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GENERAL CONSIDERATIONS OF JUDICIAL WILL REGARDING ITS LIMITS IN ECO – ECONOMICAL CONTRACTS

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Abstract:
After a brief study of the contract legal concept we attempted to examine the essential elements of the contract - the agreement of will between parties.
The autonomy theory of will - which legally promoted contemporary, the concept of freedom of contract, we will analyze the concept in question, both over time and in last centuries when transformations of freedom of contract and contractual law have been most reliable, amplifying the ambiguity of the meaning of contractual freedom in the Romanian legal order and the number and diversity of doctrines that were interested in freedom of contract become substantial.
Economic and social realities experienced significant changes, which made the autonomy theory of will first to be put in question and then challenged, attempting to detect the judicial construction of the contract.

Keywords: *will, contract, autonomy, theory of will, limits*

Introduction:

In front of uncertainties and increasing complexity of the world, every individual should aspire to an additional awareness, wisdom in understanding its environment, in the sense that every manager of human organizations must be able to develop “intelligent actions" to cope with the complex systems of nature and especially of society.

This paper is devoted to a particular actual topic and represents now one of the most effective means of solving the eco- economic issue. The topicality of the issue results from the major tasks currently undertaken by the law science in order to address the issue concerning the protection of eco-economy.

Man needs a more environmental action. This can only be the result of everyone’s will and this requires the development of individual consciousness.

If plants and animals adapt to the conditions offered by the environment, man has imposed its own will, adapting it to his needs and to those of society. As long as his interventions have not passed a certain threshold, below which the system had its own capacity to redress the ecological balance, there was no sign disturbing the relationship between the man as "exploiter" and the environment.

Man through his economical activity must resize his strategy for an environment close to equilibrium, in order to correct imbalances through a conscious activity.

The time has come to understand that man and societies are part of the biosphere and that they show and addiction to the resources it offers. Therefore degradation of the biosphere will have adverse consequences on the human species.

„ The will is the most important factor because it can dominate any other factor, provided it be reconciled with the life program; no hereditary influence, no pressure from the environment, nothing is more powerful than the will!”(Edgar Cayce).

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In human mental processes, the will have a special place, but it is not a separate process. It is always linked to thinking, representation, memory, learning, perception, sensation and attention.

Using the maximum principle of will autonomy as the freedom of the conventions, the traders did proceed to the formation of rules to facilitate their work, to increase speed and safety of the commercial operations.

In this sense, the modern contracting techniques have replaced the older modalities, creating standard contracts for form and general conditions for the fund.

The paper contains:

A true market economy, without any doubt, is supported in a considerable measure, by the regularity and fairness of legal relations between the partners within the extensive and complex process of production and circulation of goods, in the large field of services, with the purpose to satisfy the people's needs.

Such a fundamental goal can be achieved only if supported, especially the main act of birth, and fighting to achieve or to end those relationships – the civil contract.

An important legal instrument within the economic life, the ***contract*** has been known since ancient times. It became known on the territory of our country at the end of the eighteenth century and the first half of next century, by the Romanian rule; in the area of the former gold mines of Dacia during Trajan rule, at Alburnus Maior, around 50 coated tablets were discovered, out of which 25 were retained, and they were published in 1873 by the famous historian Theodor Momsen in his work, "Corpus inscriptiorum latinarum".

They contain the text of some civil contracts, unique in the world through the original conception in the art of writing.

„***The Contract***" of the Romanian law and the Greek„ ***synallagma"*** (today translated within the concept of synallagmatic contract) represents the origin of the great multitude and variety of contracts in the modern market economy.

The Middle Age Law developed the field by restricting the ancient contract formalism, and by approaching the priority related to the „ the free expression of human will "and by customizing commercial contracts compared to the civil ones .The Contract did not loose its importance not even today. It is the main source of obligations, offering the means to achieve the stability in human relations within the circulation of goods and values.

A significant Latin adagio, "*contractus legem ex conventione accipiunt* "(Contracts receive legal sanction from the agreement of the parties) highlights ***the parties' legal force*** materialized in this important legal document.

The basis of the contract - the theory of autonomy of will. Following the developments that have occurred since the late nineteenth century, political, economic and social realities have changed. The theory of the autonomy of will came into conflict with these facts, therefore, was put into question and even challenged. This is why attempts were made in order to find another basic concept of the contract. It was searched within the space of legal positivism doctrine. Thus, the following was proposed: the contract theory – objective legal situation; the theory grounding the common good contract and equity or the principles of social utility and commutative justice.

The contractual solidarity belongs to the same field, grounding the contracts and its effects on the relationship of solidarity between the parties, which work together to achieve common objective consisting of the sum of their contractual interests. The contractual solidarity agreement has significant consequences, from pre-contractual stage and then throughout its execution.

None of these theories is unanimously accepted. Therefore, this study concludes with the proposal to be built an eclectic theory, and from the contract's basic concept the following cannot miss: the will of the contracting parties, the solidarity relations arising between the parties due to contractual interest of each party, but undertaken by the other party, and the positive law, meaning the state norms which are imperative in this field.

The psychology represents the science that provides data and information needed in order to create the legal will. These data show a high degree of generality, of schematics and mobility, in order to be introduced in the middle of the, moving fluidity of life"[1].

In the field of Law, the role of the will has a double meaning on the one hand, the general will of the whole society or social groups, due to certain common interests, which tends to formalize through state activity, creating the state law, and on the other hand, the individual will expressed through law enforcement[2].

The **legal is part of** the components of legal consciousness.

Consequently, the **legal will** represents an attitude expressed by the subject by right, in order to participate to the completion of legal documents, where elements that lead to *decision making to have such a conduct*, are included.

The autonomy of will in the legal sense is identified with the principle of legal freedom[3].

The autonomy of will theory, inspired by the individualism that strongly marked philosophical thinking of the past centuries was transformed by the current realities in a real myth or dogma, as many authors deny to this theory the possibility to realize and to set the basis of the contractual freedom, due to the restrictions this freedom has suffered or it is still subject to.

Historically analyzing the concept of "autonomy of will", the Roman law did not know a principle of autonomy of will, as Roman law was strictly formalist, and therefore the existence of autonomy of will could not be recognized, without observing its external forms, in order to generate legal effects.

An idea supporting the existence of self-expression was promoted at the end of the late nineteenth century and it was produced as a direct result of the occurrence of the first signs of threat of its main consequences – contractual freedom – consisting of the development of new types of contract, different from the classic ones, as contracts of adhesion[4].

The classical contract considered in drafting the French Civil Code of 1804 representing an operation where "two persons with the same legal and economic power expose and discuss in a free debate their claims which they oppose, as they make concessions to each other and concluded an agreement where all terms are the wise and true expression of their common will", was followed by the emergence of a category of contracts of adhesion, drafted unilaterally by one party only, as defined by „ the unilateral will contract determining the economy of the contract where one of its elements, the adhering party's will, intervenes only to give legal efficacy of this unilateral will"[5].

For the undefined contracts when they were recognized as binding, "their legal value was resulting not from the fact that they represented agreements of will, but from the fact (independent of them) that a party had already performed a service, as they were relying on the principle of unjust enrichment and not on the *common will"*.

The Will is subject to the law, because it could not be included within the counter-law or defiance of morality. The formalism specific to the Roman law was continued within the Roman and Germanic Law dominated by culture although its concrete manifestations suffered some changes[6].

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[1] Tr. Ionascu, op.cit., pg. 261.

[2] I. Dogaru, Drept civil. Idei producatoare de efecte juridice /Ideas leading to legal efefcts, Ed. All Beck, Bucuresti 2002, pg. 740.

[3] A se vedea, J. Carbonier, Droit civil, Tome premier, PUF, 1955, p. 140; C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, op. cit, p. 91.

[4] V. Ranouil, L'autonomie de la volonte: Naissane et evolution d'un concept, Travaux de l'Universite de Paris, II, 1980. p. 656.

[5] G. Berlioz, *Le contract d'adhesion,* Ed. LGDJ, 1973, P.13 in Pascal Lotriec p. 60.

[6] R. Tison, op. cit. p.17-19. Thus, manifestations of „fides facta", „festuca" and „vadium" They were borrowed from the ancient French law, but in the same time they were replaced with the shake of hand and oath – gestures which still exist today, but without the same juridical content.

The principle *„solo consensus obligat"* didn't have the juridical valences that we give it nowadays. It didn't assign the autonomy of will – this matter having its origin in the practice of cannon law, which legalized the practice of the ***promissory oath***[7]**.**

The principle„ *solo consensus obligat"* rather represents the evolution from Roman Law formalism to the „Christianization of the law and of convention"

From the religious promissory oath to the secular one, there was just a step, apparently made by Grotius[8].

The same principle became to be used in order to explain the contract termination if promises were not kept; thus, the rule „ *solo consensus obligat"* will explain not only the ***contract conclusion or establishment*** , by also its achievement, regardless it was a named one or not.

The will was considered the unique source of justice. The Contract is not only a source of rights and obligations, but it also refers to the idea of justice, because only the contract by self-approved limitation – ensures the freedom of conscious will.

The contract is generally above the law, so the law cannot cut individual freedom, but as far as it facilitates to freedom of others.

The theory regarding the autonomy of will represent the basis of economic and political liberalism, and on the legal plan it determined the principle of contractual freedom. In these conditions, the western societies were less developed and the stated, minimally conceived, did not intervene in social-economical issues.

Briefly, the principle of contractual freedom can be concentrated in a few ideas: the basis of the binding force of contracts represents the will of the parties, the parties are free to determine the content and form of contract, the contract is binding for the parties and considered the „law of the parties"; the effects of the will agreement do not extend to the third parties, as that did not participate to the establishment of the legal relation[9].

According to the Civil Code, individuals or legal entities have the right to conclude contracts freely. The principle of the contractual freedom will be thus materialized.

The Civil Law recognized the **contractual freedom –** when interpreting the legal papers, the inner will of the contracting parties will prevail, the ***autonomy of will*** being very important.

In Commercial Law, the declared will prevails, by using written or printed documents, frame agreements. The Romanian Constitution does not expressly guarantee as a fundamental right or as a fundamental freedom or as a constitutional principle, the contractual freedom.

Any analysis of this concept comes against the trivialization of the notion itself referring to contractual freedom, by its metaphorical use and very rarely clarified by the consequences of the autonomy of will.

The Contract is the main source of obligations. Its importance as a means of establishing the various relationships between individuals and legal entities will be present in all fields, from the simplest needs of people, up to the professional business activities.

A contract is considered as concluded when the will is expressed by complying with the conditions of substance and form required by law, by making reference to the specifics of each contract.

The essential factor is the conclusion of the agreement of the parties – **the legal will.** The contractual freedom will be expressed from the perspective related to the form, within the rule regarding the consensus of the conventions, according to which in order to validate such a

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[7] R. Tison po. Cit. p. 19, by which God was conventionally valued in a double role.

[8] Grotius, *Le droit de la guerre et de la paix, t.II, cap. XIII, Du sermet,* Paris 1865, in the sens that the contribution of Grotius led to the secularization of natural law during his time and it was essential, see E. Gounot – *Le principe de l'autonomie de la volonte en droit priv*e, Dijon, 1912, p.3.

[9] Constantin Acostioaei, Note de curs - Elemente de drept pentru economişti/ Law elements for economists, Ed. All Beck, Bucharest 2004, p. 162.

convention, all you need is the agreement of the parties, unless we are talking about real or formal contracts and the obligations will be performed as undertaken, („pacta sunt servanda").

The basis of the principle of contractual freedom can be found in the so-called theory regarding the autonomy of will formulated by the French jurist Charles Dimonliu, who, in its drafting, took into consideration the necessity of finding some solutions for conflicts or laws of the province appeared in the 17th century France[10].

As the human will is free, the contracting parties, exclusively by their will cand give birth to a contract, took into consideration.

As a philosophical argument of this theory, it was said that "when people assume obligations through a contract, they limit their freedom by their own will… therefore individual will has its own power creating obligations from itself, not from the law and in this sense it is creative[11].

If discussing about the contractual freedom represents a sensitive step, even a risky one, the obligation to approach at least the most visible layer, remains legitimized not only theoretical, ethnically, but especially in a connotative and psychological plan: as long as the Romanian Constituent Party seems to have ignored this freedom, to talk about it largely represents to make it familiar.

Romanian specialized legal literature gives us some brief definitions of the concept of *contractual freedom* involving the same coordinates: contractual freedom is an abstract possibility circumscribed by the legal framework for both natural and legal persons, on the one hand in order to concluded contracts, meaning to engage in creating a contractual relationship, the contract establishing the actual content of this report, and on the other hand not to conclude a contract, meaning to refuse to engage in a determining contractual relationship.

Professor I.Albu considers[12] that contractual freedom represents „ the possibility of legal and natural persons, according to the law, to create contracts and to establish their content".

Another Romanian authors[13] argues „ that contractual freedom can result in the possibility to create a contract according to the parties' will, but also by refusing to concluded a contract". If any contract is justified by itself and the obligation arises from the parties' will, it is normal that they can determine the content[14] and the expression form of their legal will.

The most important field of application of the principle regarding the autonomy of will is therefore the contractual aspect, where we deal with two types of contracts: named or unnamed. This classification is very important from the viewpoint of the study, because contractual freedom is much higher in the unnamed ones. If within the named contracts the will of the parties is limited by other legal provisions, within those unnamed, the parties are free, with even the duty, to provide and detail the terms they desire.

The legal will and its limits within a contract.

Although the theory regarding the autonomy of twill theory could impose an absolute contractual freedom this has not happened and being limited all the time. In the Romanian law, the Civil Code provides no derogation by convention or private provision from ***public order and morals***. The freedom of the parties is thus limited and their will must violate the above-mentioned legal texts. This is considered as the great principle of autonomy of will[15].

[10] I. Filipescu, *Drept internațional privat/ Private International Law,* Ed. Procardia, Buharest1993, p.88

[11] L.Pop, *Teoria Generala a Obligațiilor/General Theories of Obligations, Tratat,* Ed. Chemarea, Iaşi, 1994, p.31.

[12] I. Albu, *Libertatea contractuală/Contractual freedom,* Revista Dreptul nr. 3/1993, Buc, p.29.

[13] Gabriel Olteanu, *Autonomia de voință în dreptul privat/ Autonomy of will in private law,* Ed. Universitaria, Craiova 2001, p. 49.

[14] L. Pop, *Tratat de drept civil. Teoria generala a obligațiilor/General Theory of Obligations, Ed. Chemarea Iaşi 1994, p. 60.*

[15] C.Hamangiu, I.Rosetti-Balanescu, AL. Baicoianu, op. cit., p.30.

Mandatory rules. Depending on the conduct prescribed by law legal rules and devices are binding. The rules entities can not deviate from, being thus subject to such sanctions are imperative, and the onerative rules are those norms requiring a particular conduct or those prohibitive when they ban something[16].

Public order. Public order is defined in the Romanian law as: the political, economic and social order as regulated by the Constitution. Briefly, the public order is the state public policy [17].

The limitations to the autonomy of the will can be change in the same time with the change of the political opinions of the law making authority, and the breach of the imperative provisions which establish the political, economic and social order will be sanctioned with the absolute nullity.

Good Morals. In the Civil Code, the Romanian law making authority used the word "good morals". In this name were included the rules regarding the actual morals and also those regarding the public morals.

The good morals represent a new limitation of the freedom related to legal papers. An immoral or illicit cause has as a result the nullity of the civil legal paper, as it happened in the following cases:

- a decision[18] of the former Supreme Court established that, in the case when, contrary to the social life rules, a contracting party took advantage of the other party's ignorance or constraining state, in order to obtain benefits that are disproportionate compared to the performance the latter received, the respective convention cannot be considered as valid, as it was established on an immoral cause.

- when the applicant has followed the conclusion of the legal act with a manifestly immoral purpose, the reimbursement of the provided services is not accepted;

- the amounts requested by a Belgian surgeon in order to be sent to the Attending Physician cannot represent a remuneration, but a fee that the surgeon pays to the person helping him to have a patient. Such a practice was considered by the court as having an immoral cause, as its purpose was to introduce in such a profession a commercial spirit and consequently the amount of 20,000 Belgian francs was returned to the patient[19].

The autonomy of will in commercial contracts

In commonly used and simple commercial contracts, negotiation lacks completely. Currently, the commercial activity is described by the true expansion of the adhesion contracts. The stronger partner eliminates from the beginning the possibility of negotiation, the other party having only the freedom to accept or not the contract.

For the sale-purchase contracts, the general practice in the traders' activity is to display the price of the good, the buyer having no choice but to accept it. (Retail). In these cases, the autonomy of will is limited by "take it or leave it"".

The adhesion contracts can be also found in the insurance field, in the banking activity, in transportation or in electric and thermal energy supply contracts.

A specific enforcement of the principle related to the autonomy of will from a commercial point of view, is the principle of free competition. This consists of the freedom provided to the economic agents to freely use the means and methods to win and maintain the clients[20].

Some authors have used in order to define this attitude of the economic agents, the notion of *competitive conduct*[21].

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[16] A se vedea N. Popa, Teoria generala a dreptului/General Theory of Law, Ed. Actami, Bucuresti, 1996, p.172.

[17] C.Hamangiu, I.Rosetti-Balanescu, AL. Baicoianu, op. cit., p.91.

[18] Tribunalul Suprem, S.Civ., decizia nr. 73/1969, in RRD, NR. 7/1971, p. 112, cu nota de N.Cosma.

[19] Civ. Bruxelles, 25 aprilie 1931, Pas., 1931, II, p. 98 in J.Falys, op. cit., p. 200.

[20] R. Houin, M. Pedamon, Droit commercial. Acte de commerce et commerciants. Activite commerciale et concurrence, Dalloz, Paris, 1980, p.379.

[21] C. Barsan, A. Ticlea, V. Dobrinoiu, M.Toma, Societatile comerciale/Trading companies, Casa de editura si presa Sansa SRL, Bucuresti, 1993, p.198.

Among the limitations brought to the free competition we can find[22]*:*

- The conditions to maintain an economic balance for the companies;
- The economic orientation and the protection as measures apparently complying with the principle of free competition, such as commercial standardization and urbanism which often marks onerous operations favoring some players on the economic market.
- Conventions to limit competitions.

Although the human being permanently evolves and gains rights and freedoms, almost in the same rhythm, if not faster, obligations are being imposed to him, and these are limiting is will and capacity to act. He has to respect not only the objective laws of nature, but also the norms of the society he lives in, the rights, aspirations and freedoms of the collectivity hosting him[23]. More than that, the alarming signals come from the planet which he populates, from the changes of the environment he lives in, and from the self-destruction risk. Therefore, beyond the daily, common rights and obligations, the right to a healthy environment and especially the obligation to respect and protect the environment and to develop a green economy represent the only rules capable to help the species survival and more than this, the planet survival.

Conclusion:

As the economic and social evolution is more and more far from the principles of the old civil codes, we can wonder if the principles governing the legal document, especially the contract, are still up-to-date and consequently applicable.

In this paper I tried to underline the need to maintain the principle of autonomy of will and contractual freedom in question, as research topics for jurist, with the personal hope, which totally lacks fantasy, to bring a plus of consistency in the awareness of contractual freedom within the legal culture of the Romanian Law system, as well as in the French system; systems where the actual distances in the contractual freedom prove their incapacity to remove the convergences of the same field as traditionally imposed in a legal freedom space drafted by the Civil Codes and consolidate Modern Constitutions.

The recommendations set forth in the article will allow the development of certain directions in science, law and practice. This, at its turn will lead to the revision of the traditional general view on contractual, including the environmental reports.

In addition to the fact that in doctrine and practice a clear idea about the specific environmental reports will be outlined, as elements of distinct branches, this will represent a first-step in the consecration of a difference in the procedure for examining complaints and disputes related to environmental issues dealing with the environmental damage.

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