The Principle of Autonomy of Contractual Will

Luan Hasneziri

Prof. Assoc. Dr.

Abstract

One of the fundamental principles on which the contractual law of any democratic state is based is the *principle of contractual freedom*. This principle is accepted by both Western legal systems, civil law and common law as well. Therefore, in dealing with this principle of contractual law, we shall have to refer to both the civil legislations of the states that are part of the civil law system, as well as those that are included in the common law legal system. One of the main issues of this paper concerns the meaning and content of the principle of autonomy of contractual will. In this matter, the most important aspects of this principle will be dealt with in summary, starting from the right of the parties to freely determine the content of the contract and ending with the limitations placed on the will of the parties in application of this principle. The elements of the principle of contractual freedom will be addressed in this paper, looking at them in a comparative perspective with the legislation of other countries, in addition to the Albanian civil legislation, highlighting the mutual features and differences between them. Another issue of this paper will be the application of the principle of autonomy of will to consumer contracts. Our focus herein in particular on the special rules that apply in this case, where it is worth noting that contemporary civil legislations have imposed a number of restrictions on the implementation of this principle, in order to protect the consumer. In this paper, the rules that are applied in the cases of standard or adhesion contracts will be treated, in a summarized way, in application of the principle of contractual freedom. At the end of the paper, the conclusions will be provided, as well as the bibliography on which it is based.

Keywords: contractual autonomy, will of the parties, public interest, consumer contracts, standard contracts

Introduction

The meaning and content of the principle of autonomy of the will

The principle of contractual freedom consists of several aspects or elements. One of the most crucial aspects of this principle *is that the parties are free to determine the*

content of the contract in accordance with their interests that they intend to achieve by concluding it. In a market economy that is always changing and developing, the number and type of contracts that parties can enter into is endless. Especially nowadays, in the conditions of the great development of technology and information, an increasing number of new contracts are being born, with an international character, which has laid the need for regulation in the field of private international law of contractual freedom of parties.

This aspect of the principle of contractual freedom is expressly contemplated in the applicable Civil Code, according to which *the contracting parties are free to determine its content, in accordance with their legitimate interests.* Based on this principle, the content of each contract, as well as its terms, are determined by the parties by agreement. Neither the state nor other public bodies, nor third parties are intitled to interfere or influence the will of the parties in determining the content of the contract, provided that it does not infringe the rights of others and does not come contrary to a mandatory norm of the law.[1]

The right of the parties to freely determine the content of the contract concluded between them is a principle that finds wide application in practice. In the implementation of this principle, it does not matter if one of the parties concluding the contract is the state or its bodies, while the other party is a private natural or legal person. This is due to the fact that the state and its bodies, when acting in the field of contract law, are equal to private natural or legal persons and therefore cannot impose on the latter conditions or clauses that contradict the principle of contractual freedom.

The issue of the right of the parties to freely determine the content of the contract is controversial in cases where the terms of the contract are drawn up by one party, while the other party does not participate in drafting the content of the contract, but only is entitled to choose to sign the contract or not. These contracts are recognized by contract law as *accession contracts or adhesion contracts* or even as standard contracts and in the conditions of continuous economic development of society, they are becoming widespread, especially in developed countries, in application of the principle of the fair treatment of all entities that can enter into such a contract.

In the theory of contract law, the issue of whether adhesion or standard contracts violate the contractual freedom of the party who does not participate in the drafting of the terms and content of the contract has been raised for discussion. Regarding this issue, our opinion is that in the case of standard contracts, there is no violation of contractual autonomy for the party that does not participate in the drafting of the terms of the contract, because the right of the party to choose freely of its own will, to enter or not in such an agreement, shows that contractual freedom is not violated in

[1] Article 660 of the Civil Code of the Republic of Albania provides:
"The parties to the contract freely define its content, within the limits established by the applicable legislation".

this case. However, we must be careful with standard contracts, in cases where the party drafting the terms of the *contract has a dominant position in the market or has exclusivity in providing a certain service*, which means that it is in a monopoly position and individual consumers do not have right of choice, except to conclude the contract according to the conditions set by the dominant party in the market or that owns the monopoly.

Under such cases, *it is necessary for the state and society to foresee concrete mechanisms and institutions, which make it possible to audit the economic activity of these public or private companies*, especially in the field of unfair competition. This is because in the absence of other choices by the individual, as well as in the absence of the efficient action of these supervisory and controlling institutions, *we would be facing the violation of contractual autonomy.*

The authors of civil law in Italy pay special attention to the treatment of the said principle. According to them, what distinguishes the contract from other ways of entering into, changing or terminating a legal relationship *is the will of the parties*. The contracting parties agree on the establishment, change or termination of a property legal relationship between them. The legal effect of the establishment, change or termination of this relationship is the product of the will of the parties who have concluded the contract.

In order to determine this role of the will of the parties, it is necessary to clarify the principle of autonomy of contractual freedom. The contractual freedom and autonomy of the parties is considered in a double aspect; in the negative aspect and in the positive aspect. *Contractual freedom and autonomy in the negative aspect means that no person can neither be deprived of his property rights or other rights that he enjoys, nor can he be forced to perform obligations in favor of others against his will*, since as a principle every man obeys only his will and cannot be bound by the will of others, except when the law expressly provides for such a thing.

In the positive sense, contractual autonomy is in the general concept of the contract as an agreement of the parties to create, change or extinguish a legal relationship. The contract, by rule, binds only the parties who have participated in the agreement and who have expressed their will for the establishment or change of legal relations. This principle is expressly defined in law; the contract does not produce effects on third parties, unless the law provides otherwise. In the positive sense, the principle of contractual freedom and autonomy means that the parties can, through the act of their will, i.e. the contract, establish, change or terminate legal relations, that they can dispose of their belongings and can be obliged to execute obligations in favor of others. In this sense, contractual autonomy corresponds to the owner's right to freely dispose of his belongings, within the limits set by the law, which is included in the subject of the right of ownership.

In the positive aspect, contractual autonomy may appear in three forms:

i. The right of the parties to choose to conclude the kind or type of contract that is consistent with their legitimate interests. According to this form, the parties may freely dispose of their belongings by means of a sales, donation or exchange contract etc., they can be obliged to others in the form of a contract of rent, loan, deposit, enterprise, commission, etc.

ii. *The right of the parties to freely determine the content of the contract, in accordance with the agreement reached between them.* Such a right can be the determination of the sale price, the time and place of delivery of the sold item, the modalities of payment of the sale price or the terms of payment of rent and return of the rented item, of the value of the work built by the entrepreneur and the time of delivery of the work and the price, etc.

iii. The right of the parties to conclude non-typical or non-named contracts. These are contracts that are not expressly provided for in the Civil Code, but that are established and practiced by business relationships, where this right will be dealt with later in this paper, as it constitutes one of the special aspects of the principle of freedom of contractual autonomy.[1]

The civil law of the Republic of Kosovo expressly provides for the autonomy of contractual freedom. According to the said law, the parties are free to determine the content and terms of the contract based on their will and according to the interests they intend to achieve through it. Contractual freedom as one of the basic principles of contract law is reflected in several provisions of the Kosovo civil law, which is a new law and has received the best models of western legislation for the recognition and guarantee of this principle.[2]

English contract law pays special attention to the principle of autonomy of will. According to English contract law, the classical law of contracts is based on contractual freedom and *the sanctity of the contract*, which means the freedom of the parties to decide on the content of the contract according to their will, while the duty of the court is to give effect to the agreement reached between the parties. But contract law cannot be based on one principle alone, to the exclusion of other principles.

Civil law in any case aims to regulate the fairness of the agreement reached and the protection of the weaker party. Thus, children do not have the ability to conclude contracts or the court has refused to give effect to contracts that are illegal. The autonomy of contractual freedom is confronted with the need to protect the party who has no experience or who is vulnerable, while in the case of an illegal contract, it

[1] See also: Galgano, F; *"Private Law",* translated by Alban Brati, Tirana 2006, pages 266-268.
[2] Paragraph 1 of Article 2 of Book 2 of the Civil Code of the Republic of Kosovo provides:
"1. The parties are free to regulate their contractual relations on the basis of their will, within the limits determined by mandatory provisions, by public order or by proper custom".

cannot have any effect, because it violates the clause of public order or a mandatory norm of the law. *The law endeavors to establish a fair balance between the autonomy of contractual freedom on the one hand and fairness in the conclusion of contracts on the other.* This conflict of interests is named as "commercial individualism" and "consumer welfare" by the well-known English authors J. Adams and R. Brownsword in their article " *The ideologies of contract.* [1]

According to these authors, there is an academic debate on how far the limits of contract law extend, in relation to the fact that which laws and judicial precedents constitute contract law. Authors who are known as functionalists (modern authors who are based on the fact that the contract has the function of establishing or changing civil rights and obligations) argue that contract law deals with the regulation of any agreement concluded between the parties and any material law that has to deal with the regulation of these agreements, should be included within the contract law. Traditional authors have a narrower view according to which contract law includes only contracts that are expressly regulated by law. According to them, only a known and clearly defined number of cases, together with the laws governing them, similarly organized in certain books, constitutes contract law.

The view embraced by traditionalists defends the theory of commercial individualism, according to which contract law should minimally regulate contracts. On the other hand, the view defended by functionalists is related to the theory of consumer welfare and argues that contract law should regulate contracts in detail, providing for most of the clauses that the parties can include in a contract.

The theory of commercial individualism has both commercial and individualistic grounds. Both of these bases mutually support each other, but to get a better insight into this theory it would be useful to treat each of them separately. According to the free market theory, the field of commerce is the place of exchange of competing interests. The function of the contract is not simply to create opportunities to carry out the exchange of goods and services between the parties, yet to create opportunities for a competitive exchange.

Contract law defines the basic rules according to which competitive trade can be carried out. Thus, the party who is subject to fraud, misrepresentation, threat, etc., cannot be forced to fulfill what he has promised. In many cases, the line between the misunderstanding of the party in the binding of the contract and the non-disclosure of the facts that are important for its binding, emphasizes this view. There are a number of restrictions on contracting parties. Commercial law is not the law of the jungle and these rules deal with cases where there is a misunderstanding between the parties in the conclusion of the contract. However, the non-disclosure of certain information that constitutes advantages is simply a matter of caution on the part of

[1] See also: McKendrick, E, *"Contract Law, Text, Cases and Materials",* Oxford University Press, Oxford 2020, page 9.

the parties in concluding the contract – the contracting parties are involved in a competitive situation and cannot be expected to disclose any information to each other. Based on the above assumptions, the free market theory is based on these main conclusions:

Firstly: The *security of contractual transactions* must be guaranteed and promoted. This means that when a party develops a commercial activity and signs a contract for the development of this activity, it is reasonably presumed that it intended to enter into a contractual relationship and this presumption must be protected by law. The interest in the security of the contract leads to the doctrine of the objective recognition of the intention to conclude the contract, as well as to the warning of subjective errors and the protection of third parties who are not parties to the contract[1]

Ideally, contractual security means that the parties fulfill the obligations they have assumed according to the contract signed thereof, but as judicial practice proves, a large number of contracts are executed late and the possibility of not executing the contracts at all is increasing more and more. In order to protect the innocent party, the contract contemplates expected compensation measures in its favor and in principle the contract sanctity hardly accepts excuses for its non-execution.

Secondly: It is of paramount importance for those who enter the free market, in order to enter into a commercial transaction, to know their place and position in this market. This means that the basic rules of the contract must be clear. While the restrictions on the conclusion of contracts should not only be minimal, in the context of the competitive nature of the free market, but should also be clearly defined, in the context of the fact that free trade requires predictability, accountability, etc. Acceptance of a postal rule is an example of the theory of commercial individualism, in the sense that it is clear, simple, and not surrounded by various interpretations that leave the contracting parties constantly uncertain. Similarly the classification of cases of repudiation of contract involves the virtue of certainty, which is sacred to the theory of commercial individualism.

Thirdly: As long as the contract deals with free market transactions, the law must apply commercial practices and not other practices which are not related to commerce, such as practices in the field of personal non-property relationships, marriage, etc. Differences in the implementation of commercial practices are evident for the theory of commercial individualism, alongside the implementation of other practices.

Also, we should not overestimate the general importance that many rules related to the conclusion of the contract, such as the display of goods in the shop window together with the price, whether it constitutes an offer or negotiation for an offer, are

[1] See also: Torrente, A; Schlesinger, P; *"Manual of Private Law",* Publication of the Chamber of Advocates of Albania, Tirana 2021, page 540

simply obstacles to the conclusion of the contract. This fact may constitute a clear rule, but one that should never be neglected. The rules of contract law, which aim to avoid the conclusion of inappropriate contracts, are an exceptional measure, which at the end of the day aim to ensure free trade between the parties.

According to individualism theory, a constant theme of it is that *judges should have a non-interference role in relation to the issue of contracts*. The principle of non-interference of judges in matters of binding and implementation of contracts originates from the part of the theory of individualism as an aspect of the theory of commercial individualism. The basic idea is that the parties must enter the free market, choose their own contracting party, determine the terms of the contract and sign it. *The essence of the theory of individualism are the doctrine of the autonomy of the contractual freedom and that of the sanctity of the contract.*

Emphasizing contractual freedom means *freedom of choice* for the parties. *First, the parties must be free to choose the other party as a partner in concluding the contract*. Like the tango dance, the contract can only be performed when there are two parties, and both parties, in theory, must have chosen each other by consensus. *Second, the parties must be free to choose the terms of the contract they will enter int*o. The contract involves the exchange of competing interests, but this exchange must be consensual.

Regardless of the fact that the principle of choosing the other contracting party has been fading, this principle is an essential and vital principle for the development of contract law. This can be observed in two main directions:

The right of the parties to choose the other contracting party for concluding the contract and for determining its content, in principle, should be maximized and

The parties must implement the agreements made of their own free will, based on the Roman principle "pacta sunt servenda"; the agreements entered into cannot be violated.

The second direction of the freedom of contract is nothing else but the principle of the sanctity of the contract. By providing that the parties must implement their agreements, the principle of sanctity of the contract places the emphasis in a two-fold manner. *First,* if the parties adhere to their agreements, they should be treated as professionals of the agreements made and the court should not interfere with the agreements of the parties by evaluating them as being made unreasonably or negligently. Second, if the parties adhere to their agreements, then the court cannot release one of the parties for non-fulfillment of the obligations arising from these agreements.

2. Application of the principle of contractual freedom to consumer contracts

This principle in cases of consumer contracts means that even in these cases, the court does not have the right to re-evaluate the adequacy of the legal interest; the principles on which the contracting parties were based in concluding the contract; difficulties

facing the assessment of mistakes made by one party; common mistakes made by the parties and their difficult economic situation in concluding the contract; anxiety to define the doctrine of inequality of contracting power, etc. The principle of the sanctity of the contract is a principle that operates in contract law from the beginning of the conclusion of the contract, to its end, allowing the courts to be very careful in violating this principle, only in cases where contractual freedom is substantially breached or where one or both parties have acted in bad faith.

The theory of consumer welfare stems from consumer protection policies and the principles of fairness and reasonableness in contracting. It is not based on the premises of individualism commercial theory, according to which all contracts must be minimally regulated by law. On the contrary, it presupposes that consumer contracts should be regulated expressly and in as much detail as possible and that commercial contracts, which can be viewed as an exchange of competing interests, should be subject to more extensive regulation by law than theory of commercial individualism allows.

Difficulties with consumer welfare theory emerge as soon as one attempts to identify its specific guiding principles. For example, are the principles of fairness and reasonableness applicable in every case of concluding a consumer contract? Without pretending to give exhaustively the main principles on which the consumer theory is based, we can say that some of its principles are:

a. *The principle of stability*. According to this principle, the parties should be stable in the development of their civil legal relations, even in the absence of a written contract. They are not allowed to "jump up and down", that is, to have an unstable relationship, either in the choice of contracting parties, or in determining the content of the contract. A person must not encourage another to act differently or create a legitimate expectation different from the usual.
b. *The principle of proportionality.* According to this principle, the compensation of the innocent party for the breach of contract by the guilty party must be in accordance with the seriousness and consequences of the breach. We can see this principle applied in determining the terms of the contract for the size of the amount of compensation. Thus, the criminal conditions do not apply, since they are not related to the real losses of the innocent party.
c. *The principle of bona fide*, according to which parties who act in bad faith cannot claim to be protected by applying the principle of good faith.
d. *The principle according to which no one can profit from his own misdeeds*. Of course, this principle in civil law has its exceptions, such as the examples of the acquisition of ownership by prescription without title, or the acquisition of objects by occupation, but in consumer law these exceptions do not apply and this principle is applied in any case, unless the law expressly provides otherwise.

e. *The principle of unjust enrichment*. According to this principle, no party, even when it is not at fault, is allowed to dishonestly enrich themselves at the expense of the other party. Thus, it is not reasonable and permissible for the innocent party to use the breach of contract committed by the other party so that the innocent party is dishonestly enriched. Also, on the basis of this principle, the provision of criminal terms in the contract is prohibited, as well as the occurrence of the other party in a difficult financial situation cannot be used by the other party as an opportunity for unjust enrichment.
f. *The principle of the least possible damage*, according to which when a loss must be distributed between two or more innocent parties, it is reasonable that the loss should be borne by the party that possesses the most economic opportunity to do so. Because of their role, trading parties are better able to bear losses than consumers.
g. *The principle of non-exploitation of the other party*. This principle means that the stronger party is not allowed to exploit the weakness of the other party in concluding the contract, but the parties to the agreement with the same position and economic strength are not allowed to exploit the weakness of the other party. The first part of this principle constitutes a positive aspect of intervention by allowing the application of a general principle of ignorance and justifies consumer protection policies. The second part of the principle is equally important, because it does not allow the intervention of the state in commercial contracts.
h. *The principle of a fair agreement for consumers*. According to this principle, consumers should be offered protection against the practices of "sharp advertisements", which constitute those that are too complicated or exciting that prevent the consumer from having a clear opinion about whether or not to enter into a contract. Also, according to this principle, conditions that may lead to misinterpretation or those related to the presentation of false, untrue elements or that limit the rights of the consumer are prohibited. Furthermore, the consumer's misunderstanding in the conclusion of the contract must be fairly compensated.
i. *The principle of information of advantages by the party that enjoys these advantages*. The party that has special advantageous information must inform the other party, but the parties that have the same advantageous information do not have the obligation to notify each other. The positive aspect of the advantage information principle is protective, but its negative aspect does not provide assistance to representatives who are judged to have to find such information themselves.
j. *The principle of responsibility for the fault committed*. The party that is at fault should not be given the opportunity to avoid its responsibility for its fault. This principle includes both exclusionary clauses dealing with negligence and indemnification clauses intended to leave liability for negligence to chance.

k. *The principle of pater familias care*. According to this principle, parties who enter into an agreement for which they have shown due care can renounce it, if justice requires so. The cases when the party has the right to renounce the contract concluded pursuant to this principle is when it is the weak party to the contract or has shown itself to be naive. Also, the theory of consumer protection in cases of ordinary mistakes or the difficult situation of the party, suggests the termination of the effects of the contract[1]

Another aspect of the autonomy of contractual freedom is that *the parties are free to enter into other contracts that are not expressly provided for in the Civil Code, as well as to freely determine their content*. Regarding this aspect of contractual freedom, our Civil Code is not expressed in a taxing manner, however, by making a systematic interpretation of its provisions, we can conclude that this Code recognizes this aspect of contractual freedom. Thus, according to this Code, the parties have the right to conclude other contracts that are not foreseen and not regulated thereof, it is sufficient that through them they realize their legitimate interests and their content is not in conflict with its mandatory provisions or special laws.

The right of the parties to conclude contracts that are not expressly regulated in the Civil Code has been accepted in unison by various authors of the law of obligations in Albania. Thus, some of the most well-known authors of this right state that the parties can conclude other contracts that do not belong to the types regulated in the Civil Code, so-called atypical contracts, it is enough that these contracts aim to regulate the interests of the parties that are protected by the subjective law. According to these authors, in such cases it may be difficult to define precisely the rules that will be applied to atypical contracts concluded by the parties, but such a thing can be solved by means of the extended interpretation of the civil law or by analogy, bearing in mind the legal provisions governing contracts and legal actions in general[1]

Regarding such aspect of contractual autonomy, it seems that the position held by the doctrine of civil law has been the same. Thus, according to another well-known author of the law of obligations in the communist period, in each Civil Code different types of contracts are provided which are encountered more often in practice, but the law may not provide for all types of contracts that may arise in practice. In this case, according to this author, the question arises whether the parties can conclude contracts that are not provided for in the Civil Code and do these contracts have legal power? According to him, the answer to this question is that the parties could conclude contracts that were not expressly provided for by the law, and such a thing was provided for in the second paragraph of Article 33 of Law no. 2359, dated 15.11.1956 "*On legal actions and obligations*[2]

[1] See also: Nuni, A; Mustafaj, I; Vokshi, A; "*The law of obligations Part I",* Tirana 2008, page 49.
[2] See also: Article 33 of Law no. 2359, dated 15.11.1956 *"On legal actions and obligations".*

This author, in relation to this aspect of contractual autonomy, further reasoned that the parties are free to enter into other contracts that are not provided for in the law, as long as these contracts are not contrary to a mandatory provision of the law, with the rules of socialist coexistence and not intend to harm the state or third parties. As a typical example that was not regulated by the law of theat time, the above author gives the life annuity contract, which, although it was not provided for by the law, could be concluded by the parties, this fact was also accepted by the judicial practice of the time.

The author in question includes this aspect of contractual autonomy in the so-called mixed contracts. As such are those contracts which contain the elements of two or more contracts provided by law. As an example of such a contract, the case of the exchange of land by the owner with the entrepreneur, against the construction of a certain work by the entrepreneur, which is usually a residential building or a building for the exercise of commercial activity, is provided above.[1]

If we look at this aspect of contractual autonomy in a comparative perspective, we find that it is recognized by the legislation and legal doctrine of most of the contemporary states. Thus, the Civil Code of Kosovo expressly provides that the parties may conclude other contracts that are not provided for by law, as well as freely determine their content[2]

The Italian Civil Code more fully contemplates this aspect of contractual freedom. According to this Code, the parties can also enter into contracts that do not belong to the types that are regulated in a special way in the Civil Code, provided that they aim to realize the legal interests that are protected by the Italian legal order. For the conclusion of contracts other than those expressly regulated by civil law, the Italian Civil Code requires that two conditions be met at the same time; a) the parties to the conclusion of these contracts must aim to realize their legitimate interests and b) the realization of the legitimate interests of the parties deserves to be protected by the legal system[3]

Even the doctrine of contract law in Italy pays special attention to this aspect of contractual autonomy, according to which the parties are free to enter into contracts that are not expressly regulated by civil law, known as non-typical or non-named contracts. These contracts do not correspond to the types of contracts provided by the Civil Code or by special laws, but are created and practiced in the business world.

[1] See also: Sallabanda, A; *"The Law of Obligations, General Part",* pages 55-56, publication of the Faculty of Law of the University of Tirana, Tirana 1962, pages 55-56.

[2] Paragraph 2 of Article 2 of Book 2 of the Civil Code of the Republic of Kosovo provides:
"2. Within the limits mentioned in paragraph 1, the parties may enter into contracts other than those previously provided by law and determine their content".

[3] The second paragraph of Article 1322 of the Civil Code of the Republic of Italy provides:
"Parties can also conclude contracts that belong to types that do not have a special discipline, provided that they intend to realize interests that can be protected according to the legal order."

It is worth emphasizing the fact that a significant part of typical contracts in contemporary civil legislations have their origin from non-typical contracts. They were born and spread in the business world before the law predicted and regulated them. As examples of such contracts, we can mention some of the bank contracts, such as the opening of the bank loan, or the bank advance contract, which today are regulated by civil law, but which previously existed as non-typical contracts created by practice of banks in the field of banking activity.

As the Italian Civil Code defines, non-typical contracts are valid if they aim to realize interests that deserve to be protected by the legal system or legal order. This condition of validity for non-typical contracts constitutes the cause of the contract, which is one of the essential conditions of its existence. Non-typical contracts are subject to the legal norms that regulate contracts in general, while the rest are regulated by the conditions that the parties themselves have provided in the contract[1]

Despite the fact that the courts have in some cases been able to protect the weaker party by applying strict rules of interpretation or by refusing to include as part of the contract exclusion clauses in favor of the business, the general picture is the impossibility of common law to solve such issue. Instead it is left to Parliament to step in and fix the problems these standard contracts present. Such a thing was done by the English Parliament with the approval of the law of 1977: "*Law on the unfair terms of the contract*".

Pursuant to such law, consumers have been given a great protection against standard contracts drawn up by businesses. The amended "Consumer Protection" Act of 2008, which originates from the European Union Directive of the same name, provides the consumers with wider protection against unfair contract terms. The law has finally provided for the existence of certain rules for consumer protection in standard contracts[2]

The second issue to be discussed is that the *form and content* of contemporary contracts have become more and more complex. Today's contracts usually include a large number of conditions, which seek to foresee a variety of events that may have an impact on the performance of the contracts.

Some of these conditions are provided to avoid rights that the law would otherwise recognize, such as in the case of the exclusion clause and the terms of the contract in its entirety. Other conditions are the results of the perceived stiffness of the common law. Common law has usually been reluctant to cancel a contract on the claim of its unfair terms, and to solve such problem, the parties include in their contracts a set of complex conditions, such as the party's sudden and unforeseen economic hardship, force majeure, which make it possible to adjourn the implementation of the contract

[1] See also: Galgano, F; *"Private Law",* translated by Alban Brati, Tirana 2006, page 268-269.
[2] See also: Law no. 9902, dated 07.04.2008 *"On consumer protection",* amended.

or to suspend or terminate it, without forcing the party that has not implemented the contract, in these cases to compensate the damage caused.

Conclusions

From the above paper we can draw some crucial conclusions. One of them is the fact that the principle of the autonomy of the will constitutes the basis for the establishment and implementation of contracts in contemporary legal systems. This principle implies not only the right of the parties to freely determine the content of the contract, but also any of their rights related to the execution and termination of the contract. Nevertheless, this principle is not unlimited. In its implementation, the parties must not violate the rights of third parties nor the interests of society in its entirety, and this limitation of the application of the principle of contractual freedom is known as the "*public order clause*".

In dealing with the content of the principle of autonomy of will, two are the principal theories recognized by contract law; a) individualism theory and b) consumer welfare theory. The individualism theory supports the idea that the parties are free to determine the content of the contract in each of its elements, they can conclude any type of contract, as long as they do not violate the public order clause. This theory requires that the state should interfere as little as possible in the autonomy of the will of the parties, since according to it, no one can protect their interests better than the parties.

The theory of consumer welfare recognizes that the will of the parties in concluding contracts is not unlimited and the content of a contract must be in accordance with the principles of justice and honesty. The above theory requires the state to regulate in the most detailed way possible, the autonomy of the will of the parties, as well as to issue special norms in favor of consumer protection.

Nowadays legislations of democratic states, including Albania in the regulation of the principle of contractual autonomy, endeavor to find a balance as fair as possible between these two theories, in order to ensure a faster circulation of goods and services on the one hand, and protect consumer rights, on the other hand. From the above treatment, it follows that the individualism theory is more applicable in the cases of commercial contracts, while the consumer protection theory is applied in the cases of consumer contracts.

If we look at the civil legislation in Albania, it is found that recently more priority is being given to the theory of consumer protection, this fact is also expressed with the approval in 2008 of the law "*On consumer protection*", which has been continuously amended in order to adapt it to the European Union Directive in this field. Likewise, we find the application of this theory in the provisions of the Civil Code, which contains as part of contractual freedom the conclusion, execution and interpretation of the contract based on the principles of bona fide and impartiality. We find such a fact more expressed, especially in the standard contract, where the law determines

that the conditions set by the parties have priority over the general rules set in advance by the party that drafted them.

Regardless of the limitations that have been imposed today on the principle of contractual autonomy, we can affirm again that it finds wide application and constitutes the basic principle on which the conclusion, execution and termination of contracts are based. It constitutes a universally accepted principle of private international law, the roots of which can be found in Roman law applied more than 20 centuries ago and which continues to be applied even nowadays in democratic states.

The civil legislation in Albania fully guarantees this important principle of contract law, taking in this direction the best models from the legislations of the most developed countries. What is worth emphasizing at the end of these conclusions is the fact that the principle of the autonomy of the contractual will does not only mean rights for the parties, but also responsibilities for them, not only not to unfairly infringe the interests of the other party, but not to infringe the interests of third parties or the interests of the public in its entirety.

References

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[3] Civil Code of the Republic of Kosovo;
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