ВОЗРАЖЕНИЯ ПО ДОГОВОРУ В АНГЛИЙСКОМ И ФРАНЦУЗСКОМ ЗАКОНОДАТЕЛЬСТВЕ

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В статье содержится сравнительно-правовой анализ понятия «возражение по договору» в рамках английской и французской правовых систем с учетом правоприменительной практики и конкретных прецедентов. В результате исследования автор приходит к выводу о том, что, несмотря на различные правовые подходы, существующие в общем и гражданском праве, целью возражений по договору является обеспечение защиты свободного волеизъявления контрагентов и сохранение обязательной и исковой силы самого договора.

As traditionally defined, a contract is formed when two wills meet, and a contract, when formed, becomes a law for the parties to the contract. In order to ensure the equity of the contract, the enlightened and sincere consent of all the parties is required. Therefore, defenses exist to protect the consent of the parties, to prevent one party from dominating the other in the undue manner. The comparison of French and English systems reveals slightly different conceptions of the consent and the limits which exist between convincing and coercing or abusing. Comparing the two systems is even more relevant since the last February's reform of the contracts law in France.

Three defenses exist in the Civil Code: mistake, willful misrepresentation and violence. The mistake, as defined in articles 1132 to 1136, must be material and about essential qualities of the goods or the service; it can be on minor details if one of the parties explicitly mentioned them as important. The mistake on the price is not a defense.[1] As in English law, a person should not be allowed to benefit from his ignorance. The mistake must be excusable. The articles 1137 to 1139 define the willful misrepresentation as a maneuver to get the other party's consent. Silence can lead to willful misrepresentation, the seller has the obligation of information toward the customer. It must be proven by the plaintiff.[2] A mistake resulting from willful misrepresentation always makes the contract voidable, even if the mistake is on the price or a minor detail. The last defense is the violence, presented in articles 1140 to 1143. It is really similar to duress, but makes the contract voidable only, even if there is physical violence. Violence is also a defense when it threatens the family of the party. The contract becomes voidable when the violence is illegitimate, decisive and comes from a natural person. For instance, the respect for the parents is not a form of violence. Economic violence is now recognized in the Civil Code – which led to ban prostitution in France in April. Finally, and contrary to English law, unconscionability is not a defense, but abusive clauses in adhesion contracts are void - « réputées non écrites » - and cannot be enforced, but do not make the entire contract void, as described in the article 1171. [4]

Historically in the 1804 the defenses were recognized under strict criteria, corresponding to the doctrine of these times, when a contract was considered to be formed by two equal parties, equally capable. Nevertheless the judges, since1804, tended to widen the application of these defenses, especially in order to protect non-professional parties against professionals, as in Baldus or Poussin cases, these two cases opposing particulars to art professionals who tried to undervalue works of art to purchase them at a low price.[8], [9]. This evolution

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can be seen as positive, but leads to the question of the juridical security: if a contract can be declared void if the judge finds it unfair to a party, there is no actual freedom to contract. Hence the question is to know how the two systems arbitrated between juridical security and protection of consent.

On the one hand, the use of defenses places fairness of the contract above the absolute juridical security (I); but on the other hand, this practice supports the contract.

Defenses appear as a threat to juridical security, as they theoretically allow the judge to break a contract if a party recalls his consent. There is no absolute freedom to contract, to get someone else's consent. In both English and French systems, defenses create some limits to the method which can be used to obtain one's consent. These limits are obvious for some, but for instance, the information obligation of a professional seller to the purchaser is a restriction of the seller's freedom to sell his goods. The defenses constitute legal artefacts allowing the judge to act as if the contract had never existed and this feature could lead to serious abuses if it were not executed properly. This desire to allow the parties to rescind a contract when they feel swindled comes from the idea that a party can take advantage of his (her) knowledge or strength, and that the legal system should bring back fairness to the contract.

Allowing the judge to break a contract thanks to the defenses is quite surprising from the legislators of France's 19th century. At this time, the lawmaker is often suspicious towards the judge and tends to give him as little power as possible. This is partially why the French judge can only rescind a contract, and not amend it in any way. The English judge has even less power, as a contract formed under mistake, fraud, mental duress, undue influence, or unconscionability is only voidable and not void.

The three types of French defenses are explicit about their objective: they aim at protecting the weakest party to a contract, the one who could not defend himself or was abused by maneuvers. This is also why some people lose their enjoyment capacity for some contracts, as doctors, lawyers or therapists. The recognition by the reform of the economic violence is a huge breakthrough, especially because it has led to the ban of prostitution, recognizing it as a form of rape with the use of economical violence to get the prostitute's consent. But this protection of the weakest population could actually prevent people from forming contract, as this last could be declared void by a judge in the event of disagreement upon the conclusion. The contract then loses its force and its first principle of being absolutely binding upon the parties.

This may appear as a problem in a society where lots of social interactions consist of contracts, from the simple purchase at a grocery store to a working contract or a technical distribution contract. If the parties could break a contract easily, it would lose its purpose. This is why defenses are taken into account under strict conditions and cannot lead to any form of punitive damages. But defenses are not an impediment to juridical security for another reason.

Defenses actually reinforce the contracts, as they guarantee the full consent of the parties, who will, on the face of things, fulfill their obligations bona fide – or we can at least hope for it. The parties to the contract can be sure, in a valid contract, that their views on the substance of the contract are the same, and their partner share their view to a certain extent. Defenses permit to remove massive uncertainties of the contract and ensure a better harmony between the parties. The parties can foresee where they are heading to, and cannot be forced, by force or by ruse, into contracting to something they do not want. The contract, due to the defenses, becomes thus a fair "little law" to the parties, and all the valid contracts become stronger and more easily enforceable, as a result of a free decision of the parties.

The English and French systems have different approaches to the subject, English law making the contract voidable and thus authorizing a party to rescind it, and French law breaking the contract unless it is confirmed by a party. They also have different definitions of defenses, the French willful misrepresentation corresponds more or less to fraud and undue influence – noting that undue influence is in French law limited to the loss of capacity of enjoyment by some professions [7].

As a sum of all the above mentioned, we can bring this paper to a close by affirming that defenses in French and English laws, in spite of their differences in definitions and sanctions, pursue the exact same objective which is to protect all the parties of dishonest methods of convincing and strengthen the obligatory force of the contracts.

"DEFENSES TO CONTRACT IN ENGLISH AND FRENCH LAW"

In her article, the author focuses on similarities and distinctions existing as to the concept of "defense to contract" in French and English legal systems. The author considers specific cases and law application practices demonstrating key features of defenses to contracts in common and civil law. The author concludes that, irrespective of different judicial approaches to this concept in the UK and France, defenses to a contract are designed for the same purpose, i.e. to protect free will of parties entering into a contract, and to preserve the contract's binding nature.

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