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Camelia IGNĂTESCU

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JUDICIAL REVIEW OF A CONTRACT VERSUS THE PRINCIPLE OF BINDING FORCE

Camelia IGNĂTESCU [1]

Abstract

In the legislation prior to October1, 2011, the cases in which the court could intervene and modify the contract were very few, conditions for exercising such prerogatives being specifically indicated. The present Civil Code is crossed by the idea of recognizing a court's intervention power on the contract, much higher compared to the old regulation, in accordance with other states'legislation and the international law. In this paper we examine whether the principle of the binding force of a contract does not preclude the recognition of a right to judicial review of a contract.

Keywords:

judicial review of a contract, the principle of binding force

[1] Camelia IGNĂTESCU - Lecturer PhD, Stefan Cel Mare University of Suceava, Faculty of Economics and Public Administration, Email: cameliaignatescu@yahoo.com

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Introduction

The current Civil Code is crossed by the idea of granting greater powers of courts to reappraise the contract. Recognizing the moderating power of judicial branch aims to give the possibility to restore the balance between the contracting parties, from the perspective of rights and obligations arising from the parties' agreement.

In the legislation prior to October 1, 2011, the cases in which the court could intervene and modify the contract were very few, conditions and limits of the intervention being specifically indicated. We refer to the criminal clause that could be diminished by the judge in the case of partial execution of the main obligation and a few cases laid down in special laws.

At the moment the Civil Code widens the circumstances in which the contract can be concluded or modified by judicial body. If we considered only a few causes we would mention: adapting the contract in unpredictable situations or completing the contract by the court, when the parties have not reached agreement on secondary elements in the negotiations, or reducing the penalty obviously excessive. Also dedicated laws, especially those related to customer protection, invest the judge to protect the weak side, the customer, having the power to rearrange the contract.

The court's interventions on a contract are based on judge's assessment that in the case brought before, the objective and subjective conditions are fulfilled which gives him the legal prerogative to revise the contract. Any changes to the contract by judicial body involves subjectivity, the Civil Code become saturated with 'the reasonable' that helps judge to decide.

We have not proposed to analyze the extent to which such powers conferred to judicial bodies is or is not appropriate in the current social, economic, political context, or to make an overview of all cases in which the court could modify a contract, or the cases where the court might appeal to the criterion of 'reasonableness' to decide. In what follows, we will analyze if recognition of a right to judicial review of the contract does not violate the principle of the binding force of the contract.

The three pillars of the classical regime of contracts are: contractual freedom, the binding force of the contract and the relativity of the contract effects.

When analyzing the binding force of a contract we consider the strength and contents of juridical relationship between the contractors

Ignatescu, C., (2013). Judicial Review of a Contract Versus the Principle of Binding Force, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 151-160

with special attention on the intervention of the legislator and especially on the intervention of the court on the contract.

Judicial Review of a Contract

According to art.1270 of the Civil Code: 'The *contract concluded has the force of law between the contracting parties.'* This article resumes in a form quite analogous art. 969 of the old Civil Code that 'legal *agreements have the force of law between the contracting parties.'* The legislator wished to emphasize the strength of the contract between the contracting parties. The contract must be carried out by the rule of law. The metaphor used in art.1270 of the Civil Code led to consider the contract as the law of the parties. In the principle of freedom and equality of contracting parties we will find the explanation for the power of law of the contract.

People are free to enter into any agreement, art.1169 of the Civil Code establishes expressly the principle of freedom of contract: parties are free to enter into any contract and determine their contents, to the extent required by law, public order and morals. The principle of freedom of contract is elevated to constitutional contract. In the case of professionals, contractual freedom derives from the principle of market economy. According to the Constitution, the Romanian economy is a market economy in which the state is obliged to ensure free trade and protection of fair competition. Of course, the parties are free to enter into a contract, but once they have concluded it, they have the obligation to respect it as a law (M.,Dumitru, (2011):56)

Limits of contractual freedom are found in laws that interest public order and good morals, other laws, the prohibition of certain rights. As required by art. 11 of the Civil Code, there is no derogation by agreements or unilateral legal acts from the laws that interest public order or morals. New aspects resulting from European integration are added to the national economic public policy. Thus, EU states currently speak about a European public order, beyond countries, which must be taken into account in contracts (A.-E., Moise, G.-I., Moise, (2013):112). In same line of thought, art. 61 paragraph 2 of the Civil Code, as a novelty, establishes that the interest and welfare of the human being shall prevail over the sole interest of society or science.

It is noteworthy that freedom of contract currently experiencing a visible steady erosion (L.,Pop, (2009):62) as professionals and consumers have no more unfettered freedom to contract or to refrain the contract,

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business needs and personal needs make people to contract; law or regulation that the professional adheres requires to conclude contracts whose terms are imposed by one party. Moreover, sometimes one or both parties are forced to enter into a particular contract . The protectionism of the weak side is fully manifested in the realm of adhesion contracts, which are characterized by the fact that although each party is free, more theoretical, to conclude a contract unilaterally, its content is determined by the will of one party that is the professional (M., Dumitru, (2011))

Principle of Binding Force

Apparently, the principle of the binding force of the contract (L.,Pop, (2009):62) seems to resist to judicial review of the convention. However, it might legitimize the interference of the court over the parties. From an exclusively-positivist perspective, the expression of art. 1270 Civil Code 'valid contract has the force of law between the contracting parties' names more an ideal of stability of the legislature and excludes amending contract terms by the court. However, beyond the simplicity of expression, the content of art. 1270 Civil Code emphasizes in terms of moral, economic, social, a richness that is able to explain the apparent severity. A contract has the force of law between the parties, as it is presumed to be dominated by good faith and utility for the contracting parties. When this utility is no longer subsistent, simultaneously or not, in disregard of the execution rule in good faith, it disappears even the basis of the principle of being itself (M., Dumitru, (2010): 48). For example, when the creditor is not entitled to penal clause as it is extremely onerous for the debtor and he is unable to execute it, the penal clause is no longer useful. In these situations the judge's intervention in the contract is not only necessary but also possible juridically, in the sense of being permitted, by linking the principle of good faith and the principle of fairness (C. E., Zamşa, (2006):86).

The law power of the contract conferred by Art. paragraph 1 of the Civil Code refers to the conventions 'legally made.'The freedom of contract does not mean that the parties have an absolute freedom or discretion to contract, i.e. to establish the law. The full legal force is only recognized to those conventions that respect public order and morals. Therefore, only if the contract does not contravene any law, including those that refer to good faith, fairness, public policy and morals, it is binding and the first called to respect it is the court. Otherwise it cannot

Ignatescu, C., (2013). Judicial Review of a Contract Versus the Principle of Binding Force, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 151-160

be opposite to parties, and, *a fortiori*, to the court (M., Dumitru, (2008): 40). The principle of binding force must be interpreted and examined in close connection with the theory of contractual solidarity , which considers that the essence of the contract consists not only of the intention of the parties but also the contractual interest of each of them (L. Pop, 2005).

According to the supporters of this theory, when the contract terms do not provide the conciliation of the interests of the parties, their content requires to be modified by the judge, who must have the power to review the contract. In the ambiance of the contractual solidarity, the judge's intervention in agreements is not considered as an attack on the principle of the binding force of the contract, the contract should not be seen in a rigid and immutable way. In other words, the binding force of the contract is necessary to be analyzed and applied with flexibility and elasticity (L. Pop, 2009).

The possibility of judicial review of the contract would be based also on the principle of good faith, which, according to renowned authors (I., Deleanu, S., Deleanu, 2003) acquired constitutional value and is a principle of public policy. Accordingly, the parties cannot agree contrary to the requirements of good faith. In the same sense art. 14 Civil Code proclaimed imperatively that „every person shall exercise the rights and perform his civil duties in good faith, in accordance with public order and good morals.' Under the current Civil Code can be considered that good faith is an implied contractual clause. Art.1170 of the Civil Code provides that the parties must show good faith both at the time of negotiation, as well as during the execution of the contract. Moreover, the legislature expressly stated that 'the parties may not remove or limit this duty."

The majoritarian concept was that good faith is a notion with a strong inclination to morals, psychology and ethics. Acceptations of good faith in the legal systems of the EU countries have a common denominator, namely that it is regarded as a purely juridical concept because it serves functions. Thus, given the variety of institutions with which it interacts, is necessary to distinguish between good faith in contract laws, in matters relating to property, but it is also necessary to identify those common components that are the basis of this notion. In all cases, the tendency of the doctrine was to confer psychological traits on good faith (L. T., Paveliu, 2013).

Ignatescu, C., (2013). Judicial Review of a Contract Versus the Principle of Binding Force, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 151-160

In current legislation, good faith refers both to the individual state and general abstract standards, meaning the level of understanding of an ordinary person. We believe that at least formally, good faith in the new code embodies the theory of good faith as a general norm. In this respect, good faith has limited application only in special cases where the Civil Code or laws provide it. As a principle, good faith recognizes its ability to complement and supplement the law and the will of the parties where appropriate, and in court it takes the form of an instrument for the interpretation of legal acts but also for reviewing the contracts. When it turns out that the good faith in assuming and fulfilling the obligations was violated - evidence that must be made as good faith presumes - so, when a principle has been breached, the court has not only the opportunity but also an obligation to intervene and remove this violation.

The two principles discussed above - the binding force of the contract and the assuming and fulfilling of contractual obligations in good faith – are closely related.

From a systematic interpretation of the old Civil Code follows that it is necessary to relocate the relation between art.1270 paragraph 1 and art.1170 of the Civil Code. [Zamsa, 2006]. The connection between the principles of obligation and of good faith is strongly illustrated in the French Civil Code, where the provisions relating to the execution in good faith are part of paragraph 3 of art.1134 (art. 1270 of the Romanian Civil Code). The first paragraph establishes the principle of *pacta sunt servanda*. Art.1270 paragraph 1 of the Civil Code does not apply reclusively but is inseparable from art.1170 of the Civil Code, the execution in good faith being a corollary of the obligation of the contract. The interdependence of the two principles results in removing the absolute rigidity of binding force of a contract, remaining the law of parties only to the extent that none of the parties rejects its duties in assuming and executing in good faith of its services(I., Bilouseac, (2012): 238-243). The role of good faith in determining the obligation of a contract and the possibility of court's intervention result in a widening of the role of the judge in the contract but also requires moderation and caution in exercising such powers (M., Dumitru, 2011).

The principle of equity leads to a conclusion regarding permissive intervention of the court on the penalty clause. Equity and good faith are two different notions. Between them there is a relationship of part to whole. Good faith requires loyalty and cooperation in carrying out, the

Ignatescu, C., (2013). Judicial Review of a Contract Versus the Principle of Binding Force, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 151-160

judge can give fairness in a particular case to determine the existence of contractual balance not only legally but also morally, and if he finds a moral imbalance of obligations, he intervenes into the contractual relationship and reassesses it, to ensure equality between the contracting parties (M., Dumitru, 2011).

The current Civil Code is crossed by the idea of recognizing a court's intervention powers on the contract, much higher compared to the old regulation, in accordance with the laws of other states and international legislation. The reference to the contract covers both the conclusion and execution of the contract and the consequences of non-execution – the extension of the contractual liability (of damages).

The power of a judge to modify the parties' agreement is not recognized as a general rule but it is exceptionally recognized only in certain situations, such as the case of penalty clause manifestly excessive or of unpredictability. Moreover, as we argue in the following, the power of judicial review of the contract conferred by the law does not prejudice the principle of the binding force of the contract even in cases in which it was granted. We will analyze the above assertions in two cases, namely in the case of unpredictability, or a penalty manifestly excessive.

The unpredictability - hidden and contradictory facet of the principle of binding force of the contract - is generated by a social and economic reality arisen from drastic and uncertain conditions in which a contract is to be executed, with reference to those envisaged by the parties upon its conclusion (D., Dobrev, 2011).

In the current regulation form, the unpredictability appears as a very exceptional situation that gives grounds for assuming the intention of the legislator for an applicability as narrow as possible to leave no room for abuse. Therefore, in the first paragraph of art. 1271 of the Civil Code it is expressly stated that 'the parties are bound to perform its obligations even if their performance has become more onerous, either due to increased costs of execution of its own obligations or due to the fall in value of the counterwork', admitting that the unpredictability is incidental only if the execution of the contract became "excessively onerous" and, moreover, it is due to 'extraordinary changes' of the circumstances.

It is observed that the decision is at judge's charge, taking into account the facts drawn from the case before, to discern between 'onerous' and 'excessively onerous' conditions for performing the contracts. The cumulative conditions laid down in art. 1271 paragraph 3

Ignatescu, C., (2013). Judicial Review of a Contract Versus the Principle of Binding Force, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 151-160

of the Civil Code to be fulfilled for incidental unpredictability outlines the relative difficulty in terms of evidence, but also in terms of task discretion of the court, which would accompany a possible judicial approach of the victim of unpredictability (A.-E. Moise, G.-I., Moise, 2013).

Appealing to the origins of the concept of *rebus sic stantibus* but also its continuous evolution, becomes interesting to note that this so-called exceptional case does not involve a rule different from that purported, nor diminishes its power, but rather gives dynamism, flexibility and necessary correspondence to the principle of binding force of the contract with the current economic and social context.

The unpredictability theory should be seen in the framework of the new regulations as a legal instrument, available to parties acting in good faith and loyalty, wanting solve the "crisis" of the contract, the effective execution and successful completion of their contractual relations. We hope that, wherever possible, most of the decisions taken by the courts under these regulations adjust the contract and not cancel it, since this is essentially the 'innovation' brought by that old legal concept of unpredictability within Romanian legislation.

Prior to the enactment of the current Civil Code there was no law of general application enabling the judge, upon request or *ex officio*, in certain circumstances, to intervene and amend the penal clause. On the contrary, there were provisions of general application which appeared to expressly prohibit judicial reassessment opportunity of the penalty clause and, through the relatively recent legislation, but prior to October 1, 2011, the court has recognized such power only for certain clearly defined contractual relationships.

Currently, according to art.1541 of the Civil Code, marginally titled 'Reducing the amount of penalty,' 'the court may not reduce the penalty only when (...) is manifestly excessive to the damage that could be predicted by the parties to the contract.' From the way in which it is made art. 1541 of the Civil Code results that, in principle, the courts cannot change the penal clause. By way of exception and only to the extent that the conditions are fulfilled legally speaking, the court might modify the contractual clause that sets the penalty. In other words, the court might reduce the amount of the penalty clause only if it will appreciate it as being manifestly excessive, compared to the damage that could be predicted by the parties when concluding the contract.

Ignatescu, C., (2013). Judicial Review of a Contract Versus the Principle of Binding Force, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 151-160

Conclusions

As we have seen, there are many arguments that support the idea that the binding force of the contract remains untouchable despite the fact that the judicial body, in certain exceptional circumstances, is entitled to amend the contract's architecture. Although enjoys support in many legal systems, due to the particularities of the Romanian legal system and Romanian society, it seems to us inappropriate at this time, to recognize *de jure*, as a general rule, the moderating powers of the court. The present Civil Code is a law that will increase the complexity of the contracts and will make indispensable the legal expert from negotiations or from the court room. Last but not least he will closely involve the judge in human relationships. The contract will become a kind of three-party agreement, in which the contracting parties will establish the essential relations between them, the judge being entitled to complete the contract with detail elements or to modify it, or even in unpredictable situations to alter the essence of the contract, first by decomposing it into parts and then rebuilding it on the new foundation, determined by this state of unpredictability, intending to enable further execution of the contract. We believe that over time, participants in the legal life will conclude that it is simpler, cheaper and more useful to respect the contract and in case of difficulty of execution to seek amicable solutions for its review, and only in extremis, to seek justice.

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