

A variety of the contract of purchase and sale. The contract of consumption

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Abstract

The right to consumption, which is imposed as a new law branch, corresponds to the increased need for juridical security felt by the modern world. Its imposition is also due to the “thirst” for goods manifested by the contemporary human individual, for whose protection are imposed new juridical regulations at national and community level.

Keyword: consumer, rules, community.

The evolution of society has determined the emergence of new ways of perfecting contracts, characterized by the level of generalization and by the exclusion of commercial negotiation. The emergence of some recent regulations with respect to the contract of consumption has determined a doctrinaire dispute regarding the place and role this concept takes in the system. The object of discussions is constituted by the new consumerist institutions, sometimes different, other times even opposable to the rules already consecrated by the general theory.

That is why justly comes the question: “How can the withdrawal of consent be interpreted after the valid conclusion of a sale of consumption? or “How is the existence of some pre-contractual obligations explained, as long as the obligations of the parties are effects of the conclusion of the contract?”

In the present research we will analyze only the aspect of the report between the sale of consumption and the sale and purchase contract.

I. The topic and interest

If in economy the new contractual forms have proven their effectiveness, contractually they have negatively affected the freedom of will of the private contractors, placing under a question mark the topicality of the principle of the autonomy of the will.

For example, professionals have adopted modern techniques that allowed a broad communication between people from different places. These have been added to the traditional way of contracting through correspondence, thus outlining a wider notion such as the distance contract.

Purchasing products through long-distance communication techniques is, obviously, *the main advantage of avoiding being on the go* and, besides, it allows the consumer to reflect before ordering.

The inconveniences in this matter are not excluded, for there is no *direct contact with the good* that the consumer wants to purchase and because the buyer finds himself in the impossibility of checking the documents that come along with the good. Thus, the consumer only possesses the information that the trader presents to him, which makes *loyal conduct play a special role* in this matter.

To counter these shortcomings, the Directive no. 97/7/CEE of the European Parliament and of the Council from May 20, 1997 has been adopted at European Union level and shifted in the national right through O.G. no. 130/2000, which regulates the conditions of conclusion and execution of commercial contracts at distance between traders who provide products and services on one hand, and consumers on the other hand.

Thus, the consumerism emerged as *a reaction to the excesses of the consumerist society and the abuses of the professionals*. It responds to the idea according to which “the consumer is manipulated through advertising and marketing, which generate artificial needs and the illusion of a

false abundance”. Consumerism is also justified by the fact that the traders’ freedom to compete is not enough to adjust the market, and a protection of the consumers is required.

National regulations in the matter of the right to consumption are recent and have emerged as a juridical consequence of Romania’s adherence to the European Union. According to article 1 of Law no. 296/2004 of the Consumption Code, the object of the regulation is constituted by “the juridical reports created between the economic operators and the consumers with respect to the purchasing of products and services, ensuring the necessary frame for the access to products and services” (article 1) admitting, implicitly, that the relations between the traders and consumers are *contractual*.

The adoption of these rules is justified by the consumer’s necessity of knowledgeably expressing free will, and the necessity of equality between the parties at the moment of concluding the contract. The established juridical regime is, obviously, applicable only to the contracts whose parties are the professionals and the consumers.

II. Institutions specific to the consumption contract.

Concluding and implementing the consumption contract involves some specific mechanisms imposed by the ruler, from which we only mention the pre-contractual information requirement, the consumerist consent: the unilateral denunciation and the abusive clauses.

Thus, forming the consumption contract has modified the classical conception of the meeting between offer and acceptance. This way a *period of transition* between the moment when the professional makes his offer and the moment when the consumer expresses his will of acceptance has been imposed.

The consumption contract is concluded through the will of the parties, the trader and the consumer. According to article 5, O.G.no 130/2000, “unless the parties have not agreed otherwise, the moment of concluding a long-distance contract is constituted by the moment when the message of confirmation is received by the consumer, regarding his order”, thus, referring to “the receiving” of the message of confirmation.

The pre-contractual obligation to inform is an imperative disposition of the law that is included in the content of the offer. Thus, before concluding the contract, the professional must inform the consumer about the essential aspects of the contract as follows: his identity and address, the essential characteristics of the product or service; the price or tariff, by case; the delivering expense; the modalities of payment, delivery or provision; the right of unilateral denunciation of the contract etc.

The informing must be complete, correct, precise and relevant, easy to understand and based on the principle of good faith.

Not respecting the information requirement when concluding the contract has a delictual ground, for it sanctions deeds that are placed *before perfecting the contract*.

The obligation to counsel is an aspect of the obligation to inform and consists in providing all the data referring to the contract that will be concluded.

Thus, sometimes the consumer not only needs information, *but also counselling, the opinion of a professional*. The notion of counselling involves a certain conduct from the professional that has to pertinently orient the choice of the consumer.

The obligation to inform continues along the process of implementing the contract as well. The consumer must possess information on the right of unilateral denunciation, on the headquarters and other identification elements, the post-sale service, and offered guarantees.

The professional must meet his obligations no later than 30 days from the date when the consumer placed the order, except from the case in which the parties have agreed otherwise. The deadline of 30 days is not calculated from the date when the contract was concluded, but from the date when the consumer placed the order.

The obligations assumed by the parties in the consumption contract must express the balance of the parties in the civil obligation report.

The clauses are abusive when they create, to the detriment of the consumer, contrary to the good-faith requirements, a significant imbalance between his rights and obligations (article 4 of Law no. 193/2000). The clause is abusive when it gathers the following elements:

- *it has not been directly negotiated with the consumer* (when it has been established without giving the consumer the possibility to influence its nature, as in the case of pre-formulated standard contracts); (3)
- *when the good-faith requirement is broken* (general request, applicable to all juridical documents);
- *when there is a significant imbalance between the rights and obligations of the parties (the law does not specify what is understood by imbalance, but points out that there are rights and obligations).*

According to article 4, paragraph 6 of Law no. 193/2000 regarding abusive clauses, those which define the main purpose of the contract or establish the equivalence between the price and the provided service or product make exception from the dispositions as long as they are expressed in an intelligible language, easy to understand.

In the specialized literature the right of unilateral denunciation belonging to the consumer has received *many qualifications*.

One of the opinions of the French doctrine shows that the contract signed by the consumer represents only one *stage in the progressive forming of his will*. The consumer's will is not a final one, for he has the possibility to reflect within the denunciation term. Hence, the right of denunciation does not affect the compulsory character of the contract, its implementation being placed in a moment when the contract is not finally concluded. In addition, it has been shown that this opinion explains why the contract cannot produce effects as long as it is not *utterly formed*.

Another opinion appreciated that the right of denunciation is *a faculty of denial* which can be exercised within a certain term, thus bringing into discussion the compulsory character of the contract.

The doctrine has also supported *the theory of gradual or progressive formation of contract* according to which, although in an incipient stage the consent of the professional met the one of the consumer, the contract *was not definitively formed* (concluded), but only temporarily, following that within the denial term, while the consumer does not exercise his right of withdrawal, his consent grow and the contract strengthen until permanent concluding is reached.

We do not share the opinion of progressive formation of contract, because from the legal dispositions does not result that there has been considered the gradual formation of the consent. Likewise, in certain situations, the term of exercising the right of denunciation is calculated beginning from the date when the contract was concluded. Moreover, the contract also produces effects, the consequences of the right of denunciation of the already provided services being regulated.

We appreciate that the consumer's right of "unilateral denunciation" represents a faculty given to (*ad legem*) the "acquirer" of "withdrawing from signing the contract, which in juridical terms is translated as his possibility to *recant the consent* given when perfecting the contract

In the above mentioned conditions, *the recantation is not a way of cancelling the contract with a way of withdrawing the consent*.

The consumer's right of unilateral denunciation stipulated in the Consumption Code and the special laws is a *legal and free right*. Because it does not imply the agreement of the professional, it is also a potestative right.

Although only the consumer's right of unilateral denunciation is regulated, it is not excluded the possibility that *the professional also benefit from a similar right*.

Exercising the right of denunciation draws *the retroactive cancellation of the contract, having as a consequence* the services restoration.

Although the right of denunciation is an advantageous alternative to the consumer, in order to protect his own interests he may also resort to different options provided either by the common law, or by the specific regulations. For example, the contract cancellation may be required in order to vitiate the consent or to cancel a clause for being abusive, specifying that a special disposition cannot exclude the incidence of a general rule that has a different legal basis.

III. The contract of consumption, as such – inexistent.

Considering the special conditions imposed by law on “the contract of consumption”, in the doctrine have been raised questions such as: Is “the contract of consumption” a juridical operation as the contract is understood in the civil right, or is it a new concept? What is the report between the contract of consumption and the special, “classic” contracts?

Trying to answer the above mentioned questions, we point out the following: In a prestigious opinion, “the contract of consumption” has been understood as being, in fact, a compilation of *two distinct contracts: a fund agreement* (which can be a sale, a loan, etc.) and a “*contract of consumption*” (which doubles the normative character of the first one, in other words, the fund agreement has a personal juridical regime to which *shall be added – by legal overlapping – the juridical regime of consumption as well*. For example, “in case of selling (consumption), this will obey the special juridical regime of the sale and purchase agreement, but the party who sells will be kept to take note of the imperative norms of the right of consumption as well”.

According to the above-mentioned concept, the institution of the „contract of consumption” has the following characteristics:

- “the contract of consumption” *is not a juridical operation but an ambiguous juridical concept*, a mix of public and private law norms;

- “the contract of consumption” *does not have its own juridical nature* – in private law being a mere legal tool;

- “the contract of consumption” constitutes *a normative superstructure* which is applicable to some subjects of law (independently on the concrete juridical content of the juridical relations existent between them);

- “the contract of consumption” *is not a juridical act*, but a legal juridical regime (applicable to some concrete commercial reports);

- “the contract of consumption” *does not impose a consent* (being a legal and objective institution)

In conclusion, according to the opinion presented above, “the contract of consumption” is not a juridical operation, a *negotium juris*, but a *juridical regime imperatively defined by a law of public order and automatically applicable*.

Although we appreciate the depth of the above-presented research, we do not share the idea of overlapping two different juridical regimes, respectively a fund agreement doubled by a “contract of consumption”.

According to the new dispositions of article 1177, 2009 Civil Code, “the contract concluded with the consumers *is submitted* to the special laws and, in addition, *to the dispositions of the present code*” (with respect to the contract).

It results that, according to 2009 Civil Code, “the contract of consumption” is in fact *a contract resulted from a manifestation of will* (within a special juridical regime).

We appreciate that the collocation “contract of consumption” *cannot designate a general concept with an autonomous existence*, at least for two reasons: before special contracts *there are no general contracts* (but only a general theory of the contract); *Likewise, not to be forgotten that the right of consumption was born in order regulate special civil contracts (when they are concluded between professionals and consumers).*

In conclusion, the contract of consumption *can only be found as a special contract* (a sale, a loan, a lease etc.) whose parties are the professional and *the consumer* (and to which special dispositions are applied).

We mention that *there is no such thing as a general contract of consumption, but only a sale of consumption, a loan of consumption*. The purchase and sale contract of consumption is, therefore, a sale that presents certain particularities (imposed by special dispositions of consumption), which is similar to the sale of real estate, the sale with repurchase agreement, the sale of inherited properties etc., sales that are distinguished within the doctrine as varieties of the purchase and sale agreement.

Thus, we can assert that *the sale of consumption is a variety of the purchase and sale agreement* (regulated by 2009 Civil Code). Likewise, we can assert that the loan between a professional and a consumer is a variety of the loan agreement.

Qualifying the sale of consumption as a variety of the purchase and sale agreement represents *doctrinaire value and practice to identify the common law*.

The institution of the so-called “contract of consumption” is an incontestable emergence with important consequences in the Romanian economic and juridical life, which is why we believe that it receives the proper attention.

Once “the contract of consumption” takes its rightful place, the only thing left is that the doctrine and jurisprudence find the most suitable solutions for the implementation (harmonization) of their atypical institutions in the general contractual context.

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