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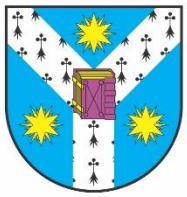

ALEXANDRU IOAN CUZA UNIVERSITY of IAŞI

Doctoral School of Law

The adaptation of contract in comparative private law Systems: German, French and Romanian

-PhD Thesis Summary-

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II.Introduction

This current thesis focuses on identifying the legal conditions regarding the notion of contractual adaptation, analyzed through the complexity of international and European contract law systems. The work begins with a "parental" note of instruction, from the work of the great Romanian professor Grig I. Alexandresco, who perhaps best defined the legal methods of the Romanians, foreshadowing an air with a Balkan scent: "With the haste and recklessness with which all the foreign institutions brought to us in the country without any modification or adaptation to the needs, the degree of culture and the aspirations of our people… so the laws of the foreigners were brought and they were given in obedience to the people "[1].

The theme of the doctoral thesis is that of a gradual Westernization of Romanian society and implicitly the legal system, marks the temporal comparative link between archaic law (comparative treatise within the Prolegomena) and the European private law system, which will accompany us until the end of the work. Like a dense canvas, the complexity of European legal systems came to life primarily through the humanist spirit of one who looks at the world around him in an organic way. Thus, this extensive process of disseminating legal systems, as well as their folding on the dynamism of social needs was initially led by regulations and directives issued by European state bodies of justice, our Romanian framework, "devouring" legal spirit, was much time untouched by these developments, still predominantly shaped by national systems of private law.

Relatively recently, considerable efforts have been made to overcome this somewhat anachronistic discrepancy, paving the way for a new European legal culture that opens its way majestically through the interaction of several, hitherto largely separate disciplines such as European Community law and modern doctrine of private law. In this regard, we note that, since 1990, Professor Helmut Coing has noted the need for the establishment of a legal "Europeanization" of law [2]and especially in the field of contract law. Furthermore, the author draws our attention to the primacy of private law of the United States as a legal model.

As such, this paper will focus on the notions of reconfiguration and reset of the manifestation of will of the parties, also trying that, by comparative presentation of various techniques regulated in European and international contract law systems, to identify concrete solutions to fill the deficit. existing procedural law in Romanian law concerning civil law, especially on the level of

[1] Grig I. Alexandresco*, Studii asupra obiceiurilor juridice ale Poporului Romîn şi Teoria Viitorului Cod Civil,* „Şansa'', Bucureschi, 1896.
[2] Helmuth Coing, *Europaeisches Privatrecht, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*. Romanistische Abteilung. Volume 108, Issue 1, Pages 548–554, ISSN (Online) 2304-4934, ISSN (Print) 0323-4096 Volum consultat online pe : https: //www.degruyter.com/view/j/zrgra.1991.108.issue-1/zrgra.1991.108.1.548/zrgra.1991.108.1.548.xml;

limiting the parties to choosing only certain contractual remedies in a framework, most often ultra-institutionalized. The contract, however, is not just an agreement of wills, but represents more than that, the united interests of the parties; the contract is therefore in fact a summum of the wills and interests of the parties. The agreement of wills represents the consent, the expressed will of the parties who have the legal capacity to contract, while their interest is the content of the contract, its object (what the parties want) and the cause of its conclusion (why the parties want it).

In relation to the above, we would like to submit our research to questions that will be the guideline of the main points we would like to analyze:

1. What is the natural dynamism of the principle of autonomy of will regarding the establishment of the theory of unpredictability?

2. What are the legal limits regarding the theory of contingency to which the Romanian, French or Luxembourg judge may intervene in terms of establishing the rights and obligations of the parties as a result of the incidence of the major imbalance of benefits? - benchmarking.

3. What are the conditions for adjusting the contract under French and Luxembourg law, in the light of the reform of the law on obligations under the French and Romanian civil codes?

4. What will be the limits within which a judge will be able to intervene in the private sphere of the parties, modeling their manifestation of the initial will?

In this regard, we would like to propose the existence of a system in which the judge will intervene, in the sense that it will give the parties the decision-making power on how a contract can be adapted to ensure the continuity of initial relations following the intervention of contingency. in order to avoid the occurrence of nullity. The Supreme Court expressed its view in examining the provisions of Article 129 (4) of the Code of Civil Procedure: "The judge has the right to ask them to provide explanations, either orally or in writing", and to discuss any circumstances "In fact or in law, even if they are not mentioned in the application or complaint". Therefore, "the active role of the judge must not affect the right of availability of the party but must be in accordance with the initiative of the parties to establish the truth."[3]

5. What role do the qualities of the parties (consumer, economic operator) play in obtaining (much desired) contractual adjustments in accordance with the theory of contingency under several EU directives and regulations on specific areas "(Directive 2011/83 / EU on consumer rights" , "Regulation No 2137/85 on the European Economic Interest Grouping")?

6. Since the contract is seen as a means of reconfiguring and regulating conduct and is not merely a traditional tool of the will to generate legal relations between the parties), what role

[3] See Decision no. 2049 of 23.05.2013 within the Second Civil Section, High Court of Cassation and Justice.

does the definition and classification of the parties' interests play, in general, according to ensuring the adaptation of the contract?

7. Since the contract has a meticulous economic side, is the ordinary judge entitled to decide only on the basis of legal arguments to adapt the contract?

Taking into account art. 22 par. 4 NCPC, can the judge seriously reconsider the facts of the case and can decrease or violate the total value of the contract?

8. What role does equity play as a source of contract law in order to achieve an adjustment of the contract and an economic balance of benefits?

Starting from this basis, I noticed that the social nature of the elements of comparison is a sine qua non condition, as they place the individual in the central sphere of comparative law. Comparisons are made, from our point of view, with reference to the action and evolution of the individual in his social space and his interaction with peers and not to legal norms or hyper-complex, bland and meaningless definitions, which, in most cases, they are the expression of superficiality and neglect.

III.Structuring the doctoral thesis.Approach

The present thesis is structured in five chapters; it focuses on identifying the legal conditions regarding the notion of contractual adaptation, analyzed in the light of the complexity of international and European contract law systems, more precisely: the German, French, common law and Romanian systems.

Our goal was to focus on the notions of reconfiguration and reset of the manifestation of will of the parties, also trying that, by comparative presentation of the various techniques regulated in the systems of European and international contract law, to identify concrete solutions to fill the deficit. existing procedural law in Romanian law concerning civil law, especially regarding the limitation imposed on the parties to choose only certain contractual remedies in a framework, often ultra-institutionalized.

Our desire is to investigate and expose the various cases and problematic situations that would prevent the contracting parties from continuing their initial manifestation of will (as examples of termination or transformation of contract performance, we also consider its nullity or conversion), our research is it will in principle be based on the flexibility enjoyed by civil law in general. Therefore, we will emphasize not only the importance of legal and trade relations related to the rule of law, but also their impact on the gradual determination and shaping of the legal will. Also, we intend to contribute through this paper to a full understanding of the term in question (contingency and adaptation of the contract) and we intend by law ferenda that the analyzed institution is no longer considered a *sine qua non* prerogative related to the nullity of the civil legal act. The problem we mention is the inability of the parties to a contract to resort to this procedure (adaptation of the contract). Adaptation of the contract, as a reform procedure inherent in unforeseen circumstances, should be seen rather as an independent alternative belonging to the private sector as well as a significant instrument that belongs eminently to the public, state sector whose constant interference becomes really suffocating.

The proposed novelty solutions are those that refer to the settlement of the conflicting relationship between the parties' right to dispose of the contract because of the intervention of situations outside their control, which unbalances the initial contractual relationship. In general, contractual procedures regarding contingency are treated in an internal, non-organic vision, the Kafkaesque refractory feeling of "outside" penetration is still felt nationally, and this is due to the fact that we are partisans of a meticulous survey of various comparative methods and techniques of German and French law that would "fill" the gaps in Romanian legislation on contract adaptation procedures.

In the following, we will try to unravel the secrets of contractual adjustment through a comparative analysis having as a model of comparison the systems: German, French and Romanian. Thus, we cannot begin the argumentation of this paper without mentioning the indissoluble link between the procedures of contractual adaptation (as part of the unpredictability and conversion of the civil legal act) and the theory of autonomy of will - reference principle of the French comparative system.

IV.Presentation of the chapters of the doctoral thesis

Chapter One: The Diachronic Dimension of Contract Adaptation in Private Law. Elements of Cultural Anthropology continues the inherent issues discussed within the Prolegomena, it includes the attempt to identify the origin of the adaptability of the contract in the context of human security by insisting on various anthropic, natural, social, economic and political factors that shape the conditions of manifestations. a stage of contractual equilibrium. We also tried to devote a generous part to cultural anthropology in analyzing the relationship between foreign social causes that cause the economic gap and the position, impact, damage caused in the universe of the simple man often abandoned to endure the weather. We also tried to make a detailed analysis of the history of the institution in question, its origins in Roman law, the principles that enshrine the adaptability of the contract in universal history, the evolution of the concept in Europe with a careful focus on the German, French and Romanian system, existing theories in specialized doctrines, legal dogmas that consecrate its existence.

In the sections dedicated to the origin of the institution of contract adaptation, we will refer to the main theories relevant to our discussion. We will begin the argumentative journey by exposing the main pillar of the continuation of contractual relations, namely the theory of contract efficiency which mainly exposes the fact that the parties have the right to choose the most appropriate remedy to correct their performance. As such, they often have to resort to effectiveness, to ensuring a continuation of their contractual relationship in the harshest conditions; this principle is also guaranteed by the European Convention on Human Rights[4]. The theory of contract efficiency ensures the resolution of various "accusations" of violation of the Convention at the domestic level by including in its scope the right to an effective remedy which, for the institution of contingency, will play a crucial role in the practical application of the principle of subsidiarity[5].

[4] Article 13 of the European Convention on Human Rights establishes the right to an effective remedy, stating that "any person whose rights and freedoms, as expressed in this Convention, are violated, shall enjoy an effective remedy before a national authority. , even if the violation was committed by persons acting in an official context ". This is one of the basic provisions that underlines the system of protection of human rights imagined by the Convention, together with the requirements expressed
in Article 1, on the obligation to respect human rights, and in Article 46, on the enforcement of judgments of the European Court of Human Rights;

[5] Article 13 of the Convention, which expresses the right to an effective remedy, imposes on the States Parties the following obligation: "All persons whose rights and freedoms, as expressed in this Convention, are violated shall be entitled to an effective remedy before a national authorities, regardless of whether the infringement was committed by persons acting in an official capacity. " According to the case law of the Court, this provision has a "close affinity" with Article 35, paragraph 1, of the Convention, whereby the Court will deal with the matter only after all domestic remedies have been exhausted, in so far as based on the assumption, reflected in Article 13 of the Convention, […] that there is an effective remedy available to the domestic system for the alleged infringement ', for more details, see: Guide to Good Practice for Internal Remedies developed by the European Commission and adopted by the by the Ministers on 18.09.2013;

In the execution phase of the contract, good faith allows the adaptation or judicial revision of the contract by balancing the benefits either by: removing the injury-original contractual imbalance, or by removing the unforeseen-contractual imbalance occurred, or by removing the error - vice of consent "[6]. The chosen remedy is interdependent on the relations created further by the contracting parties, but also on the political environment in which it operates.

It is undeniable that Roman law is the cornerstone of the de facto legal basis of the entire European continent. Since then, interpersonal legal relations have been governed by a focus on the speedy resolution of disputes. The economic and social context of an ancient world in a permanent desire for civilization are reflected in the attempt to progressively improve the justice system. The history of the contract refers to the existence of a pre-established agreement of will between the contracting parties, to a binder that subsequently requires the creation of rights and obligations. In Romanian private law, the term obligation meant, as I mentioned, a material corporal connection, between two persons, between creditor and debtor.

The contractual adaptation is strongly correlated in Roman law with the idea of *mora creditoris*: "Mora est solutionis faciendae"[7]. The specificity of the regulation refers to the idea that if the debtor can compromise the "smooth" exchange of benefits, so can the creditor: the second postpones the acceptance of the benefit offered by the debtor[8]. Both the creditor and the debtor use two types of *mora creditoris*: essentially both are based on fault. Where there is fault, there must be a breach of debt, as fault can only be attributed to As a general rule, we can observe a particular application of the notion of *mora creditoris* and contractual adjustment, namely, the debtor had to do all the necessary diligence, not so much to obtain the result. to fully satisfy the minimum requirements of the legal operation in question. the debtor had, for example, to bring goods or sums of money stipulated in the contract; in the event of non-compliance with the obligation, it was sufficient for the latter to make another offer to the creditor.

The jurists of the Middle Ages understood very well the turbulent and uncertain times in which they lived and that is why a constant preparation and care was required in the drafting of various conventions. The *pacta sunt servanda* principle dominated the spirit of the time and rightly so, moving to a gradual sacralization of the contract, as it was believed that if someone did not keep his word, the wrath of God would intervene that would mystify that understanding and punish them. those who will deviate from his word.

However, the turning point in creating a stable, homogeneous definition of the doctrine of changing circumstances and, implicitly, of adapting the contract is found in the works of Hugo Grotius who reformed the contractual theory claiming that the binding force of a promise can be

[6] A se vedea pentru detalii Gheorghe Piperea, *Terorism contractua*l, articol publicat pe platforma: www.juridice.ro, ,material consultat la data de 29.05.2018, ora 19.10.

[7] *Ibidem*

[8] Reinhardt Zimmermann, *„The Law of Obligations”*, South-Africa/Boston, 1992,p. 817.

limited to two. situations: if the will that created a certain obligation was no longer valid and if a situation arose during the execution that would be contrary to the initial will of the parties.[9]

The development of the idea of modern contract and implicitly the principle pacta sunt servanda appears much later, in the middle of the 14th century, and Professor Hans Wehberg identifies the elements of this principle developed in the work of the Dutch jurist Jean Bodin through his famous work "De la Republique" from 1577. In it we can observe the evolution of the theory of sovereignty, as an absolute value in a state, with respect for the values and rights of the citizen and, moreover, desecrate any law out of the "human hand", it can be amended as necessary, of the state and socio-political changes that have taken place.

The acceptance of the *pacta sunt servanda* principle and, implicitly, of the principle of consensualism was achieved in a natural way, not being (too) much hindered by its critics, but the eternal debate between formalism and consensualism continues until today. This acceptance, we say, is a natural and common sense one, because, even if to give more security, the contracts will be concluded in writing, respecting certain formalities, natural law prevails, and what has been stipulated and agreed by parts will remain. However, at the dawn of the 19th century, various European codes, such as the German (BGB) code adopted in 1900, capitalized on the principle of consensualism by officially recognizing the institution of shaking contractual reliability and upsetting the rights and obligations of the parties (*Wegfall der Geschäftsgrundlage*). modern German system.

In terms of evolution, various theories strengthen the concept that the social evolution of man and, implicitly, his social needs can be met by the existence of a "standard solution", based on the idea of the uniformity of human behavior. This chapter continued with the explanation of various theories: the theory of contract efficiency, the theory of law enforcement, the theory of contract frustration, Eisenberg's theory of risk anticipation, insisting on their relevance in maintaining contractual balance.

The second chapter: The adaptation of the contract in French law, revolves around the idea of contractual risk, and the French view on contractual risk sums up its own elements, the phrase: "*changement de circontances imprévisible*"[10] can refer to natural, economic, technological, social phenomena is it done on behalf of all those listed? On the other hand, French administrative law presents a different situation in the manner of the judge's interventionist policy. He will take over the task of adjusting the provisions by guaranteeing the party who is in the situation of the public service executor as a result of excessive burden, compensatory allowances called 'unpredictability. Then there is the remedy *recours en indemnité* and *recours en annulation*. They are used as tools to hold public authorities accountable for issuing administrative acts in breach of the principle of legality and morality in the event of an exorbitant event likely to create an

[9] Hugo Grotius, "*De iure belli*," Edition available and consulted online on 22.12.2019, 11.16. Link: „http://lonang.com/library/reference/grotius-law-war- and-peace/gro-211/";

[10] Changing of the unforseen circumstances

excess of public power (excess of power). to the notion of hardship, if we were to consider the application of the doctrine of hardship in the vision of the United Nations Convention on the International Sale of Goods, adopted in Vienna in 1980, the disproportion between contractual losses suffered as a result of fortuitous situations 150% -200% of the actual value of the object of the contract.

The meaning of the notion of contingency or contractual adjustment includes aspects which refer to the incidence of excessive onerousness of the contractual object, as a result of an exorbitant event, but not insurmountable, since in this respect the institution of force majeure would be incidental. I mentioned earlier that the refusal of French law to introduce contingency into the internal regulation of the Civil Code, prior to the 2016 reform, is justified by maintaining the idea of good faith in contracts and the incidence of the *rebus sic standibus principle*, these issues being notorious for practitioners, but also for those who deepen the elements of continental private law. The French specialized doctrine draws our attention to the fact that in the absence of an obligation of result, the courts opt for the option of not admitting the unforeseen situation as the parties have not reached any concrete result following the negotiations; as such, the condition of the absence of the fulfillment of an obligation of result is, also from our point of view, an aspect that must be modified, especially since in the content of article 1271 (3) letter d of the Romanian Civil Code we face the same way of dealing with the problem, in which the debtor "tries" in good faith to negotiate the contract.

Moreover, in French law, the risk assumed, this vital issue is correlated with the maintenance of stability before the conclusion of the contract, in the sense of a much stronger awareness of the impediments to performance, so there would be no de facto impediment for one party to - assumes the risk of the destabilizing event, a provision widely used in the regulations of international commercial contracts, the only limit would be the incidence of abusive actions. Regardless of who assumes the risk of the unforeseen event, the assumption must not violate the provisions of good faith or contractual reciprocity.

In summary, in fulfilling the conditions of contingency or rather in delimiting contingency from other institutions, French law shows us that the parties should take into account the occurrence of excessive onerousness and the fact that the fortuitous element reconfigures the contractual route and produces a different result than originally intended. by them at the time of concluding the contract. The incidence of this element is also found in the hardship doctrine, but also in the elements of the incidence of the doctrine of lack of practical commercial use previously analyzed.

Third chapter: Adaptation of the contract in the German system

Regarding the German system, I discovered the care with which the German literature treats the processes of contractual adjustment, the Germans having a preoccupation, deeply rooted - noticed by sociologists and anthropologists - for systematization and forecasting in contractual matters. *Wegfall der Geschaeftsgrundlage*, *Hochere Gewalt*, *aussergewoehnliche Schwierigkeit*, are just a few of the institutions analyzed, contractual fairness in the event of a sudden change in economic circumstances This clause is called *unentwickelte Bedingung*[11] and operates in the form of a condition precedent. If activated, it will take effect as soon as the imminence of a sudden change in economic circumstances is certain. In other words, the purpose of this clause is an interesting one, precisely in order to preserve the provisions of the parties, to remain unaltered from the moment of the occurrence of the disturbing factor and until the moment when the parties will agree on a uniform distribution of costs and losses.

Regarding the approach of the contingency clause, in the view of different legal systems, we can only observe certain nuances of doctrinal perception: in the American legal system or in German law there is a constant concern to find the answer to the relevant question on the amount of risk of debtor (called promisor). The approach, moreover, is objective despite German private law, which gives a more subjective note, in the sense that the amount of compensation or the risk assumed is left to the discretion of the contracting parties (*Subjektiv Geschäsftsgrundlage*)[12]. The assessment of the seriousness of the risk is made, for the most part, primarily in accordance with the principles of good faith, the seriousness of the impact on the contract, the distribution of rights and obligations, etc. German civil law, through doctrines such as: *Unmoeglichkeit* and *Unnutzbarkeit*, attributes an absolutist character to the debtor's efforts, as he cannot be forced, outside the limits of the human being, to selflessly fulfill those rights and obligations[13]. Therefore, it will never be possible to discuss the excess of the sphere of good faith and reasonable conduct that certifies those efforts.

In view of the above, the German specialized doctrine will take over the rules of European law regarding the previous negotiation obligations, and the German courts will grant the adaptation of the contract only insofar as there will be a priori contractual renegotiation by the parties. The opening of the German courts is based on the changes brought about by the reform of contract law of 1 January 2002, which insists on a much more relaxed approach, in support of the parties facing the difficulty of changing contractual circumstances. Therefore, in comparison with the regulations of the Principles of European Contract Law, German civil law allows the adjustment of contractual clauses, in particular: their adaptation, including in case the major economic

[11] K.Zweigert & H. Koetz, *„Introduction to Comparative Law”*, p. 439. *apud* Gordon Chung, *A Comparative Analysis of the Frustration Rule: Possibility of Reconciliation Between Hong Kong-English “Hands-off Approach” and German “Interventionist Mechanism”*, European Review of Private Law, 1/2017, Kluwer International BV, Olanda, p.125.

[12] See for a clearer note the notes to Article 59 of the United Nations Convention on the Law of Treaties, available online.Link: http://www.monitoruljuridic.ro/act/conventie-din-23-mai-1969-cu-privire-la-dreptul-tratatelor-emitent-organizatia-natiunilor-unite-publicat-n-brosura-36591.html

[13] *Ibidem*

imbalance will occur at a time before the conclusion of the contract[14]. As regards the damage suffered by one of the parties, it must not be "excessively onerous". We note in the wording of Paragraph 313 BGB a reference to the idea of good faith, in the sense that, as a result of the elimination of the lexical wording: 'excessive', we consider the intention of the German legislature to become extremely clear, relying on adaptability.

Chapter Four: Contractual adaptation within the common law system

The American doctrinal legal expression emphasizes the importance of the psychological and ethical dimension of the contracting process, given that the whole structure around which it revolves is the consolidation of a trust in establishing any contractual relations, and this fact was best understood by American jurists when establishing the concept. de trust, *equitable lien* Thus an equitable lien (in a literal translation it would mean "*equitable lien*" -since there is no correspondent in the Romanian literature) involves that burden imposed on the property of a person by which a debt is insured owes to another person[15] (the approximately identical regulation in Romanian law would be with the mortgage). The specialized doctrine considers it as a benefit granted to the creditor as "it would allow the creditor who has established an equitable lien on the property in assuming the basic assumption (basic assumption) that the respective exceptional element will not take place. We have dedicated a larger number of pages, which illustrates not only our interest, the passion for the common law system is a natural one given the number and complexity of existing institutions in contract law.

We have identified certain functions of contract adjustment in the common law system:

1. The utilitarian function is identified in the various agreements (agreements) which ensure the idea of consideration and avoidance of prejudice to the other party;

2. The function of contractual reciprocity and contractual solidarity;

3. The function of effectiveness - this ensures the execution of the service and the fluidization of the contractual dynamism, the parties will be in a constant state of balance and recalibration of services at the time of occurrence of inaccuracies, obstacles to execution.

We have noticed that the normalization of the effects and the restoration of the contractual balance was achieved through the doctrine of considerations, regarding the functionality of the doctrine of consideration, its purpose can not only be to provide consideration or establish a solid basis to guarantee a transaction it must comprise two essential pillars: the loss that both parties will suffer (legal detriment condition), a loss that the other party usually benefits from, ie its

[14] Richard Backhaus, *„The Limits of The Duty to Perform in The Principles of European Contract Law"*, „Electronic Journal of Comparative Law, vol. 8". 1, p.16.
[15] To be consulted: http://thelawdictionary.org/common-law-lien/

benefit (*legal benefit*) and the need for a *bargain condition* [16]. We notice that all these characteristics lead to the simplification of procedures, to efficiency. Of course, its absence from the contract does not invalidate the contract, the legal operation will remain valid, but will not be able to be executed.

Estoppel procedure

The reason for the estoppel procedure derives from the *indicium* principle, from Roman law, it presupposed an abstract promise to reward the one who would denounce a runaway slave. Thus, a true legal relationship was established in the task of the one who undertook to fulfill in relation to his unilateral promise, the purpose of this procedure was to maintain consistency in statements. The first of these refers to a clear, precise and unequivocal promise. Secondly, the beneficiary of the fulfillment of a certain obligation must be given the appearance that it will materialize, that it will be fulfilled with certainty; he to whom something has been promised has an interest, he waits for the fulfillment of the promise. Furthermore, the promise to fulfill the obligation has induced in the conscience of the one to whom the idea of a certain trust (reliance) is promised, and in this sense, his legal conduct will be modified by virtue of the fulfillment of the promised obligation.

Frustration doctrine

We also discovered that equity has existed since the Middle Ages, detached from the activity of the Court of Chancery, and since the thirteenth century, the parties were allowed to resort to equitable remedies in case of aggravation of their contractual situation is equivalent, this from our point of view, with the deprivation of that legal operation of its identity, in the sense that the party would not have entered into contractual relations if what is intended to happen, will no longer be fulfilled- loss of purpose, frustration of purpose. Frustration of contract is not a form of impossibility of execution, it is not a modern form of execution. Why? As enforcement remains possible, however, the pecuniary value expected by the party to be discharged has been offset by an unforeseen event[17]. Consequently, the contract becomes, in particular, a well-structured mechanism and works in the interests of both the parties and the court. By comparison, the notion of impracticability is a term specific to the American legal system, used especially in commercial activities. The doctrine of lack of practical commercial use refers to the impossibility of executing an obligation, being used as a defense tool that exempts the party obliged to execute when the object of execution has become excessively onerous, difficult to execute or much too expensive.

[16] Henry Whintropp Ballantine, *„Is the Doctrine of Consideration Sensless and Illogical* ?", „Michigan Law Review",1913,Vol11,Nr6,Michiganm Law Review Association p.426.
[17] See the 1944 Lloyd v Murphy case of the Supreme Court of California.

The last chapter: Adaptation of contract within the Romanian system and the European contract law

In this chapter, we refer to two plans: the European one in which we tried to illustrate the main mechanisms introduced at Community level to simplify inter-contractual procedures and the Romanian one in which we analyzed the specific means of contractual adaptation of national law. With regard to European law, I noted in this regard the clear openness of the European Commission towards contractual adjustment. It has established some clear principles by which to give up that legal nationalism with which we are accustomed, it is abandoned and sets common principles. Specifically, we are thinking of the lack of exacerbated interventionism, as we mentioned earlier. The Commission's view is in line with the effectiveness and dynamism of the market.

The Commission also proposes the creation of common principles of contract law to develop national legislation. We strongly believe in the existence of these principles of contractual adaptation and in the creation of common elements that would lead to the development of cooperation in the field of comparative law. The third point debated is thus, encouraging the improvement of the quality of legislation, this is considered especially in the simplification of the content of regulations, which is not a novelty in the European discourse. The materialization of these ideas is taking shape through the SLIM (Simplification of Internal Market Legislation) or BEST (European Project on the Simplification of Business Environment and Contract Procedures) project, which are, in our view, laudable initiatives.[18] It would be auspicious, including the extension of the directives, to the various procedures which have comparable characteristics and which have not been taken into account by them. These instruments also include the *acquis communautaire*, the transposition of general rules into a particular area as well as the various directives on consumer contracts, including the creation of a List of International Instruments on substantive aspects of contract law, including contractual adaptation. Romanian law, on the other hand, imports contractual adjustment mechanisms within the conversion of the civil legal act, *error communis facit ius*, the error of consent, within the administrative law thanks to the principle of continuity of public services and fait du prince and in commercial law through specific mechanisms: for example, the preventive mandate.

The idea of converting the civil legal act complements the various methods by which an act produces legal effects recognized by judicial doctrine and practice. In our analysis, we will corroborate the conversion with similar ideas producing legal effects. In this sense, we refer to the fact that the law, regardless of its amplitude, allows the legislator and practitioners to "juggle" with the elasticity of the interpretations it benefits from, considered imposed by the dynamism of the legal reality.

[18] Mads Andenas, Frank Wooldridge, *„European Comparative Company Law”*, „Cambridge University Press”, 2009 , p.22.

The principle of conversion of the civil legal act is the result of a long process of study of the national and international legal doctrine on the institution of the principle of conversion of the civil legal act. In the elaboration of the scientific paper we propose a critical analysis of the institution in question, starting from the premise of the rigor of the sanction of nullity, the flexibility of civil and commercial legal relations and the impact on the social dimension, in order to determine and shape the legal will of participants. civil legal relationship.

Among the ideas producing legal effects we mention:

a) the idea according to which the partial contract produces the effects that were not removed by the sanction of nullity;

b) "if it has an independent existence, the valid clause expressed in a null contract sometimes produces legal effects";

c) the idea of good faith in certain situations, produces legal effects;

d) the idea according to which the annulable contract may constitute a just title in the case of the real estate acquisitive prescription or in the land book system;

e) the contract has legal consequences when the rule applies: "Nemo auditur propriam turpitudinem alegans[19];"

f) the idea of appearance is recognized as having civil legal effects under certain conditions.[20]

The conversion of the civil legal act represents the manifestation of will equivalent to a "legal act, even if it is not valid as another legal act"[21]. This implies the transformation of a legal operation into another legal operation, determined by the fact that "an act struck by nullity may produce the effects of another legal act, the conditions of validity of which it meets". The conversion was also designated in the doctrine and by the formula: "the manifestation of will within a null act can be valued independently of the fate of that act, as another legal act."[22]

The conversion was defined in the doctrine as "the fragmented way of saving a null legal act, in that it is changed, transformed into another"[23], further stating that: "this conversion of the initial

[19] Ion Dogaru, *„Drept Civil Român, Idei producătoare de efecte juridice,*1998,p.189.
[20] Ion Dogaru,*Studiul asupra conceptului ideii de aparenţă în drep*t, La Revue de Sciences Juridiques, nr. 13-14/1998. P. 182.
[21] Bazil Oglindă, *„Conversiunea actului juridic în dreptul privat român "*, Social Science Research Network", „http://ssrn.com/abstract".

[22] Trăian Ionașcu, Eugen Barasch , "*Tratat de drept civil vol.I",*1967, p. 384
[23] Sergiu Boca, "*Conversiunea ca modelitate de înlaturare a efectelor nulității actului juridic civil",* „Revista Nationala de Drept, Nr.6/"2012,p.56.

contract into another legal, subsequent and valid act is based on the principle of autonomy of will, which allows the interpretation of the will of the parties in the sense that the act has effect. "

The effects of conversion must be analyzed in terms of the nature and form that the manifestation of will takes. An additional logical argument would be, from the point of view of the syntax of expression, namely, that the effects produced by a unilateral civil legal act are created in favor of the party, the only subject of civil law entitled to benefit, in our opinion, from the "fruits ”His unilateral act. In the case of a bilateral legal act, there are always at least two or more parties, and due to the cumulation of expressions of will, this mixture produces legal effects in their favor. Moreover, as mentioned above, we cannot contravene the principle of autonomy of will and believe that it can be fragmented. Although art. 1260 paragraph 1 of the Civil Code, allows the conversion of a null contract into a valid legal act, the identity of the parties is still part of the integrity of the principle.[24]

In essence, the principle of *error communis facit ius* has as its central idea the pre-eminence in law, namely the idea of inducing another alternative legal reality to third parties, based on the good faith of one of the parties.[25] It was also expressed that the theory of appearance in law presupposes a true institution against the law[26], but regardless of how it is perceived, it creates new rights and legal relationships, generating obligations. Related to what was discussed, it was observed in the literature that: "there is an application of a strong" subsidiary "character for situations where even the courts could not invoke another basis for their solutions, the theory of appearance extending its application in all areas of law ”[27]. It was specified in the specialized doctrine that “the origin of the theory of appearance must be sought in Roman law, more precisely in a text from Digest belonging to Ulpianus. Gradually, the adage was used to validate the acts committed by a person in respect of whom the common error was created that he had the official capacity required by law to draft an act. This adage was clearly widened when the French judicial practice ruled that the acquirer in good faith of an apparent heir who had made a false will in his favor would win the case against the true heir in the action brought by the latter.[28] '

[24] Mariana Șargarovschi, *„Dimensiunea juridico-civilă a conversiuni...”op.cit.*p.214.

[25] Valeriu Stoica, *„Drepturile reale principale”*, Humanitas, Bucureşti, 2006, p.544.
[26] Ion Deleanu, *„Ficţiunile juridice”*, All Beck, Bucureşti, 2005, p.242
[27] *Ibidem*, p.243
[28] Trăian Ionaşcu, *„Ideea de aparență și rolul său în dreptul civil român modern”*, Editura „Cursurilor litografiate”, București, 1943, pp. 3-5.

The popularity of the *error communis facit ius* principle has created multiple valences in French doctrine. Regarding the tradition of French doctrine, we share the opinion expressed by other authors in the field[29] who believe that the French did not invent the principle of fairness, but simply developed it, expressing very plastically that: the theory of appearance in law presupposes the primacy of the situation on the legal situation[30], the fictitious dominates on the concrete, and the various untimely situations or those, most of the times not officially regulated, are reconfigured by the legislator so as to have a real power for the parties. Regarding the notion of reconfiguring the de facto situation of the parties, an example would be telling in this regard. Suppose that in a testamentary matter we have the following situation: a person was appointed as universal legatee, but a few years later another person challenges this quality for the occurrence of two authentic wills. Suppose that the issue presented would be submitted to the Court of Appeal, which would recognize the validity of the two wills, as well as their revocable effect, and order the restitution of private legacies, but the notary who investigated the operation will be convicted of forgery in official documents. , as such, the situation is uncomfortable and affects, first of all, the professional credibility of the notary, as the suspicion regarding his bad faith hangs over most of the documents, including in the case of the will presented. It is also assumed that one of the (fictitious) legatees would be complicit with the notary in the presented crime. Thus, according to the principle of *error communis facit ius*, the appearance in law will produce effects towards the bona fide legatee, who will benefit from his share of the annulled legacy. We believe that this would be the most equitable solution that the court could decide or possibly the hierarchically superior one in the reason for the protection of good faith.

Also, *error communis facit ius*, has multiple applicability, especially in the internal structure of the institution of the apparent mandate. There is the well-known situation in which a person is firmly convinced that he is dealing with the person who, indeed, represents the interests of the principal. Regarding this aspect-preservation of good-faith-doctrine, he specified that: "Good-faith is excusable when a person, with average diligence and prudence, has carried out research to find out the real legal situation. American law states that a third party must act reasonably. It is necessary for him to take into account the facts and circumstances in which the transaction is concluded. Based on the information available, the third party must carry out investigations before relying, reasonably, on the apparent power of attorney. In other words, the behavior of the third party must be free of any fault, no matter how slight ... The essential effect of the apparent mandate is that the legal act concluded by the apparent agent with a bona fide third party is valid and opposable to the alleged principal. , producing effects in the name and on behalf of the latter. The situation is reached in which a person, who has not consented to be represented, will be employed vis-à-vis third parties in good faith, even if the act concluded by an alleged agent is not useful. The principal may lose a right without his consent or deed, and in some cases through no fault of his own.

[29] Petru Ciacli, Ioana Mihnea, *„The „Error communis facit jus" Principle in the French Law"*, „2012 International Conference on Humanity , History and Society", Volume 34 „IPEDR, IACSIT Press, Singapore" , 2012, p.90.
[30] Christoph Blanchard *, „Le Dispense en Droit Prive"* , LGDJ Diffuseur , p.53., p.393.

V.Conclusion

The present thesis revolves around the two pillars: the social data and the social construct, as elements of modeling the legal will of the parties and as the main scaffolding of the adaptability of the contract. We started from these two terms, as the modeling of the rules of human behavior, based on the emerging dynamism of society is the premise of our analysis, and the social construct is only the means, the "weapon", the arsenal with which the party distributes and claims evenly. claims, metamorphosing the contract. Of course, the presence of social data in the life of the contracting parties is overwhelming in less developed societies, as such, the means of contractual adaptability are carried out in good understanding, being considered, rather, a component of the sincerity and willingness of human nature to solve differences in this way. Social data is, from our point of view, one of the definitions of natural law. Its main source is the act of manifestation of man[31]. As for the social construct, it is well regimented in economically and socially developed societies where distrust, suspicion between the authority of the given word is already an almost neurotic precedent.

When the symbiosis between these two pillars is ensured, in the center of which the adaptability of the contract oscillates, we will approach the point of view we want to express, namely that: the adaptability of the contract depends rather on the social data, the right naturally, by the conscience and dynamism of the parties who wish to continue their manifestation of initial will. In doctrine, the renowned economist Friedrich Hayek supports the theory of the spontaneous appearance of legal manifestations and, implicitly, going by extrapolation, of law; the procedures, the present mechanisms are the prerogative of the state principles with which the disturbance of the contractual relations is regularized and these aspects belong to legal tradition, legal family, administrative apparatuses.

Moreover, the consecration of the notion of contractual adaptation must be corroborated with a comparative study of mentalities, because each people includes a huge plethora of social habits, and reactions to the unforeseen are different, given the emerging cultural multitude within each, with particular conditions. of evolution. However, Alexandru Xenopol identifies a certain succession of historical series in the development of a people, maintaining, on the other hand, the theory of singularity and individual development. Our perspective, in what will follow, is to demonstrate this effectiveness of human adaptability to the social environment and its various forms of externalization of this adaptation, from a legal and cultural point of view.

Finally, the procedure for adapting the contract or revising it, restoring it to its original conditions are required in order to preserve its usefulness and efficiency. Both the revision and the termination of the contract are implemented either by agreement of the parties or by a court decision. The wills of the parties being united, the principle of contractual balance and its

[31] Francis Fukuyama, *„The Origins of Political Order, Vol I From Prehuman Times to the French Revolution”*, „Profile Books” Ltd,Great Britain, 2012, pp.28-29.

adaptation can preserve the quality, the freedom that the professional uses in the elaboration of his work. It goes without saying that the parties should not abuse their rights if the contract is drawn up on an unfounded basis. As such, in good faith, the Contracting Parties have an obligation to adapt in order to quickly reconcile their interests, especially in the event of emerging currency fluctuations. Using this means, they show a high moral and legal conscience in the respect and gratitude given to the civilizing spirit and the most important process of the universe - evolution.

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