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The Modern Debate on Trust and the Doctrinal Novelty in Albania

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Abstract:

The historical development of the debate on trust in the twentieth century can be understood as a complex series of interactions between the two poles, leading to a gradual diversion to altruism. We recall here that the German "explosion" of trust in the doctrine of "transaction foundations" in 1920 paved the way for justice between the parties with the same negotiating power. This development cannot be understood as the defense of the weaker party or a general principle of substantive exchange of justice. The fundamental objective is that of justice and distribution in a situation of unreasonable loss of one party that brings a fortune unexpected for the other party.

In the American debate, this issue has been clearly identified by Kessler and Fine, whose essays on the "fault of the fulfillment of the obligation" can be seen as the minimum of supposedly individualistic doctrines, developing the following altruistic notions: "The classic ideas of contract freedom and contracting equality are being challenged and modified in response to honest trust and honesty requirements. ".

As above, at the conclusion of this debate, leaving the story aside and returning to the present, we can say with fullness that the same tension between the poles of individualism and altruism paves the way for modern debate over and how to extend trust in contractual obligations.

Key words: trust, doctrine, debate, Albanian practice, legislation.

THE WORLDWIDE DEBATE

1. Individualism vs. altruism

The most important issue with regard to trust obligations in contract law is the degree of responsibility carried forward by the other party.[1] From this we will derive the approach of different legal systems regarding trust and the degree of its acceptability. Following Kennedy's terminology, the two opposite poles within the spectrum of possible degree of obligations are called individualism and altruism.[2] The essence of individualism is the attitude that, since every individual is the best judge of his needs or preferences, the most desired social situation is where the personal freedom to pursue especially what is in the personal interest is the maximum and is limited only by the rules of necessary to ensure coexistence with other individual actors.[3] The consequences of individualism are private autonomy and self-reliance.

Under the regime of private autonomy, individuals are themselves the owners of their actions and are entitled to the enjoyment of benefits. Individual actors are also themselves responsible for carrying the burden of proof in case of failure or disaster without having the right to help, share responsibility or sacrifice to others. The ideal of individualism, deeply rooted in Western intellectual tradition, is also the main principle of private law thinking. Particularly contractual law, founded on the parties' equality of arms and control after contracting, has always been and is still described by individualistic motives.

[1] Auer, M., (2006) "*The Structure of Good Faith*", A Comparative Study of Good Faith Arguments, p. 49
[2] Kennedy, D., "*Form and Substance in Private Law Adjudication*", 89 Harvard Law Review (1976) p. 1713
[3] Ibid.

An individualist view of private law would be unrealistic and contrary to such motives as, responsibility for the other party, and limitations of personal freedom regarding the legitimacy of the other's damage. These ethical, spiritual, or distributive motives, gathered under the altruism, make up an obvious ideal contrary to individualism. The essence of altruism, which is as well established in philosophical thought as individualism, is the overriding obligation to others over self-interest.[4]

Trust obligations between foreigners in an equal relationship are found in the dividing line between individualism and altruism in contract law. These two poles of essential debate constitute a virtual magnetic field within which numerous countless variations of trust obligations are listed as metal dusts[5]. The history of trust and the general clause is pervaded by the moments of tension between these two ideals.

2. Theories in the U.S

The US Commercial Law Second Restatement Project (1981), American Courts and American Law in general, were influenced by the ideas of professors Robert Summer and Steven Burton, who were divided into two approaches: Exclusive Analysis and Access to "Opportunities provided ". Emily Houh describes the first as the approach of justice, and the second as the approach of economic analysis and confidence.[6] These two perspectives opened up debates over what Americans call the trust conceptualisation.

Professor Summer in a 1968 article, later revised in the early '80s, supported the theory called "Exclusive Analysis," in which in order to determine what constitutes good faith/trust we should start from the opposite, from the bad faith. For this

[4] Kennedy, D., *op.cit*. p. (1717-1719)
[5] Ibid.
[6] Houh, E., (2005) "*The doctrine of good faith in contract law: A (nearly) empty vessel?*", Utah Law Review, p.2

he emphasizes that *"trust is a concept without a general understanding and serves to exclude a range of heterogeneous forms of bad faith*" .[7] We must therefore see what is "excluded" from the concept of bad faith to reach the remainder constitutes trust.

Summer defines four categories of mistrust: "Conflict in Negotiation and Contract Formation", "Confidence in Performance," "Confusion in Raising and Resolving Contractual Disputes," "Confusion in Claim for Compensation." The first one was not included in Second Restatement. Second, the most important thing, according to him, includes these situations in bad faith: a) Avoiding the spirit of agreement; b) lack of zeal and rhythm reduction; c) voluntary return only to "core performance"; d) abuse of power over the determination of reconciliation; e) overlap or failure to cooperate in performing the other party. What is noticeable is that he saw trust as a principle rather than as a rule.

The second approach only deals with the second category of mistrust classified by Summer. It starts from the economic analysis of non-execution of the contractual obligation. Burton notes that the cost of misconduct is similar to that resulting from the mere execution of an explicit promise.[8] According to him, the approach of anticipated opportunities presupposes that, during the process of contract formation, the parties provide for the possibility of entering into an agreement others. Misconduct is described as exercising the contractor's discretion to "recapture" these opportunities provided during the contract's formation because the parties must have known that the contract precludes the subsequent recapture of these opportunities. According to him, the anticipated access approach presupposes that, during the process of contract formation, the parties provide for the possibility of entering into other agreements. Misconduct is described as exercising the

[7] Ibid., p.5
[8] Ibid., p.8

contractor's discretion to "recapture" these opportunities provided for in the contract's formation because the parties should have known that the contract precludes the subsequent recapture of these opportunities.

Seeing in a comparative manner Burton's theory has been criticized as unorthodox, while Summer's theory has been criticized as too broad, without borders. Even Burton himself points out that one of the advantages of his theory is that it allows the courts a less amorphous and more factual investigation into the assessment of the non-performance of the trust obligation. Both approaches are used alternately by US courts. In some cases they are used together. As Emily Houh notes, the courts have used them as additional arguments during the analysis of the case. This implies that courts can make the decision without relying on trust doctrine, while trust has played no decisive role in cases dealt with in practice. Such a thing leads Houh to the conclusion that the doctrine of trust is a (almost) empty container.

3. Albanian law

In Albanian domestic law, the doctrine of trust is not developed as in other countries. The conclusion above is derived from this section, where we will refer to the trust in the three cornerstones of its "source": legislative, doctrinal and jurisprudential. Article 166 of the Civil Code sanctions: "*A person who, on the basis of a legal action for the transfer of ownership has obtained towards a good faith reward a movable good, becomes the owner of this good even if the alienator was not available to him".* However, the winner, even in good faith, does not become the owner of the good when it is stolen. The winner becomes the owner of coins and securities in the leasing company, even if these have been stolen or lost to the owner or public legal person.

The above provisions do not apply to movables that are listed in public records. Property is acquitted of the other's

rights over the item if these rights are not derived from the title and the trust of the winner. Although the aforementioned article does not enter into the field of contract law (but is seen as a way of acquiring ownership, the case in question relates to the application of the out-of-trust contract) as stated, constitutes the classic case of trust in its subjective meaning.

While Articles 674, 675 and 682 of the Civil Code sanction trust in contract law, more specifically Article 674 states: "*The parties during the negotiation of the contract drafting should behave in good faith to each other. The party who knew or ought to know the cause of the invalidity of the contract and did not disclose it to the other party is liable to reimburse the damage suffered by the latter because he believed without fault in the validity of the contract".*

Whereas Article 675 sanctions: "*In the event that a contracting party has professional knowledge and the other party gives rise to that trust, the first is obliged to give it in good faith, information and guidance."* The framework becomes even more complete by Article 682, which among others is emphasized that the contract must be interpreted in good faith by the parties.

For the above, we conclude that: Although incomplete, the legislative framework is treated both in the objective and in the subjective sense, and even its functions are emphasized (eg, the interpretive function article 682). It applies both to the pre and post-contract stage. As far as domestic doctrine is concerned, it should be emphasized that trust is a very little tackled subject.

Regarding jurisprudence, the number of decisions dealing with trust is relatively small, among the most important we stress: Unifying Decision no. 932, dated 22.06.2000, the United Colleges of the Supreme Court use the term "economic and moral factors" to limit contractual freedom, terms which imply trust. In some other decisions, the Supreme

Court has explicitly mentioned trust as a principle[9] and as a contractual obligation[10]. The importance of this decision lies in that, it serves as a "base" where trust is elaborated as a doctrine on its own. A parallel can be removed with the Paragon Finance v Nash & Staunton decision at this point.[11] The United Colleges of the Supreme Court after arguing that the contract concluded between the plaintiff and the defendant for borrowing the sum of 12,500,000 drachmas is legal and valid, among other things stated: *However, both the district court of Saranda and the Civil College of the Supreme Court have made a mistake when they have accepted the validity of the loan agreement between the parties to be considered valid for the part that accepts such interest that is beyond any economic logic. Panels consider that any legitimate banking or commercial activity, however successful, can not create a high profit rate that will allow such high interests to be paid as foreseen in the contract concluded between the parties to the conflict. It is true that in 1996 the informal currency market in Albania marked extremely high interest rates and outside of any economic logic. But it must be acknowledged that this informal money market situation posed a fierce and enslaving competition even to small borrowers as plaintiffs who practically found it difficult to find loans at interest rates lower than the interests offered by the pyramid schemes, while lending from banks was completely smothered.*

It is true that the provisions governing the loan contract provide for the possibility of imposing a liability for the payment of interest under the agreement of the parties and that non-payment of interest constitutes an essential fulfillment of the obligation (Article 1051 of the Civil Code). On the other hand, Albanian Civil Code has not set a maximum

[9] Decision no. 270, dated 24.11.2011 of the Civil College of the Supreme Court
[10] Decision no. 231, dated 08.05.2012 of the Civil College of the Supreme Court
[11] *Paragon Finance v Nash & Staunton*, (2002), W. L. R

limit of allowed interest rates, as foresee legislation of other countries. It has accepted the principle of full freedom of contracting and competition according to market rules. This is the ubiquitous position for a free market of goods, money and capital, where rules are respected, but in a market deformed and conquered by the intervention of unlawful and even criminal criminals such as fraudulent pyramid schemes, there can be no question of freedom of contracting, but the opposite of it.

The maximum limit of allowed interest rates, in the relevant legislation, serves as a barrier to avoid entering into contracts with such conditions that lead to the loss or disproportionate damage to the interests of the contracting party. Since the provisions of the special part of the Civil Code of the Albanian Republic (which regulate the loan contract) do not foresee the maximum allowed interest rate, then it becomes more necessary to refer to the general provisions regarding the economic nature of the obligation and the fairness of the participants in it. According to Article 422 of the Civil Code, "*the creditor and the debtor must behave towards each other fairly, impartially and according to the requirements of reason*". The content of this provision and those that lay down the general conditions of contracts leads to the conclusion that freedom of contracting is also not absolute. It can, however, be "limited" by some economic and moral factors, such as those mentioned in the above provision, which must be taken into account by the court in resolving any concrete issues. Ignoring the above factors leads to a lack of proportionality, or, as the lawmaker puts it, in the disproportionate damage to the interests of the contracting party, which implies that the will of this party was not entirely free.

According to Article 686/2 of the Civil Code, "*General conditions which result in a disproportionate loss or damage to the interests of a contracting party, in particular where they differ materially from the principles of equality and impartiality*

expressed in the provisions of this code that regulate contractual relations". In the present case, the interest-rate loan agreement is in itself a legitimate and valid legal action. The general condition of invalidity, pursuant to Article 686/2 of the Civil Code, is the interest rate that exceeds the limit allowed by the economic logic, reason and morality, as analyzed above. In such cases the courts must take into account the recognized rule that the invalid parts do not necessarily invalidate all legal action. According to Article 111 of the Civil Code, *"When the cause of invalidity concerns only part of the legal action, this remains valid in other parts of it except when, according to the content of legal action, these parts represent an inseparable relationship with the part invalid legal actio*n".

Finally, the United Colleges conclude that, in the sense of Article 686/2 of the Civil Code, the loan contract dated 14.10.1996 should be considered invalid in the portion of the interest rate to be repaid at the end of the year as, was also accepted above, a lawful activity can not generate income for which such high interest rates are paid. Faced with this fact, the United Colleges consider that the legal transaction, the loan contract of 14 October 1996 concluded between the plaintiff and the defendant, should be considered valid with the exception of the part dealing with the interests, remaining the debtor plaintiff to the defendant for the value of the loan received in the amount of 12,500,000 drachma and of an annual interest, to the highest interest rate given by the banks of Albania at the time of the conclusion of the contract.

For the above, we come to the conclusion that the United Colleges of the Supreme Court, in the case cited above, have recognized, acknowledged and sanctioned, albeit underestimated, trust as a doctrine when they emphasize that although Albanian Civil Code has not set a maximum limit of interest on as provided by the legislation of other countries, by accepting the principle of full freedom of contracting. Freedom of contracting is not absolute, it can, however, be "limited" by

some economic and moral factors, which should also consider the court in resolving any concrete issues. Ignoring the above factors leads to a lack of proportionality, or, as the lawmaker puts it, in the disproportionate damage to the interests of the contracting party, which implies that the will of this party was not entirely free. Interestingly remains the decision on determining the interest rate, where an annual interest rate is set, to the highest interest rate provided by the banks of Albania at the time of signing the contract (the same "logic" applies to the judgment of the Appeal Court of England, Paragon Finance v Nash & Staunton).

CONCLUSIONS

Trends of modern debate on trust and doctrinal innovations, have focused primarily on such issues as the way of approaching different systems of trust. This is an answer to be asked to what these systems have embraced, individualistic or altruistic theory.

These two poles of essential debate constitute a virtual magnetic field within which numerous countless variations of trust obligations are clustered as metal dust.

It then points out that American courts and American law in general have been influenced by the ideas of professors Robert Summer and Steven Burton, who are divided into two approaches: the exclusion analysis and the approach of "anticipated opportunities" to what Americans call the conceptualisation.

The doctrine in Albania is not very developed in terms of trust, even there are a few discussions about it. This requires a development of judicial practice as well as discussions between lawyers and academics.

Despite the pros and cons arguments, it should be noted that there is no uniformity in jurisprudence and the debate if trust can be excluded from the contract remains open.

LITERATURE

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