CLAUSES DEEMED UNWRITTEN. INTERNATIONAL LANDMARKS

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ABSTRACT:
ALTHOUGH THE NEW ROMANIAN CIVIL CODE PROVIDES THE CLAUSES CONSIDERED UNWRITTEN IN MOST OF THE MATTERS CONTAINED THEREIN, IT DOES NOT DEFINE THEM IN ITS CONTENT. THIS STUDY AIMS TO PRESENT, IN A COMPARATIVE MANNER, THE CLAUSES CONSIDERED UNWRITTEN AS PROVIDED BY THE LAWS OF CERTAIN STATES, ESPECIALLY THOSE THAT HAVE INFLUENCED THE DRAFTING OF THE ROMANIAN CIVIL CODE. ALTHOUGH THE CLAUSES CONSIDERED UNWRITTEN HAVE A LONG HISTORY, TODAY STILL EXIST DOCTRINAL DEBATES ON THE NATURE OF THEIR LEGAL REGIME AND THREE SOLUTIONS ARE PROPOSED: THE THEORY OF NON-EXISTENT ACTS, SANCTION OF NULLITY OR AUTONOMOUS SANCTION.

KEY WORDS: CLAUSES DEEMED UNWRITTEN; NULLITY; NON-EXISTENT ACTS; IMPOSSIBLE CONDITION, CONTRARY TO LAW OR GOOD MORALS; ROMANIAN CIVIL CODE

INTRODUCTION

On October 1st, 2011, the New Romanian Civil Code[2] came into force in which the legal concept of the clauses deemed unwritten is foreseen. The lack of a legal definition has given rise to a strong doctrinal debate on the nature of their legal regime, the clauses deemed unwritten being related to the theory of non-existent acts[3], or to the partial nullity sanction[4] or

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[2] Law no. 287/2009 privind Codul civil, republished in "Monitorul Oficial al României", part I, no. 505 of July 15, 2011, as amended and supplemented.

[3] Regarding the theory of non-existent acts, see: Dimitrie Alexandresco, *Principiile dreptului civil*, (Bucureşti: Atelierele grafice SOCEC & Co., Societate anonimă, 1926), 74-75, 80-84; Doru Cosma, *Teoria generaăl a actului juridic civil*, (București: Editura Științifică, 1969), 300-302; Liviu Pop, *Tratat de drept civil. Obligațiile, vol. II, Contractul*, (București: Universul Juridic, 2009), 438-439.

[4] Regarding the nullity, see: Ion Dogaru, Sevastian Cercel, *Drept civil Partea generală*, (București, C.H. Beck, 2007), 147; Gabriel Boroi, *Drept civil Partea generală Persoanele ediția a III-a, revizuită și adăugită*, (București: Hamangiu, 2008), 172-203; Gabriel Boroi, Carla Alexandra Anghelescu, *Curs de drept civil. Partea generală*, ediția a2-a, (București: Hamangiu, 2012), 249; Cristina Zamșa, „Comment (at art. 1204-1288)", in *Noul Cod civil. Comentariu pe articole. Art. 1-2664*, Flavius Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.) (București: C.H.Beck, 2012): 1315; Marian Nicolae, "*Nulitatea parţială şi clauzele considerate nescrise în lumina Noului Cod civil. Aspecte de drept material şi drept tranzitoriu"*, *Dreptul* 11 (2012): 11-39.

considered as an autonomous sanction[5]. „*Regardless of the perspective from which it is analyzed, the consideration of the clause as unwritten is obviously a limit to the autonomy of will of the subjects of law in their capacity as contracting parties. This is mainly due to the fact that the unwritten clause effect is lawful, so the consideration of the clause as unwritten is lawful, which makes the will of the contracting parties unimportant*"[6]. The drafting of this article is based on the premise that, in order to be able to correctly establish the nature of the legal regime of the terms considered unwritten, we must also investigate the legal systems of other states, especially those that have exerted a great influence on the current Romanian Civil Code and " *according to a well-known practice of the Romanian legislator, this institution was borrowed from the laws of other states, possibly from French or Quebec legislation, and has been transposed into national law without a regulation that is sufficiently consistent to make it possible to understand and its application in practice*"[7]. I have chosen to outline how the clauses deemed unwritten are governed by the Quebec Civil Code and the French Civil Code updated due to the fact that these two codes exerted a strong influence on the Romanian Civil Code. I also analyzed the regulation of the systems of other European states, but also of the American system.

The **QUEBEC CIVIL CODE** came into force in 1994, approximately 50 years after the beginning of its drafting. Until then, the Civil Code of Bas-Canada was applied in Quebec, the first codification of the province, made in 1866 and based on the French Civil Code.

The Romanian Civil Code follows the same structure of systematization of the fundamental institutions of civil law as the Civil Code of Quebec: natural[8]and legal person, family, successions, property, obligations[9], including special contracts, privileges and mortgages, extinctive prescription, publicity of rights and, also, rules of private international law. Among the notions and institutions retained by the Romanian Civil Code, I mention: the principle of the superior interest of the child and the notion of parental authority, rules on succession, the adhesion contract, the institution of administering the assets of another.

Regarding the clauses deemed unwritten, the Civil Code of Quebec provides them in the following articles: 757, 758, 778, 1101, 1216 and 1438. An analysis of these articles reveals their applicability in several matters: legal documents affected by an impossible or immoral condition, succession, commercial or property. Thus, the condition that is impossible or contrary to good morals that affects a legal act between living or dead causes is considered unwritten. Also, the condition limiting the surviving spouse's rights in the event of a new marriage or civil partnership is considered unwritten. The criminal clause aimed at removing the right of an heir or a private legatee to challenge the will or part of it or the criminal clause in which there is a disinheritance for the same purpose is considered unwritten. The clause which has the effect of restricting the rights and obligations of the executor in such a manner that he can not perform the act of inheritance or the inventory is

[5] See: Carmen Tamara Ungureanu, "*Clauzele contractuale considerate de Noul Cod civil ca nescrise reprezintă o sancţiune autonomă?", Dreptul* 10 (2013): 48-61; Stela Stoicescu, "*Clauzele nescrise în sistemul Codului civil", Revista română de drept privat* 2 (2015): 193-217.

[6] Anca Costina Gheorghe, "*Consideraţii asupra clauzei reputate nescrise", Revista de Ştiinţe Juridice 2* (2014): 118.

[7] Anca Costina Gheorghe, "*Consideraţii asupra clauzei reputate nescrise"...,* 116.

[8] Regarding the ability of the natural person, see: Sevastian Cercel, Ștefan Scurtu, "*Full Legal Capacity Acquired before the Age of Majority", Revista de Ştiinţe Politice* 46 (2015): 297-304.

[9] Regarding the submission of obligations, see: Sevastian Cercel, Ștefan Scurtu, *"Cesiunea de creanță în Noul Cod Civil", Revista de Ştiinţe Juridice* 1 (2014): 64-79.

considered unwritten. In commercial matters, the Code provides that any stipulation in the constitutive act amending the number of votes required by the law to make any decision is considered unwritten. Any clause that tends to remove the right of a person whose property is inalienable to challenge the validity of the ineligibility clause or to apply for a transfer of ownership permission is considered unwritten. Also, any criminal clause that has the same effect is also unwritten.

It is interesting to know the provisions of art. 1438 of the Civil Code of Quebec according to which the void clause does not lead to the abolition of the entire act unless it was crucial to its conclusion. The same happens with clauses that have no effect or are considered unwritten. "*This last article reveals the terminological difficulties which in the articulation of sanctions, that the clauses are " sans effet" (without effect),"nulles" (null) or "réputée non écrites" (struck out). However, the Quebec doctrine does not seem to see in these terminological variations hesitation about thei basis, moreover it considers the difference terms used as synonyms*"[10].

THE FRENCH CIVIL CODE UP TO DATE

Upon entry into force in 1804, the French Civil Code provided the sanction of clauses deemed unwritten only in the field of donations and the testamentary, in art. 900. From that point on until today, the code has been modified, updated to regulate social relations in a more folded way. Currently, the French Civil Code provides the sanction of clauses deemed unwritten in the following matters: successions, contracts, companies, property and guarantees.

In the field of property, the Code provides in art. 1831-5 that any stipulation contrary to the fact that the judicial transaction or the liquidation of the assets does not automatically lead to termination of the contract is considered unwritten. Also, art. 1873-6, which is part of Title IX bis, Chapter I "Agreements on the exercise of individual rights in the absence of the usufructuary", states that all the clauses which extend the powers of the administrator to what the article provides are considered unwritten

In commercial matters, art. 1844-1 states that a clause granting one shareholder the entire profit of the company or he is exempt from participating in losses is considered unwritten. Also, art. 1844-10 provides that any clause that violates a legal provision governed by Title IX and is not punished with nullity shall be deemed unwritten. Article 1843-5 provides that any clause in the articles of association of a company which has the effect of subordinating the exercise of company rights to a prior notice or prior authorization of the general meeting or the waiver of the exercise of such rights shall be deemed not to be written.

In the matter of the lease, art.1792-5 states that that any clause excluding or limiting the liability, guarantees or solidarity provided by certain previous articles is considered unwritten.

In 2006, the French Civil Code was amended by Ordinance no. 346 of 23.03.2006 which provided for the sanction of the clauses deemed unwritten in the matter of personal and real guarantees. Also, art. 2372-3, art. 2488-3, art. 2372-5, art. 2488-5 and art. 2422 provide for this civil sanction.

In the context of legislative inflation, Ordinance no. 131 of February 10, 2016 reformed the subject matter of contracts and obligations. One of the objectives of this reform was the introduction of the case law in the Code. This reform regulated the direct negotiation of the contract, the conclusion of the contract, the non-execution of the contract and the sanctions,

[10] Bénédicte Fauvarque-Cosson and Denis Mazeaud, *European Contract Law Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, (Munich: Sellier European Law Publishers, 2008): 385.

as well as the exceptions. Regarding the sanction of clauses considered unwritten, art. 1170 provides that all clauses that deprive of its substance the essential obligation are considered unwritten and then art. 1171 states that in an adhesion contract any clause that generates a significant imbalance between the rights and obligations of the contracting parties is reputed as unwritten. Article 1184 par. 2 specifies that if a clause is considered unwritten, the contract is maintained. The criminal clause is governed by art. 1231-5, which ultimately states that any contrary stipulation is considered unwritten. According to art. 1245-14, the clause that removes or reduces the warranty obligation for defective products, unless the parties are professional, is deemed unwritten. In the matter of payment, art. 1343-5 regulates the conditions under which payment may be postponed or suspended by court for a specified period, stating that any contrary provision is considered unwritten.

In addition to the French Civil Code, the sanction of clauses deemed unwritten is also provided in other normative acts, such as: Insurance code[11], Commercial Code[12], Consumer Code[13], Labor code[14], Environmental Code[15], Public Health Code[16] sau Social Security Code[17].

The **GERMAN CIVIL CODE**, applicable since January 1st, 1900 continues to produce legal effects today. Article 138 par. 1 provides that the legal act contrary to public order is null. The German Civil Code like the Cuza Civil Code assigns the same legal regime both to conventions and to testaments affected by a condition contrary to good morals, namely their nullity. Article 2171 par. 1 of the Code provides that a will affected by a condition impossible or contrary to law is ineffective, therefore produces no effect.

It is also interesting to know the provisions of the German Civil Code in respect of abusive clauses as they have been regulated since 1977 and which recognizes two terminologies of their legal consequences.

The Code defines standard business clauses as contract terms that are drawn up for more than two contracts and that a party to the contract (the user) imposes on the other party without being directly negotiated with the latter when the contract is concluded. It is further specified that such clauses form parts of the contract are valid only if they are presented and accepted by the other contracting party. Article 305c par. 1 of the Code provides that these standard business clauses, if they are unusual and the part of the contract that did not propose them could not expect to meet them in the contract, do not also form part of the contract. Therefore, a first category of consequences of abusive clauses is not to be considered as part of the content of the contract.

The second category results from the insertion in the contract of a clause contrary to good faith and which creates a major imbalance for the party that did not propose it or by inserting a forbidden clause with or without the possibility of evaluation as defined by art. 308 and 309 of the Code. All these clauses are declared ineffective.

It can be noticed that, irrespective of the terminology used, the result is virtually the same, namely that the clause will not produce any legal effect and the legal document will be maintained. It has been argued that the different terminology has been retained because in the case of the first category, the clause is not part of the contract unless all the circumstances

[11] See art. L121-16, L126-2, L127-2-2, L211-6, L351-7, R322-53 II, R322-55-4 II.
[12] See art. L 132-8, L 134-16, L 141-2, L 142-45, L 221-7 al. 3, L 221-12, L 221-13, L 221-16, L 222-9, L 223-14 and others.
[13] See art. L524-1, L623-32, L312-38, L343-3, L331-3, L 621-2, L621-8, L241-5, L241-1.
[14] See art. L2231-9, L2232-27, L2232-22.
[15] See art. L412-13, 541-33.
[16] See art. 1113-9.
[17] See art. R922-26, R931-3-15, R931-3-19, R931-3-21, R931-1-23, R931-3-39, R931-3-44.

that led to the conclusion of the document are taken into account, the clause may be valid in another contract, whereas the ineffective clauses can not be validly part of any contract. Moreover, ineffective clauses can be challenged in court collectively by consumer associations or other organizations, unlike the other clauses that can only be the subject of an individual action[18].

The **SWISS CIVIL CODE** entered into force on January 1, 1912, provides for the legal regime of wills affected by conditions or encumbrances in art. 482. This article distinguishes between the legal status of unlawful or contrary to good morals conditions or encumbrances and onerous conditions or encumbrances for others or meaningless. As regards the first category, the Swiss Civil Code declares the wills affected by such conditions or encumbrances void. Concerning the second category, it is provided the solution of considering the condition or encumbrance as unwritten.

The Swiss Federal Code of Obligations of 1911, unlike the Swiss Civil Code, which refers to the clauses deemed unwritten only in art. 482, provides them repeatedly. For example, in relation to the regulation of the bill of lading (art. 995, art. 999, art. 1002, art. 1006) and the check (art. 1104, art. 1106, art. 1109, art. 1110, art. 1115). It is important to note that art. 1123 and art. 1125 use the expression "clause réputée non avenue" ("deemed not done") - that may create confusion. The articles provide that the deletion of the designated bank name from a barred check, i.e. the deletion of the statement "only on the account of the beneficiary", shall be considered as not made. It is noted that the provisions refer to a material removal operation that leaves no effect, the check still being valid as it existed prior to deletion. Therefore, this operation does not have legal consequences.

The **AUSTRIAN CIVIL CODE**, applicable since 1811, provides in art. 696 the definition of the condition, namely that "*It is called a condition, an event to which a right is attached*"[19]. Further, art. 698 states that only the suspensive condition that is impossible or contrary to the law cancels the donation or the will, while the impossible or illicit resolving condition is considered unwritten regardless of whether it affects a donation or a will.

Like the Calimach Code applicable on the territory of Moldova[20] and Caragea Code applicable in Romanian Country[21], the Austrian Civil Code provides the nullity of the donation affected by an impossible or unlawful suspensive condition, but unlike them, the impossible or contrary to the law resolving condition inserted into a donation is considered unwritten. The same regime is governed by the Austrian Civil Code for the will affected by an impossible or unlawful condition, making a distinction between the suspensive and resolving condition. Both, the Calimach Code and the Caragea Code, regardeless of the impossible or immoral condition, considered it unwritten if included into a will. Also, the Romanian legislator provided in the Romanian Civil Code of 1865 for donations and wills affected by condition that is contary to law and good morals, the same legal regime, namely nullity, unlike the Austrian legislature which regulated differentiated as we have shown above.

[18] See Bénédicte Fauvarque-Cosson and Denis Mazeaud, *European Contract Law Materials…,* 387.

[19] Dimitrie Alexandresco, *Explicațiunea teoretică și practică a dreptului civil român, Tomul IV, Partea I*, (București: Atelierele grafice SOCEC & CO. societate anonimă, 1913), footnote no. 4: 173.

[20] It entered into force on October 1, 1817 1 and was abrogated by the Romanian Civil Code published in ”Monitorul Oficial” no. 271 of December 4, 1864.

[21] It entered into force in 1819 and was abrogated by the Romanian Civil Code published in ”Monitorul Oficial” no. 271 of December 4, 1864.

The **ITALIAN CIVIL CODE OF 1865** was applicable until 1942 when it was replaced by the current Civil Code of Italy. It provided in art. 849 that if the condition contained in a will is impossible, contrary to law or good morals, it will be deemed unwritten**.** Also, art. 1065 established that such a condition cancels the donation. It is noted that the Italian legislator opted for the solution provided by the French Civil Code. Similarly, the Calimach Code and Caragea Law distinguished between the impossible, illicit or immoral condition provided in a donation or testament, and were on the same line of settlement. Although the Italian Civil Code of 1865 was a source of inspiration for the Romanian Civil Code of 1865, the Romanian legislature preferred to abolish both donations and wills affected by an impossible condition, contrary to law or good morals.

Currently, Italian law no longer recognizes the sanction of clauses deemed unwritten[22].

The **BELGIAN CIVIL CODE** provides in art. 900 that in the legal documents between the living and within the testaments, the impossible conditions, contrary to law or good morals are considered unwritten. Although it was heavily influenced by the Napoleon Code, it did not keep the legal difference between donations and wills affected by an impossible, illicit or immoral condition. Similarly, in the matter of obligations, are provided clauses deeemed unwritten (articles 1153 and 1231).

The **ENGLISH LEGAL SYSTEM**, being a common-law system, its main feature is that it is not coded. This means that there is a written legislative encompassing legal rules only as an exception.

" *The Anglo-Saxon law system has a number of characteristics (compared to Roman-German law): it has a separate structure (common-law, equity and legislative law); the system of springs, the conceptualization procedures and the legal language are different; the division of law into public law and private law is not recognized; the creation of the right is not necessarily the fruit of specialized activity governed by principles of legislative technique; there are, generally, no codes based on the continental model*"[23].

"The Unfair Contract Terms Act" adopted in 1977 and entered into force on February 1, 1978, states that those clauses which are abusive or do not pass the „reasonableness test" as regulated by law do not produce any effect. On the other hand, the sanction of nullity is provided separately for clauses that meet other criteria. Since 1994, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts has been transposed. The first transposition legislation was "The Unfair Terms in Consumer Contracts Regulations" drafted in 1994 and entered into force on July 1st, 1995. It was replaced in 1999 by "Consumer Protection: the Unfair terms in Consumer Contracts Regulations" which entered into force on October 1st. Since 2015, "The Consumer Rights Act" applies and replace the 1999 act. In principle, all three legislative acts provided that an abusive clause in contracts concluded with consumers is not binding on them, so it does not produce legal effects in respect of them and the legal document will remain in place regarding the other clauses[24].

The **AMERICAN LAW SYSTEM,** like the English one, is also a common-law system that applies in the United States of America (with the exception of the state of Louisiana which adopted the legal system according to the French model).

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[22] See Bénédicte Fauvarque-Cosson and Denis Mazeaud, *European Contract Law Materials…,* 380.

[23] Nicolae Popa, *Teoria generală a dreptului*, (București: C.H.Beck, 2008): 59.

[24] See: *The Unfair Terms in Consumer Contracts Regulations 1994*, art. 5; *Consumer Protection : the Unfair terms in Consumer Contracts Regulations 1999*, art. 8, *The Consumer Rights Act 2015*, art. 62 and art. 67.

"The Second Restatement of the Law of Contracts" is a treaty of law that provides for the general principles of contrats in the common-law system. According to it, a part of an agreement which ”*has reason to believe that the other party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement*”[25]. Thus, it is regulated that certain clauses may be considered as not being part of the contract.

CONCLUSION

This brief overview leads us to the conclusion that the provision of the clauses deemed unwritten in the national laws of different states extends not only to European continent, but also to the American one. Romania is not the only state in which a unanimous solution has not been reached with regard to the nature of their legal regime, but knowing the regulations of other states and the foreign doctrinal opinions is a cornerstone for the formation of an reasoned opinion. If in Quebec, the terms considered unwritten are largely assimilated to nullity, France tends towards the solution of an autonomous sanction. So far, the Romanian doctrine has reached a consensus, that regardless of the nature of their legal regime, the clauses deemed unwritten do not produce any legal effect.

[25] See Bénédicte Fauvarque-Cosson și Denis Mazeaud, *European Contract Law Materials…,* 386

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