# Nemo potest venire contra factum proprium. The coherence principle in European contract law

Codrin CODREA*

**Abstract**

*The coherence principle was elaborated by the legal scholar Dimitri Houtcieff in the field of contract law of the French legal system as an instrument for overcoming those contradictions regarding the contract or the contractual behavior which may be damaging for the other party or even for third parties. The coherence principle relies on the hypothesis that a contract, as the agreement of the parties, is a coherent system, and that whatever contradictions it may contain are irreducible oppositions within the system, deriving either from certain explicit provisions in the contract or from the behavior of the party, which can affect the dynamics of the contract in various ways. The article intends to elaborate on the notion of contractual contradiction as it was developed in the French doctrine, to analyze such contradictions in the French contract law and to verify, on the one hand, if there can be established any relation of equivalence between the legal notions employed in the French legal doctrine and the Romanian one, and, on the other hand, if the coherence principle may prove to be applicable in the Romanian contract law as an equally useful tool.*

**Keywords**: principle of coherence, contradiction, contract law, interpretation

## Introduction

Following a thorough analysis of a multitude of legal practices which start from the formation of contracts and their performance to the febrile litigation point where the decisions of the courts articulate judiciary practices, Dimitri Houtcieff, professor at Faculty of Law and Political Sciences of Aix-Merseille, managed to identify an overarching principle which has the effect of restoring the contract or the specific inconsistent, heterogeneous conduct of a party to its coherence, when applied to any prejudicial contradiction to either the other party or third parties (Houtcieff, 2001). The notion of contradiction which he elaborates consists in an irreducible opposition within a system and at this level of abstraction it can only have an invariable and objective nature, due to its logical and formal characters, regardless of whether it affects the contract itself or the conduct of the contracting parties. However, if the contradiction may be identified as an invariable formal deviation, the resulting

* Codrin CODREA is Assistant Lecturer PhD at the Faculty of Law, Alexandru Ioan Cuza University, Iasi, Romania, e-mail: codrin_codrea@yahoo.com.

incoherence may have various degrees, and as such, may also have different effects on the contractual dynamics.

The points Houtcieff analyses refer to somewhat disparate contractual aspects, such as the interpretation of contracts, the situation of conditional obligations, especially those under a *condition potestative*, the contractual provisions regarding the reduction, limitation or ease of the liability of the debtor, the formation of contracts through both negotiations and offer-acceptance mechanism, or the contractual remedies for breach of contract a party understands to make use of. For all these aspects where occurrences of contradictions within the contract or related to the contractual conduct of the parties can be identified, he proposes the application of the coherence principle as a means to overcome the damaging effects of incongruities and redress the contract (Pătulea *et al.*, 2008, p. 118).

Since the coherence principle elaborated by Houtcieff is a result of precise transversal interpretations of nuanced aspects of contract law, which finds its particular application within the French legal system, the question of whether such a principle could be acculturated somewhere else, if it would prove useful or even plausible within a different legal system bears a significant relevance. However, the Romanian legal system heavily relies on French civil institutions, since the former Romanian civil code of 1865 was inspired by the 1804 Napoleon Code and the transformations that the French civil code underwent were also considered in the elaboration of the current Romanian civil code in force since 2011. As such, the success of a legal transplant in the Romanian legal system of the French coherence principle can be anticipated, since it relies on the general resemblance of the legal contractual architecture in both legal systems. Nevertheless, the scope of the principle, as it was outlined on the basis of the French civil code and French judiciary practice, may be subjected to specific variations on specific marginal aspects of the contractual dynamics in Romanian civil law, which the article also intends to analyze.

## 1. Occurrences of the principle of coherence

It is relevant for the purpose of this article to briefly follow the dynamic of the principle of coherence, on both diachronic and synchronic levels, thus sketching the evolution of the principle as it was constituted under different sets of norms, different denominations and as an answer to specific issues. As such, the overview proceeds from the Latin apothegm itself, which encapsulates the essence of the principle of coherence and offers its most supple and concrete phrasing, *Nemo potest venire contra factum proprium*. From the Roman understanding, the norms and practices of the Middle Ages come into discussion with regard to the principle, with an accent on the autonomous body of norms known under the rather broad reference of *Lex Mercatoria*, norms which were

designed to govern particularly international commercial contracts, but gained a specific echo in the process of codification in European legal systems. From this point on, the analysis focuses on the gradual development of the principle of coherence in contemporary international commercial contracts, with an emphasis of the current set of norms of *Lex Mercatoria*. In order to capture a comprehensive perspective on the principle of coherence, the overview concludes with the sanctions provided in common law under the doctrines of promissory and equitable estoppel, legal solutions equivalent to those provided under the principle of coherence.

### 1.1. The coherence principle in international commercial contracts

The latin phrase *Nemo potest venire contra factum proprium* is part of the standard repertory of private European law, and it was firstly used in Roman law to refer to the prohibition of a party to act in such a way that contradicts a previous act of his own on which the other party relied, thus causing a detriment to the latter (Zimmermann, 2003, pp. 57-57). The phrase would later reflect in the coherence principle, which was not explicitly articulated as such, but only implied by the duty of good faith in trading practices under *Lex Mercatoria*, the Law Merchant emerging from the customs of traders and merchants of the Middle Ages (Gordley, 2000, p. 108). The medieval *Lex Mercatoria* constituted itself as an independent body of rules that was not an emanation of a specific political authority and that compiled a roughly coherent set of principles and rules based on the particular needs, interests and risks of medieval inter-city and cross-border trade (Wolaver, 1934). The medieval *Lex Mercatoria* disappeared during the 19th century, when the emergence of the nation state and the issues of state-sovereignty it entailed became dominant to the detriment of the idea of an independent transnational trading law. However, since it was tailor-made after the specific needs of merchants and thus bearing a significant relevance for economic agents, the principles and rules of *Lex Mercatoria* were incorporated in the most important legal systems of both major legal families: in the continental-European legal systems, in the commercial law codifications such as the French Code de Commerce or the German Handelsgesetzbuch, and in the common law as well, even though, as Blackstone noted, *Lex Mercatoria* differed from the general rules of the common law (Blackstone, 1809, p. 75).

Nevertheless, the new *Lex Mercatoria* managed to reorganize principles and rules of transnational trading law which are currently being used in international arbitrations by counselors and arbitrators, as well as contract drafters and academics at the international level (Berger, 2018). The TransLex-Principles is such a strain of the ongoing contemporary *Lex Mercatoria*, which started in 1992 and managed to compile a non-exhaustive and open list of more than 130 principles and rules of transnational trading law, such as *pacta sunt servanda*, duty to mitigate damages, duty to pay

interest, or compensation for expropriation (Commentary to Trans-Lex Principle). Among these general principles of international trading contract law, which can be traced back from the Roman law even to the contemporary legal systems of both continental European and common law legal families, there is also a reference to the Roman *Nemo potest venire contra factum proprium*, however, under a different denomination, which articulates the principle of coherence: Chapter I: General provisions, Section 1: Good faith and fair dealing I.1.2 - Prohibition of inconsistent behavior: (a) A party cannot set itself in contradiction to its previous conduct vis-à-vis another party if that latter party has acted in reasonable reliance on such conduct. (b) Violation of this Principle may result in the loss, suspension, or modification of rights otherwise available to the party violating this Principle or in the creation of rights otherwise not available to the aggrieved party.

The placing of the principle of coherence in the section regarding good faith in the TransLex-Principles is not a singular occurrence. Good faith is a well established principle in international commercial law, as it is explicitly stated in art. 7 (1) of the 1980 Vienna Convention for example, and it is usually correlated with the principle of fair dealing in trade. The fair conduct is to be evaluated abstractly, objectively, considering the behavior of a reasonable trader in a similar situation. The Uniform Commercial Code of United States of America, as well, regulates both the good faith and the fair dealing principle in art. 1-304, which states that every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement, and in art. 2-103, which states that good faith in the case of merchants means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. Also UNIDROIT Principles of International Commercial Contracts focus on the good faith, which it relates to the fair dealing in art. 1.7 of the first chapter, referring to the general provisions regarding international trading contract law. This imperative principle demands from each party to act according to good faith and fairness in trading and that the parties cannot exclude nor limit this obligation, thus the mandatory nature of the provision. The notion of good faith and fair dealing in international trade is to be applied considering especially the conditions of international trade and not according to regular standards adopted by different national legal systems, which can be considered only if it is proven that those standards are generally shared by different legal systems (Sitaru, 2008, pp. 517-518).

A remarkable aspect is that within or alongside the principle of good faith and fair dealing in international trade, the coherence principle was also introduced, even though the latter was not directly deduced from the first. The deduction was mediated by the notion of abuse of rights, which also derives from good faith as it is stated in the 2016 version of the UNIDROIT Principles, and which consists in a specific conduct of a party who exerts his contractual right in order to damage the other party, for any other purposes other than the ones for which the right was given or when the

exercise of the right is disproportionate to the result initially considered by the parties. The introduction of the coherence principle in the UNIDROIT Principles occurred only in the 2004 version, in art. 1.8, which sanctions the inconsistent behavior, stating that a party cannot act inconsistently with an understanding it has caused the other party to have and upon which the other party has reasonably acted in reliance to its detriment. As it is stated in the first comment on the provision 1.8, the coherence principle derives from the principle of good faith and fair dealing and imposes a responsibility on a party not to produce a detriment to another party by acting inconsistently with an understanding regarding their contractual relationship which it has caused the other party to have and upon which the latter has reasonably acted in reliance. The second comment states that there is a variety of ways one party may cause the other to have an understanding concerning their contract, regarding either its performance, or its enforcement. The understanding may result, for example, from a representation made by the party, from his conduct or silence, when the other party would reasonably expect an intervention in order to correct either a known error or a misunderstanding that was being relied upon. The comment also states that the understanding may refer to any area of the contract and it is not limited to any particular subject-matter as long as it relates in some way to the contractual relationship of the parties. It may relate to a matter of fact or of law, to a matter of intention, or to the way in which one or other party can or must act. The only limitation regarding the understanding is that it must be one on which the other party can and does reasonably rely on in those circumstances. The reasonable character of the reliance is a matter of fact related to those circumstances considering, in particular, the communications and the conduct of the parties, but also the nature and setting of the parties' dealings and the expectations they could reasonably have from each other.

### 1.2. The coherence principle in common law – promissory and equitable estoppel

Even if the common law does not recognize the principle of coherence as such, it employs specific institutions in order to sanction the fact that *Nemo potest venire contra factum proprium* through the estoppel doctrine through its both forms, promissory estoppel and equitable estoppel.

The promissory estoppel doctrine was firstly introduced through the 1947 Central London Property Trust Ltd v. High Trees House Ltd. The defendant concluded in 1937 a contract with the plaintiff for renting a block of flats for 2500 pounds. During the Second World War, 1939-1945, the apartments could not have been sublet, since a great part of the population of that area left. In 1940, due to this state of war, the plaintiffs agreed to a reduced rent of 1250 pounds, without specifying the period of time in which they would accept the diminished rent. At the end of the war, in 1945, the

apartments where sublet, but the defendant continued to pay the diminished rent. The plaintiff demanded that the defendant would pay the amount of rent agreed upon before the start of the war, from the moment the apartments could have been sublet, and the Court agreed, since the conditions that justified the diminished rent ceased to exist. However, Lord Denning stated that, although the plaintiffs won, if they would have requested the full rent also for the period during the war, their request would have been denied on the basis of promissory estoppel. This doctrine does not allow a plaintiff to insist in the realization of his legal rights, even if there was no consideration given in exchange to the promise, if the following conditions are fulfilled: the plaintiff assumed a promise not to insist in his legal rights and this promise was made with the intention to produce legal effects, the plaintiff knew that the defendant was relying on the promise and acted according to that promise (MacIntyre, 2007, pp. 121-123).

The equitable estoppel doctrine intends to protect the defendant who is held liable for the illegal situation resulting from the trust the defendant had relying on the affirmations or acts of the other party (Hyland, 2009, p. 462). In the judiciary practices there were established the conditions which allow the use of the equitable estoppel: the existence of representation over a state of affairs which both parties knew, but later proved to be false, the reliance of the defendant on that false representation, and the change in attitude of the plaintiff regarding that state of affairs. The legal doctrine refers to the 1862 case of Dillwyn v. Llewelyn as an application of the equitable estoppel. In this case, the father gives some land to one of his sons by making a deed in which he mentions that the gift was made so that his son can build a house, and the son, with the agreement of his father, builds a house. At the death of the father, the other son contests the transfer of land, showing that the deed was not legally valid since it did not meet all the required conditions. The Court rejected the claim and Lord Chancellor Westbury affirmed that, even though the equitable estoppel cannot save acts which are illegal under common law, if the father gave the land to his son to build a house and he did so with the agreement of his father, the son has a right to call on the donor to perform that contract and complete the imperfect donation which was made with the disregard of the law (Codrea, 2016, pp. 239-240).

## 2. Houtcieff's contractual contradictions in French and Romanian legal systems

Advancing the notion of contractual contradiction as a formal irreducible opposition within a contract, understood as a coherent system, in his 2001 *Le principe de coherence en matière contractuelle*, Dimitri Houtcieff notes that such contradictions may have a various depths (Houtcieff, 2001). Starting from the formal identification of the contradiction, deriving either from certain

provisions included by the parties in the contract or from acts, facts and conducts external to the contract but closely related to it, the judge has two possibilities: either resolve the contradiction by interpreting the contract as it firstly appeared, as a heterogeneous set of opposing provisions, in a coherent manner, or, if a coherent thread through the conflicting contractual dispositions cannot be identified, eliminate the conflicting provisions from the contract, which would then be completed with the common dispositions. The first possibility can be efficiently implemented through the rules of interpretation of the contract, similar in both French and Romanian legal systems, which rely on the primacy of the internal, real volition of the parties and on the systematic interpretation of the contractual provisions. A specific set of dispositions with this regard are provided in art. 1202 of the Romanian civil code. These dispositions refer to the particular situation of the contract concluded without negotiations and consisting in standard provisions which are unilaterally established by one of the parties (Oglindă, 2017, pp. 73-74). If the contract contains both standard clauses and negotiated ones, if there is a contradiction between the first and the latter, the negotiated ones prevail over the others, as it is stated in art. 1202 (3). Art. 1202 (4) states that if both parties use standard clauses without agreeing on them, the contract is considered concluded on the basis of negotiated clauses and of those standard clauses which have a common substance. Any divergent standard clause is excluded from the contract, and its disposition is replaced with the general rule provided in the civil code.

However, Houtcieff is primarily concerned with the latter possibility, related to those contractual clauses and also extra-contractual conducts of the parties which would corrode the very core of the contract by breaching *pacta sunt servanda*, the binding force of contracts. Such contradictions imply that a party, although seems to submit to the obligatory force of the legal act, manages to elude its binding effect through provisions stipulated in the contract or through certain acts, facts or conducts related to the contract but external to it. The analysis should, then, follow the distinction deriving from the proximity of the contradiction to the contract: contradictions arising from contractual provisions, and those deriving from extra-contractual acts, facts or conducts.

### 2.1. Contradictions arising from contractual provisions

The contradictions which arise from provisions in the contract and endanger the binding force of the contract itself usually translate an incoherence located at the level of the legal volition of a party. Such dissimulating provisions are those that encapsulate conditional obligations, like the ones assumed by the debtor under a potestative condition, which art. 1174 of Code Napoleon prohibited: The obligation is null when it was contracted under a potestative condition on the part of the debtor (*Toute obligation est nulle lorsqu'elle a été contractée sous une condition potestative de la part de*

*celui qui s'oblige*). Without referring explicitly to the potestative condition under which the obligation was assumed, the French civil code in force abandons the previous phrasing and broadens the scope of the prohibition to any clause that deprives the debtor of its essential obligation, stating in art. 1170 that such a clause is deemed unwritten (*Toute clause qui prive de sa substance l'obligation essentielle du débiteur est réputée non écrite*). The 1865 Romanian civil code included in art. 1010 a similar provision to the one in Code Napoleon, and so does the Romanian civil code in force in art. 1403. The reason for this prohibition, common to both legal systems, is that such obligations contradict the very idea of a commitment, which can only lead to the logical conclusion of the inexistence of the legal volition to conclude the contract. The irreducible opposition is to the very core of the contract, to its binding nature, since through those clauses the debtor reserves an arbitrary power to intervene in order to make the event presupposed by the condition to occur or to stop, depending on the nature of the condition – the event either triggers the very existence of the obligation or its dissolution. The coherence principle in these cases consists in the nullity of the clauses, a sanction which saves *pacta sunt servanda* by constraining the debtor to execute his obligation (Pătulea *et al.*, 2008, pp. 118-119).

A different application of the coherence principle can be found in the cases of contradictions deriving from those contractual provisions which limit either the obligations or the liability of the debtor. Through these provisions the debtor assumes a certain obligation while simultaneously preserving the right to arbitrarily evaluate the circumstances which would allow the performance of the obligation. The contradiction in these cases is between the binding principle of contracts and the unrestricted power of the debtor to prevent the performance of the obligation he assumed. The application of the coherence principle would annihilate the contradiction and save the contract through the discharge of the incoherent clause. A related example is that of the clauses through which, on the one hand, the debtor assumes an obligation that he admits can only be performed by him, while, on the other hand, reduces, limits or excludes his liability. In these cases, the fact that the debtor explicitly admits the performance is entirely depending on him, means that he also admits there is no external risk in the performance of the obligation, contradicting thus the clause which limits or excludes his liability. Through the use of the coherence principle the contradiction would be annihilated and the logical dynamic of the contract would be restored.

Art. 1170 of the French civil code in force, which refers to clauses that deprives the debtor of its essential obligation, contains the very essence of the coherence principle, connecting it to the essential contractual elements. The provision assumes that there is a critical point in a contract beyond which a contradiction through a reduction of the obligation or a limitation of liability attacks the very idea of the contract by emptying the content of the obligation itself. The Romanian civil code in force explicitly refers to the essential elements of the contract in art. 1182 (2), related to the formation of


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contracts through negotiations, but the essential elements referred to in the provision have a different meaning than the one implied in art. 1170 of the French civil code. Art. 1182 (2) states that it is sufficient that the parties agree on the essential elements of the contract, even if they leave some secondary elements either to be agreed upon at an ulterior time or to be determined by a third party. This provision introduces the theory of sufficient agreement for the conclusion of contracts through negotiations and the essential elements of the contract are those referring to the legal volition of the parties in the absence of which there can be no contract whatsoever (Vasilescu, 2017, pp. 320-321). The essential obligation referred to in art. 1170 of the French civil code and the essential elements referred to in art. 1182 (2) of the Romanian civil code are two distinct notions, which only apparently overlap on the semantic sphere of that which is essential, as something which is fundamentally required, a *sine qua non* quality. However, if the French provision is concerned with the preservation of the principle of *pacta sunt servanda* in an already concluded contract and relate to obligations alone which require that they are assumed with a minimal content, the Romanian provisions relate to the minimal contractual aspects required for a contract to be concluded through negotiations, such as the object of the contract, the object of the obligations or any other aspects on which the parties insist for the conclusion of the contract.

### 2.2. Contradictions arising from extra-contractual acts, facts and conducts

Houtcieff does not limit the scope of the application of the principle of coherence only to the contractual content and its explicit provisions alone, but is also concerned with specific acts of the parties, external to the contract, but intimately related to it. Such extra-contractual acts occur during formation of contracts through negotiations or through the offer-acceptance mechanism and breach the principle of coherence as long as they contradict the concluded contract.

In the negotiation phase, the partners may use different pre-contractual documents with various binding forces. Houtcieff refers especially to advertising documents employed by the debtor through which he describes the performance of his contractual obligation. The French legal practice considers that such a pre-contractual instrument, although it is not explicitly included in the final negotiated contract and although in itself it lacks any binding effect whatsoever, has to be recognized mandatory force if it contradicts the obligations explicitly assumed in the contract. The coherence principle used in these situations considers the advertising document and the negotiated contract as a coherent whole, composed of two distinct instruments which separately lack any coherence. The contradiction between those two instruments, fixed through the coherence principle since *prestatio non valet contra factum*, allows for the contracting party to demand an adequate compensation from the debtor. The

parties, however, can prevent the interference of a judge in the establishment of the contact of the negotiated contract by inserting in the final contract a merger clause, through which any pre-contractual instrument used by the parties during negotiations is excluded from the content of the final contract. Even in this case, if the parties did not explicitly state, the merger clause does not exclude the interpretative value of the pre-contractual instruments, which the judge can refer to whenever the interpretation of the real, internal will of the parties is required (Pop *et al.*, 2015, p. 90).

A similar situation related to the negotiation phase, where also pre-contractual instruments are used which later contradict the final contract, is the one in which the debtor, during negotiations, adopts a particularly persuasive act, which is known under an identical denomination in both French and Romanian legal system: *engagement d'honneur* (Malaurie *et al.*, 2009, pp. 231-323). These commitments are not sanctioned by the law and have no autonomous legal force, since they imply that the one who assumes it connects the efficiency of his promise to his own personal attributes, such as loyalty or honor, which may very well be translated into an obligation assumed under a condition whose fulfillment depends entirely on the debtor. However, if such a commitment was made in order to persuade the other party to conclude the contract, the first cannot oppose to the latter the non-binding nature of the commitment. The contradiction in this case relies on the fact that the pre-contractual instrument and the final contract were presented by one party and considered by the other as correlated entities, and the one who assumed the commitment, opposing to the other the non-binding effect, would fracture the correlation on which the other party relied. The coherence principle applied with respect to this particular contradiction allows the judge, whenever he appreciates it to be just, to prohibit the debtor of the commitment to use the non-binding effect in the detriment of the other party.

Contradictions may as well arise in the formation of contracts through the offer-acceptance mechanism. Both French and Romanian legal systems admit that if the offer to contract stipulates a term for acceptance, it is irrevocable. However, such an offer may be retracted if the withdrawal of the offer reaches the addressee at the latest simultaneously with the offer. If it reaches the addressee after he received the offer, the issuer of the offer is liable. The same is the situation of an offer made without an explicit term for acceptance, which is considered to be irrevocable a reasonable amount of time, depending on the circumstances necessary for receiving, analyzing and deciding on the offer, or when the addressee can prove that the offer without an explicit term of acceptance nevertheless implied a term deriving from the habits and practices of the parties (Veress, 2018, pp. 32-33). This possibility for the addressee to prove the existence of a reasonable or implied term in an offer issued without an explicit term for acceptance is provided in art. 1193 of the Romanian civil code, and relies on the principle of coherence. Whenever the term is explicitly stipulated in the offer or such a term

can be derived from circumstances, the addressee is recognized the right to ignore the revocation of the offer when the withdrawal of the offer reached him after the offer itself, and the right to send his acceptance to the bidder, concluding the contract. The contradictory conduct of the bidder who either includes in the offer a term for acceptance or knows that the acceptance of the offer requires a reasonable or implicit amount of time and then, within that amount of time, withdraws his offer, is sanctioned through the possibility of the addressee to either ignore the withdrawal and conclude the contract or to give it effects and demand damages.

An interesting application of the coherence principle occurs in the context of voidable ownership, which presupposes that the owner gains the property right through a voidable act. The property right of the owner is insecure either until the consummation of the prescription term of the action for the annulment of the act, or if the one who is entitled to demand the annulment of the act confirms it. However, such a confirmation may only occur considering the rights of third parties, as stated in art. 1265 (1) of the Romanian civil code. This phrase refers to the situation in which a party transfers the property right through a voidable act and later concludes a different act with a different party transferring the same property right (Adam, 2017, pp. 428-429). The party of the second act concludes it only in reliance to the fact that the transferor will legally demand the annulment of the first act, and this is the point where the contradiction occurs: instead of demanding the annulment of the voidable act on which the second party relied on, the transferor confirms the first act, securing the property right transferred through the first act. In this situation, art. 1265 (1) is an application of the coherence principle insofar as it considers ineffective the confirmation of the first act as a contradictory conduct with regard to the second party, who relied on him acting in a certain way.

A distinct application of the coherence principle can be located in the field of representation. In order to produce direct effects between the third party and the principal, the agent has to let the third party know both his quality of an agent and his powers to act on behalf of the principal. Whenever the agent does not comply with these obligations or acts beyond the quality and given powers, he is personally bound by the contract concluded with the third party. However, if the principal, through his conduct, determines the third party to reasonably believe that the agent has the power to act in the name and on behalf of the principal, the contract concluded by the agent with the third party will bound the principal, even though he was not a party of the contract. The coherence principle sanctions the contradiction between the conduct of the principal and the representation he led the third party to believe as valid, by binding the principal to an act to which he would not have been normally tied to.

Also the simulation implies a contradiction which is sanctioned through the principle of coherence, since the parties conclude two distinct contracts, an apparent, public one, and a real, secret one, which corresponds to the real intention of the parties and which contradicts partially or entirely

the legal appearance created through the public act. In every form of the simulation, the fictive act, the disguising act or the interposition of parties, the contradiction is between that which is publicly stated and that which is privately assumed. If one of the parties of the simulation refuses to perform the secret contract by opposing to the other party the public act, the coherence principle sanctions such a behavior by allowing the party to introduce an action against simulation, through which he can prove the inexistence of the public contract, the existence of the secret one and demand the performance of the latter. Also as a consequence of the coherence principle, the secret act cannot be held against the third parties who acted in good faith, those who did not know of the existence of the simulation, since there is a contradiction between using a simulation in order to hide a specific operation from third parties and demanding that the secret contract produce effects towards those same third parties from which the act was kept secret.

### 2.3. The principle of coherence applied to one's own conduct

Houtcieff argues that there can deduced an obligation for a party to be coherent to himself in those situations where a party relies on a certain quality to gain a benefit and then to rely on the opposing quality to gain another advantage, or to elude the consequences of his first conduct (Pătulea *et al.*, 2008, pp. 121-122).

These situations may roughly be assimilated to the Roman principle *Nemo auditur propriam turpitudinem allegans*, in those contracts annulled for immoral or illicit cause, where the restitution would place one party in the position of gaining from his own culpable conduct. The same is the situation where the parties stipulated a provision in the contract that would entail a conventional rescission, provision which the debtor would hold against the creditor who demands the enforcement of the contract. The admission of the demands of the debtor would offer a means to escape the enforceability of the contract in the detriment of the creditor, through the use of *pacta sunt servanda* and the efficiency of the rescission provision in the contract and, as such, it would contradict the fundamental idea that all the remedies for non-performance of the contract are and should be at the disposition of the creditor.

The coherence principle applied to a party's own conduct also implies that a party cannot simultaneously rely on excluding remedies, demanding both the rescission and the enforcement of the contract. Also, in the situations in which the non-performance of one party is caused by the other, the latter cannot use *exceptio non adimpleti contractus*, because otherwise it would imply that the creditor is relying on his own culpable conduct, *mora creditoris*, in order to not execute his own obligations.

## Conclusions

The principle of coherence in contract is a general principle recognized in the field of international commercial contracts, regulated as such in specific international documents, and also implicitly affirmed in the legal systems of both legal families, continental-European and common law. If the understanding of the coherence principle in international commercial contracts implies a broader definition, relating the principle to the idea of abuse of rights or to the good faith principle, especially in the French legal system the notion elaborated by Dimitri Houtcieff relies on an formal equivalence of an opposition against logic, which requires only an objective evaluation with regard to the contract, understood as a logically coherent system. From this abstract point of view, the contradiction can occur in relation to either internal contractual provisions or external acts, facts and conducts of the parties, but its evaluation does not require an analysis of the complex problematic of the subjective position and psychological attitudes of the parties. As such, the coherence principle saves especially the core of the contract, whenever the contradiction attacks the very essence of *pacta sunt servanda*. However, the coherence principle tends to restore the contract to its clarity whenever a contradiction occurs, even though it is not affecting the core of the contract. In this respect, the analysis of several contradictions and the solutions given after the application of the coherence principle in the French legal systems proved that the principle of coherence can be employed as well in the Romanian legal system. The legal doctrine already mentions such an implicit obligation of coherence in the contractual conduct of the party, along with the obligation of cooperation, information and good faith, and such an implicit obligation is deducted from the dispositions of art. 1272 (2) of the Romanian civil code, which states that the usual contractual clauses are implied even though they are not explicitly mentioned in the contract.

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