

CONSIDERATIONS ON THE IMPACT OF LEGAL INSTITUTIONS RENEWAL IN STRATEGIC MANAGEMENT

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Abstract: For a developing country whose legal system belongs to the civil-law's family, reaching the desideratum to increase the attractiveness of the investment climate through low transaction costs, a better enforcement of contracts, protection of property rights would be possible through an institutional legal transplant along with a renovation of other existing legal institutions. The paper aims a radiography of the most important legal institutions (some specific to the Napoleonic law but reformed and others transplanted from Anglo-Saxon common law) evident in the New Civil Code in Romania, trying to highlight a potential impact (negative / positive) in strategic management of private economic organizations.

Keywords: legal system, economic performance, business strategy, The New Civil Code

1. INTRODUCTION

The research in this area empirically validates the fact that the origin of a country's legal system, from a historical perspective that is grafted on both archetypal systems of *civil law* and *common law*, plays a significant role in generating performance for the economic agents, the latter being specific a better defend of the interests of investors, less involvement in the economy of the state as public property and specific regulations, along with a more independent judiciary system in terms of political interference even less formalized.

For a developing country whose legal system belongs to the civil-law's family, reaching the desideratum to increase the attractiveness of the investment climate through low transaction costs, a better enforcement of contracts, protection of property rights - as factors concerned in substantiating business strategy of private law organizations - would be possible through an institutional legal transplant along with a renovation of other existing legal institutions.

In this context, our paper aims a radiography of the most important legal institutions (some specific to the Napoleonic law but reformed and others transplanted from Anglo-Saxon common law) evident in the New Civil Code in Romania, trying to highlight a potential impact (negative / positive) in strategic management of private economic organizations.

2. THEORETICAL CONTRIBUTIONS AND FACTUAL EVIDENCE

Concerns of the specialty literature assign a great importance to the impact of the historical origin to a country's legal system in generating economic growth towards enhancing the attractiveness of the investment climate through low transaction costs, better enforcement

of contracts, protection of property rights as factors concerned in substantiating the business strategy of private organizations.

Researches in this field identify a historical path of the Anglo-Saxon legal system (common law) and one that finds its principles in the Napoleonic code (civil law), depending on which preponderance is articulated the mainly specifics of each country's legal system [4]. Of course that each legislation is not important only by the extent to which they were assimilated as characteristic elements of the systems listed, carrying the finest touch of culture, religion and extremely different economic conditions.

However, scientific approaches that empirically validate the fact that common law system, in comparison with the French one, is specific to a better defend of the interests of investors, less involvement in the economy as public property and specific regulations, along with a more independent judiciary system in terms of political interference and less formalized. [2]

Other authors consider that such differences may be explained from a historical perspective, the specific way of thinking in a lawful manner, incorporating the distinctive legal institutions, ideology, elements that form the internal structure of each system [9]. Most of the differences are based on the fact that civil proceedings in common law are rather adversarial and that those in civil law are rather inquisitorial [5]. In common law, litigation is led by parties' lawyers while judges remain neutral referees who only ensure that the parties follow the rules of procedure and evidence [1]. In civil law, judges take a more active, inquisitorial role and parties often have to answer judicial questions, on the basis that judges have a direct interest in revealing the truth in private disputes. [3]

Judge-made law in common law countries is justified by reliance on precedent, social norms, or rationality. Judicial rulings in civil law countries are based more on the meaning of the code, with case law and rationality playing secondary roles. [1]

From a historical perspective, if the common law was conceived to serve the best interests of traders and aristocracy in terms of property rights and contract, seeking to mitigate the interference with the sovereign powers [6], the civil-law sought to eliminate the jurisprudence as source law in order to limit the possibility for judges to create law, giving this way the regulatory power to written coding only, as the outcome of the legislative forum.

Given the above mentioned, the question whether a national legal system that stems from the Napoleonic code, will bear some of its defects, or if they can be dimmed by means of the legislative reform, by the importation of legal institutions specific to the Anglo-Saxon jurisprudence? Such important institutions should be able to achieve better enforcement of contracts, would have as result a decrease in transaction costs, and jurisprudence would ensure predictability solutions delivered by the courts, due to cases brought to court? An answer to this question is offered by Milhaupt and Pistor, who consider that successful transplantation of legal institutions from one country to another is the way that they are compatible with pre-existing legal infrastructure, with the remaining laws in force, but also with other national political, economical social institutions. [7]

In our opinion, pre-conditions that would ensure the success of a legal transplant, must be combined with a comprehensive reform of national legal institutions, to develop a coherent legal framework, more flexible and adapted to evolution and the specific of the socio-economic relations, achieving a major goal related to the possibility of promptly imposing compulsory contracts, as an attribute of low transaction costs. In these circumstances, the national legal system as an exogenous variable will shape future directions to follow in designing competitive strategies of private organizations.

Entry into force of the New Civil Code in Romania (in which we find legal institutions belonging to common law, some of them being transplanted from civil law as well), marks from this perspective a turning point, resulting in extensive and lively debates on its mission to strengthen the binding force of contracts (even through the intervention of the courts). It should be noted that there are already critical appreciations, which consider it an imperfect instrument poorly adapted to recent developments in the economic, social, cultural field that will create an environment favourable for arbitrariness, abuse of law and contradictory jurisprudence solutions.

If so things will stay or not, it is still hard to guess just based on the *stricto sensu* content of the legal norms proclaimed, that is of recent application (October 1, 2011), given that the data are not sufficient and representative to support the allegations for or against, on the positive or negative impact of the new legal institutions within the performance of economic participants. Then the New Code compatibility with other laws in force, its provisions correlation with the new Code of Civil Procedure will represent new experiences, subjected to the final test of articulating on the structure of low transaction costs, with direct consequences in imagining appropriate strategies at company level.

3. THE NEW CIVIL CODE - THE SYMBIOSIS AMONG THE TRANSPLANTED LEGAL INSTITUTIONS AND THOSE TRADITIONAL. THE IMPACT ON STRATEGIC MANAGEMENT

Even from the beginning, we must point out that the New civil code follows a long tradition of application (147 years) of a civil code inspired by the French civil code in 1806, wanting to make the transition to a

monistic system, in which civil and commercial law branches are combined and have as unique source of law the new law text.

In our view, this attempt is perfectible, the new Civil Code being far from the requirements of monistic theory given that these are limited to a general regulation of the legal person, remaining outside the Code, having special commercial regulations, we mention here the regulations for trade companies, insurance companies, credit institutions, national companies, state owned companies, cooperatives, groups of commercial interest. This partial failure in full realization of the monistic theory of private law theory, is no exception, but is on the line drawn by the Italian Civil Code and Swiss Civil Code (or even the Canadian province of Quebec Civil Code) which, even in this respect, were the sources of documentation to elaborate the New Civil Code project. Unfortunately, the editors of this project were limited to inspire from the mentioned sources without criticism and without notice and shortcomings of these sources.

Provisions of the New Civil Code clarify to a great extent regulation of real guarantees by fixing all legal provisions in a single legislative act, reducing incidental legal texts and simplify the process of cause solving, which requires correlation and interpretation of clauses of the agreement concluded between the parties. New in mortgage regulation as a form of real warranty, is the fact that it may have both real estate but also movable estate, being evident on this occasion the strong mark over the new legal provisions, generated by the development of social realities, as if for a large period of time real estate have been regarded as only goods of considerable value, able to provide a solid guarantee of assumed obligations, economic growth has significantly changed the relationship between categories of goods, facilitating the emergence of movable estate with competing value / superior to real estate.

We note also the new elements introduced by the New Civil Code regarding the agency contract, creation of common law system, which, without the constraints of civil law system, has built a legal mechanism characterized by greater conceptual flexibility responding to the requirements of commercial activities. Reformulating this legal text is a consequence of the abandonment of dualist system of private law in favour of monistic system.

An interesting approach is found in connection with the matter of obligations performance, regarding the delay of the debtor. Thus, the New Civil Code extends the situations where the debtor is actually in delay as saying that the burden of proof in this case is always creditor's job in order to protect in this way the other party from any abuse of the creditor. However, in this regard, it must be underlined the solution chosen by the legislator for the purposes of granting the debtor an additional time to ensure the fulfilment of voluntarily assumed obligations, to the detriment of immediate recourse to foreclosure proceedings.

This new regulation is highly positive, mostly regarding economic activity, especially in commercial matters, where, although it is recognized the principle of celerity of legal relations, there must also be considered the very negative consequences resulting from starting

the enforcement proceedings, respectively additional costs to be supported by the creditor in a significant period of time, any damage to the debtor's financial situation which, in turn, as an economic agent may depend on their suppliers, as well as interruption of economic relations, especially given the current market conditions in Romania.

A unique provision recognized in the new normative refer to the moratorium damages for monetary obligations. According to the New Civil Code, if a payment is not paid until expiry date, the creditor is entitled to moratorium damages, since this time and until actual payment, in the amount provided by the parties, or, in missing, in the one provided by law, without having to prove the existence of any injury.

By this legal text is repeated the principle according to which the existence of the damage in case of non execution, respectively delayed execution of the obligation concerning an amount of money, is presumed, resulting from the lack of use of the respective capital that the creditor is deprived of. By corroborating the legal provisions in force, the interest owed by the debtor in case of the non-execution of a monetary obligation is due from the date of default, which usually is after the expiry date. This change has an obvious advantage, providing an incentive for the debtor in order to realize payments, in consideration of the fact that the delay implies a substantial loss of its assets, but that also comes and meets business operations, increasing the celerity of their development and increasing the productivity at the macroeconomic level.

The New Civil Code brings substantial changes in the nullity matter establishing the retroactive principle of nullity for the successive execution contracts. [8] In this respect, it is provided that at the abolition of the contract, the parties will be required to repay, in kind or equivalent the benefits received, even if they were executed sequentially or were ongoing.

In the old Civil Code regime, successive execution contracts were a classic example of an exception to the principle of restoring the previous situation (*restitutio in integrum*) and, implicitly, the retroactive principle of nullity effects. The main argument which was the basis for establishing this exception was the objective impossibility of restoring the previous situation, which determines that the effects of nullity occur only for the future (*ex nunc*). For example, if a tenancy contract terminated for cause of nullity, the use of good was considered definitely executed and couldn't be returned to the tenant, and the latter was not obliged to return the rent received as would be produced an unfair enrichment of to the tenant.

Currently, the one forced to refund, even if it was of good faith, owes an allowance for the use of the property if that use was the main object of the benefit or if the property was, by its nature, subjected to rapid depreciation. However, the debtor in good faith will not return the benefits of the good to restore or the use of the good other than the two mentioned above, namely in situations where the use of the good was not the main object of the benefit or the good was not by its nature subject to rapid depreciation. The debtor of the refund obligation that was in bad faith will return, but in all

cases the benefits acquired or that he could have acquired as well as the use of the good. Thus, in the above example, of the tenancy contract declared null or cancelled, the tenant shall pay a compensation for the use of the good, even if he was in good faith (as the main use is considered benefit), while the tenant will be bound to repay rent received.

We emphasize that the solution promoted in the New Civil Code is expected to cause some problems, particularly regarding the practical manner in which the return of benefits will be done in those cases where it cannot be held in kind.

The existence of several possible solutions that courts may choose in terms of establishing the amount to be refunded is likely to lead to insecurity among the justice seekers, because until the settlement of a uniform practice, the effects of invalidity of a contract with successive execution and the extension of the obligation to refund cannot be anticipated. Moreover, the practice and doctrine of legal systems that recognize the retroactive effect of nullity with no distinction between contract types, and that the editors of the New Civil Code have used as inspiration source in this matter, are also not uniform, having multiple interpretations and theories on legal grounds underlying the restitution of benefits, as well as practical ways of making it.

Another novelty brought by the New Civil Code is to regulate the assignment contract, institution absolutely necessary in today's economic environment, an aspect noted, especially by the most famous Romanian civil law specialists who supported *de lege ferenda* that our future civil legislation would have to retain also the transmission of debt. Thus, it is allowed the assignment of rights and obligations held by one party (assignor) to a third party from the time of contract elaboration (assignee), the third party becoming part of the contract and having a contractual relationship with the original contractor (assigned contractor).

The basic conditions of contract assignment are that benefits have not yet been fully executed and the assigned contractor to gave consent to the assignment of the contract. Therefore, assignment of the contract may only intervene if the contract is ongoing or if the case of a *uno actu* execution contract that was not fully executed (for example, in the case of a sale and purchase contract with the price paid in instalments).

The assignment of the contract takes effect only for the future, the assigned contractor opposing to the assignee with all exceptions under the contract, less the ones the result from personal rights arising from the original contract for the assigned against the assignor (e.g. right of action for annulment for fraud, error or violence), which cannot be exercised automatically against the assignee, but only if the assigned contractor provides for himself such a possibility by the contract of assignment. The main effect of the assignment of the contract is the assignor release, providing as a rule the release of the assignor of its obligations towards the assignee from the moment when the substitution takes effect towards it.

Our attention is held by the New code regulation of a unique principle until now, the unpredictability principle that applies to all contracts affected by the contingencies

that will produce effects other than those initially set by the parties.

The lack of unpredictable regulation in the old Civil Code, made this institution not to be approved by the courts. Ignoring it, in practice, was opposed to the potential that theorists recognized, when they qualified it as the only solution able to regulate some unfair situations.

Regulating the New Civil Code is the result of a radical change of legislator's vision. Former traditionalist perspective is replaced by law regulation, which allows the court to intervene to protect the interests of contracting party affected by market developments. As a result of this intervention, the court shall decide either the contract adjustment (so that benefits are equitably distributed between the parties) or its termination.

We note however that court intervention in an area previously reserved only to parties (the one to modify or terminate a contract) is limited only to those assumptions in which the situation of the respective debtor is seriously affected by extraordinary circumstances which could not be previewed on contract conclusion, and that the debtor has not assumed. The limitations set out are designed to naturally prevent the use of unpredictability as a tool to reach parties who want to get rid of a contract that became undesirable as compared with other business opportunities.

Thus, the legislator's concern is transposed, to prevent an abusive call of the parties to the unpredictability institution, to get rid of the burden of uncomfortable contracts.

However, the New Civil Code requires the affected party to negotiate with the other party, to adapt the contract, prior recourse to the court, a condition designed to establish the role of judge, in what concerns the replacement of the consent of the parties, as a last resort, if negotiations fail.

We plead that the limitations described are natural, underlying the need to maintain the mechanisms for amendments and termination of the contract as being, as a rule, the attribute of the agreement of will of the parties. The legislator also sought not to allow a party to break or modify the contract balance unless economic changes have occurred on a certain scale, which could not reasonably be anticipated, and have some drastic effects on the debtor.

The court practice will crystallize critical issues for the applicability of the unpredictability (and therefore the notion of exceptional circumstances, meant to affect the contract equilibrium) or, where appropriate, for the inapplicability of the unpredictability.

Finally, the establishment of the unpredictability will set on the judge's shoulders the not so easy task to reshape a contract, but avoiding the situation where this goes to produce other effects than those originally intended by the parties.

Beyond these future developments of practice, at this point is welcomed the regulation of unpredictability by the New Civil Code, an essential remedy to correct the inequitable situation arising during the execution of a contract.

4. CONCLUSIONS

Our study reveal the fact that the new legislative codification is a flexible regulation, well suited to the socio-economic developments, both by renovating some traditional legal institutions, and by importing some specific to common law.

Such transplanted institutions give an active role to jurisprudence and therefore to the court (even if there are some limitations), helping to reduce transaction costs, a better protection of property rights, strengthening the constraint of binding force of contracts.

Although these regulations are perfectible, they will represent, in our opinion, a considerable advantage to increase Romanian business environment, as a determiner to conceive future investment strategies for private economic organizations.

Given that the present coding is new, we do not have sufficient representative data to fully support our allegations, the empirical validation of these will be an objective of future research.

5. ACKNOWLEDGEMENTS

This work was supported by the project "Post-Doctoral Studies in Economics: training program for elite researchers – SPODE" co-funded from the European Social Fund through the Development of Human Resources Operational Programme 2007-2013, contract no. POSDRU/89/1.5/S/61755.

6. REFERENCES

- [1] Arruñada, B. & Andonova, V. (2008). Common Law and Civil Law as ProMarket Adaptations, *Washington University Journal of Law & Policy*, Vol. 26 (June 30, 2008), ISSN: 1533-4686 ed: v.263 fasc. pp. 81-130
- [2] Djankov, S., La Porta, R., Lopez-de-Silanes, F. & Shleifer, A. (2003). Courts, *Quarterly Journal of Economics*, Vol. 118, No. 2, 2003, pp. 453-517, Online ISSN 1531-4650, Print ISSN 0033-5533
- [3] Hadfield, G.K. (2006). *The Quality of Law in Civil Code and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law*, pp. 11 Available from <http://works.bepress.com/ghadfield/6/> Accessed: 2012-06-10
- [4] La Porta, R., Lopez-de-Silanes, F. & Shleifer, A. (2008). The Economic Consequences of Legal Origins, *Journal of Economic Literature*, Vol. 46, No. 2, 2008, pp. 285-332, Available from: <http://www.aeaweb.org/articles.php?doi=10.1257/jel.46.2.285> Accessed: 2012-05-03
- [5] Lengeling, D. (2008). *Common law and civil law – differences, reciprocal influences and points of intersection*, Toronto / Siegen, Available from: http://www.consulegis.com/fileadmin/downloads/thomas_marx_08/DLengeling_paper.pdf Accessed: 2012-07-03
- [6] Mahoney, P. (2001). The common law and economic growth: Hayek might be right, *Journal of Legal Studies*, Vol. 30, No. 2, June 2001, pp. 504-525, ISSN: 00472530, E-ISSN 15375366
- [7] Milhaupt, C. & Pistor, K. (2008). *Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World*, University of Chicago Press, ISBN-13: 978-0226525273, Chicago
- [8] Raducan, G. (2011). *Nullity and its Boundaries*, LUMEN International Scientific Conference: Section Law, Iasi 2011, ISBN 978-973-166-257-2
- [9] Zweigert, K. & Kotz, H. (1998). *Introduction to Comparative Law*, Clarendon Press, ISBN 0-19-826589-9, Oxford