THE PRINCIPLE OF CONTRACTUAL FREEDOM

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The principle of contractual freedom is the prerogative characteristic for any natural or legal person to establish civil rights and obligations, to freely conclude civil contract, determine its content, modify it and terminate it. This principle assumes the freedom to settle in the sense of conditioned freedom, by the social and legal norms. The basic function of this principle consists in confirming the achievement of the freedom of the contracting parties, at all stages of the process of forming the contract, of executing and extinguishing of the obligations.

The purpose of the standard of contractual liberty is included in the idea that laws protect our general safety. The principles that civil law in founded on, tends to ensure out rights as citizens against abuses: abuses by other individuals, or organizations or by the government its self with its public authorities. Moreover, the unwavering aim of liberty of the contracts is: to define the extend of responsibilities of the contracting parties, to accede their desired outcomes and to obtain comfortable positions to both, taking into account the scenario and all necessary details.

Considering the doctrine, the liberty of the contract, as a value, is divided into positive and negative sense. The positive sense – determines the right of the natural and legal person to conclude a contract and to include various clauses. In the negative sense, it supposes that no one can be forced to conclude a contract against his or her will [1, p.1-46]. According to CC of RM, art.993, this principle is defined as a freedom of anyone to choose their contractor, within the limits of mandatory legal provisions; unless expressly provided otherwise in the CC, the contracting parties may, by contract, derogate from those provisions contained in the CC, in special laws and other normative acts relating to the rights, obligations and other legal effects produced by the contract, including the distribution of risks, if from the manner of expressing the provision, its content or context does not undoubtedly show that the legal provision is imperative.

Contractual freedom is one of the fundamental rights guaranteed by the state, but this right is not an absolute one and must not lead to the denial or diminution of other rights and freedoms and can be limited by organic law only on the grounds provided by the Constitution [2, p. 248]. Inferring from stated above, it is critical not to confuse or mislead the principle of contractual freedom with other principles of law, with which we can correlate it. There are numerous principles that can be compared with the principle of contractual freedom like: the principle of formalism, consensual principle, principle of the relativity of the effects of the contract, principle of binding force of the contract, principle of recognition of the equality of participants in civil relations, principle of the inadmissibility of interference in private affairs, *favor contractus* principle, the principle of sanctity of contract.

In the philosophical aspect of contractual freedom, there are some specific concepts that are worth analysing. These concepts are referred to free will, necessity and equality in relationship with freedom: first one is the long evolution of the free will (in the philosophical sense) from negative (freedom from) to positive (freedom for) interpretation, next in order comes the idea of freedom seen as a necessity or the necessity is seen as the premise of the freedom and the last one, is the perception of freedom along the lines of equality. Equality and freedom from discrimination are frameworks as basic human rights by the Universal Declaration of Human Rights, at art.3. In this sense it can be introduced the term of 'discrimination' as well, because it comes in contravention with 'equality'. In circumstances of freedom of the contract, people receive horizons of the hugeness of the state of competition and rivalry, respectively, discrimination, as a phenomenon exists in these realms, too. This means that the autonomy in contractual matters should be exercised without any discrimination, because any intervention against private discrimination is therefore unconstitutional [3, p. 269-290].

Also the freedom to contract arises, as much as possible, practically as a "freedom to be bound", facing an antithesis, when one person is tied to another through a legal instrument – the contract. This abstract behaviour of individuals to act contractually, involve

their agreement of will, that created obligations in the burden of parties, which appear as a contradiction, strongminded by two opposite terms: freedom and binding.

Freedom of will is established by law, but it is not absolute, it is still limited. It is the society that, through the legal norms it dictates, establishes the limits within which, the will of individuals can produce its effects. The individual, "as an element of society, must fall within the order established by the society to which he belongs, the freedom to make legal acts is recognized in a certain legal framework, but it is only a rule of legal technique whose the only foundation is in its economic and social unity" [4, p.1- 183]. The contractual freedom is recognized for all the law subjects, provided that they will be in the need for legal order and first of all within the limits set by the rules of law interested in public order. This sphere includes all the legal norms and general principles of the law that protects social and economic organization.

The limits pursue several purposes: to protect of the weaker party in the contract, which begins at the stage of concluding the contract and ends by its execution or by liability for non-execution, to defend the interests of creditors whose damage could have a negative effect on the entire civil circuit and to defend the interests of the state, which represent in a concentrated form, the interests of society; In this sense, the legislator regulated by imperative norms certain civil law institutions, including those referring to the contract, as example is art. 922 CC of RM.

There is also a classification of the limits of contractual freedom. The limits can be positive and negative. Positive are the limits that are manifested by the obligation, established by law for certain persons to conclude contracts. Negative are the limits established by law which prohibits or restricts the possibility of concluding certain categories of contracts by certain subjects. The negative limitations are: the imperative norms, public order and good morals. Positive limitations are: the obligation to contract, the obligation to contract within the pre-contractual civil legal relations and the obligation to contract within the contractual civil legal relations. As paradoxical as it may

sound, the limitation of the principle of freedom the contract is necessary, among other things, for the sake of ensuring the very same freedom of the contract.

To sum up, by contractual freedom is meant the right of the participants of civil legal relations to freely conclude civil contracts, both provided by legislation, as well as contracts not provided by law but which are not prohibited by the imperative norms, to freely determine the content of the contract or to modify its content and the right to terminate the contract at any time.

The contract must be a tool of unlimited adaptability, in order to be priceless to businessmen and other members of a free society. To achieve this, the legal system permitted freedom as to the form and content of contractual arrangements. Contract inviolability is dominant. Such a free contract system encourages dynamic processes and technological achievements by permitting entrepreneurs to experiment quickly and flexibly. Freedom to contract promotes progress civil law, which establishes for the subjects of contractual relations freedom to several rights.

Furthermore, by treating individuals as free and equal elements, the contract allows people to create provisions far beyond the general ones. Creativity in legal domain is not prohibited, individuals have an infinite horizon to include whatever clause they think is reliable and which corresponds with the expected results. By treating individuals in this manner, can the wide-ranging rules of law, allow people to use their own knowledge, express their uniqueness, and take advantage of their own ideas by connecting their goods and property in various ways. The idea of contract raises growth by encouraging specialization in this domain of contract law. In addition, the remarkable goal of contract law is not to inspire legal suits and disputes in courts, but to settle or avoid them.

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Recomandat
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