

SOLIDARISM AS THEORETICAL FOUNDATION OF THE CONTRACT

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Abstract in original language

Contractual solidarism as recent resurrection of that contract as well as the extension of its doctrine in legal theory became the basis of contract pleasing in the last years of an increasing number of followers who consider it necessary to raise with a principle of jurisprudence in contract law, the solidarity demands of loyalty and good faith in contractual mechanism resulting in the affirmation of the obligation of collaboration and cooperation between the parties. The co-contractual solidarism focused on collaboration and cooperation obligation of the parties thereto aims to distinguish the contractual performance of the contract making primarily affect its binding force. Being a relatively new and insufficiently developed theory which makes it sometimes impossible to be separate from the doctrine of usefulness and necessary fair, it continues to be contested today. However, his supporters believe it is not only possible but even necessary to do the reassessment of the three pillars of the legal regime of the contract, namely: freedom of contract, binding force of contract and its relativity effects. By situating the three principles under the contractual solidarism authority on trying to prove the existence and their actions are not put at risk in the context of current developments of positive law.

Key words in original language

Contract; freedom of contract; binding force of contract; relativity effects of contract.

Preliminaries

Indeed, nowadays, contract not only that does not know the crisis, as it was often affirmed in the specialty literature¹ - but moreover, it is permanently expanding. The affirmation is based, on one hand, on the appearance of an increasing number of contracts among which the non-named ones prevail

¹ See Liviu Pop, *Civil Law Treaty. Obligations*, volume III, Contract, Juridical Universe Press, Bucharest, 2009, p. 55, Paul Vasilescu, *Relativity of the Civil Juridical Document. Reference Points for a New General Theory of the Private Law Document*, Rosetti Press, Bucharest, 2003, p. 51.

and, on the other hand, on the diversification of the special legislation, in different juridical branches².

In parallel, we also assist to the enhancement of the role of the legislator and of the court regarding the contract forming and settling. Nowadays, the legislator has given up to his passive behaviour as a substitute of the contracting parts' will during the contract individualism, and he was happy to adopt disposing norms and he proceeds to the adoption and application of more and more imperative norms. The natural consequence of the new role undertaken by the legislator is the multiplication of the forced contracts and of the adhesion ones in relation to the negotiated ones.

At its turn, the court announces its presence in all the existential stages of the respective contract both in its concluding phase and during its existence when it follows the control of the behaviour of the parts and their obligation to a loyal and cooperating behaviour so that everyone could obtain the discounted advantages with minimum expenditures.

These changes that have appeared in the contractual mechanism made its evolution not to be explicit and understood in the highlight of the theory of the will autonomy. As a consequence, in the doctrine there were unleashed researches in order to find new fundamentals³ that could lead to understanding and explaining the contractual mechanism that should be generally accepted in the new developing context.

The theory of contractual solidarism subscribes in this sphere of concerns.

2. The content of the theory of contractual solidarism

Contractual solidarism starts from the finding that the voluntarist theory about the contract edifies its fundament only on the will of the parts, without considering their interest in the contract. Contractual solidarism considers interest as the concrete, constitutive element of the reports between the parts of the contract, and it affirms the necessity to accomplish the contract both on the will of the parts and on the interest they follow in order to conclude the contract.

² It is about the right to consume; the right to concurrence, the right to work and to have social security etc.

³ Therefore, beside the will autonomy theory and the one of contractual solidarism, there were also advanced the contract theory – an objective juridical situation and the theory of the common good and of the equity of the principles of social utility and commutative justice. For development, see Liviu Pop, *op. cit.*, p. 40-55.

Therefore, in the conception of social solidarism, the role of the juridical will consists of allowing the contracting parts to affirm their interest since concluding the contract and during their entire existence.

Contractual solidarism places interest in the centre of the reports between the contracting parts, offering it the main role in contractual mechanism. The analysis of the interest followed by the contracting parts makes possible the outlining of the real feature of the contractual relations. It considers that, as the parts express their consent to conclude the contract, each of them accepts to undertake the target to accomplish the other co-contractor's interest, who at his turn believes that this objective of concluding the contract and of its existence will be achieved.

Therefore, the contract generates between the parts a status of mutual dependence, fact that justifies and features the solidarity connection between them. By means of the contract, the parts manifest their interests, negotiate them and make them compatible, accomplishing a certain balance between them. The compatibilization of the interests of the contracting parts makes necessary the conciliation of their interests that are accomplished on the fair distribution of the losses and profits of the contracting parts basing on the principles of proportionality and coherence⁴.

The principle of proportionality has the value of a general rule between the targets and the advantages resulted from the contract, basing on and to the favour of the contracting parts.

The principle of coherence means the fact that the different clauses that form the contract content must be presented in a logical harmony, with no contradiction.

Contractual solidarism is the principle that imposes what contract must be, being endowed with a corrective function. It governs the contract content and, at the same time, the behaviour of the contracting parts.

During the existence of the contract, the parts accomplish a double role of contract authors and of actors in executing it.

Basing on the facts mentioned above, the authors of the theory of contractual solidarism consider that it is possible and even necessary to proceed to the reassessment of the three principles of the juridical system of the contract, namely: the contractual freedom, the mandatory force of the contract and the relativity of the contract effects.

⁴ See Vasile Patulea, Gheorghe Stancu, *Right of the Contracts*, CH Beck Press, 2008, p. 12.

By placing the three principles under the authority of the contractual solidarism, we are trying to prove that their existence and action are not endangered in the context of the current evolution of the positive law.

3. Contractual freedom and contractual solidarism

In time, the definition of the contractual freedom raised no problems. In exchange, the establishment of its limits has constituted and still constitutes a divergence source due to the evolutions in the contemporary positive law. The so-called contract “crisis” that is actually the will autonomy crisis – strongly manifested starting from the half of the 20th century, mainly occurs because of the number of legislative stipulations that have restraint the sphere of the contractual freedom, fact that lead to the affirmation of the “contractual dirigisme” assertion, in order to describe and qualify the new matrix applicable to the right of the contracts.

The contractual freedom is materialized in:

- the inexistence of the juridical obligation to conclude;
- every individual’s freedom to contract or not, by choosing his partner;
- the possibility of the parts to establish by their common will both the contract content and the meaning of the contractual clauses or stipulations⁵.

Contractual freedom defined as such appears as an absolute principle, with no limits, as it was considered by the principle of the will autonomy for which no restriction could and should be raised in order to hinder the freedom to contract. By means of suppletive norms that regulate the contract matter, the Civil Code largely respects this conception. However, the freedom to contract does not have an absolute feature, but a relative one, whereas both article 6 of the French Civil Code and article 5 of the Romanian Civil Code establish two restrictions, namely: public order and good manners⁶.

First of all, it is affirmed that contractual freedom finds its limit in the solidarity connection between the contracting parts, basing on which every

⁵ See Ion Dogaru, Nicolae Popa, Dan Claudiu Dănișor, Sevastian Cercel, *Bases of the Civil Law, volume I, General Theory*, CH Beck Press, Bucharest, 2008, p. 217.

⁶ Art. 1169 called “Freedom to contract” of the undertaken Romanian Civil Code – Law no. nr. 287/2009 specifies that: The parts are free to conclude any contracts and to determine their content, in the limits imposed by the law, by the public order and by the good manners”.

part must undertake the obligation to accomplish the co-contractor's interest. As a consequence, nobody should conclude unless they know they are able to accomplish their undertaken obligation.

From this obligation, we find certain obligations of the parts in the pre-contractual period, such as: the obligation to inform and the one to abnegation. In the Romanian legislation, the obligation to inform the professionals for the consumers' benefit is expressly regulated in art. 37-62 of law 296/2004 regarding the consumption code⁷ and consists of the necessity to provide the possibility of every co-contracting part to express advisedly its will.

The obligation to abnegation may be defined as being the duty not to contract, being the target of one of the parts, as a consequence of the incapacity of the other part to accomplish its contractual interest⁸. The solution is also the same regarding the client, namely by knowing his patrimonial situation, he must not contract an excessive credit that he will not be able to reimburse.

These correlative obligations are actually based on the solidarity connection between the contracting parts. According to the will autonomy theory, the contractual freedom is concretized in the possibility to choose the contract. But this side of the freedom to contract knows many imposed limitations, in the first place, by the forced contracts⁹.

Regarding the freedom of the parts to establish the contract content, it is affirmed that this appears under the authority of the contractual solidarism

⁷ Law 296/2004 regarding the consumption code was published in the Romanian Official Gazette, part I, No. 593 since July, 1st 2004.

⁸ For example, regarding the caution contract of a consumption credit operation art. L. 321-10 of the French Consumption Code stipulates that the credit institution cannot prevail this contract if when concluding the contract, the guarantor's commitment was disproportioned in relation to his goods and incomes. See Liviu Pop. *op. cit.*, p. 62.

⁹ It is about the contracts of mandatory insurance of motor contractual responsibility whose conclusion cannot be rejected by the insurance society for which the insured future opted or by the estranged real estate for which it is stipulated a pre-emption right in favour of certain persons. Similarly, it is discussed the problem regarding the adhesion contracts.

whereas the respective content must constitute a conciliation of the interests of the contracting parts¹⁰.

At the same time, under the principles of proportionality and coherence, the judicial courts are closer to the contractors and to their commitment than the law and they have to right to proceed to checking the contract content, by limiting the contractual freedom by means of the solidarity connection that needs to exist between the contracting parts.

4. The mandatory force of the contract and contractual solidarism

The mandatory force of the contract¹¹ supposes two aspects tightly connected one to another. The first one consists of the fact that, since its valid conclusion, the contract has a definitely established content and it must be respected as the imperative legal prescriptions, namely the parts are kept to execute exactly the performances resulted from the contract.

The second one is the consequence of the first one and represents the irrevocability of the contract that concretizes in the fact that the concluded contract usually cannot be changed or unilaterally undone by the will of one of the contracting parts. Also, the contract has the same juridical force for the judicial court. This must force the parts to respect exactly the contract and, at the same time, it is kept to respect the legal contractual clauses.

Starting from this content, according to the will autonomy theory, the mandatory force of the contract has its fundament in the individual's will that legally connects by itself the contracting parts, without needing the interference of an outside factor. But the mandatory force of the contract is not actually based on its voluntarist origins, but on the law force.

¹⁰ The French doctrine refers to the renting contract, the work contract, the insurance contract, the consumption contract for which they establish juridical means able to provide a certain balance of the contract content, respectively the conciliation of the interests of the parts as an expression of the solidarity of the parts. See Liviu Pop, *op. cit.*, p. 64.

¹¹ In the Romanian law, the legal regulation of the principle of the mandatory force of the contract is found in art. 969, paragraph 1 of Civil Code that stipulates: "Legal conventions that were accomplished have law power between the contracting parties". This is the correlative of art. 1134 of the French Civil Code. The text of art. 969 of the Romanian Civil Code is also found in the Assumed Civil Code (Law no. 287/2009) in art. 1270, paragraph 1 called "Mandatory Force", having the following content: "The validly concluded contract has law power between the contracting powers".

As such, law and not the will of the parts is the one that impresses juridical force to the individual commitments. Other authors specified that the mandatory force of the contract is acknowledged by the legislator as the contract responds to the social justice and utility¹². Finally, other doctrinaires say that the mandatory force of the contract must be searched in the creditor's trust in his debtor or in the creditor's expectations that should be reasonable.

According to the social solidarism a validly concluded contract must be respected and executed exactly according to the agreed clauses. At the same time, it is appreciated as a first limit of the mandatory force the conciliation of the interests of the parts that is actually a condition of the contract existence. As a consequence, in order to have mandatory force, the contract must accomplish, beside the validated requirements appreciated when concluding the contract, the existence condition – namely the conciliation of the interests of the contracting parts that represent the contract content and that is appreciated during the entire contract. If, during the contract existence, imbalances interfere between the interests of the parts, it is necessary to interfere a new conciliation of the respective interests.

On this line art. 1271 of Law no. 287/2009 (Assumed Romanian Civil Code) specifies that: “(1) The parts are kept to execute their obligations, even if their execution has become more onerous. (2) However, the parts are forced to negotiate in order to adopt the contract or its cessation, if the execution becomes excessively onerous for one of the parts because of a change of circumstances:

That occurred after concluding the contract;

That could not be reasonably considered when concluding the contract and
Regarding which the injured part should not suffer the production risk”.

Referring to the rule of the unilateral undoing of the contract, it does not operate regarding the contracts concluded on a non-determined term. This exception does not result from the contractual solidarism, but from the fact that such commitments would give birth to perpetual contractual connections that are expressly forbidden by the law¹³.

In exchange, this rule is applicable regarding the contracts concluded on a determined term. Related to this, the question is if, by invoking contractual

¹² See Liviu Pop, op. cit., p. 66.

¹³ In this sense, art. 1471 of the Romanian Civil Code states that: “Nobody can put in another person's service its works, unless it is about a determined concerned or an a limited term.”

solidarism, we could admit though an exception from the rule when a part is not interested anymore to continue the contractual connection basing on the fact that it is less favourable for her whereas w third has offered it the possibility to conclude another contract whose execution would bring it a bigger profit. The answer of the supporters of the contractual solidarism theory is negative. Basing on the contractual solidarism, the contract content may be and should be corrected during its existence in order to provide the conciliation of the co-contractors' interests. As such, the rule registered in art. 1134, paragraph 2 of the French Civil Code and respectively 969, paragraph 2 of the Romanian Civil Code does not know limitations based on the social solidarism.

Regarding the judge's role in the contracts, it was shown that, according the contractual solidarism theory, he must impose to every contracting part to undertake the obligation to accomplish the contractual interest of the other part. Also, when it is imposed, the judge may order the conciliation of the interests of the parts.

In the name of this principle, its supporters consider that the judge should have the power to review the contract in case of lack of foreseeability in the limits needed in order to provide the conciliation of the interests and of the effective reestablishment of the solidarity connections.

The judge's intervention is not considered as an attempt to the principle of the mandatory force of the contract, but it is regarded as an action meant to provide the contract vigour and efficiency.

5. Relativity of the contract effects and contractual solidarism

Starting from the stipulations of art. 1165 of the French Civil Code and respectively 973 of the Romanian Civil Code, it was stated for a long time that the principle of the relativity of the contract effects is registered together with the contractual freedom and the mandatory force of the contract, in the logistics of the will autonomy.

In this sense, it was stated that any contract has its juridical force in the co-contractors' will and as such, it is natural and normal for him to produce mandatory effects only regarding them, without affecting the thirds.

Thus, the relativity of the mandatory effect of the contract is in harmony with the individualist doctrine of the will autonomy, stating that the stipulations. However, some authors have tried to prove the falsity of the affirmation according to which the principle of the relativity of the contract effects is based on the will autonomy theory, stating that the stipulations of art. 1165 of the French Civil Code and respectively, 973 of the Romanian Civil Code do not find their origins in the will autonomy principle, but in

the reality inspired from “res inter alios acta, alius neque nocere neque prodesse potest”¹⁴. The supporters of the social solidarism theory, basing on this last viewpoint, state that the relativity of the contract effects must be analysed and delimited by the will autonomy theory.

In this conception, the contract is seen and researched in the juridical environment where he belongs, a fact that makes any contract to be considered as an autonomous juridical entity in relation to the contracting parts. In the juridical environment, it is for everybody a juridical fact.

The principle of the relativity of the contract effects refers only to the solidarity connection between the contracting parts and includes the thirds. Contractual solidarism serves for determining the parts and the thirds. The defining of the parts is simpler if we consider the contractual interest that is a fundament of the solidarity connection between the contracting parts. The consideration of the interest for determining the notion of contracting part should be analysed from three viewpoints, namely:

- expressing the consent in order to accomplish the volitional agreement is made only by the person that wants to accomplish an interest of his;
- affirming the interest allows the analysing of the principle of relativity of the contract effects and of the principle of its opposability during the entire contract existence;
- the interest criterion allows the determination of each contracting part that is not always reduced to one person. Thus, the interest is unique even if the will may come from two or several persons¹⁵.

6. Conclusions

The supporters of the contractual solidarism theory consider that the funding of the contracts should consider both the will criterion and the interest one. Will represents the subjective criterion while the interest criterion represent

¹⁴ „The thing agreed between some people can be neither damaging, nor useful for others”. See, Felicia Stef, *Dictionary of Latin Juridical Expressions*, Oscar Print Press, Bucharest, 1998, p. 259.

¹⁵ See Liviu Pop, *op. cit.*, p. 71.

the objective one. Wills can be many, the interest is unique. Naturally the part notion may be defined only by report to the other co-contractor. Every part entrusts to the other part the accomplishment of its own interest so that the co-contractors' obligations become mutual.

The existence and the action of the solidarity connection between the contracting parts is manifested during the entire contract existence. During the execution of the contract, the accomplishment of the contractual interest may have difficulties due both to some subjective factors and to some objective ones. In such a situation, the parts, basing on the solidarism, must not stay passive, but they should act in order to conciliate their contractual interests. In this purpose, contractual solidarism generates two obligations, namely a tolerance one that should manifest when the difficulties to execute the contract occur due to the inadequate behaviour of one of the parts and a obligation to adapt the contract when the difficulties are generated by objective circumstances, above the will of the parts. The existence of the contractual solidarism is also beneficial when a part fails when accomplishing the co-contractor's interest.

The conciliation of the interests of the contracting parts imposes the affirmation of the "fair measure" as a corollary of the proportionality principle if the contract is not executed by one of the parts.

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