FREEDOM OF CONTRACT AND ITS LIMITATIONS IN THE ROMANIAN CIVIL CODE

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Abstract
This study aims to present the vision of the Romanian Civil Code about the freedom of contracting.
The Romanian legislator has restated in terminis that the principle of contractual freedom is a fundament of the conventions but has also established its restraints: the law, the public order and the moral values.
In order to attain the stated goal of this research, the effort was directed toward: presenting the freedom to contract as a principle of the private law, evoking the autonomy of the will theory as a fundament for the freedom to contract and toward systemically enunciating the competing theories and the decline of the actual autonomy of the will theory.
The effort was also directed toward presenting the restraints of the freedom to contract, as they are stated in the Civic Code and the different categories of contracts which are the consequence of those restraints.

Keywords: *the freedom to contract, legal restraints, moral values, good faith, adhesion contracts, law enforced contracts*

A . Introduction: freedom of contract – the private law principle

Art. 1169 of the new Civil Code has the merit of consecrating *in terminis* the freedom of contract principle, stipulating that parties are free to enter into any contracts and determine content of the same. The legal text also stipulates the limitations of this freedom: law, public order and morality.

The provisions of art. 1170 of the Code add to the freedom of contract principle the requirement of good faith which must be met both in contract negotiation and execution, and contract implementation, and which can neither be conventionally removed or restricted.

The legislative consecration of the much debated contractual freedom principle may be considered "revenge" in its own right. The question is whether it is equitable reparation or not?

A traditionally caution-based conduct makes us postpone the time when we state our complete victory and further seek for reasons that might shade this victory as we have become accustomed to regulations that, in the next article, make previously proclaimed rights *tabula rasa* or almost that.

In reality, we can but wonder what and, especially, how much of the splendid principle of contractual freedom is left available by "law", "public order" and "morality".

Are all these limitations cases of the ineffectiveness of the freedom of contract? And why not, what and how much remains of this principle?

We valiantly and hopefully face these questions and attempt, by scientific arguments, to outline the area of application and consequences of the freedom of contract principle as are nowadays given the circumstances for the enforcement of the new Civil Code, and also other legal provisions, as we attempt to define the limitations for the application of said principle as regulated by law and also imposed by our social and economic reality.

B. Freedom of contract – a corollary of the autonomy of will

An examination of the provisions of art. 1166 of the new Civil Code leads to the conclusion that the Romanian lawmaker established the parties' agreement as a basis of a contract. Equally, the provisions of art. 1169 of the Code result in the fact that the Code has acknowledged the freedom of

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contract principle; the logical conclusion is that the freedom of contract is based on the autonomy of will and it is a necessary consequence of the autonomy of will and its utmost achievement.

The freedom of contract is acknowledged to all persons, except for the cases of incapacity and prohibition laid down by law. This is the conclusion of the provisions of art. 1180 of the New Civil Code that stipulate that "any person who is not declared unable by law and stopped to enter into certain contracts may contract". As the right to contract is the rule, it has been rightfully stated[1] that the freedom of contract is part of the content of the natural and legal entities' civil capacity.

C. Consequences of the freedom of contract principle

Bringing back to mind the provisions of art.1169 of the New Civil Code, we note that the Romanian lawmaker has defined two of the coordinates of the freedom of contract principle: the parties' freedom to enter into any contracts and the freedom to establish contract content.

In the area of commercial contracts, the freedom of evidence and the freedom to settle disputes by arbitration were mentioned[2] with the same status besides the two aforementioned consequences.

Also, in close connection with the freedom of contract principle, one must separately consider the principle of consensualism and formalism, also in consideration of the relation f their forces, as this is influenced by the effectiveness of the new Civil Code.

Thus, we should highlight the fact that another consequence of the freedom of contract principle is the freedom of contract form, known in the doctrine as principle of consensualism.

Art. 1178 of the new Civil Code equally consecrates the autonomy of will theory and the principle of consensualism, underlying the fact that the parties' mere agreement is required for contract execution, showing its limitations – formalities required by law.

Therefore, the contracts entered into as *solo consensu* are the rule, whereas formal contracts are the exception.

It has been shown[2] in specialised literature that in the area of commercial contracts the multitude of such contracts and the necessity to enter into the same with rapidity lead to the fact that they are entered into in the form the parties consider best: verbally, by phone, via electronic means, in writing.

It has also been highlighted[2] that, for contracts entered into *inter absentes* (or remotely), the contracting parties' manifestations of will may take various forms, e.g. simplified contract (or order followed by immediate execution), as laid down in article 36 of the former Commercial Code and taken over in art. 1186 para. 2 of the new Civil Code.

When manifestations of will are expressed in various forms, it is required that their interpretation result in the idea of convergence which, in fact, is the agreement such manifestations of will should reach.

The doctrine[3] has also highlighted the distinction between civil contracts and commercial contracts. In the former case, the focus is placed on the identification of the parties' actual will whereas in the latter case it is placed on declarative will in connection with the fact that often professionals resort to standardized forms, conventions referring to general, framework contract terms and conditions.

D. Limitations of the freedom of contract principle

We have shown in the preceding rationale that, given the provisions of art. 1169 of the new Civil Code, the freedom of contract is the rule, however, this principle should not be considered absolute as the legal text itself also states its limitations: law, public order and morality.

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[1] Adam , Ioan , - Drept civil . Obligațiile . Contractul , Bucharest, C.H.Beck Publishing House, 2011, page 28.

[2] - idem.

[3] Pătulea, Vasile; Turianu, Corneliu – Curs de drept comercial român. 2nd edition, Bucharest, All Beck Publishing House, 2000, page 74.

The provisions of art. 1170 of the new Civil Code stipulate, if not a limitation of the will to contract, at least a conditioning thereof, which is, in fact, a good faith obligation – good faith that the parties should meet both in the negotiation and execution stages of the contract, and during contract implementation.

The law as limitation of the freedom of contract

We estimate this analysis has four lines of interest: 1) limitations laid down by law concerning the capacity to contract, also known as incapacities; 2) incompatibilities and termination of rights concerning certain persons; 3) prohibition laid down by law to enter into certain types of contracts; 4) prohibition to enter into contracts with certain subject matters.

1) Incapacities are strictly related to the capacity to exert a right, defined by art. 37 of the new Civil Code as a person's capacity to enter into civil legal documents on his/her own.

The sanction for the failure to comply with the capacity to exert a right is the cancellation of the document, as results from the interpretation of provisions art.44 para.1 of the new Civil Code.

Pursuant to art. 28 of the New Civil Code, the rule is the existence of the capacity to use which no person can be prevented from exerting according to art. 29 para. 1 of the Code and the existence of the capacity to exert which people can be fully or partially deprived of only in the cases and under the conditions laid down by law, according to the same art. 29 para. 1 of the Code.

Art. 43 para.1 of the new Civil Code states that, except for other cases laid down by law, children under the age of 14 and the mentally disabled have no capacity of exertion, therefore these are the cases where the natural person cannot enter into legal documents on his/her own.

As concerns legal entities, the legal regime of their capacity to use is provided by clauses of art. 205-208 of the new Civil Code, whereas the legal regime of the capacity to exert is provided by the clauses of art. 209-211 of the same law.

It is worth signalling that, as concerns membership to administration and control bodies, art. 211 speaks about incapacities and incompatibilities and includes in these categories those deprived of the right to exert a position within these bodies and those declared unable to occupy such position by law or under the articles of association.

In reality, the legal text should have marginally taken into consideration the fact that it speaks of incapacities (which have a legal origin), termination of rights (of the same origin) and incompatibilities (that can be of legal or conventional origin).

In this case as well, the sanction for the failure to comply with the provisions of art. 211 of the new Civil Code is cancelation of the deed(s) entered into under these conditions.

2. a Incompatibilities

With strict reference to commercial activities[4], a long list of incompatibilities, all required by law, has been drafted in connection with certain positions or professions that should remain within the limits of their specific dignity and prestige:

- judge, prosecutor and judge of the Constitutional Court – art.125, 132 and 144 of the Romanian Constitution;
- deputy, senator, member of the government, especially local public official – art. 81, 84, 87 and 94 of Law No. 161/2003, alongside clauses of Law No. 188/1999 on the status of public officials;
- officer and diplomat – clauses of Law No. 80/1995 and Law No. 269/2003;
- lawyer – art.15 letter c of Law No. 51/1995 ;
- public notary – art. 69 letter e and f of Law No. 36/1995.

The sanction for breach of incompatibility is not deed cancelation, but a professional and/or disciplinary sanction.

[4] Cărpenaru, Stanciu D. – Tratat …, 2009 edition, pages 93-94.

2b. Termination of rights

Sanctions are laid down for commercial activities upon breach of the legal provisions concerning public order and morality.

Provisions of Law No. 12/1990 on the protection of population against illegal commercial activities are laid down, however it has been estimated[5] that the sanction of termination of right does not operate under the law and that such termination could be determined by a criminal conviction sentence, i.e. by enforcement of termination as complementary sanction.

3. Prohibition to enter into certain types of contracts

Still in relation to commercial activities[6], it has been decided that, for the purpose of protecting some general interests of society, with economic, social or moral content, there are activities that cannot be scope of trading companies, which activities are expressly laid down in the Government's Decision No. 1323/1990.

Also, by virtue of Law No. 31/1996 on the regime of state monopoly, as well as under the Government's Decision No. 1323/1990 on some measures for the enforcement of the Law on trading companies, it has been decided that the activity conducted by traders in relation with certain economic activities should be subject to limitations in the form of licences, approvals and agreements.

The sanction for failure to comply with the legal requirements on the approval of competent bodies is particularly drastic and leads to the cancelation of the memoranda of association.

4. Prohibition to enter into contracts of certain subject matters

The major prohibitions are related to the sale-purchase contract, more accurately, the assets that are the subject matter thereof. The legal texts prohibiting the execution of these contracts require it in consideration of a certain quality of the contracting parties, either to protect a social interest, or in the interest of a person placed in a certain legal relation with the person the prohibition concerns.

Thus, in order to ensure dignity typical of certain positions and professions, but also in order to provide a general feeling of trust related to the exertion of said positions and professions, art. 1653 para. 1 of the New Civil Code stipulates that judges, prosecutors, court registrars, judicial executors, lawyers, public notaries, legal advisors and insolvency experts cannot buy, directly or by intermediaries, litigious rights that fall under the competence of relevant courts of law, otherwise the sanction is absolute nullity.

Art. 1654 para. 1 of the new Civil Code stipulates both a prohibition to buy, and a series of incapacities related to the buyer. Thus, the following are unable to buy, directly or by intermediaries, even by a public auction:

a) attorneys-in-fact – for the assets they are authorized to sell, except for the case laid down in article 1304 of the new Civil Code, i.e. contract with oneself and double representation as agreed by the person appointing his/her attorney-in-fact or who is not in a situation of conflicts of interests with the attorney-in-fact.

The sanction is relative nullity.

b) parents, tutor, custodian, provisional administrator – for the assets of the persons he/she represents.

The sanction is relative nullity.

c) public officials, syndic judges, insolvency experts, judicial executors, as well as any such persons (Attention: not positions or professions!) that could influence the conditions of the sale done through them or whose objects are the assets they administer or the administration of which they supervise.

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[5] - *Ditto*, pages 95.

[6] - *Ditto*, pages 95-97.

The sanction is absolute nullity.

Article 1655 para. 1 of the New Civil Code also rests upon the same persons the prohibition to sell one's own assets for a price consisting of a sum of money resulting from the sale or use of the asset(s) that he/she administers or the administration of which he/she supervise, as the case may be.

Paragraph 2 of the same article extends the area of prohibitions to other contracts as well (not named) where, in exchange for an activity promised by the persons laid down in article 1654 para. 1, the other party undertakes to pay a sum of money.

If the freedom of contract principle may authorise the persons laid down in article 1654 para. 1 letters a and b of the Code to perform a legal activity, it is unclear what the case is with „activities" that may be promised, and particularly performed by the persons laid down in article 1654 para. 1 letter c, given that the legal system of these persons' professions and positions is strictly regulated by special laws that stipulate the types of activities that may be carried out, which activities have nothing in common with the freedom of contract.

Public order – limitation of contractual freedom

When it comes to public order, the existence of a system of rules is essential, that aiming at the political and administrative organisation of society within the state, ensure the activity of political institutions, i.e. the prevalence of the collective entity over the individual.

The doctrine is almost unanimous to consider there is no definition of the public order concept, which means, however, that the preeminence of this concept over the concept of individual is questionable.

In time, given the ongoing economic changes, there appeared a need that the state quit the "laisser faire, laisser passer" position and have a say in this area by means of imperative legal provisions that have alleviated the autonomy of will principle.

This attitude of the state has been known as contractual dirigisme, a phenomenon that was not manifest in the economic area only, but in the area of civil and employment contracts.

Some authors[7] believed that contractual dirigisme replaced liberalism by creating and extending commercial public services (mail, telecommunications, banks, railroads) and by what is of interest in this analysis, i.e. restricting contractual freedom, by prohibiting the inclusion of abusive clauses, requiring the inclusion of consumer protection clauses, legal obligations to contract or creating prior administrative authorisations.

In the same context, it has been estimated[8] that the decline of contractual individualism was manifest by the recognition of standard contracts by the public authorities and the legality of adhesion contracts.

Other authors[9] agreed to the concept of contractual dirigisme, which dramatically limited in time the freedom of contract, the widening of the public order notion that penetrated both the economic, and social areas.

It is constantly acknowledged that public order is a concept with an economic dimension, apparent in monetary and price policy, loan policy and economic planning, a fundamental dimension that influences the existence and evolution of contractual relations with economic content.

Also, the social dimension of public order is acknowledged, having an impact particularly on the regulation of legal relations (hence, contracts) of labour.

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[7] Turcu , Ion; Pop , Liviu – *Contracte comerciale . Formare şi executare* , vol.I, Bucharest, Lumina Lex Publishing House, 1997, pages 15-16.

[8] *Ditto*, page 16.

[9] Stătescu , Constantin; Bîrsan, Corneliu – Drept civil . Teoria generală a obligaţiilor, 9th edition, Bucharest, Hamangiu Publishing House, 2008, pages 20-21.

At the same time, public order acquired a professional dimension, and a European one as well, the latter being focused on the consumer protection requirement and manifest in the prohibition of abusive clauses in the contracts consumers enter into.[10]

In any case, the state's intervention in the economy and contract dynamics, known as contractual dirigisme, has evolved from the vision of planned economy[11], an expression of the political public order acknowledgement to the goal of removing social inequities that the autonomy of will theory determined as this was the extent of its lack of contact with the reality it affirmed.

Contractual dirigisme is considered[12] an instrument to correct social inequity that autonomy of will generates, a mechanism that is at the disposal of the state that undertakes the role of arbitrator of social justice.

It appears of significance to recall that this goal of "social justice" seems to reach limits that should represent a shield intended to protect not only the consumer exposed to the professionals' abuse, but also the vulnerable entrepreneur, trapped in the mechanism of a contract marked by apparent disbalance.

In the Italian legal order at least, the theory of the third contract[13] is spoken of, which means that the contract is entered into in an egalitarian fashion, aspiring to the maximum freedom and that it requires the need to cover a legislative gap, characterized by lack of discipline that should grant protection to the "weak" entrepreneur involved in a disbalanced contractual relation.

The goal of the "contractual justice" of public order is thus extended from the individual consumer considered a vulnerable (disfavoured) contractor in its relations to the professionals to the "weak entrepreneur", involved in the same type of legal relations, which protection is legislatively acknowledged for consumers.

Morality as a limitation of the freedom of contract

A concept that seems to "say" everything from the very beginning, but that is as evanescent as smoke and the institution of "good faith", morality has always censored the extent and even the substance of contracts entered into individuals, being mentioned in the former Romanian Civil Code with the same purpose (article 5).

No code or legal provision has defined "morality" that were intended and even managed to maintain the parties' agreements within the limitations set by moral precepts. Even if there is no (legal, jurisprudent or doctrinary) concept definition available, law practitioners must acknowledge the minor percentage of litigations where the validity of contracts was objected to on the grounds that it presumably was contrary to morality.

However, as they are considered a legal limitation of contractual freedom, morality should be paid attention to at least by the theoretical determination of the concept.

Some authors[14] believe morality is "the totality of conduct rules shaped in society's conscience, the compliance of which became imperatively compelling by extensive experience and practice, for achieving the general interests of a given society".

In that respect, it has been estimated that morality has a religious aspect, impregnated by the moral norms of Christian dogma, morality that, in its turn, is public and personal.[15]

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[10] *DItto*, page 21.

[11] Cărpenaru, Stanciu D. – Contractele economice. Teoria generală, Bucharest, Scientifical and Encyclopedical Publishing House, 1981, pages 21-22 and 35-36.

[12] Stătescu , Constantin.; Bîrsan , Corneliu – quoted work, page 21.

[13] Marsico , Rita , "Le nuove frontiere della dottrina civilistica : il terzo contratto" – http://www.filodiritto.com/index.php?azione=visualizza&iddoc=.

[14] Adam , Ioan – quoted work, pages 33-35.

[15] *Ditto*.

At the same time, it has been estimated[16] that the other side of morality is empirical, based on sociological rules regarded as natural habits or habits acquired by tradition and education, centered on the idea of "good" and "bad".

The same author[17] believes this concept of "morality" is at full speed and includes rules concerning morality, habits or customs that society deems fundamental principles. The judge summoned to decide any violation thereof will determine, in reality, their importance.

However, it must be highlighted that the execution of a contract in breach of the law, public order and morality leads to various sanctions that are laid down, in principle, in art. 1247 and 1248 of the New Civil Code:

Art. 1247 of the New Civil Code states the sanction of absolute nullity of a contract executed in breach of a legal provision laid down for the protection of a general interest.

Art. 1248 of the Code states the sanction of relative nullity (i.e. cancelability) of a contract executed in breach of a legal provision laid down for the protection of a general interest.

As the Code does not establish criteria to determine general and individual interest, the actual analysis of this aspect lies with the court of law.[18]

Good faith and the freedom of contract

In the above, by the interpretation of the provisions of article 1170 of the New Civil Code, good faith was estimated to be not a factor limiting contractual liberty, but a factor conditioning the exertion of this principle, which turns it into an intrinsic element thereof. There are no *in terminis* sanctions for the violation of this obligation that is not simultaneous with the contract negotiation stage, is at the basis of contract execution and accompanies the contract like an actual „guardian angel" to the date it is terminated.

However, the provision of article 1170, final thesis, of the new Civil Code, that consecrates the inherent, irremovable and insurmountable nature of the good faith obligation leads to the fact that the breach of this obligation be sanctioned by nullity, absolute nullity, we dare say, as good faith has acquired, via this regulation, the role of instrument defending a general interest.[19]

Adhesion contracts

It has been shown[20] that an adhesion contract is a non-negotiable, hence non-negotiated, contract. The entire contract is devised exclusively by one of parties, whereas the other does not have the power to discuss or change it. The only possibilities are to accept the contract as a whole, adhering to all its clauses, or to refuse to contract.

Worryingly, nowadays quite a few contracts are adhesion contracts: utility contracts (electrical power, gas, water supply, waste management), bank contracts, leasing and insurance contracts etc. These are dictated contracts and are explainable by the fact that one of the parties has great economic power, sometimes the actual monopoly of the provided service, which renders it unavailable for negotiations.

Good examples are contracts based on exclusive[21] or selective distribution agreement, as well as franchise contracts that, in practice, attach the parties and forbid them to provide typical services in any other context than the one set by contract. They are also known as dependency contracts[22].

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[16] *Ditto*, page 34.

[17] *Ditto*, page 35.

[18] In the same respect, please see also Pop , Liviu; Popa, Ionuț-Florin ; Vidu , Stelian Ioan , Tratat elementar de drept civil . Obligațiile , Bucharest , Universul Juridic Publishing House, 2012 , pages 69-70; Piperea, Gheorghe – Introducere în Dreptul contractelor profesionale , quoted work, pages 137-139.

[19] Considerations on the good faith implication in contracts: Turcu, Ion, Tratat teoretic şi practic de drept commercial , vol. III, Bucharest, C.H. Beck Publishing House, 2008 , pages 105-111.

[20] Fabre-Magnan, Muriel – Droits des obligations . Contrat et engagement unilatéral , II-ième edition, I-er volume , Paris , Presses Universitaires de France , 2010 ,page 230.

[21] Chirică, Dan – „Principiul libertații de a contracta şi limitele sale în materie de vânzare-cumpărare" în Studii de drept privat , Bucharest , Universul Juridic Publishing House, 2010.

[22] Piperea, Gheorghe – quoted work, page 71.

Equally, mention must be made of contracts that hospitals and family GP's are obliged to enter into with the health authorities, which contracts are executed in the context of a framework agreement signed by the Ministry of Health and the National Authority of Health Insurance[23].

Law-imposed (forced) contracts

The distinction resides in that their execution is mandatory under the law.

It is most often the case of mandatory asset (housing) insurance contracts or third party liability contracts or health insurance (the latter being mandatory when travelling abroad).

We should say that the law imposes exclusively the type of contract and the obligation to enter into the same, but it is the parties who actually agree on the contractual clauses.

Special debate should be associated with the cases where, under the law or according to the parties' agreement (actually manifested as a preliminary contract), an obligation to enter into the contract is generated, but either party refuses to meet such obligation.

In the context of Decree No. 144/1958 on regulating the issue of construction, construction repair and demolition permits, as well as those concerning alienation and sharing of land, with or without constructions on it, the refusal of any of the parties to be present before a public notary for the authentication of the alienation document may be sanctioned by a court of law.

The provisions of art. 12 para.1 of Decree No. 144/1958[24] granted the party having met its obligations the right to address the court of law in order to get a decision to substitute the authentic alienation deed, this way the court replacing the promissory seller's consent.

Decree No. 144/1958 was abrogated by Law No. 50/1991 on the construction permits and some measures for housing, and the abrogation law no longer contained the trial remedy made available in the old text. In this context, though there was no other legal text of similar content concerning real estate alienation, with or without constructions on it, the practice of making decisions to replace an authentic alienation deed was maintained in certain courts of law that, this time, went back to the legal grounds of the provisions of art. 1073 of the former Civil Code, which provisions grant the creditor the right to obtain the **exact** fulfillment of the relevant obligation.

We estimate this option is debatable in the absence of an express legal provision granting the court of law the right to substitute a party's consent in the execution of a contract. The contractual freedom principle focuses on agreement and autonomy of will, and its limitations should be expressly laid down by law.

In the given situation, we believe the creditor of an unfulfilled obligation was not left with no legal protection whatsoever as long as it is still art.1073, final thesis, in the old Civil Code the one to stipulate its right to indemnification for failure of the exact exertion of the contracted right.

The Romanian lawmaker has remained constant in its options to make a decision to replace a contract.

Thus, it is worth mentioning the provisions of art. 16 of the Government's Ordinance No. 51/1997 on leasing transactions and leasing companies, stating that, if the lessor/lender fails to comply with the lessee's/user's right of option, as laid down in the ordinance, the former owes damages equal to the total prejudice caused by the breach of this obligation, and the court of law authorized to determine the damages *will be able to make a decision to substitute a deed of sale.*

In the same context, mention must be made of the provisions of art. 5 para. 2 of Title X – Legal circulation of land in Law No. 247/2005 on the reform in property and justice, as well as some adjacent measures. These provisions follow the tradition of those of art. 12 of Decree No. 144/1958 and stipulate that, if, after the execution of a preliminary contract concerning land, either party later

[23] Ditto, page 70-71.

[24] Chirică, Dan – "Acțiunea întemeiată pe art.12 din Decretul nr.144/1958 şi hotărârea judecătorească de admitere a acesteia" in the quoted work, pages 127-128.

refuses to enter into said contract, the party having met its obligations may notify the competent court that may make a decision to substitute the contract.

Law No. 287/2009 on the Civil Code abrogated the provisions of Title X of Law No. 247/2005, however, the new Civil Code continued the previous solution, stipulating with regard to sale, in art. 1669 para. 1, the following: when either party having entered into a bilateral sale promissory deed refuses, with no justification, to enter into the promised contract, the other party may request the court to make a decision to substitute the contract if all the other validity requirements are met.

In relation to the aforementioned legal provisions, that are the most recent in the researched area, two observations must be made:

The first concerns the fact that the substitution by the court of ether party's consent no longer predominantly occurs in alienation deeds for which the law requests an authentic document, as previously was the case of land with or without constructions on it.

The second is related to the fact that, in order to submit an action before a court of law, the requirements of art. 1669 para.1 of the new Civil Code, the beneficiary of the promissory sale no longer has to prove that, in his turn, has met the obligations undertaken by he promissory deed, but only that all the other validity requirements have been met.

Again with regard to law-imposed contracts, the provisions of two laws are worth mentioning, both concerning small and medium enterprises (SME's).

Law No. 133/!999 on stimulating private entrepreneurs to establish and develop small and medium enterprises stipulated in art. 12 the access of SME's to the available assets of trading companies and national companies with predominantly state capital, as well as those of autonomous administrations, also establishing access conditions as well.

In addition, the second paragraph of the same article stipulates the obligation of trading companies, national companies and autonomous administrations to enter into sale contracts, and ensure priority access respectively to the lease, concession or leasing of the assets laid down in the previous paragraph.

There are similar provisions in art. 12 of Law No. 346/2004 on stimulating the formation and development of SME's, a law that abrogated Law No. 133/1999.

The two aforementioned laws do not grant SME's the right to request the court to make a decision to substitute an authentic deed, hence, in practice, these enterprises submitted requests to courts via which they requested obliging the other party to enter into the contract. In this case, one can notice that, if the SME's were granted favorable decisions, they had no guarantee that the relevant contracts would be entered into even when the obligation to enter into said contracts was stated by the court under the civil sanction of comminatory damages.

As a general conclusion, as concerns law-imposed contracts, one may notice that the legal limitation to contract merely consists of the obligation imposed on the execution of the type of contract, not the selection of the co-contracting party or the actual contractual clauses, which allows for the freedom to negotiate that is higher than typical of an adhesion contract.

Contracts containing law-imposed clauses

Strictly referring to commercial contracts, in the first years after the 1989 Revolution, the lawmaker intervened in the contractual balance by passing Law No. 76/1992 on measures to refund loans derived from compensation, system of payments for merchants, prevention of incapacity to pay and financial blockage.

The provisions of this law stipulate the parties' obligation to state late-payment penalties in the contracts they execute, the minimum threshold of these penalties, as well as the limitation of the total penalties to the sum for which they are calculated (art. 7 of the law).

The provisions concerning late-payment penalties similar to those in Law No. 76/1992, abrogated by the Government's Emergency Ordinance No. 10/1997 on the reduction of the financial

blockage and losses in the economy, could be found in Law No. 469/2002 on some measures for the consolidation of contractual discipline[25].

These provisions have sparkled fierce debate[26] as concerns the obligation to include the clause concerning the obligation to pay the penalties, which clause, in the absence of all sanctions, was estimated to serve as mere recommendation.

The same law resulted in critical reactions[27] as concerns cumulated penalties and damages, and the limitation of the penalty amount to the level of the main debt, and, in the absence of a contrary agreement between the parties[28], the provision was estimated to contrary to the principle of full prejudice reparation as a result of the failure to comply with contractual obligations [29].

Mention must be made that Law No. 469/2002 was abrogated by Law No. 246/2009 and was no longer replaced by a similar law.

The provisions of art. 46 of the Government's Emergency Ordinance No. 50/2010 on loan contracts for consumers should be mentioned still in the category of law-imposed clauses.

Included in *Section II – Information that must be included in loan contracts*, the provisions of art. 46 of the Government's Emergency Ordinance No. 50/2010 stand for as many clauses that the parties' contract must include, however, the content of which remains at the parties' discretion.

Contracts containing law-prohibited clauses

We highlighted in the above the community lawmaker's intervention mostly in the area of contracts entered into by consumers, wherein the purpose of said intervention was to protect the consumer – an individual regarded as a "weak", vulnerable contractor in his/her legal relations with professionals.

This tendency could also be found in the Romanian law, as the Romanian lawmaker passed Law No. 193/2000 on abusive clauses in contracts entered into between merchants and consumers.

Consumer protection imposed as a measure intended to limit abusive contracts. As concerns the notion of abuse, the following were suggestively shown[30]:

"In the latter decades, qualifying a conduct as abusive extends to all areas of law. Thus, for example, the clauses of a contract may be classified as abusive as regards the consumer, a dominant position-imposed abuse is forbidden, economic dependency is reprehensible, the termination of the employment contract or contract of mandate are sanctioned, majority abuse is consecrated to the trading company-related area of expertise in terms of jurisprudence and legislation, and some price unilateral establishment clauses are qualified as abusive in order to prevent the stipulation of abusively high or low prices".

As concerns contracts entered into with consumers, the state's intervention taking the form of prohibition of abusive clauses is justified by the pressing need to prevent a significant disbalance of the contract[31] and is based on the good faith obligation in contracts.[32]

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[25] Cărpenaru, Stanciu D. –"Tratat …." Edition 2009. As regards the same topic, please see Chera, Nicolae, quoted work, page 39-40.

[26] Cunescu, Constantin; Balaciu, Anca Alina, Leaua, Crenguța; Beligrădeanu, Ștefan – "Prezentare de ansamblu și observații critice asupra legii nr.469/2002 privind unele măsuri pentru întărirea discuției contractuale" in Dreptul, issue 11/2002, page10.

[27] *Ditto*, page12-14. In the same respect, please see also Cărpenaru, Stanciu D. – "Tratat …." Edition 2009 .

[28] Cărpenaru, Stanciu D. – "Tratat …." Edition, 2009 .

[29] A comprehensive study of the topic belongs to university professor Stanciu D. Cărpenaru, Ph.D., in article "Considerații asupra noii reglementări privind întărirea discuției contractuale" in Curierul judiciar, issue No. 11/2002 – page1-9.

[30] Turcu, Ion – Tratat teoretic și practic de drept comercial – vol. III, Bucharest , C.H. Beck Publising House, 2009, page 105.

[31] Jeannin, Marie-Véronique – "Le désequilibre significatif au regard de la liberté contractuelle" – http//www.avocats-fourgoux.com/Droit-des-affaires. For the topic of contractual balance and disbalance, please also see Turcu, Ion – Tratat … vol. III, quoted work, pages136-156.

The doctrine[33] has drafted real inventories of clauses deemed abusive and even spoke of presumption of abuse.[34]

In terms of contractual freedom, however, the prohibition to include presumably abusive clauses, as laid down in Law No. 193/2000, in consumer contracts, the applicable sanction, absolute nullity respectively, as well as possible enforcement of an offence sanction to the merchant having made use of such clauses is of interest.

One should note that absolute nullity applies to the abusive clause only, not necessarily to the entire contract[35], and the latter may stay effective if this is possible in the absence of the relevant clause.

The provisions of the Government's Emergency Ordinance No. 50/2010, as amended to date, are significant as concerns consumer loan contracts via which the lawmaker established a series of forbidden clauses depending on the type of loan, the most significant being the provisions of art. 35 and art. 36 on fees chargeable by the bank.

Speaking of the same law, mention must be made of the provisions of art. 40 para. 1, that prohibit the inclusion in a contract of clauses entitling the creditor to unilaterally amend contractual clauses, without entering into an addendum agreed on by the consumer

Recently, the European Court of Justice decided in favour of the national court's right to *ex officio* investigate abusive clauses in consumer contracts, if any.

E. Conclusions

For the time being it is difficult to establish if the contractual freedom principle still owns the supremacy. The multitude of contracts that the common citizen is required to enter into as well as the discrepancy generated by the different economical position of the contractual parteners lead to the conclusion that the contractual freedom is rather a desideratum. This proves, more often than not, that the freedom of contracting resides solely in entering into a contract with preestablished clauses or not entering into it al all .

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[32] Popa, Ionuț-Florin – "Reprimarea clauzelor abuzive" in Pandectele Române, issue 2/2004, pages194-195.

[33] "Clausole vessatorie. Elenco indicativo di clausole abusive" – www.signoreesignori.

[34] Minussi, Daniele – "Presunzione di vessatorietà" – http://www.e-gloso.it/wiki/prezunzione_di_vessatorieta.aspex.

[35] Piperea, Gheorghe – Drept comercial, vol. II, Bucharest, C.H. Beck Publishing House, 2009, page 67.

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