

NEGOTIATED, MIXED AND STANDARD FORM CONTRACTS. A PROPOSAL FOR A NEW CLASSIFICATION OF CONTRACTS

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ABSTRACT

If negotiation is considered the current manner in which contracts are concluded thereby making negotiated contracts the norm, non-negotiated terms included in contracts are an unavoidable part of everyday legal operations. Although the importance of this phenomenon in the private-law landscape has been recognized by the Romanian Civil Code through several provisions, those provisions do not address non-negotiated contracts as a whole but specific issues of non-negotiated contractual terms included in any type of contract. Firstly, with the support of the legal doctrine this article intends to examine those specific provisions of the Romanian Civil Code addressing both negotiation as a pre-contractual phase and non-negotiated contractual terms along with the particular provisions provided in the secondary legislation such as Law No. 193 of 6th of November 2000 regarding abusive terms in contracts concluded between professionals and consumers. Secondly, through this overview, the article proposes to identify the outlines of different types of contracts determined by the various degrees of non-negotiated terms in their design.

KEYWORDS: adhesion contract, standard form contract, standard terms, unusual terms, abusive terms, negotiation, mixed contract.

INTRODUCTION

With regard to the formation of contracts, the New Romanian Civil Code introduces specific provisions regarding negotiations. However, there is no doubt that negotiation was an inherent practice of concluding contracts with a broad application even during the 1864 Civil Code, even though this Code, heavily influenced by the French 1804 Code Napoleon, did not explicitly contain any particular provisions regarding this manner of contract formation (Dogaru, Drăghici, 2014, pp. 158-165). Therefore, by introducing specific dispositions regarding negotiation of contracts, the New Romanian Civil Code allows for two logical conclusions to be drawn: firstly, through those provisions it is offered a formal recognition to the importance of this manner of concluding contracts by assigning a specific legal status to contractual negotiations which are broadly used with or without an existing legal framework addressing it; secondly, it also creates a legal space for a counter-part, which would consist of contracts concluded in a non-negotiating manner. The New Romanian Civil Code does not address in detail the legal status of such contracts, merely defining standard form contracts in article 1175 in a section of the Code dedicated to different types of contracts, and focuses instead on non-negotiated terms which are addressed through specific provisions regarding standard and unusual terms. Building on the provisions of the New Romanian Civil Code, the legal doctrine addresses also, symmetrically, separate aspects – it refers to negotiation as a pre-contractual phase and as a means of contract formation to which there is provided a specific legal status, and the counter-part of negotiation is addressed on the somewhat different level of the non-negotiated contractual terms (Pop, Popa, Vidu, 2020, pp. 56-109). This article makes the case that combining both levels in which the problem of negotiation is reflected in the legal provisions of the New Romanian Civil Code – as a means of contract formation and as reflected on the level of contractual terms – there is sufficient legal ground to speak of different types of contracts determined by the various degrees of non-negotiated terms they contain.

NEGOTIATION AS A MEANS OF CONTRACT FORMATION

Negotiation as a pre-contractual phase is addressed through a series of provisions such as 1182, 1183, 1184 of the New Romanian Civil Code where it is mentioned that contracts can be concluded either through negotiation or an unconditioned acceptance of a contractual offer (Baiaș, Chelaru, Constantinovici, Macovei, 2021, pp. 1407-1413). Observing the practice of contractual negotiations, the legal doctrine mentioned that the negotiation phase starts when the eventual contractual parties announce to each other their intention to come to an agreement on the elements of the contract (Ciochină-Barbu, Jora, 2020, pp. 39-41). Negotiations end whenever any of these three possible outcomes is reached – the formation of the negotiated contract, the refusal to conclude the contract, or the conclusion of what the legal doctrine has called `preparatory contracts` (Veress, 2019, p. 33). These last contracts are concluded at the end of negotiations, when the parties have agreed on the essential elements of the future contract, but through which they agree to schedule or condition in various ways the conclusion of the negotiated contract.

As a consequence of the freedom of will principle applied in contractual law, this pre-contractual phase is governed by the principle of freedom of negotiations, which implies, as stated in article 1183 (1) of the New Romanian Civil Code, that anyone is free to choose with whom they enter a negotiation, free to start, to conduct or to break negotiations, and in this particular case, cannot be held liable for the failure of negotiations (Oglindă, 2017, pp. 51-52). As a broad definition, the negotiation is the attempt of the parties to agree on the elements of the contract. Article 1182 (2) of the New Romanian Civil Code states that it is sufficient for the parties to agree on the essential elements of the contract for the contract to be concluded, even if they postpone the agreement on secondary elements or entrust a third party to determine them. The essential elements of the contract are considered those which determine the will of the parties and in the absence of which the contract cannot be concluded, such as the object of the contract and of the obligations or any other aspects on which the parties insist in order to conclude the contract (Romoșan, 2018, p. 41). Therefore, there is no fixed, strict limit between essential and secondary elements. Besides those aspects of the contract in the absence of which there is no contract whatsoever, the only criteria for determining essential from secondary elements of the contract is the will of the party – whenever one of the parties insists on a certain aspect in concluding the contract, it is considered to be an essential element (Almășan, 2018, pp. 16-18). Thus, the New Romanian Civil Code recognizes the sufficient agreement theory, which considers the contract to be concluded whenever the parties have reached an agreement on the essential elements of the contract. The effect is that whenever the parties do not reach an agreement on secondary elements of the contract or the designated third party does not determine those secondary elements, any of the parties can request from a judge to complete the contract, who will proceed in doing so by taking into account the will of the parties and the nature of the contract, as stated in article 1182 (3) of the New Romanian Civil Code.

Also deriving from the negotiation practice, the legal doctrine mentioned that the participants in a negotiation are allowed to customize the manner in which the negotiations are to be conducted through contracts governing this pre-contractual phase (Pop, Popa, Vidu, 2020, pp. 64-72). However, in the absence of such contracts which would configure according to the will of the partners the manner in which negotiations are to be conducted, there is a set of legal obligations the negotiating participants are bound to – the good faith obligation, the confidentiality obligation and an implied legal obligation to inform (Codrea, 2018, 357-370). The breach of any of these legal obligations generates a form of liability governed by tort law, just as the breach of any obligation stipulated in a contract through which participants understand to conduct negotiations would generate a contractual liability.

Non-negotiated terms: standard terms, unusual terms, abusive terms

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The New Romanian Civil Code contains several provisions regarding non-negotiated terms. There is a general disposition regarding standard terms in article 1202 (2), applying to any kind of non-negotiated terms, and also article 1203 that addresses unusual terms, which are a particular type of standard terms. Also, article 1177, referring to contracts concluded with consumers, relates the general provisions of the Code to the special legislation which governs such contracts without specifically identifying it (which is Law No. 193 of 6th of November 2000 Regarding Abusive Terms in Contracts Concluded Between Professionals and Consumers). Therefore, under the broad category of non-negotiated terms we can speak of standard terms, unusual terms and abusive terms. Related to non-negotiated contracts there is a definition to standard form or adhesion contracts provided in article 1175, as contracts containing essential terms imposed or drafted by one of the parties, for itself or according to its instructions, which the other party can only accept as such. We can so far conclude that according to the explicit provisions of the New Romanian Civil Code there are two types of contracts – negotiated contracts and non-negotiated contracts, such as standard form or adhesion contracts, as explicitly mentioned in article 1175.

Standard terms are those prepared in advance by one of the parties in order to be used in a general and repeated manner, without being negotiated with the other party. The legal doctrine has mentioned that the use of standard terms is due to the superior economic position of the party who uses standard terms or due to the frequent nature of its activity (Pop, Popa, Vidu, 2020, pp. 99-102). However, not all non-negotiated terms are standard terms. In order to be a standard term, the contractual provision, besides being non-negotiated, it also has to have a repeated character which derives from the intention of the proposing party (Vasilescu, 2017, pp. 292-295). As a particular kind of standard terms, article 1203 refers to unusual terms, as those terms which stipulate in the benefit of the one who proposes them the limitation of liability, the right to unilaterally revoke the contract, the right to suspend the performance of the obligations, forfeiture of the rights or the benefit of the term of the other party, the limitation of the other party's right to use exceptions, the limitation of the right of the other party to contract with others, the implied renewal of the contract, the applicable law, compromissory clause or the change of the jurisdiction from the common courts. These specific cases are explicitly and limitedly provided by the article 1203, which also states that unusual terms are valid and have full effect only with the explicit, written acceptance of the other party, which can be accomplished in several ways as the legal doctrine pointed out: by signing in the contract next to the term, by adding an appendix to the contract containing those specific terms or by any written document through which the other party acknowledges the fact that it has been informed about the terms (Almășan, 2018, pp. 92-93). The consequence of not respecting the written conditions imposed by the law for unusual terms is that those terms can be declared invalid.

With regard to abusive terms, the New Romanian Civil Code refers to the special legislation governing contracts concluded with consumers in article 1177. Law No. 193 of 6th of November 2000 Regarding Abusive Terms in Contracts Concluded Between Professionals and Consumers defines consumer contracts as those contracts concluded between a professional (individual or legal person for whom the contract is concluded as part of its business activity) and a consumer (individual for whom the contract is concluded for reasons outside of its business activity). Article 4 of the Law defines the abusive term as a term which was not directly negotiated with the consumer and which by itself or in relation to other terms of the contract generates in the detriment of the consumer and in breach of good faith a significant imbalance between the rights and obligations of the parties. The Law also specifies that abusive terms in consumer contracts are considered completely void which implies that the absolute nullity can be established by the court itself, it can be raised any time, cannot be confirmed by the consumer and, in addition, if after the exclusion of the abusive term the contract cannot produce its effects anymore, the consumer can claim the rescission of the

contract with damages. Abusive terms, however, can be included not only in consumer contracts, but in general contracts as well, in which case they do not fall within the scope of Law No. 193 of 6th of November 2000 Regarding Abusive Terms in Contracts Concluded Between Professionals and Consumers. In these cases, following the same definition as stated in the Law, abusive terms are subjected to the same rules as standard terms, and as such, their effects can be counteracted on several grounds, such as undue influence, unjust or lack of cause, abuse of rights or through interpretation of the contract.

Negotiated contracts, standard form contracts, mixed contracts

If we can conclude that there are negotiated contracts on the basis of the provisions regarding negotiation as a pre-contractual phase and as a mode of contract formation, and non-negotiated contracts such as standard form or adhesion contracts as it is explicitly stated in article 1175 of the New Romanian Civil Code, there is sufficient ground to speak of a third type of contract which is not addressed as such, but to which several provisions of the New Romanian Civil Code relate. I would call this third type of contract mixed contract, insofar as it does not consist solely of negotiated terms or standard terms. Before clarifying the legal status of mixed contracts as it derives from the New Romanian Civil Code provisions, I will address the issues of negotiated contracts and standard form or adhesion contracts.

The New Romanian Civil Code contains specific provisions which were already addressed regarding negotiation as a means of contract formation. However, what does a negotiated contract contain when it comes to contractual terms? It would ideally consist of only negotiated terms. However, this is rarely the case, since the parties rarely if ever negotiate every single aspect of the contract. There are several provisions related to the composition of negotiated contracts. Firstly, there is article 1168 referring to the rules applicable to unnamed contracts which states that all contracts which are not specifically regulated in the New Romanian Civil Code are subjected to the general rules and, if this does not suffice, they are subjected to the special rules applicable to the contract to which they mostly resemble. Secondly, article 1272 (2) states that the concluded contract binds the parties not only to that which is explicitly stated in the contract, but also to all those consequences which the usual practices of the parties, the custom, the law or equity derive from the nature of the contract. Therefore, we can speak of negotiated contracts and still have contractual terms which the parties may have not explicitly negotiated or agreed upon, and as such, negotiated contracts do not contain exclusively negotiated terms. On a separate note, reversely, not all terms which are considered part of the contract are explicitly reflected in the composition of the contract, as article 1201 points out referring to external terms to which the parties relate to in the contract, external terms that can be negotiated or standard. Therefore, although a negotiated contract has all these legal constrains which reflect in its composition, it can be defined as containing not only negotiated terms on which the parties have explicitly agreed upon, but also the terms which the parties have had the effective possibility of subjecting to their negotiation.

On the counter-part of negotiated contracts where both parties have a saying in the contractual terms, there are standard form or adhesion contracts. As stated before, this type of contract is merely mentioned in the New Romanian Civil Code in article 1175 as a contract which would consist solely of standard terms, established exclusively by one of the parties. In contrast to negotiated contracts, standard form or adhesion contracts leave the other party with only two options – either agree to the terms presented and conclude the contract or refuse to do so. The New Romanian Civil Code does not provide for a detailed legal status to standard form or adhesion contracts, the only disposition to be found is the one referring to matters of contract interpretation – article 1269 (2) states that stipulations included in standard form or adhesion contracts are to be interpreted against the party who proposed them. Apparently paradoxically, just as it was the case with negotiated contracts, standard-form contracts do not

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consist always entirely of standard terms, since this type of contracts is also subjected to article 1168 and article 1272 (2). Thus, a better description of standard form or adhesion contracts would refer to them as containing standard terms, unilateral reflections of the will of the proposing party, but also terms which were not explicitly addressed by those standard terms, in both cases, the other party not having the effective possibility to subject them to negotiation.

If negotiated contracts consist of negotiated terms and of all those terms which could have been effectively subjected to the negotiation of the parties, and standard form or adhesion contracts consist of standard terms and terms which without being subjected to any negotiation are not covered by standard terms, mixed contracts consist of both negotiated and standard terms and, in addition, of all those terms which were not explicitly addressed by any of the parties, deriving from the application of article 1168 and article 1272 (2) discussed above (Almășan, 2018, p. 85). Regarding this type of contracts and without specifically naming them as such, there is article 1202, containing provisions on standard terms, stating in the second paragraph that negotiated terms prevail over standard terms whenever the latter conflicts with the former. In the third paragraph it also refers to a situation involving mixed contracts, whenever such contracts are concluded through the use of standard terms by both parties. In this situation, the contract is considered to be concluded on the basis of negotiated terms or on any other standard terms common in their substance. Therefore, the formation of such mixed contracts implies a gradual process in which, firstly, divergent standard terms are excluded from the contract following an application of the general norms instead, and secondly, the remaining terms are subjected to an evaluation through the requirements of the sufficient agreement theory – if, on the basis of the remaining negotiated terms and those standard terms divergent only in form but common in substance, there is an agreement on the essential elements of the contract, the contract is concluded. When the contract is concluded in this circumstance the article 1202 recognizes the possibility of any of the parties to notify the other, either before or immediately after concluding the contract, that it has no intention of being part of such contract.

CONCLUSIONS

After analysing the legal framework of negotiation as it is explicitly provided in the dispositions of the New Romanian Civil Code, along with those provisions regarding the definition of standard form or adhesion contracts, the status of standard terms, unusual terms and abusive terms, the latter being addressed in Law No. 193 of 6th of November 2000 Regarding Abusive Terms in Contracts Concluded Between Professionals and Consumers, the analysis continued with addressing the issue of the types of contract. I proposed a new classification of contracts on the analysed legal basis, referring to negotiated contracts, standard form or adhesion contracts and a new category, mixed contracts. However, this leaves unaddressed the manner of formation of the contracts belonging to this category. On the level of the contractual terms, negotiated contracts consist of negotiated terms and of all those terms which could have been effectively subjected to the negotiation of the parties, standard form or adhesion contracts consist entirely of standard terms and terms which, although were not subjected to any negotiation, are not covered by the standard terms, mixed contracts consist of both negotiated and standard terms and also of all those terms which were not explicitly addressed by any of the parties, deriving from the application of article 1168 and article 1272 (2). On the level of contract formation, however, if negotiated contracts are concluded through negotiation as article 1182 (1) states, and standard form or adhesion contracts are concluded without any negotiation by the mere acceptance of the other party as stated in article 1175, the mixed contracts presuppose in their formation also a pre-contractual phase of negotiation, as it derives from article 1202 (1) – even though it is limited in scope by

the standard terms used by any or both of the parties, the rules governing negotiations apply to this category as well.

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