# THE PRINCIPLES OF CONTRACTUAL FREEDOM AND GOOD FAITH IN JURIDICAL CONTRACTS

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**Abstract**

*The contract is the very heart of the Civil Code, and it is in fact also the cornerstone of any society, as without it relations and rapport amongst citizens could not occur nor unfold, and as such it is presently considered an effective legal instrument for organizing the behavior of all members of society.*

*The importance of contracts, the extent of contractual freedoms, the rapports that contracts entertain with laws, norms and other regulations and the means to properly frame and limit the State's intervention in the economy all hinge on the evolution of society and it's general ideological proclivity. The contract acts as the mirror of all this and it comes as no surprise that a society that has shortly left an organization based on the tenants of communism still bears the full weight of this ideology when it comes to contracts.*

*In the framework of the New Civil Code, the contract is viewed as based on a series of principles which are carefully drawn and well established in the general consciousness. As such, altering these principles would naturally cause important concern and uncertainty between the Parties to the Contract. Therefore, when times require repealing from a principle, this should be implemented with the greatest prudence by the legislature.*

*This paper contains a summary of the guiding principles of contracts from the provisions of the New Civil Code. For the first time in our legal history, these provisions regulate the two most fundamental principles of contracts; contractual freedom and good faith, which is why the author chose to insist on these new regulations*

***Key words:*** *Contract, contractual freedom, Civil Code, principles, good faith*

## Introduction

There is no doubt that even since it's dawning the Civil Code has been „a mirror to any society as its norms have answered concrete needs and it constituted a modeling force for human relations and rapports, offering to the individual in relation to himself as well as others, principles by which to lead one's life, in all of its aspects, be it spiritual, material, biological, and particularly, social"

In the Romanian legal system, the Civil Code was drafted (in 1864) and entered into force (1865) under the reign of Alexandru Ioan Cuza. Hence, it has suffered numerous modifications both before and after 1947, in most part due to the changes of social relations.

The importance of the Civil Code, in a society, especially the Romanian one is unquestionable, as „all human life, flowing from birth or tied thereto and unto death or with regard thereto, as linked to succession and legacy, is governed by the tenants of Civil Law."

Institutions belonging to this this branch of law play an important part in regulating the life of legal entities, from their founding or tied thereto and until they cease to exist by reorganization or dissolution, and even unto the consequences following from these measures.

Based on these considerations we may say that it is important that in the norms of the Civil code the needs of society, in its current state, should be reflected, and this makes it necessary that the norms adapt themselves to new realities and new demands of the individuals that make up society.

The importance of contracts, the extent of contractual freedoms, the rapports that contracts entertain with laws, norms and other regulations and the means to properly frame and limit the State's intervention in the economy all hinge on the evolution of society and it's general ideological proclivity. The contract acts as the mirror of all this and it comes as no surprise that a society that has

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shortly left an organization based on the tenants of communism still bears the full weight of this ideology when it comes to contracts

Thus, the emergence of the New Civil Code unfolded in response to a major Romanian legal necessity as naturally, the needs of 1864 no longer match the needs of today's society.

The contract stands as the very heart of the Civil Code, and it is in fact also the cornerstone of any society, as without it relations and rapport amongst citizens could not occur nor unfold, and as such it is presently considered an effective legal instrument for organizing the behaviour of all members of society.

More than any institution belonging to the Civil Code, the contract must be the best at adapting itself to the times it crosses.

Contract, as it is known is based on a series of carefully drawn and well established principles in all conscience and modification of these principles would create as natural uncertainty in relations between the Contracting Parties. Therefore, when the times require derogation from a principle, it should be implemented very carefully, very carefully by the legislator.

This is also the scope and object of this paper that holds a summary of the guiding principles pertaining to contracts, based on the regulations of the New Civil Code.

**Content**

For the first time in our legal history, the New Civil Code regulates the principle of contractual freedom as well as that of good faith.

In the system of the New Civil Code, the contract stands out as the main source of obligations, alongside other juridical documents[1], juridical acts in the narrow sense[2] and events[3]. Thus, as per art. 1.165 of the New civil code, obligations flow from contracts, unilateral acts, managing businesses, enrichment without just cause, payments undue, illicit actions, as well as any other act or fact to which the law ties the birth of an obligation.

Following the model of the French "Code Civile", the Romanian civil Code founds the institution of contracts on the principle of the autonomy of juridical will. This is the result of a concept of juridical philosophy that states that the contractual obligation originates exclusively from the will of the parties. Thus, the Contract is the agreement of wills between two or more persons with the intent to build, modify or extinguish a juridical rapport (art. 1166 of new Civil Code).

From the legal definition it therefore also results that the essence of the contract is the agreement of wills. No contract may be formed so long as the wills that concur to its creation have not found an agreement.

From the same legal definition, it results that the contract may be a bilateral or multilateral juridical act.

Juridical acts that necessitate the agreement of wills from two parties to be formed are bilateral; those requiring agreement of will from three or more parties are considered multilateral.

Thus the contract once completed implies the agreement of the parties and cannot be modified or cease without their consent (mutuus consensus mutuus disensus). The irrevocable nature sheds light – a contrario – that the will of a single party –unilateral will- cannot modify or terminate the contract except in circumstances specifically provided for by law or the contract itself. It then stands that, in principle, consent is the only means of resolution or termination of a contract.

[1] Defined in the doctrine as those manifestations of will in the sense of producing juridical effects consisting in the birth, modification or termination of civil juridical reports.

[2] Defined as those manifestations of will without intent to produce legal effects, effects which are produced under the law.

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The history of contractual will is, at the same time, the history of the concepts regarding contractual freedom, in other words, it is the history of the principle of contractual freedom.

As we have mentioned, the forming of the contract requires manifesting an agreement of will between at least to participants whom, according to contractual freedom, must be able to choose each other and once the contract is completed, contractual freedoms is continued in determining the terms of the contract and its execution. The essence of contractual freedom with regards to determining the contents of the contract and its effects consists of that, abiding by the limitations set forth in the Civil Code, upholding public order, good morals, restrictions on the object and cause, the parties may set the terms of the contract in accordance to the interests they pursue, thereby binding it entirely.

Therefore we may conclude that, by its nature, the contract is the sum of the wills and interests of the parties, although in the doctrine not all authors consider it to be rigorously exact to speak of contract as agreement of will, as the contract embodies not only the will but also the interest (Ghe. Piperea). Thereby even the expression "agreement of wills" is not rigorously exact as the will of the parties are in most cases contrary one another, or at least substantially different from one another, and always remain theoretically independent "wills" and as such we cannot speak of a unique or even unitary contractual "will". The parties may pursue a common interest or goal, especially in multilateral contracts, but they will never make-up a unique or common will.

The wills of the parties concur in a single point: when the parties agree to generate a juridical rapport, which is to say rights and obligation, as by the contract all parties aim to achieve a result.

In the opinion of the same author (Ghe. Piperea), the contract, in a more holistic approach, built upon the wills and interests of the parties, is upheld by three pillars: contractual freedom, binding force, and relativity of effects. However, the contract cannot function correctly and justly unless these building elements are modeled to the principle of contractual solidarism, when upon, a contract is a conciliation of the interests of the parties and a partnership in which each of the parties is bound to realize their purpose, underlining the fact that a contract is not merely made for oneself but to materialize goals.

Insisting upon the fact that the juridical trajectory of a contract is governed by:

1.The principle of contractual freedom;

2.The principle of good faith

Detailing the contents thereof is in order.

1.The principle of contractual freedom

The parties are free to enter into any contracts and determine the contents thereof within the bounds imposed by the law, public order, and good morals (art. 1169 New civil code). As such, contractual freedom can only be brought to bear in a legal framework, and by respecting reasonable limits imposed for the safeguarding of legitimate public and private interests; if exercised outside this frame, with no bounds any freedom loses its legitimacy and tends to turn to anarchy. In other words, "Nothing imposes so many obligations on the individual as freedom" (Viekoslav Kaleb).

Therefore, the parties are free to choose the person with which they will enter into agreement and to set the content of the contract place of execution, currency of payment…etc. In older civil law doctrine this principle was thus synthesized[4] : "As a matter of principle, the parties are free to enter or to abstain from entering into juridical acts, they may choose their counterparties freely, may by mutual agreement determine the object of the contact and the terms and effects thereof, they may modify them or terminate them, may adopt or reject in full or in part the patterns set forth by law (so called named acts), they may merge elements of these typical documents or create new acts unforeseen by the law, they may express their consent in the form of their own choosing, the juridical will having the same effectiveness whether openly or silently expressed, as sometimes silence itself may cause juridical effects".

[4] D. Cosma, (Theory of contract)"Teoria generală a actului juridic civil", Ed. Ştiinţifică, Bucureşti, 1969, p. 63.

The principle of contractual freedom also induces the freedom to negotiate and absence of liability in the event of not completing the contract. The omnipotence of contractual freedom explains – and justifies – that the parties undergo a series of "saccades" in the process of forming the contract. If they are free to bind themselves to the terms of the final agreement, the parties are just as free to set forth, in the contract, the means to "sever" the legal bond that blossoms between them[5].

Of course, this principle has its own limitations. Thus, the dispositions that make up the "economic public order" affect the freedom to contract in varied way such as: by forbidding any contracts pertaining to a determined object that is thus removed from trade; forbidding the use of terms deemed abusive; imposing on one of the parties obligations to complete certain formalities before treating with its partners; making it mandatory to agree to contracts with any and all who manifest a will towards such; by modulating the content of the contract by either determining the duration in authoritarian fashion or setting limits that one cannot exceed…etc.[6]

Other restraints are brought to the parties' freedom in establishing the contents of the contracts or choosing the form for its validity. This is the case with contracts of adhesion, that have a pre-established content and are encountered more and more in our lives (i.e. in insurance, transport relations, retail telephone services, banking, etc). The content of these contracts is the exclusive work of one of the parties, the stronger party, which thereby effectively imposes its terms.

Gh. Piperea:

"Considering that the freedom to contract was never accepted by the lawmaker as being absolute and observing that those pressed by needs are forced to want what the strong of the economy are free to impose upon them, we can firmly state that the autonomy of will is but a legal fiction, further removing itself from the contemporary reality. In a modern, globalized world there are contracts in which the will of a party is missing, is altered, or limited to the option of signing the contract or not. Such a contract is guided, almost in its entirety, by the interest to sign the contract. Yet this does not mean we live an age of twilight of contracts as the instrument of human options."

In theory, the parties to a contract are free to contract, but also to set the terms of the contract themselves. Synthetically, contractual freedom means freedom to contract, to not contract, to choose the contractual partner and to set or negotiate the contents of the contract.

2.Principle of good faith

Good faith is first and foremost a fundamental principle of civil law and art. 1170 of the new Civil Code brings this solution home to the realm of contracts by targeting the pre-contractual period in which negotiations occur (this idea is expanded in art. 1183 of NCC) as well as the mechanism for completing and executing the contract.

Good faith in negotiations

Art. 1183 NCC

"1- The parties are free to initiate, conduct and break negotiations and cannot be held liable for their failure

2- The party that enters into a negotiation is held to uphold the demands of good faith. The parties cannot agree to limit or exclude this obligation

3- Amongst other things, the conduct of a party entering negotiations or continuing negotiations without intent to complete a contract is deemed contrary to the demands of good faith.

4- The party that initiates, continues or breaks negotiations contrary to good faith is liable for the damages caused to other parties. To account for such damage, the costs incurred by the negotiations will be held under advisement as well as other offers the parties may have waived due to such or any other similar circumstance.

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[5] J. Goicovici, (The formation of contracts)"Formarea progresivă a contractelor", Ed. Wolters Kluwer, Bucureşti, 2008, p. 16

[6] See G. Farjat, "L'ordre public économique", Dalloz, Paris, 1965, p. 52 and foll. & p. 399 and foll.

Therefore, the New civil code regulates the negotiations phase, an exceptionally important step in the forming of a contract, during which the offer to contract is constructed and the potential agreement thereto as well. Indeed, in contemporary law, the actual closing of the agreement is sometimes especially complex and necessitates talks and discussions which serve to the final agreement of wills and outline the pre-contractual period (see. L. Pop, "Obligatiile", vol II, p. 203)

From the body of regulations of the new civil code derives the idea that, in the lawmakers' opinion, negotiations can be pre-contractual or post-contractual. As a general rule, negotiations imply certain actions unfolding to the point of determining the content of a contract, however, based on art. 1182 par. 2 of NCC, the contract can be completed only by establishing the key elements, which implies that for secondary matters the parties may continue negotiations. In such a scenario, the parties will still be in the process of defining the contents of the contract although it was already created and attributed binding force, it is then a post-contractual negotiation. In other words, post-contractual negotiation implies negotiating secondary elements regarding a contract that has been agreed upon and does not refer to designing futures contracts (even when these are but modified variants of an existing contract), in which case we are still face with pre-contractual negotiations.

The obligation to act in good faith implies that the parties take up a loyal behavior, and art. 1183, par. 3 of NCC holds a non-limited example as to what constitutes contrary behavior: the case in which a party initiates or continues negotiations with no intent of actually having a contract as a result. To the extent that there is a will to have a contract, but other aspects imposed by good faith regarding initiating, continuing or breaking negotiations are infringed upon, the infringing party will be faced with tort liability for the damage caused, based on art 1183, sec. 4 of NCC. For instance, breaking negotiations already in an advanced state, absent legitimate reason in a brutal manner by one of the parties can be considered to be an act of bad faith (see L. Pop, Obligatiile, Vol II, p. 208). Similarly, the holding of a partner in an extended state of uncertainty through long negotiations without a real and serious reason can also be thus considered (see Fr. Terre s.a., Les Obligations, p. 191)

Article 12, par. 2 of NCC establishes that good faith is presumed until proven otherwise, which imposes to prove behavior contrary thereto.

The lawmaker indicates some elements useful in determining the damages caused by initiating, continuing or breaking negotiations contrary to good faith. Costs incurred for the unfolding of the negotiations will be held under advisement as well as other offers from third parties the harmed party (/ies) may have waived due to such or any other similar circumstance.

Good faith when concluding the contract

Good faith is the expression of the general duty of loyal behavior and consists for each of the parties in not betraying the trust awarded by the other party or parties. Rightly, it was noted that this predictability is at the heart of the contract, and good faith represents and extension of binding force capable of upholding the contract to its full effectiveness.

Loyalty in concluding a contract imposes on the parties the duty to inform each other, which is to say to present all data and elements needed for the contract to be formed under good conditions. The duty to inform falls upon all parties to the contract with regards to both the rights and obligations borne by entering into it and their extent as well as any other facts that may be relevant for a party to know so as to act accordingly.

Good faith in the unfolding of the contract

The parties to the contract must fulfill the obligations undertaken, in spite of any difficulties that may arise in the unfolding of the legal relationship. While executing the contract, the imperative of good faith imposes a duty to initiative, cooperation and collaboration with the goal of efficiently executing the contract, and the party I denied behaviors which could bring harm to these aspects. In spite of this, the duty of good faith does not force to protect another's interests over one's own.

The parties cannot remove or otherwise exempt themselves from the duty to act in good faith, which implies the idea that good faith is imposed by public order, the sanction for infringing thereon being that the clause be considered null and void.

The absence of good faith

It was noted in the doctrine that the temptation may arise for a judge or arbitrator to take advantage of the elasticity of this concept of good faith to exert an uncontrolled and moderating power, and that to prevent such consequences limiting the application of the concept to the prerogatives accessory to the right to claim of the creditor (i.e. the right to Resolution). In any case, we must note the there is no sanction *per se* when good faith is absent from the negotiation, conclusion or execution of the contract. The form and extent of the liability is to be outlined based on the elements of the specific characteristics juridical situation in which good faith was breached; for instance, presence of dol can incur tort liability, while non-compliance in bad faith with a contractual obligation may lead to the Resolution of the contract – art. 1549 NCC "the right to Resolution or termination.

1- If enforcement of contractual obligations is not demanded, the creditor is entitled to the Resolution or, as the case may be, termination of the contract, as well as any liquidated damages due to him.

2- Resolution can occur for a part of a contract only when its execution is severable. Likewise, in the case of a plurilateral contract, the non-fulfillment by one of the parties will not incur Resolution towards the other parties, except when the non-fulfilled performance is deemed essential under the circumstances."

**Conclusions**

From the major importance that the Civil Code has in regulating the reports amongst members of society flows the necessity for such a juridical too reflect as well and accurately as possible the needs of society.

With the emergence of the new Civil Code, for the first time in Romanian legal history, the fundamental principles of contractual freedom and good faith have been introduced, reason for having to set very clear limits (imposed by law for reasons pertaining to safeguarding legitimate public and private interests) to which parties may conclude contracts, determine the contents thereof, negotiate, choose their partners, the object of the contract, means of its unfolding, etc. Furthermore the means by which the principle of good faith -fundamental to Romanian civil law- is applied to the matter of contracts for each stage in particular from pre-contract, negotiation, conclusion and execution must also be clearly stated in detail.

In this paper, we have set forth a summary of these notions striving to emphasize the practical implications thereof.

**References**


- Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei – "Noul Cod Civil", Ed. C.H. Beck, Bucuresti 2012.
- Ghe. Piperea, (Introduction in professional contracts law)"Introducere in Dreptul contractelor profesionale", Ed. C.H. Beck, Bucuresti 2011.
- D. Cosma, (Theory of contract)"Teoria generală a actului juridic civil", Ed. Ştiinţifică, Bucureşti, 1969, p. 63.
- J. Goicovici, (The formation of contracts)"Formarea progresivă a contractelor", Ed. Wolters Kluwer, Bucureşti, 2008, p. 16.
- G. Farjat, "L'ordre public économique", Dalloz, Paris 1965.
- L. Pop, (Obligations)„Obligatiile", Vol II, Ed Universul Juridic, 2009.