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Editor's Note. Autonomy of the Will and Regulation. By A. Noboa-Pagán.

The *principle of autonomy of the will* is one of the pillars of the Dominican Legal System. It recognizes the dignity of the individual and its free will, typical of constitutional regimes.

No matter how strict or authoritarian a government intervention may be through the economic regulation provided in the laws and regulations establishing the guidelines for the operation of DR markets, there is one last stronghold in the scope of such freedom that cannot go unrecognized.

Our interest is to reflect on this major aspect at a time when various bills and regulations on competition (Senate), consumer protection (Secretaryship of Industry and Commerce (SEIC)), tariffs and costs (INDOTEL) are under discussion or planning; while a regulation for the protection of bank customers have been put into effect by the financial authorities.

In the entrepreneurial world, the most important demonstration of the autonomy of the will resides in the *freedom of contract*. As well, the autonomy of the will as an exercise of *free enterprise* rests primarily within the scope of the entering into agreements.

The authority of entrepreneurs to self-regulate their trade relations find in the *act reserve*; that is, the power of congress to pass trade-related acts, a substantial limit in their acting.

The laws on the *promotion of competition*, combined with *environmental and consumer rights*,

and *tax obligations and other universal taxes* in the national legal system are the sole retaining walls for the enjoyment of economic freedoms in search of a collective distribution of social and economic advancement and welfare.

The legislative branch shall have to acknowledge that the entrepreneur needs, and the constitutional state must see to it, a minimum margin of contractual autonomy.

Consequently, freedom of contract is indisputably an individual's right. It's *binding effect*, the first corollary, except for any express legal provision imposing other criteria with regard to goals of *legality or public order*.

This is so because the autonomy of the will is not absolute not even in the consecrating Civil Code, given that it does call for a legal cause, respect to public order, limitations to the form and merits, for the validity of the agreements. These in addition to the restrictions imposed by the doctrine and jurisprudence, in the application of theories such as the *breach, improvidence, and abuse of rights*, explains Marcelo Carlos Quaglia, professor of Civil Law and Consumer Law at Universidad Austral, in Rosario, Argentina.

The aforementioned shows that no "contract crisis" exists as a result of the economic regulation. Freedom of contract has never been complete or unlimited. The evolution of private law admits multiple intrinsic *limitations* to the principle and its binding force.

On the other hand, Public Law has also substantiated the limits of such freedom of contract through *extrinsic limitations* to its consent.



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The French Constitutional Court has so established it when it states that the principle of contractual freedom is not always a constitutional principle, and in fact, it could only be invoked to the Constitutional Council whenever "it led to affect the constitutionally guaranteed rights and freedoms ...considering that *freedom of enterprise* is neither general nor absolute, it is exercised within the framework of the regulations established in the law; ... the difficulties established by the legislator with the intent to preserve the financial security of the salary earners, with respect to the creation, management, and control of savings funds, fail to liberate this freedom of excessive attacks susceptible of lessening its scope.¹"

The Dominican Constitution consecrates freedom of enterprise, trade, and industry, and the prohibition of monopolies, along with an express act reserve. This implies that freedom of business contracting geared toward the preservation of profitability and market share is constitutionally guaranteed in our country. Any extrinsic limitation shall necessarily result from a law passed by the National Congress. It shall also be consistent with the obligations undertaken in international treaties, in preservation of such trade freedom.

Public order is an extrinsic limitation of the autonomy of the will, as established in the Dominican Civil Code article 1133. The crux of the matter shall lie in verifying whenever the public order of the

agreements assumes a constitutional and legally relevant modality, whether to:

- a) Ensure the *public order of full consent*, with the intent, for instance, to guarantee the rights (instead of assistance or subsidies) to consumers; or,
- b) *guarantee the public order of coordination*, as the regulation to be adopted shall not restrict the contractual freedom of the entrepreneur to the extent of compromising other freedoms secured under the law, for instance, the reasonable return of his/her investment; or,
- c) Respect to the *public order of direction*, that is, the compatibility of the proposed measure, let's say an intervention in the prices of products with the strategic direction from the rest of the Government's public policies, called to attract investment sources that will ensure the sustained development of citizens.

It is not about a general and little profound principle, as stated by some authors about the autonomy of the will. It is about protecting the *commercial bona fide*, the *objective fairness*, and the *balance of interests*, the same rights sought by tax, consumer protection, and environmental law and antitrust. Any economic regulatory modality outside the intents of these legislative microsystems would bring with it an abuse of the administrative power in the event it resulted from a regulation and an improper interpretation of the constitutional regime, if prescribed by law.

¹ LLAVERIAS, María Elisa, MENA ALBA, Enmanuel, "Summary of the Award 97-388 rendered by the French Constitutional Board," PUCMM, Santiago, 2006.



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In short, the agreement is the center of the business life and the practical tool that performs the most diverse purposes of the economic life.² The regulatory intervention to the contractual freedom protecting the entrepreneurs in DR would only be constitutionally admissible if it came from a limitation expressed in the law to establish taxes and universal tax burdens, protect consumer rights (not just assistance), to establish environmental costs or the right of the free enterprise and competition of other right owners.

Any economic regulatory contrary or unrelated to these rules, shall wander within the context of illegality in the form of an unjustified *negative externality* in the market's operation. The laws and regulations under discussion and implementation shall take into account such principles and rules.

Financial. Monetary Council Resolutions of March 9 and March 23, 2006. By J. Velázquez-Morales.

Last April 17, the Monetary and Financial Administration published in the newspaper "El Caribe" the resolution issued by the Monetary Council on March 9 and 23. Following is a summary of the relevant aspects of the Seventh Resolution.

The **Seventh Resolution** modifies paragraph II of article 20 and article 21 of the Sanctions Regulation, which establishes that late information is any information received by the Competent Authority past 4:00 p.m. on the due date; henceforth it shall read: *"Late information shall be any*

information received by the Competent authority after the due time and date established by the Monetary Council for each type of information (...), in the event the deadline falls on a non-business day or holiday, the receipt due date shall extend to the following business day."

While article 21 shall read as follows: *"Information submitted with errors or inconsistencies affecting the quality of same shall be considered as nonreceived and shall be returned to the appropriate entity for corrections resulting in the application of the sanctions provided in article 20 (...). This rule shall also be enforced whenever the information is resent by the financial mediation entities at their own initiative."*

"Establish that financial mediation entities with daily requirement of submission of their interest rates must do so no later than 11:00 AM on the next business day following the date in question. (...) Likewise, such entities shall send to the Central Bank, by electronic transmission, through the online banking system or any other means (...), preliminary information pertaining to the Analytical Check Balance and the Annex of Local and Foreign Currency Loan Portfolio required for the legal reserves, on a daily basis, by 1:00 PM on the following day (...)"

The old provisions had misled some financial mediation entities with regard to the time limit for the submission of the Analytical Check Balance and the information on interest rates on a daily basis.

Consequently, financial mediation entities frequently do information resends at their own initiative after the deadline. These resends have not been typified as

² MESSINO, Francesco "Doctrina General del Contrato", Ed. Ejea, Bs. As., 1952, t.I., Pag. 34



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sanctionable infringement even if the quality of information remitted has been affected.

The **Seventh Resolution** modifies the Exchange Rate Regulation in Law No. 183-02, approved through the First Resolution dated February 5, 2004 by the Monetary Council.

The Committee appointed by the Governor of the Central Bank for the review of the regulation addressed the issues raised by the interested parties (ADOCAMBIO and ADEREDI), in addition to proposing content modifications, as well as the adoption of writing format similar to the regulations that have been approved by such Organization.

Content modifications include the incorporation of provisions regarding the sale of stocks by an exchange intermediary, which shall allow the Financial and Monetary Administration to know at all times the stock makeup of such entities; as well as with regard to the infringements and sanctions provided for the exchange intermediaries for the referred Regulation to be coherent with the provisions contemplated in the Monetary and Financial Law No. 182-02.

On the other hand, the establishment of public consultation was integrated. A 15-day term has been granted as of the date of publication of this regulation in order to comply with provisions in subparagraph g of article 4 of the Monetary and Financial Law.

For an executive summary of the Exchange Rate Regulation of the Monetary and Financial Law No. 182-02 of April 17, 2006 visit our *web site* www.noboapagan.com.