Abstract
The contract is, beyond doubt, an expression of the individual’s freedom, being unanimously acknowledged that their will is the contract’s foundation. Realistic and solidarist vision on the contract nowadays, by means of the law of consumption, also reflects the evolution of the general theory’s aspirations.

Keywords: consumerist, law of consumption, contract

The law of consumption, granting the consumer free, clear and conscious will (rather thought, it would be rigorous to state that the law of consumption tries to grant such consent), is to model the foundations of the general theory of contracts.

This realistic and solidarist vision on the contract nowadays, by means of the law of consumption, also reflects the evolution of the general theory’s aspirations.

Thus, the French doctrine has shaped the new principles on the consumerist consent, the essence of the contract to be concluded between the professional and the consumer – natural person.1

The contract is, beyond doubt, an expression of the individual’s freedom, being unanimously acknowledged that their will is the contract’s foundation.

Considering however that to achieve legal clarification, individual will must observe the requirements of the law, the doctrine has asked questions such as:

- Is freedom to contract unlimited?
- Which is the relation between individual will and the legal provisions (respectively, which is the relation between the individual and general interest)?

The answer to the questions above actually involves choosing between the concepts of will autonomy or the limited contractual freedom.

a) The contract in the common law: freedom of will or guidance?

The principle of will autonomy involves that the conclusion and mandatory force of legal documents depend exclusively on the will of the parties (not on the law).

The concept of will autonomy appeared at the end of the 19th century when it also knew its “golden age”.2

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2 The principle of will autonomy, adopted by the authors of the French Civil Law in 1804, rooted in the theory of the natural law (Grotius, the 18th century) which pointed out the freedom of the individual and the importance of their will, of the theory of social contract of Rousseau (adopted by Kant, who used for the first time the formula “will autonomy”) and the influence of the economic liberalism, synthesized by Carbonnier in the expression „laisser contracter”.
According to the initial conception, the contract was, in general, superior to the law. Thus, the law had, only in principle, a suppletive role, namely: it only established the aspects the contractors had not considered. Briefly, the legal document compelled only because the parties wanted to.

The initial concept was often criticized because it underestimated the role that the law had to play in the existence of legal. Thus, the initial theory was criticized because it neglected the imperative of good will and equity.

The contemporary law of contracts acknowledges the fundamental role of will, but will is no longer autonomous, but must be correlated with the respect due to the law.

The reconsideration of the concept of will autonomy resulted in the decline of freedom to contract and the mandatory force of will.

Although, the theory has suffered significant changes, the concept of will autonomy keeps its usefulness, respectively it explains the important rules governing the legal regime of contracts.

The principle of limited contractual freedom considers that the parties are free to conclude any contracts (and to determine their contents), but only within the limits set by the law, public order and good morals (art. 1169 of the New Civil Code).

Thus, the freedom of legal will is exercised only within legal limits.

The contractual legal limits consider the compliance with public order.

The notion of public order is composed of: public, moral, social and economic order.

In the doctrine, the limits of will are comprised by the concept of “compliance of the contract with public order and good morals”.

As answer to the questions above, it has been deemed that will is determined and the “Law – as objective normative instrument – cannot be considered the essence of the contract only because it is something more substantial than the contract, but in itself it represents only a generalization incapable of producing anything effectively.”

Thus, the individual will to contract cannot be autonomous. It is essential in the formation, execution and completion of the contract, but limited by the imperative norm of the law.

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1 In a new approach of the 20th century, the contract becomes mandatory only if the norm of superior degree (the law) authorizes the subject to create a norm of inferior degree (the contract). Thus, the contract (which creates subjective rights) has legal value only if observes the rules of the objective law; see Kelsen, La theorie juridique de la convention, 1940, p. 14.

2 Thus, individual freedom becomes “a privileged tool to fulfill social needs” (theory of social voluntarism); See J. Four, J.L. Aubert, E. Savaux, Les obligations. L’acte juridique, edition XII, Sirey, Paris, 2006., p. 79 and the following.


4 The will autonomy is the theory – according to its etymologic meaning of vision – which states that the will of the contractors makes the law. Will autonomy is a philosophical notion, it grounds human freedom on rational consent, given informed, of a single rational being, who exists for now: the human being; see P. Vasilescu, Un chip al postmodernismului recent: dreptul consumatorului, în „Consumerismul contractual. Repere pentru o nouă teorie generală a contractelor de consum”, Ed. Sfera Juridică, Cluj-Napoca, 2006, p. 17.
In close connection with public order and the principle of contractual freedom are the issues of good will and law infringement.

According to the imperative provisions of art. 1170 of the New Civil Code, the parties “must act in good will when negotiating and concluding the contract and throughout its execution”. The infringement of the law is opposed to good will.

b) Freedom of will in the contract of consumption

In terms of freedom of contract, the change brought about to the law of consumption was a profound one. Thus, according to the individualist and voluntarist conception of the French Civil Code of 1804, freedom existed in general to enter into contractual relations and in particular only to get out of a contractual relation. Instead nowadays, the rule is reversed.

Note that according to the classical concept, at the level of the contract’s formation, freedom was complete (subject to the protection of the Civil Code against harm to the integrity of consent, especially the flaws of consent).

Instead, at the level of the contract’s execution, safety prevailed over freedom in order to make the contract an intangible and irrevocable block.

Nowadays, however, things have reversed: the freedom of the individual to engage in the contract’s formation stage, has given way to contractual safety (security), such that consent to be honest, and at the stage of the contract’s performance, contractual security has given way to freedom to get out of such contractual relationship.

To the above, we must add the "freedom to interrupt the formation of the contract of consumption".

In conclusion, the mutation that has occurred in relation to the principle of contractual freedom is the following: no sort of contractual freedom to contract, but freedom both to interrupt its formation and to get out of the contractual relation.

c) "Lack of freedom of will" upon the conclusion of a contract

Generally, the positive law ensures the efficiency of the contractor’s freedom to choose. However, it is a “closed” (relative) freedom and not an absolute one.

Thus, we can say without contradicting ourselves that, in general, there is no freedom of will upon the conclusion of a contract.

We say it considering that what prevails upon the conclusion of a contract is not the freedom to commit (to enter into contractual relations), but the security of a sincere and durable commitment (on long term).

There are grounded arguments to believe that, in the end, restrictions operating on the contractual freedom, are only apparent. It explains why modern law has been taking, for a long time, the pulse of the contractual reality and has diagnosed the symptoms of an economic violence, translated into contractual abuse.
The remedy of such exploitation of the weaker contractual party by the stronger contractual party resides in establishing the terms of the contractual document. Thus, the contractor may well commit contractually, but not as they plan.

Thus, the classical freedom of form, included in the French Civil Code, is replaced by the freedom through form. Even the form, in particular a form of acknowledgement, is the one allowing the contractor today to be totally informed of the contents and extent of their commitment.  

Construing consensualism as the consent expressed in a formless contract, it is logical for these persons to conclude that the formalism of acknowledgement (informational) bears the seeds of the decline of consensualism.

Considering the second meaning of consensualism – that a contract is made based on consent (agreement of will), the informational formalism can be classified as an intelligent formalism (namely it informs, thus makes the contractor reflect, think), defends the lucidity and integrity of consent.

Therefore, what might seem as a severe infringement to the civilist principles represents, in fact, the best way (the most appropriate) to restore the profoundness of the thinking reflected by the Civil Code, respectively a strong and undefeated will.

If the contractor does not make any efforts to know such formalism, then they must bear the consequences of their acts. Thus, the contractor-consumer is free only if they understand what they undertake contractually.

The result is that contracting does not mean only to undertake contractually but, in particular, to be willing to undertake contractually and well informed.

Therefore, the contractor can commit whenever, but not immediately. In fact, the freedom to enter into a contract immediately – the so-called contractual coup de foudre – is replaced by a progressive freedom to commit – a contractual time to think.

For instance, the restriction to deny an offer during a legal term, in the law of consumption, or reasonable in the common law and the obligation to keep a time to think of legal origin, in the law of consumption, or contractual – in the common law, illustrates very well the idea that the commitment must not be obtained instantaneously, but it must be formed, built, little by little.

On short, increasingly more, the weaker contracting party does not commit immediately.

The contractor-consumer can also undertake, but … not really. In this respect, the consumer finds the freedom … to interrupt the contract’s formation.

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11 See J. Goicovici, Formarea progresivă a contractului, Wolters Kluver Romania, Bucharest, 2009, p. 17 and the following.
12 It is the case of various contracts which, regularly, are concluded after a thinking period; such as: real estate contract, limited advertising offers (e.g. the sale of a special series of vehicles), the retail of furniture (also, promotional offer limited in time in hypermarkets, which means the merchandise proposed to be sold and regrouped in a supermarket) and even sale by trying is the example of a sale completed after a time of thinking. See G. Berlioz, Droit de la consommation et droit des contrats, JCP, Paris, 1979, p. 14.
d) The freedom to interrupt the formation of the contract

If the freedom to undertake contractually is defined (classified), the arsenal of the current protection of the weaker contractual party must be supplemented so that, once expressed (given), their consent does not commit them necessarily to business relations.

Consequently, if a long time ago, we were speaking about to make at present we speak about: “it is likely to make”. Thus, will is not fully exercised.

After all, the legal or contractual right to change one’s mind, to withdraw their consent (to withdraw their commitment) weakens the force of will which becomes undecided. At that moment, what matters is only the presence of the consent\textsuperscript{14}. Therefore, we have to agree with those who consider that today to give one’s consent is not enough, that person must further maintain their consent.

Thus, nowadays, to commit does not mean to really commit or, at least, not as the word was understood in the past. We have to understand that the right to change one’s mind contributes to a progressive formation of the consent.

In other words, the right to change one’s mind does not represent a way out from the contractual relations, but only the manifestation of new ways which wills have to meet.

Perusing shortly those mentioned above, freedom is “prisoner” in the beginning, respectively during the stage of the contract’s formation, but it ends by freeing itself during the stage of the contract’s execution.

e) The freedom of the will to “leave” the contract

The freedom to leave contractual relations represents the reversed rule compared to the one foreseen by the Civil Code.

In fact, while, according to the provisions of the Civil Code, the contractor is free to enter into contractual relations (but once they promised, they are bound to respect such promise), the law of consumption, on the contrary, “secures the formation of the contract”, but, on the other hand, “removes the obstacles when ceasing contractual relations”, thus affecting mainly the principle of the contractual intangibility\textsuperscript{15}.

The conception above, favorable to an enhanced freedom to cease a contract, intensifies sufficiently to state that it gives birth to a true mutation in the common law by inducing or imitating the law of consumption.

According to the aforementioned, there results a basic change in the contractual relations. Thus, the usefulness of the contract does not prevail and what is more important is what is fair, reasonable.

In fact, it is noticed that the contemporary law diminishes the usefulness of the contract to strengthen the idea of justice in a contract.

Also, traditionally, there was taught that the explanation, the foundation of the rule pacta sunt servanda was found in the so necessary honesty of both parties.

Consequently, the creditor of the given word was entitled to respect. At the same time, if they broke their promise, it created injustice, unfairness. In such context, the

\textsuperscript{14} Expression of the clairvoyant reasoning of Descartes who wrote in his discourse on method: “I would have thought that I had made a great mistake against common sense if, for something I approved back then, I had not been forced, and after that moment, to consider the thing good while everything else I approved had stopped to exist or I, myself, had stopped considering it as such”; see Ph. Delebeque, La formation de la vente entre professionnel et consommateur, R.J.Com., Paris, 1997, p. 21 și urm.

\textsuperscript{15} See Y. Picod, H. Davo, op. cit., p. 139.
principle of the mandatory force of contracts represented only a mere manifestation of
the idea of justice. But the contractual reality brought in the foreground the utopia of the
preceding philosophy; there is no, in fact, freedom without equality.

On short, it means that “a contract can be just only if it represents the result of the
personal reasoning of each contractor”\textsuperscript{16}.

In consequence, the withdrawal of the faculty to reason of the contractor based on
the argument that each party is equal to the other and, from here, the existence of “free
will”, do not have any actual support and cannot be supported (the argument being false
or, at least, it is false today given the contractual competition)\textsuperscript{17}.

We witness thus an attempt to reconcile the social usefulness of the contract (in the
meaning that the mandatory force of contracts justifies the fact for the contract to be, at
the same time, the forecasting and safety tool of the parties, as well as the engine of
liberal economy) and the contractual fairness. This reconciliation has, however, as result,
the fragility and flexibility of the modern contract.

In particular, the principle of intangibility is brought to discussion by the
contemporary law. Thus, the “contractual law” (the law of the contract) is not always that
of the parties, but the one arising from the economic public order, the latter triggering the
acceptable contractual contents, in moral terms, by the society.

This context encompasses the review of the contract through the deed of the judge,
which means a “re-writing of the contractual law” to eliminate from it all contractual
excess or abuse. In different words, the elimination of an abusive clause is “a partial way
out from the contractual relation”\textsuperscript{18}.

Anyway, any means granted to the judge is good to review contracts which include
the breach of the contractual balance: the law of abusive clauses, contractual
consequences (effects), contractual good will, the absence of cause, the extra-contractual
responsibility, fairness, etc.

To be noticed that the contractual law is also weakened when the execution of the
contract results into a social danger. The initial contract – predictable, invariable to the
internal or external factors, is replaced by a contract more or less subject to the
unpredictability, variations of the contract’s life or the fate of the weaker contractual
party. The law of excessive indebtedness is also fully responsible for the evolution of the
legal review.

In conclusion, there is less freedom to enter into contractual relations but, on the
other hand, much more freedom to cease the formation of the contract or contractual
relations – the only remedy for contractual inequality.

This change (mutation) of the contractual freedom is actually explained by the fact
that contractual freedom cannot exist without contractual equality.

and the following.

\textsuperscript{17} More precisely, the unpredictable, unexpected element is nowadays an intolerable source in terms of
media, of financial ruin with its entire trail of excessive indebtedness, of poverty. To prevent misery or social
exclusion, it is logic that the idea of justice to prevail in a contract over its usefulness in order to ensure social
peace. This social peace is achieved to the detriment of the traditional exigency of the efficacy without cracks
of the consent; see E Bazin, \textit{Le consentement du consommateur}, ANTR, Lille, 1999, p. 508.

\textsuperscript{18} See Y. Picod, H. Davo, \textit{op. cit.}, p. 139 and the following.
In consequence, *the principle of contractual equality* in the law of consumption is older. It gives life to the entire law of consumption and intertwines with other branches of the contemporary law\(^{19}\).

**REFERENCES**
