This is why in French literature it was considered that in such contracts there already is a certain amount of injustice, because of the parties' unevenness.

4. With consumption relations, goodwill plays the part of protecting the consumer's autonomy of will and contributing to the expansion of contract will, offering the possibility for public authority to intervene as control norm to abusive contracts.
Abusive clause represents a contract stipulation that is meant to break contract balance, transforming it into a method of acquiring excessive advantage in the expert's person and a "significant disadvantage" on the consumer's side, respectively. From the point of view of regulations contained by Law 193/2000 amended, and Order 93/13/EEC (The criterion of excessive advantage was adopted by French legislation in order to define abusive clauses previously to adopting the law transposing Order 93/13/EEC), an abusive clause is regarded as a contract clause that has not been negotiated directly to the consumer and which, as itself or with other contract provisions create to the detriment of the consumer and contrary to the requests of goodwill, a significant imbalance between parties' rights and liabilities. Although bearing a new vision on contract and the key devices of regulating it, the directive has not, by Law 193/2000 on abusive clauses concluded between traders and consumers, reached a legally fertile ground. Near the positive law system "steady on the will autonomy traditional pedestal", the doctrine has "not resonated" to the values proposed da varia, attempts to renew general theory – what is useful and what is just – with classic will. Actually, the abusive clause notion is agile, a standard responding to a necessity of justice, equity and loyalty in contract relations.
Provisions of item 1 line 1 of Law 193/2000 amended concern contracts concluded among dealers and consumers to sell goods or perform services, otherwise said consumption contracts; in that case, realty is the witness of the situation where the consumer, faced to such pacts, has no other possibility than to adhere to the will of the economically strong person.
2. Adhesion contracts, a consequence of the phenomenon of mass selling, as defined by Directive 93/13/EEC (according to provisions of the Directive, abusive clauses are defined as such contract clauses that, not submitted to

individual negotiation, violate the requirements of goodwill, causing significant imbalance between the parties' rights and liabilities, to the detriment of the consumer), are the reflexion of absence of direct negotiation of contract stipulations; otherwise said, they are contracts of which content is pre-established by dealers and related to which consumers have not the power to decide, to the extent of the ability to modify the contract content or nature. To the origin of adhesion contracts are standard contracts, which represent the contract model where one party, both parties or even a third party set the main rules that will govern the contract and whom are often assimilated the general contracting conditions (defined as abstract clauses applicable to contracts subsequently concluded, and which are pre-typed and imposed by a contractor to the partner).

Of provisions of art. 4 of Law 193/2000, the conclusion can be drawn that the dominating feature of adhesion contracts is the absence of previous negotiations, but *economic and social inequity* must be also considered, having as consequence unilateral establishment of the contract content by the economically strong contracting party and imposing the conventional text to the "weak party", especially with areas where real or due monopoly is exerted. Actually, the notion of abusive clause is a flexible notion, a standard responding to a need for justice, equity, loyalty within contract relations.

Along with already entered into contracts, law also approves the future ones, which might be established on *general selling conditions* - abstract clauses regarding the content of a contract to be perfected and which are pre-typed by the economically strong party and imposed to the co-contractor.

As for adhesion contracts and general conditions, the form of content materialisation is not relevant, so the *instrumentum* may equally be, as provided by art. 3 of Law 193/2000 modified, order receipt, note, ticket, etc. The doctrine mentions that for the enforcement of legal provisions regarding abusive clauses the *nature* of the contract is irrelevant, as it may be a selling and purchase contact, insurance contract, leasing contract, loan contract; the same as the contract may be either of movable or immovable nature.

An *exception* is established by item 3, line 2 to provisions of art. 1 of Law 193/2000, amended, stipulating that any contract concluded between dealers and consumers make the object of this regulation – regarding "contract clauses provided in pursuance to other normative documents", related to which an absolute presumption of contractual balance is therefore established, based on the simple provision of these clauses by law. This way as well, Order 93/13/EEC excludes by art. 1 line 2 of its scope of application contract clauses resulted from imperative provisions of statutory or regulating nature or of provisions of international conventions to which member states have adhered, thus expressly excluding contracts of transport.

4. The code of consumption, regulated by Law 296/2004, also adopted within the process of according internal and community legislations, has as an object regulating legal relations between economic agents and consumers regarding purchasing products and services, thorough and correct acknowledgment on their essential features, protecting and ensuring rights and legitimate interests of consumers against abusive practices. Although the Law comprises a wider regulating scope, as it refers to commercial practices and not contract clauses, it aims at the same target as Law 193/2000, excluding abuse, in any of its forms of display and consumer's protection. This also explains why a range of principles of Law 193/2000 are reflected in the form specific to the object of regulation of Law 296/2004 and others are taken over as such.

Starting from the fact that consumption contract is only a legal instrument by which relations of consumption right are regulated, without taking into account the concrete content of the consumption economic relation, it is appreciated by specialty literature that "abusive clause" is not a clause of consumption contract, but a hierarchical method of censoring the actual contract. This is because, on the one hand, the consumption contract not being a legal operation may not include clauses and on the other hand, as pertaining to the normative structure of consumption contract, "abusive clause" borrows the substance and accomplished its role, of legal criterion. This criterion shall be applied to the real contract, in order to apply the consumer's protection. Consumption contract as imperative legal institution may not include but "legal clauses", namely legally originated judicial standards.

We assert that this approach of the contract content bears just a theoretical importance, such a difference being hard to be practically applied, understanding the will of the contracting parties not being made but via the legal regulation frame, in a manner of overall examination of contractual clauses.

5. Of the content of the abovementioned, it can be inferred that the main conditions that must be altogether complied with so that an abusive clause may be mentioned are: the absence of direct negotiation, violation of goodwill and creating a significant imbalance between the parties' rights and liabilities.

The absence of direct negotiation is materialised, as shown, by *adhesion contracts or general sale conditions*, to which the effect is produced of *economic power abuse presumption*, which may be reversed by a professional by the negotiation trial. For such a trial to be admitted, the *effective* character of negotiation is needed to be proved, to the extent the possibility exists to change the contract content or nature, where the conclusion may be drawn that there will be no negotiating just based on simple discussion on some clauses. Negotiating contract clauses does not exclude the existence, within the same contract, of abusive clauses, because, as revealed by provisions of art. 4 line 1 of Law Law 193/2000 modified, *partial negotiation* does not have as an effect removing the

possibility of consumer protection standards enforcement against abusive clauses regarding the entire contract.

The absence of direct negotiation is also obvious in the case of ambiguity, *obscurity* of contract clause, as resulting from provisions of art. 1 line 2 of Law 193/2000 amended to the favour of the consumer". The line of this stipulation apparently puts in force a less serious penalty regarding the ambiguity of a clause, namely removing the meaning conferred to it by the professional and the preference of interpreting the clause to the consumer's advantage. However, to the extent such an ambiguous clause generates a significant imbalance between the parties' rights and liabilities, it will be considered as meeting the conditions of an abusive clause and shall be consequently punished less severely this time, bearing the unwritten mention, penalty backed by jurisprudence as well.

6. Including goodwill into the category of criteria determining abusive clauses confers it a new role, namely that of "*control criterion to abusive clauses*", as it may be inferred from provisions of art. 4 line 1 of Law 193/2000 amended (to note that whereas Romanian law has taken over from the European directive the way the significant imbalance relates to the requirements of goodwill, French law of transposing has omitted it). Calling for, to dispose of abusive clauses, the goodwill criterion, otherwise considered *the abstract fundamental of abusive clauses*, is motivated by the right abuse performed by the economically stronger contracting party; the abuse has as a consequence breaking contract balance (the doctrine has it that we will face contractual imbalance as far as contract clauses infringe upon the law, or the spirit of law or the contract purpose), and thus not noticing the obligation of goodwill incumbent on the parties both on perfecting the contract as during its performance.

The notion of goodwill may be differently understood according to the element dominating its content: subjective or objective. Therefore, by *the subjective element*, goodwill implies a diligent behaviour, cooperation to the accomplishment of the contract purpose and fidelity towards its enforcement, which has as a consequence appreciating goodwill *in concreto*. On the other hand, *the objective element* transforms goodwill into a method of establishing the imbalance and in this case it shall be established *in abstracto* (in the specialty literature a point of view was expresses according to which goodwill represents an objective standard of behaviour, acceptation that should prevail to the analysis of abusive clauses).

7. Directive 93/13/EEC justifies in its preamble appealing to the general criterion of goodwill by the necessity of a *global assessment* of different interests of the parties involved into the contract. According to the 16th item of the directive, general criteria established by law to assess the abusive character

of clauses need to be amended by a method of overall assessment. This global criterion is not different from goodwill requirement.

It is also mentioned that goodwill obligation shall be considered as accomplished as long as a professional shall reasonably act to the respect of the consumer and their interests, the stress being put on the possibility, the contractor's negotiation ability and on knowing to what extent the consumer's consent was induced or whether services or goods were supplied following consumer's explicit order. Goodwill makes direct control of the parties' loyalty possible, firstly the professional's, who might abuse of his/her economic power to exploit the consumer's weakness and lack of alternatives in order to obtain disproportionate benefits to the latter's mischief. The professional's obligation of goodwill constitutes a constant to the consumption right, being present as a leitmotif into the exhaustive and comprehensive information obligations of the consumer.