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THE WILL AND ITS LIMITS IN THE ACHIEVEMENT OF THE CONTRACT

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Abstract in original language:
The will constitutes one of the defining elements of human action. Transposed in the contract law field, the will represents the foundation of this law institution being objectified in the autonomy of manifestation and the liberty of contracting. In the law domain the will autonomy and its correlative the liberty of contracting has not an absolute character, being unbounded by the French civil code from the very 1804 and the Romanian civil Code from 1864 by the laws that concern with public order and good manners. In time those two institutions public order and good manners undefined by the legislator and having a variable content have allowed and continue to allow the state to interfere in hampering the will of contracting.

Key words in original language:
Contract Law; public order; good morals standards.

The juridical will concept and its role in the contracts

The juridical will represent the voluntary activity specific to a juridical act which incorporates informative, affective and motivational elements and effectively reflects both the “internal” and “external” will, thus permitting the human being to adjust its demeanor[1].

It appears as a chaining of specific phenomenon linked by relationships which progressively unfold and which outlined both on a psychological and juridical aspect.

Under the psychological aspect the will get through several moments namely: motivation, motives collision, decision in realization the action, and under the juridical aspect, singularizes by the characteristic marks of three components namely by “enacted decision”, by “the realizing action” and “the strived objective.”[2]

The will represents the essential factor of juridical acts achievement and on the contractual field the decisive role belongs to the willing accord, as the art. 942 civil Code stipulates.[3]

The role of the contracting wills pertain in the largest acceptation is to create and establish the content[4].

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[1] Gheorghe Iliescu, Civil law, General Part, The Superior Institute of Education, Sibiu, 1997, p.142

[2] Ibidem, Moise Bojinca, Romanian civil law, The General Theory, Academica Brancusi Publishing house , Tg.Jiu, 2008, p.160-162

[3] Art.942 Romanian civil code defines the contracts: the accord between two or more persons on purpose to establish or to extinguish juridical rapport between them.

Regarding the institution of contracts, alike with the other civil codes of the XIXth century, the Romanian civil Code marked as negotiable, respectively being the exclusive result of the common will of co-contractors.

Because other categories of contracts have appeared in time like the adhesion and imposed contracts (obligatory or tying), the role of the will has specialized from a class of contracts to another.

More over, a continue transformation of those took place. Thus, many negotiable contracts became adhesion or imposed contracts, which led to a transition from a contract creating will to a formal creating one.

Regarding the settlement of the contract content, within the negotiable contracts, the parts usually decide mutually both on the content and the effects, while in the adhesion and imposed contracts only of parts set all or almost all the contractual clauses.

Beside this the evolution of will in the contracts explain the evolution of the theories regarding the contractual freedom from the entire will autonomy to the realistic theory of contractual freedom, made within the contemporary objective law, that means in conformity with The Universal Pronouncement of Human Rights and with the internal legislation that refers to the human rights and with the internal legislation that refers to the subjective rights of the citizen of each country.

The autonomy theory of will

This theory was enounced and developed in the individualist climate of the XVIIIth century especially by Jean Jeacques Rousseau and Immanuel Kant.

Jean Jeacques Rousseau considered that the human being is free by its nature, but living in society he gives up a part of his liberty to achieve his social coexistence. Thus, was constituted the social contract as an expression of free wills accord.

At his turn, the Kantian philosophic system presumes the autonomic will is an imperative that justifies itself. Everything profound enough in human is his own free will which, he individually possesses like a native and inalienable right. For the free wills to coexist they have to limit each other to assure the social order. In Kant's vision the social order is the effect of a social contract which sequent from human rationality itself and not as a sequel to the fact that accord would sometime realized in history.

In Kant's vision, the law designates the quantum of solutions in which the free will of each individuals could coexists with the free will of everybody based on a universal law of freedom and thus constitutes the coexistence apothegm. For Kant the Law is "the science which limits the freedom to get them together".[5]

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[4] Ioan Albu, Civil Law, The contract and the contractual liability, Dacia Publishing house, Cluj Napoca, 1994, p.23

[5] To see Istrate Micescu, Course of civil law, All Beck Publishing House, Bucharest, 2000, p.42.

According with the will independence theory the foundation of the entire social building is in the free will of each individual. The theory distinguishes between the general will which is the exception and the individual will which is the rule. The general will consists of the enclosures brought to the individuals' freedom in realizing the social coexistence and which are contented in the imperatives disposals of the law. The individual will, excepting the imperative enclosures of the law, is an autonomic will, a free one which is able to manifests in each of the human activity field.

The estate is bounden to ensure the coexistence of this tow wills and the protection of its citizens against any social constraint.

In the juridical field, the theory of autonomic will has promoted the contractual freedom.

The Principle of contractual freedom

In nowadays Romanian juridical system, as in other contemporary law systems, the contractual freedom is not imagined any more as an abstract and absolute freedom, but it is introspected and analyzed objectively.

The contractual freedom is one of the important freedoms which have not been settled down by the Constitution, but it is guaranteed by that.

Seen in its plenitude, the contractual freedom consists in the legal possibility to conclude contracts, to set its content and effects, to modify and cease them and it founds the juridical foundation in the Romanian law under the corroborated provisions of art.965 paragraph 1 and those of art.5 of Civil Code.

Under a terminological aspect is to be observed that these articles, as many others of Romanian Civil Code[6] which refer to this matter, do not use expressly the phrase "contractual freedom" even they establish it undoubtedly.

Instead art.5 of Romanian civil code uses the expressions public order and good manners which also are not defined.

Naturally, following these situations, in the specialty literature many disputes were took place, both regarding these phrases and regarding their content.

This asserted as well in the fact in process of time the disposals regarding the public order has been extended, the content of the phrase good manners has changed and the contractual freedoms area has been restraint.

The contractual freedom limits

The contractual freedom limits in nonnegotiable contract

Enumeration

[6] To see art 966 and 968 of Romanian Civil Code.

Establishing some limits on concluding the contracts took place even in the Roman law, and in medieval age this law has been already well defined. In the modern law the contractual freedom limits were expressly enacted first in the French Civil code from 1804 and then in the other codes which followed it including even in the Romanian civil code by instituting the waiver interdiction from public order and good manners.

Public order

As we pronounced before the law enounces but not defines the public order, thus conferring the possibility of this to be defined after its content which vary in time and place from one society to another. In the modern law, public order was conceived as political order. Subsequently, the legal dispositions of political law multiplied and diversified which also led to configuration of this in political, economical, social and regulated order, by Constitution and organic laws. Legal dispositions of public order[7] are for strict application. That's why the concluded contracts with inobservance of them are hit of absolute nullity.

Good manners

By the phrase "good manners" on designate the behavior regulations which regards the public order. Because they look upon the public order they must be respected within the contracts exactly like the legal dispositions of public order.[8]

This phrase was used in the art 6 of French civil law by roman tradition and borrowed in art.5 Romanian civil code which gave up to the old designation of vices used in the old Romanian laws.

A pronounced amount of time in Romanian juridical terminology, in notion of good manners was included both regulations regarding manners for that matter and the regulations regarding public moral[9].

In the actual Romanian juridical terminology respectively the reviewed Constitution of Romania are also found in specific names of good manners (art.30 paragraph 7) and public moral (aert.53 par. 1).

In our concern the two notions of good manners and public moral should have been retrieving at the same time in both texts and not separated and when they are not used together, it is necessary, as prof. Ioan Albu suggested, finding a synthesis formula.[10]

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[7] It is to be mentioned that besides the legal imperative dispositions of the mentioned public orders, also other legal imperative dispositions are met of which inobservance also attracts absolute nullity. Thus they are, for example, the provisions of art. 948 from Romanian civil code which regulates the essential requirements for a valid concluding of the contracts or art.813 Romanian civil code which regulates the donation contract form,etc

[8]3 Look up Ioan Albu, quoted work, p.33

[9] In sociology as in other sciences there is a distinction between manners and public moral. The manners designs the natural skills inherited by people and collectivities traditions regarding the use of good and evil and on the other hand public moral represent the quantum of moral perceptions accepted by a collectivity as in rules of coexistence and behaving.

The contractual will limits in nonnegotiable contracts

Civil codes regarding only negotiable contract class did not deal also with other types of contract limits. It is certain that nonnegotiable contracts have narrowed the domain of contractual freedom in which we can speak about contractual liberty only in adhesion contracts but not in the imposed ones. Even in the adhesion contracts, preponderates in the contemporary contractual area, we can speak about the liberty of will to contract only two singular cases namely regarding the freedom to not contract and in the possibility to set only certain clauses of mutual accord of co contractors.

Contractual liberty and the consensus principle

In accordance with the consensus principle the contracts start by the simple volitive consent of the contracting parts and are subsequent to the contractual freedom concept.

In accordance with the consensus principle the contracting parts are those which establish within the contractual freedom, the modalities, the effects and the contract shape. That why, consensus must be seen both under the aspect of fond, according to the contractual parts are free to set the integral content of the contract and under formal aspect according to the contracting parts are free to express their will accord as they wish and not in a pre established form.

Regarding the applying of the consensus of the will manifestation must take place within the contractual freedom that means by respecting the imperative regulations by which on regulated public order and good manners.

Referring to the consensual contracts these can choose the expressing mode of will accordance. Only that this possibility which confers to the co contractors fastness in concluding the respective operation, as well as a random confidentiality , can lead to some practical difficulties as the hardness of proving the perfection and the content of the verbal contracts, the interpretation of the contracts in case the will of the parts was not clearly expressed etc.

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[10] Ioan Albu, quoted work, p.33 and 35 considers that could be used the formula of „ behavior rules which implies public order”