GOOD FAITH AND ASSURANCE OF THE CONTRACTUAL BALANCE

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Abstract

The Law represents a world of finalities. From this point of view, the parties' will is not just a means, as it is entitled to the protection of the law only in the name of the purposes (finalities) towards which it tends. In other words, the compulsory force of the agreement is not based exclusively on the individual will of the contracting parties, but also on the common well, namely on satisfying and protecting the interests of both contracting parties as well as of the society as a whole, as the society could not carry on its activities normally if the individual juridical relations are unbalanced and if they are causing inequities and injustices. This is why one came to the conclusion that only an agreement in accordance with the common well, namely oriented towards satisfying the legitimate needs and interests of the contracting parties and implicitly of the society as a whole, could stimulate and at the same time regulate the normal game of the competing individual activities, or, in other words, only a just agreement, an agreement in accordance with the old notion of commutative justice (according to which each contracting party receives the equivalent of what he offers), could satisfy the nowadays equity, morality and justice demands. The contemporary law adds to the manifest will of the agreement elaboration the interest of each of the contracting parties, as only taken together these two concepts can explain the contractual equality and the need for assuring the contractual balance throughout the existence of any agreement.

Key words*: will autonomy, compulsory force of the agreement, positivism, solidarism, contractual justice, contractual balance, good faith, unpredictability, contractual revision.*

1. Contractual Freedom and Its Limits

1. For a long period of time, the legislation, the jurisprudence and the doctrine remained faithful to the principle of the compulsory force of the agreement, to its stability, even in cases where from the time of its conclusion until the date of its execution, unpredictable economic situations occurred, and they destroyed the balance of the reciprocal services taken into account when the agreement had been concluded. Traditionally, the principle of the will autonomy is considered to be the fundament of the compulsory force of the agreement.

Product of the individualist philosophy and of the economic liberalism, the theory of the will autonomy dominated the juridical regime of the agreement, starting with the 8th century and the beginning of the 19th century. The will autonomy designates a philosophical and juridical theory according to which the parties' will is the only one responsible with the creation of the parties' rights and obligations, the only one able to endow the agreement with the compulsory force and having, therefore, a sovereign power both between the parties as well as in front of the Judge: each individual is free, and if he undertakes an obligation, it means that he undertook it voluntarily and he must observe it, the agreement being the very law for the parties signing it. The text of the article 969 of the Civil Code mentions, just as its French counterpart – article 1134, line 1, French Civil Code – the

principle of the compulsory force of the agreement (according to article 969 of the Civil Code, "the legally established conventions have the same power as the law for the contracting parties", and according to the text of the French Civil Code, "the legally set up conventions replace the law for the ones signing them"), thus imposing on the parties the obligation of strictly complying with the obligations undertaken, being in the impossibility of terminating the agreement, except for the cases provided by the law, as the principle *pacta sunt servanda* is acting. Should the debtor fail to execute the obligations undertaken, the creditor is entitled to ask the Law Courts to force the debtor to execute these obligations, including to enact the forced execution procedure. The compulsory force of the agreement between the contracting parties has the following consequences: a) both contracting parties have to fulfill exactly, one towards the other, the obligations undertaken; b) the agreement cannot be terminated if only one party wishes to terminate it; c) the contractual obligations always have to be executed in good faith. The observance of the agreements is a desiderate for all agreements, in order to ensure the juridical security and order climate that must exist in a society, and through this, to ensure the accomplishment of the rights of any legal or natural person.

As to the parties, one shall keep in mind the agreement's intangibility and the debtor's obligation to execute the obligation undertaken in the conditions provided, under the sanction of triggering the contractual responsibility, and as to the judge, his role shall be limited, without the possibility of interfering in order to modify the agreement, upon the request of one of the parties. In this case, the judiciary revision of the agreements is not possible nor is it admissible; the *pacta sunt servanda* rule is imperative, and in case of a litigation the judge's duty is limited to discerning the parties' will as resulting from the contractual clauses – internal will – and to forcing the parties to execute the agreement.

2. On the other hand, expressed according to the principles of autonomy, as result of the will manifested by the parties in a sovereign manner at its conclusion, the agreement cannot be otherwise than just and in accordance with the social interest (in the juridical literature, Professor J. Ghestin proposes the substantiation of the juridical regime of the agreement on two complementary ideas: useful and just; the concept of useful is understood as a guarantee of the accomplishment of the social, private and public interest; the concept of just is understood as a balance between the reciprocal rights and obligations of the parties; they justify the flexible understanding of the will agreement of the contracting parties and a greater interference of the judge in the agreement, in the name of the commutative justice and of its natural correspondent, which is the good faith. J. Ghestin, *Cause de l'angagement et validité du contrat,* LGDJ, Paris, 2006, pages 89-110), therefore any interference of the law or of the judge in the contractual relation created in this way is, through its nature, an injustice, an assault to the natural freedom of the human being, a freedom that is willingly defended by the law against any interference. Expressing a free will at the time of conclusion of the agreement, the parties are presumably equal according to the individualist conception of the natural law, and they are going to remain within the same limits during the execution of the agreement which can be controlled, modified or adapted only symmetrically, based on the same freely expressed wills respectively.

Morally, as it is the result of the individual wills of the contracting parties, the agreement is always in accordance with the interests of the persons signing it. Economically, one considered that the theory of the will autonomy is the essential reason of the economic life; in order to express and develop itself, the will of enterprising must be free of any barrier and constraint exterior to the individual.

The freedom of expressing the individual wills ensures the economic balance and the general prosperity. Any state constraint in the economic area is regarded as unfortunate.

The free game of the individual wills ensures the maximum production, lower prices, free competition and more and more chances for the members of the society to accomplish their interests and to fulfill their needs.

2. Harmony and Stability of the Contractual Clauses. Assurance of the Contractual Balance

1. The economic, social and juridical realities of our time sustain the assertion that the will of the contracting parties cannot be considered as the only fundament of the general construction of the agreement any more. The great economic and social changes from the end of the 19th century and the beginning of the 20th century, starting with the industrial revolution and later the technical and scientific revolution, led to profound transformations of the social structure, stressing the inequities between the participants to the civil and commercial circuit. These inequities translated, among others, in agreement standardization phenomena, especially in case of the agreements concluded between the traders and the consumers, which made useless, if not impossible, any discussion and negotiation between the future contracting parties, thus undermining the very base of the will autonomy. More and more, the weight center of the agreement moved, from its creation to the area of its execution and efficiency; in some cases, the consent by which the agreement is concluded, although freely expressed formally, is not in accordance with the general interest and with the justice. This is why one cannot say that the agreement is always just; on the contrary, in some cases, the agreement brings forward the egoism, the inequity and the purely individual interest of the parties.

2. The impossibility of the individual will to express the metamorphosis of the contractual relations in the context of the economy evolution on new bases, is the reason and the explanation for the appearance of new concepts, theories and juridical constructions whose purpose is, among others, to remove the myth from the individual will of the contracting parties in the contractual mechanism. All these theories are based on the doctrine of the juridical positivism (the doctrine of the *juridical positivism* considers as the fundament of the agreement and of its compulsory force the objective law, namely the juridical norms in force, adopted or amended by the State, granting the agreement its compulsory force). Nowadays, the compulsory force of the agreement can no longer be reduced to the compulsory content of the agreement only, it actually refers to the agreement as a whole. As asserted in the French juridical literature, although they are in a close, interdependent relation, the compulsory force of the agreement is not reduced to and it is not explained exclusively through the obligation aroused from the agreement, due to the rich content of the legally consecrated civil agreements. The law imposed certain limits to the will autonomy, as well as to the compulsory force of the will. The state positivism and interventionism contributed to the decline of the will autonomy. By interfering imperatively in the agreements, in order to remove the inequities between the participants to the contractual juridical circuit, especially in the field of the adhesion agreements, the contractual dirigisme substitutes itself to the contractual freedom, meaning that an agreement does no longer correspond to the discretionary freedom of the parties, but the law imperatively determines the elaboration conditions, the content and the effects of the agreement.

3. Using the punctual evolutions of the positive law of the agreements (such as the judiciary protection of the contractual relation, the proportionality of the private law of the agreements, the contractual balance, the agreement's intangibility, as well as the necessity of certain obligations of loyalty, coherence, cooperation and information in the pre- and post- contractual behavior, identified especially in the consumer's law), prestigious authors of the French juridical literature set up a new theoretical construction of the agreement,

based on the theory of the contractual solidarism. The contractual solidarism theory maintains the will of the contracting parties within the limits of the interest of each party at the time of signing the agreement, only that, starting from the utility of the agreement for the parties, it places the interest in the center of the relations existing between the contracting parties and grants it the main part, namely the "agreement's engine". By giving their consent at the conclusion of the agreement, each party accepts to undertake the obligation of realizing the interest of the other contracting party, who, at his turn, trusts that this common objective, namely the conclusion and existence of the agreement, shall be accomplished. Therefore, a reciprocal dependence relation exists between the contractual parties, based on which each party has to undertake the obligation of accomplishing the part in the agreement referring to the interest of the other party.

Considered, according to the above theory, as a condition of the very agreement, the conciliation of the parties' interests must be comprised in its content even from its creation, in order to impose itself with the compulsory force of the principle mentioned in article 969 of the Civil Code. The conciliation of the interests must continue until the termination of the agreement, so that, if disequilibrium between the interests of the parties occurs during the execution of the agreement, due to external factors, it is necessary to interfere with a new conciliation from the perspective of the same interests, as a breaching of the agreement solution is not possible according to this theory. Although it still plays a creating part in the set up of the agreement, strictly psychologically speaking, the juridical will must be corroborated with other notions, such as equity, good faith, contractual balance, conciliation of the interests of the contracting parties, etc.

Such a solution can be explained, because if the interest of both parties is followed, the content of the agreement can and may be corrected at any time during its existence, in order to ensure the conciliation of the parties' interests every time such an operation is possible. If the contracting parties are not taking these measures, namely to re-balance or to revise the content of the agreement, these measures could be taken by the Law Courts upon the request of the party that is about to be damaged. In this way, the contractual solidarism offers the positive law an efficient means of integrating the time factor in the contractual mechanism and the preservation of the agreement in front of the evolutions from the economic, social and juridical; fields where it exists and where it produces its effects. Following the accomplishment of the reciprocal interests of the contracting parties, the judge will have to enact that each party should undertake his obligation and accomplish the contractual interest of the other party, and if this is not possible, the judge shall be entitled to modify the content of the agreement, which has its remedy functions that make this conciliation possible. The direct intervention of the legislator and the more and more frequent intervention of the judge over the content of the agreements, in the name of the public order, is nowadays clear, in the name of the commutative justice (The justice problem has drawn the attention of many researchers that delimitated the "distributive justice" with the origin in the *Nicomahic Ethics,* and placed by Aristotle in opposition with the "corrective justice" later on called "commutative justice". The distributive justice provided that the money, the position on the society or the honor should fall on every person depending on his worthiness, while the corrective justice was asking those breaking the law to pay according to the nature of the damage caused. A. Rogojanu, *Masters of the Economic Ideas. Antiquity and Middle Age,* page 137). If no express legal regulation is available, the judge has the right, and sometimes even the obligation, to proceed to the re-balance of the agreement.

The contractual balance concept is based on the idea that both from the juridical perspective as well as from the economic perspective, the agreement's content is in

harmony. In the classic juridical order, dominated by the will autonomy, this concept was unconceivable, being irreconcilable with the consequences of the will autonomy. The situation in which such a desideratum appears as natural for the contracting parties resides in the presumption of maintaining the existent economic and social situation taken into account by the parties at the moment of signing their agreement. But pretending the same thing if unexpected circumstances invert or deform the parties' forecasts from the time of signing the agreement, thus causing an obvious disproportion of the services due by the parties, so as that they become cause of loss for one party and cause of enrichment for the other party, results in an effect contrary to the desire and feeling of justice.

In this context, the contractual balance is individually and socially useful for the concluded agreement. The survival of this agreement depends on the adaptation of its content and therefore on the maintenance of the balance. The more and more vivid and present awareness of the inequity between the contracting parties and the exploitation of the weak by the powerful justify the wish of replacing this inequity with a necessary balance and of submitting the efficiency or the very validity of the clauses to a balance control. The coexistence of the liberalism and of the dirigisme seems to be meant to last, and this is why their conciliation is more realistic than their confrontation.

The notion of contractual balance allows both a global concept of the agreement's content, as well as an analytical one, depending on the fields of application of certain norms and juridical institutions. The equivalence, the reciprocity and the proportionality of the services are the imperatives that justify, in the name of the assurance of the contractual balance, an harmonious distribution of the rights and of the obligation at the conclusion of the agreement, the possibility of indexing and revising the contractual clauses when the economic circumstances existent at the time of the conclusion of the agreement modified dramatically at the moment of execution of certain services, the annulment or the reduction of certain clauses or behaviors considered to be abusive, the limitation of certain contractual rights when exercising them would damage the other contracting party. Next, we shall analyze such attempts of the doctrine and of the jurisprudence to correct certain disequilibria that occurred at the conclusion of the agreement as well as during its execution, in the name of a contractual loyalty imposed by the moral values of the good faith.

Good Faith – Fundament of the Contractual Balance

1. The idea of good faith, mentioned by article 970, line 1 of the Civil Code, according to which "the conventions must be executed in good faith" may explain completely and convincingly the necessity of reestablishing the balance of the contractual services, namely to adapt the agreement to the changes occurred in the actual circumstances existent at the time of its conclusion, based on a new approach of the purpose and of the interest considered by the parties when using the agreement as an instrument enabling them to accomplish the economic and social necessities, based on the flexible use of the very principle of its compulsory force, in a dynamic and constructive way.

The unfaithful behavior is a disequilibrium factor of the agreement and it leads to the application of the protection measures of the disequilibrium both at the conclusion of the agreement for the harmonious distribution of the rights and obligations, as well as during the execution of the agreement, the judge being entitled to repress the bad faith in order to save the usefulness of the contractual relation, allowing the exchange to take place honestly.

When searching the contractual usefulness, good faith, through its interpretive function, allows the *dynamic adaptation* of the agreement, which is indispensable to the realization of the exchange, offering solid contractual bonds. It will offer the judge the

means necessary to attribute a veritable and efficient signification to the contractual provisions. The idea that the judge's intromission barges into the ideal of the contractual freedom, in the name of which the parties are supposed to be the best judges when their own interests are in stake, is a utopian one, especially in the case of long-term agreements, as the contracting parties, as well as the safest experts, being actually unable to anticipate the contractual environment. These rules reject the unrealistic image of the agreement conceived as an out-of-time instrument, immutable and insensitive to the economic and social transformations, considering it, on the contrary, as a living organism affected by an irreducible coefficient of uncertainty and which is therefore susceptible of evolving and transforming itself. After all, the agreement revision represents, in case of serious contractual crisis, the only alternative to the non-execution of the agreement, to its breaching, the only remedy able to save the agreement and to ensure its duration.

The more recent opinions of the specialized literature tend to rediscover the place and the part of the good faith in the economy of the contractual relations, based on a new understanding of its moralizing function by granting new functions, evolving from the only function recognized by the traditional doctrine – the interpretative function – to a function *completing* the contractual obligations of the parties with new obligations, namely collaboration, in order to ensure the finalization of the agreement, information or security, in order to ensure the full balance of the parties' services, permitting at the same time to modify or to adapt it in case of a crisis situation.

2. Good faith has a moral origin and its purpose is to channel the juridical principles towards the fundamental notion of justice. It represents the juridical expression of good moral will. Good manners design the rules imposed by a certain social moral, acquired in time and in a determined space, which, concomitantly with the public order, where they are often comprised, represent reference rules for assessing the behavior, whose common law content has an evolving character.

We consider that the conception of the basic text of article 1134, line 1 of the French Civil Code, and consequently of the text of article 969 of the Civil Code, was based on moral grounds, namely on the idea of equity, on the idea of social usefulness. Therefore, it can justify, in this form, the possibility of adapting the agreement to certain distorted circumstances of the initial contractual agreement. Starting from the historical context of the elaboration of the French Civil Code, dominated by the concept of the natural law based on reason, and analyzing the influence exercised by the work of Domat on the elaboration of the French Civil Code, and especially analyzing article 1134 of the French Civil Code, the French literature notices that, according to this writer, the obligation relations necessarily suppose a state of involvement in a contractual relation, materialized in the idea of cooperation and solidarity of the participants from the civil circuit, and therefore we cannot retain the will autonomy as a source of Domat's opinion, as the compulsory effect of the agreement, with strong moral valences in the natural law school (result of the interlacing of two inspiration sources: Roman law and canonic law) was based on the respect for the word of honor and not on the power of the individual wills.

As the base of the agreement's compulsory character is not in the sovereign power of the individual will but it is conferred by the law based on the ideas of moral, equity and social usefulness, these ideas become a constant of the analyzed principle, capable of manifesting all throughout the execution of the agreement, since its conclusion until its termination. The principle's absolutism, with its main effect of interdicting the agreement's adaptation to the actual realities of the social and economic evolution, represents therefore a false problem. According to the solidarity doctrine, the judge's intervention in the agreements is not an assault to the principle of the compulsory force of the agreement; on

the contrary, it gives the agreement its full vitality and efficiency. What seems to be an insurmountable assault to the principle of the agreement's intangibility, if considered from the point of view of the percepts of the will autonomy, is nothing but a means of ensuring the maintenance and survival of the latter.

In this context, the French literature signals even a proposition aimed at modifying the main provisions regulating the principle of the compulsory force of the agreement, forwarded by D. Mazeaud in the text of article 1134 of the French Civil Code, presented in 1997 at a colloquy.

Thus, he proposes the introduction of new moral concepts in the texts of the above mentioned article (loyalty, contractual disequilibrium) as well as the reconsideration of certain classic concepts (equity, good faith), so that, in the end, only the legally, loyally and equitably conceived conventions replace the law for the ones setting them up. The new amendment proposes a combination of certain older doctrine-related currents with newer ones, the past being present thanks to the idea of equity, while the present is suggested by the idea of loyalty in the context of the actual solidarity and fraternity doctrine-related theses, and the relativization of the compulsory force of the agreement is going to be accomplished due to the necessity of concomitantly fulfilling the three legality, loyalty and equity conditions. In this context, the conventions may be revoked or revised through mutual consent in cases authorized by the law and when the excessive disequilibrium makes the agreement incoherent or without interest for one of the contracting parties. They must be negotiated, concluded and terminated in good faith.

In this context, we would like to believe that such arguments determined the Romanian legislator to mention, exactly in the text of article 1270 line 3 of the New Civil Code, on the compulsory force of the agreement between contracting parties, that "the agreement must be executed in good faith", and afterwards, the text of the article 1271 line 1 mentions that "the parties have to execute their obligations, even if their execution became more onerous", thus clearly wishing to underline the manner in which its compulsory force shall be interpreted, namely in a more flexible manner, in a dynamic and constructive way, according to the wish of the parties to attain, even in case of bad economic circumstances that appeared during the execution of the agreement, the economic finality taken into account by both parties at the conclusion of the agreement.

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