The Theory of Consent Vices in Terms of the Rules of Consumer Law through European Legislation

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Abstract

The balance of the consumer contract concerns more the notion of cause of the obligation, since the contractual balance supposes an analysis of the counterparties. Jurisprudence and doctrine have sometimes used this concept to remedy imbalances, in particular by carrying out a more global analysis of the content of the contract. Common law has its own rules for rebalancing the contract, and in particular the theory of vices of consent. The interest of this article is to show if the rules of common law can be used to balance the consumer contract and to what extent they are to fight against contractual unfair terms in consumer contracts.

Key-words: consummer, consent vices, rules, balance, contract, unfair terms

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1. Introduction

The provisions of the Civil Code are intended to restore, where appropriate, the contractual balance of the value of benefits and the avoidance of manifestly excessive abuses. The consumer contract is a specific contract, the contractual balance being regulated by Law no.105 of 13.03.2003 on consumer protection, Law no.284-XV on electronic commerce, Law no.183 of 11.07.2012 on competition, Law no.202 of 12.07.2013 on credit contracts

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for consumers, Law no. 157 of 18.07.2014 on the conclusion and execution of distance contracts on consumer financial services. The contract, from the formation, represents an exchange of consent of the parties, according to the principles of freedom of negotiation and autonomy of will. However, even if it is difficult to conceive, the contractual imbalance exists *in concreto,* mainly because by its content the contract is binding, which can lead to situations in which one contracting party is obliged to excessive commitments to the other.

The contractual imbalance is on the border of law and fact. If the imbalance can be established ex officio, then situations may arise in the execution phase of the contract caused by factors dependent on or independent of human will.

The law uses various ways to define the contractual imbalance. In fact, the contractual imbalance allows to define other legal notions, such as injury or abusive clause. Moreover, the contractual imbalance delimits the scope of application of certain rules of law or certain clauses, specifying precisely in which cases the judge may intervene on the basis of the contract. (Giaume, 1989, p.78)

2. The notion and nature of the significant imbalance between the rights and obligations of the parties.

Contractual imbalance is defined by the opposition of the notion of equilibrium: it represents a lack of equilibrium. Finally, it is the same reality that appears behind the use of these two terms: in one case there is a contractual balance, in the other, there is not.

According to the doctrinal opinion (Terré, Simler, Lequette,1996 p.261 and Popa, 2004, p.208) a significant imbalance is, in fact, the absence of equivalent benefits, as a result of the execution of the contractual obligations by the parties, regardless of whether this imbalance actually occurs or exists only virtually. As for the nature of the consumer contract imbalance, this is twofold. Even if the legal provisions stipulate an imbalance between the "rights and obligations of the parties", which will result in the qualification of this criterion as a legal one, the purpose of the abusive clauses to affect the

economic interests of the consumer must be taken into account and widen the sphere of imbalance, including economic character. (Terré et all 1996)

The concept of significant imbalance finds its origin in the European Directive on abusive clauses of April 5, 1993, exposed in the legislation of the Republic of Moldova through the content of art. 4 of Law no. 105-XV of 13.03.2003. Indeed, it has been decided at Community level that any clause which has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance between the rights and obligations of the parties under the contract, to the detriment of good faith, must be classified as abusive. Article 4 of the Directive stating that "the unfairness of a contractual term shall be assessed in the light of the nature of the goods or services for which the contract was concluded and the terms of the contract or of another contract on which it depends".

As the contractual balance is ensured by the manifestation of consent, the French doctrinaires, E. Gounot and J. Carbonnier, state with certainty that " le Code civil place le consentement au cœur même de la théorie du contrat[1]". (Gounot, 1912,p.132 and Carbonnier, 1992, p.295) Defined as an manifestation, externalized, of the person's will to conclude a contract, the consent ensures the balance of the contract. When the consent is vitiated, the contract is not valid. In order for the consumer to give his informed consent, it is necessary for the consumer to be duly informed of the contract he intends to sign. In the contract concluded by negotiation, the classical analysis distinguishes the problems of the existence of consent from those of integrity. This distinction is particularly weak in accession contracts.

While in the contract concluded by negotiation, the analysis of consent generally affects the contract in a global way, in the case of the accession contract, as a source of abusive clauses, the analysis of the quality of accession would often be seen as a particular clause. This quality can be questioned for two reasons: either the accession was obtained through fraud or it was forced. (Berlioz,1973, p.99)

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[1] The civil code places consent right at the heart of contract theory." The translation variant belongs to us.

contract, as a source of abusive, the decision to conclude a contract is preceded by an intellectual operation, during which the author of the act represents its economic and legal consequences, appreciates the advantages and disadvantages and only then makes the decision. It is certain that if the premises from which this intellectual operation starts are false - the result of an error, or if the decision is taken as a result of a constraint, the consent cannot be considered conscious or free and therefore must not be leads to legal effects. However, not any alteration of the psychological process of consent formation leads to the annulment of the respective act, but only such an alteration that presents a certain gravity and only in the cases and under the conditions provided by law.

3. **Protection of defects of consent provided by common law**

The theory of consent defects is the traditional way of protecting contractors offered by the Civil Code, whose uncertain efficiency has given rise to new forms of defense of contractors, especially consumers. Thus, the question arises as to the extent to which the theory of consent defects can serve to remedy contractual imbalances, considering that the sanction will always be the nullity of the contract, which may not always be the best solution for the victim of a contractual imbalance.

Consent must not be tainted. For the valid formation of any contract, the consent must be free and informed. These conditions are not met when consent is altered by vices such as: error, malice, violence or injury. The error is the false representation of reality at the conclusion of a civil contract. The error can be factual or legal. The factual error is the misrepresentation of a factual situation at the conclusion of the contract (regarding the object of the act, its qualities, the person of the co-contractor, etc.). The legal literature has expressed the view that the error of fact, in principle, does not constitute a defect in consent in international commercial contracts, being incompatible with the professionalism of the trader. (Constin and Deleanu, 1995, p.29-30)

We do not agree with this view, on the grounds that the increasing diversity and complexity of international trade operations leaves room for

error even on the part of professional traders, justifying the treatment of factual error as a defect in consent.

The error of law is a misrepresentation of the existence or content of legal norms (except for imperative norms or those concerning public order). The doctrine specified that, if in national civil law the error of law does not affect the validity of the consent, operating the presumption that everyone knows the law, the situation is different in international trade relations. Here it is admitted that the presumption of knowledge of the law does not operate with respect to the norms of law of a foreign state; for the trader in one country the regulations applicable in another country may not be as familiar as his national regulations.

In order for the error to constitute grounds for annulment of the contract, it must be considerable, in the sense that the element on which the representation is false is decisive for the conclusion of the act, so that, if the reality were known, the contract would not have been concluded.

The error which is attributable to the one whose consent is vitiated cannot serve as a basis for the cancellation of the contract. The error is attributable to him if he showed negligence, did not take the basic precautions, did not fulfill his obligation to inform himself. The proof of error is always incumbent on the one who invokes this vice of consent. Being a legal fact, the error can be proved by any means of proof.

Deceit consists in misleading a person by malicious or cunning means to cause him to enter into a contract. Deceit has two constituent elements:

- *the subjective element,* which consists in the intention to mislead a person in order to determine him to conclude a contract (if the misleading was caused unintentionally, there is no malice);

- *the objective element,* which consists in the use of various cunning means to achieve the intention to mislead: cunning maneuvers, lies, etc.

In order for the deceit to be the ground for the annulment of a contact, it is necessary for the error to be decisive in order to be realized, to be added while stretching a part of the parts that is so natural, to be obvious, without being able to be put into practice while the contract is being concluded. Several others can be used. For example, it is fraudulent to mislead the buyer

into creating small quantities that may have a false certificate of origin, which will take care to establish it in front of the sale-purchase contract.

It is necessary for the malicious means to be of a certain gravity in order to be able to produce the effects of a consent defect. Thus, the seller's exaggeration of the qualities of his goods usually does not constitute fraud.

In most cases, malicious means are expressed by positive facts. However, there are cases when the deceit is realized by abstaining from actions, omissions (deceit through reluctance). It is deceit through reluctance when one of the parties intentionally silences certain circumstances that are of essential interest, decisive for the other party and that the perpetrator, if he was loyal and in good faith, had to communicate. In principle, the fraud comes from the other side of the contract. However, malice committed by a third party can also serve as a ground for annulment of the contract if the other party knew or should have known about the third party's malicious maneuvers and did not warn the co-contractor or even instigate or complicit in the third party. As in the case of error, the burden of proof lies with the one who invokes it. Being a legal fact, the malice can be proved by any means of proof.

Violence is the coercion or threat of a person with an unjust evil that produces a fear that causes him to conclude a contract, which otherwise he would not have concluded. Violence - vice of consent involves two constitutive elements:

- *the objective element,* which consists in the threat of an evil;
- *the subjective element,* which consists in the fear, as a consequence of the threat, which affects the consent.

In order for the violence to serve as a basis for the cancellation of the contract, the following conditions must be met: the violence must be decisive for the conclusion of the contract; the danger to which the victim or her property is subject must be imminent.

Violence - a vice of consent is when the threat of evil is unjust, illegitimate. It is not violence to threaten the use of a legitimate means or the exercise of a right. For example, the creditor threatens to sue the debtor if he does not fulfill his contractual obligations. The proof of violence lies with the one who invokes this vice of consent. Being a legal fact, violence can be proven by any means of proof.

The injury is the material damage suffered by one of the parties to the contract due to the obvious disproportion of value existing at the time of concluding the act between the benefit to which he was obliged and the benefit he would receive in its place. The injury as a ground for annulment of the contract involves two constituent elements:

- *the objective element,* which consists in the obvious disproportion of value between the consideration, which makes the contract extremely unfavorable for one of the parties;
- *the subjective element,* which consists in taking advantage of the state of need created by a contest of difficult circumstances in which the other party is.

In order for the injury to serve as a basis for the cancellation of the contract, the following conditions must be met:

- the state of necessity in which the party invoking the nullity finds himself to be decisive for the conclusion of the contract, so that, if he were not in such circumstances, the given party would not have concluded this contract or would not have concluded it in such conditions;

- the contract to be concluded in conditions is not simply unfavorable, but extremely unfavorable for one of the parties;

- the disproportion between the consideration to exist at the time of concluding the contract and not at a later time; otherwise there would be the situation of unforeseen, but not of injury;

- to prove that the other party took advantage of the state of necessity in which the party invoking the injury was.

The proof of the injury belongs to the one who invokes it. Being a legal fact, the injury can be proved by any means of proof.

Therefore, a contract is void when one of the contractors has not expressed his will or given a flawed consent. This principle is sometimes applied in the case of contracts involving general conditions, namely accession contracts.

Consent is completely lacking when the conditions are so obscure or so complex that consumers have not understood the nature of the contract. For example: a short-term credit agreement was canceled because the signatory confused the contract with a long-term loan. The consumer's agreement may

also be affected by the defects of consent, but in judicial practice it has been established that the given mechanism for the protection of contractors, for a start, is rarely applied. Thus, the special rules on home sales do not prohibit the invocation of the defect of consent. (Versailles, 1994, p.97, and Versailles,1995, p.147)

4. Partial effectiveness of consent defects for the protection of consumers' economic interests

Although the error is a cause for invalidity if it relates to a substantial quality of work, it may happen that the error relating to the substantial quality is simply caused by an unclear or ambiguous wording of the contractual terms and conditions and both contractors not to want a total cancellation of the contract.

Deceit allows the contract to be canceled since the actions used by one of the parties have determined the consent of the other. Deceit allows the cancellation of the contract not only if one contractor has deceived the other regarding the qualities of the good, but also regarding the balance of services, regarding the reasons for contracting or other determining elements. For this reason, it is possible that the fraud resulted from the incorrect wording of the general conditions or the fact that they were not communicated to the consumer.

Violence exercised by one party to coerce the other party into a contractual commitment is also a cause for the nullity of the contract. Violence presupposes, according to the Civil Code, that the contract was concluded under the threat of considerable and present harm. In the case of consumer contracts, violence does not have to be always physical or brutal towards consumers. Consumers may be the victims of more subtle violence: an abuse of economic power, which manifests itself in the unbalanced wording of the general conditions.

Thus, according to judicial practice, there are rare cases when contractors invoke injury, error, malice or violence for an imbalance in the case of consumer contracts. In this context, we argue that the theory of

consensual defects in consumer law is not a remedy adapted to contractual imbalances, and this being motivated by several reasons:

1. the first obstacle is the difficulties of proof to be brought by the party invoking a vice. Both malice and error are difficult for the consumer to plead against the professional, especially if the latter were allowed to prove that he mentioned the total cost of the service in any other documents (which may not have been read by the debtor), other than the contract document or that this information was provided to the consumer during pre-contractual discussions with him;

2. the second obstacle is the need to sue: the cost and procrastination of the process are, in the case of current consumer disputes, disproportionate to the consumer's interest in gambling;

3. the third obstacle, the non-adaptation of sanctions to the needs of consumers, namely the nullity of the contract is not in the direct interest of the consumer, because what he wants first, is to get a product or benefit from a service that meets his expectations and needs. (Ghestin, 1993). It should be noted that, in the end, the consumer generally wants the cancellation of the abusive clause or clauses, but in no case the cancellation of the contract as a whole.

The relative nullity of the contract, which could be invoked by the victim of economic violence, would have the consequence of putting the parties back in the previous situation, which in the case of trade relations is very difficult to achieve in fact. Therefore, even the parties would prefer an action for damages, not one in the cancellation of the contract. (Nourissat,2000, p.369)

In reality, however, in most situations, what most affects the contractual balance is one or more clauses that are not essential, and without which the contract can be performed. The victim of economic violence may thus request the partial annulment of the convention, with the effect of removing the indisputable clauses. Therefore, we appreciate that partial nullity can be a useful tool, with effects similar to those provided by consumer protection legislation.

French doctrine discusses the possibility of removing contractual imbalances resulting from economic constraints through other legal

mechanisms. In a note (Chazal,2000, p .879-882) on a decision of the French Court of Cassation, which states " *la contrainte économique se rattache à la violence et non à la lésion* ", the author proposes a new meaning of the notion of injury.

Unlike the classic form, in which the contractual imbalance is sanctioned due the fact that one of the parties is a vulnerable person (minor), in the new form, called qualified injury, the imbalance is sanctioned due to the exploitation by one of the parties of the weakness economic benefits of the partner. For the disproportion to be unfair, the dominant party must abuse its economic power.

The best solution proposed, in our opinion, to remove contractual imbalances in commercial matters, is to allow the court to intervene in contracts and to sanction the abusive exercise of contractual rights. Whenever a party exercises a right conferred by contract beyond reasonable limits, the judge may intervene. The solution is preferred by opponents of the notion of economic violence, who consider that good contractual faith and contractual loyalty are the appropriate and sufficient tools to sanction the imbalances resulting from the state of economic domination. (Montels, 2002, p.421)

The failure, at least in part, of previous theories demonstrates that classical civil law prefers the security of contractual balance transactions. No person would try to contract if the contract could be permanently jeopardized by one of the parties. This idea is not wrong, but it risks, if further promoted, placing the weakest contractors (les plus "faibles") at a disadvantage vis-à-vis the "strongest" (les plus "puissants"). (Calais-Auloy and Temple,2010, p.145)

That is why, despite the general principle, which is too dangerous due to its imprecision, positive law has recently accumulated particular rules in the field of consumer protection, in order to effectively combat contractual imbalance.

In the law of the Republic of Moldova, as well as in the French one, there is no general principle that would directly ensure the contractual balance. Since the contract results from the manifestation of the wills of both parties, it arranges the law of the parties, respectively certain advantages or disadvantages that may result from the convention. Everyone must strive to be the best judge of their interests, hence the axiom "Qui dit contractuel, dit

juste." The concept of the Civil Code, perfectly adapted to the situations in which the contractors are of equal economic power, entails a significant injustice when a contractor is in a position of force. As the common law refers to the defects of consent only after the formation of the contract, the consumer right aims to prevent the defects, offering the consumer, due to the techniques of public order protection, ways to inform and reflect before or at the end of the contract. (Terre, Simpler and Lequette, 1991)

Therefore, the French legislature, compared to the Moldovan one, which only provides for the obligation to inform, has created specific measures to protect consent, such as the deadline for reflection and the right to change one's mind or mandatory information in contracts which, Overall, it should ensure and guarantee the integrity of consent. (Terre, Simpler and Lequette, 1991)

Moreover, the case-law admits that this public order for the protection of consumer consent (Ghestin,1980,p.661-662) does not preclude the principle of proving the defect of consent and a request for annulment of the contract on the ground that the common law is intended to apply as long as the nullity of the contract is not incompatible with the specific provisions of consumer legislation.

In fact, the concept of "informational formalism" of contractual provisions - as a combination of a substantive rule with a formal rule - was created precisely to avoid the shortcomings of the actions in classic annulment for breaches of contract consent.

On the other hand, the nullity of the contract due to the defect of consent seems much more difficult to reconcile with the rules imposed on the protection formality, being expressed by the requirement of the written (Malaurie et all 1997) form or the obligatory informative mentions of the contract. In case of non-compliance with this informative formalism, (Terre et all,1991) the Contravention Code, through the Law on Consumer Protection, provides this time for particular sanctions. Thus, in the matter of consumer credit and real estate credit, the absence of obligatory informative mentions in the credit contract exposes the creditor to the forfeiture of rights to interest interests.

Summarizing the norms of consumption, we conclude that these are exceptional norms compared to the norms of civil law, which offer a guaranteed economic protection to consumers, as a weak part of the contract. Compared to private law, the consumer law has the specificity to regulate not so much social relations, but legal relations established contractually between the parties, because it applies to concrete contracts, through which the fact of consumption is achieved. We remind you that, in total, the concepts of consumer law are detached from classical civil law, become autonomous (precisely because the traditional notions have proved insufficient and limited) and receive a *sui generis* legal regime, innovative and innovative. (Vasilescu,2006,97)

In the traditional view, error, injury, deceit, and violence must be proven. In the space of the consumer right, they are presumed, whenever the written form completed with the obligatory mentions was not respected. If we admitted the opposite - if we asked the consumer to prove the error or malice of which he fell victim, by omitting by the professional the rules of Law no. 105 of 13.03.2003 on consumer protection - we would be in the same space of classical civil law, and consumer laws would be unnecessary, because if the action for annulment were allowed only after the consumer had proved the error, injury, malice or violence, the more favorable provisions of consumer law would be limited to the detriment of the economic interests of The "profane", the consumer.

5. Conclusion

Indeed, according to the Civil Code, the defects of consent ensure in a certain way the contractual balance through the prism of the common law. However, in the case of consumer contracts, we argue that, in order to ensure contractual balance, error, malice, violence and injury have a limited scope.

Thus, it is found that, through the terror of consent defects, the Civil Code does not care about the consumer, as a "weak" contracting party of the contractual relationship. Since the contractors have given their consent, they are employed, regardless of the imbalance caused by the contract.

A minimum of logical reasoning requires us to admit that, if the legislator intervened with special rules for consumer protection, it did so not to overlap with the provisions already in the Civil Code, but to provide the consumer with easier means of action used. The consumer remains free and this time to take advantage of the classic action for annulment based on error, malice, injury or violence, as they were regulated in the Civil Code and detailed by doctrine. But, if he chooses to place the action on the ground of Law no. 105 of 13.03.2003 on consumer protection and other consumer rules that regulate in particular a contract, he will benefit from the facilitated regime of legal action of the professional, made available to the consumer.

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References

Berlioz, G. (1976). Le contrat d'adhésion, LGDJ, 2e édition, pp.99.

Calais-Auloy, J. and Temple, H. (2010). Droit de la consommation, 8e éd. Dalloz, pp.145.

Carbonnier, J. (1992). Sociologie de sla vente in Flexible droit, 7eme éd. LGDJ, pp.295.

Chazal, J. P. (2000). La contrainte économique : violence ou lésion ? in Le Dalloz. No. 43, pp. 879-882.

Civil Code of Republic of Moldova, no. 1107-XV of 06.06.2002. Republished: Official Gazette of the Republic of Moldova no. 66-75 / 132 of 01.03.2019.

Costin, M.N. and Deleanu S. (1995). Dreptul comerţului internaţional. Partea Specială - Bucureşti : Lumina Lex, pp.29-30.

Ghestin, J. (1980). Traité de droit civil, Les obligations, Le contrat, Formation, 1980, n° 355.

Ghestin, J. (1993). La formation du contrat, LGDJ, n° 01 574.

Giaume, Ch. (1989). La protection du consommateur contre les clauses abusives, Thèse Nice, pp.78.

Gounot, E. (1912). Le principe de l'autonomie de la volonté en droit privé, thèse, Dijon, pp.132.

Malaurie, Ph., Aynes, L. (1997). Droit civil. Les obligations, 7e éd., Cujas, n° 444.

Montels, B. (2002). La violence économique, illustration du conflict entre droit commun des contrat et droit de la concurrence, in RTDcom., nr3/2002, pp.421.

Nourissat, C. (2000). La violence économique, vice de consentement, beaucoup de bruit pour rien ? in Le Dalloz, Chronique, pp.369.

Popa, I.-F. (2004). Reprimarea clauzelor abuzive, în Pandectele romane, n°2/2004, pp.208.

Terré, Fr., Simler, Ph., Lequette, Y. (1996). Droit civil. Les obligations, 6e édition, Dalloz, Paris.

Vasilescu, P. (2006). Consumerismul contractual, Repere pentru o teorie generala a contractelor de consum, ed. Sfera Juridică, Cluj, pp.97.