Review Article

LEGAL STATUS OF RENEGOTIATION OF CONTRACT UNDER GERMAN LAW

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ABSTRACT

According to pacta sund servanda, one of the basic principle of contract law, contracts must be kept and the parties have to fulfill their promises and obligations. On the other hand, the debts of the parties may become difficult to perform as a result of some changes that occurred after the contract was concluded. In such cases, binding with the contract may be against the rule of good faith. In order to prevent this objection, the parties may be obliged to renegotiate the contract in changes of circumstances. Especially in the context of the theory interference with the basis of the transaction, legal status of renegotiation has been discussed in German law. The two doctrine in this regard are put forward in literature. One of them is obligation and the other is duty. In this study, the legal status of the re-negotiation obligation in terms of German law is examined.

Keywords: Renegotiation, adaptation, changes of circumstances.

INTRODUCTION

In Germany, the new Civil Code (BGB) came into force in 2002 as a result of the reform studies in the field of law (Das Schuldrechtsmodernisierungsgesetz). There are many innovations in this law. One of them is the Interference with the basis of the transaction in Section 313. With This regulation If certain conditions are fulfilled in accordance, the contract will be adapted to changing conditions. But is there an obligation to renegotiate the contract before the parties apply to the court to adapt the contract to the changing conditions? If so, what is the legal status of this?

By Article 313 of BGB tittled Interference with the basis of the transaction, "if circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration".

As it is seen in the regulation, while the adaptation of the contract is being regulated, there is no mention of the renegotiation of the parties. However, in the Section 313 there is a statement in the General Preamble that "the parties must first renegotiate the contract". As can be seen from this statement, the legislator asks the parties to renegotiate before demanding the adaptation of the contract. However, there is no full view of the legal nature of the renegotiation and the sanctions of violations.

The German doctrine is divided into two. These are positive opinions and negative opinions. Defend the positive view that authors think that re-negotiation is a debt or burden. Negative views argue that this is not a debt or burden. And also, the parties of contract may make a renegotiation clause in the contract. In this case there would be a contractual obligation. So, renegotiation of contract has important place in the procedure of adaptation of contract in changes of circumstances.

Below, the opinions expressed in this regard will be examined.

1. Opinions That Accepts A Renegotiation Of The Contract As An Obligation

1.1. As General

In view of an opinion in German law and some court decisions, the parties have an obligation to renegotiate before applying to the court for adaptation of the contract if the conditions change after the establishment of the contract (Angermeir, 2004: 219; Grüneberg, 2014: Nr. 41; Riesenhuber, 2004: 2701).

According to this view, the legislator has expressed his views on the matter in the rationale. According to this, the reason why it is necessary for the parties to renegotiate in the rationale is that the re-negotiation is legalized as a liability. The most important factor in the defense of this view is the reference to Article 60 of the German Administrative Procedure Code. As a matter of fact, the parties have to renegotiate the contract in

order to open an adaptation case according to the said regulation and this has to be inconclusive. For this reason, the parties have the obligation to renegotiate, in order to adapt to the changing conditions of the contract, as required by the law on administrative procedure. In this respect, the re-negotiation of the contract is a recognized concept in the German law even before the reform law. The authors, who argue that the negotiation in German law is a contractual debt, are based on different legal foundations. The main examples in this regard are freedom of contract, pacta sunt servanda principle, good faith and constitutional provisions.

1.2. Legal Basis Of Renegotiational Obligations

1.2.1. *Freedom Of Contract*

According to an opinion in German law, the legal basis of the re-negotiation obligation is the principle of freedom of contract (Heinrichs, 2005: 195). In this view, it is concluded that the re-negotiation is a debt if the aim and benefit of the principle of freedom of contract is taken into consideration. Indeed, with the freedom of contract, the parties have the right to determine the content of the contract. For this reason, the parties who have contracted with their free will may change the contract with their free will. The way to do this is to renegotiate. However, in the event of appeal to the court without renegotiation, the judge acts as an authority and decides at his own discretion. This is contrary to the freedom of contract and the autonomy of will. The parties, who are in debt with their free will, have the right to change the contract with their free will (Eidenmüller, 1995: 1066).

1.2.2. Pacta Sunt Servanda

According to another view, one of the legal principles of the negotiation of the parties' debts is the principle of pacta sunt servanda, which is one of the basic principles of private law. As is known, the parties are contractually bound by this principle. However, if the conditions change later, the contract will be adapted or terminated. This is an exception to the pacta sunt servanda principle.

If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke (BGB § 313/2).

The parties should do their utmost to keep the agreement alive before applying to the adaptation, which is the exception of one of the most fundamental principles of private law. If necessary, he should not renegotiate and terminate the contract (Angermeir, 2004: 219).

1.2.3. Article 2 of Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) And International Principles

Some authors support the renegotiation of contract as an obligation for a constitutional fundamental (Katzenmeier, 2002: 75). According to Article 2 of Basic Law for the Federal Republic of Germany, “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law”.

If we consider this article of the Basic Law, if the debt of one of the parties becomes too difficult if the circumstances change after the establishment of the contract, it is necessary to negotiate before applying to the court to adapt or terminate the contract to the changing conditions. The parties should come together for the negotiation and negotiate the reduction in the interests due to the change. In particular, the content of the contract is important. In addition, they are the parties to the contract that know what the terms of a contract mean. If the parties of the contract have entered into this relationship for the purpose and benefit, they will be able to make changes in this direction. Therefore, it is necessary to give priority to the will of the parties before the will of the judge. Such an outcome would undoubtedly be more appropriate to the constitution and the principle of commitment to the contract.

On the other hand, in many international legal studies, re-negotiation is prioritized in order to adapt the contract to changing conditions. In particular, the obligation to renegotiate in the provisions of the Principles of International Commercial Contract Law (PICC) and the Principles of European Contract Law (PECL) is stipulated by the parties to the contract. Therefore, the obligation to renegotiate in international texts and regulations concerning contract law is introduced. The same legal conclusion is suggested in the doctrine of German law (Heinrichs, 2005: 196). Therefore, it is argued that the obligation of re-negotiation should also be regulated in the law.

1.2.4. Rule Of good Faith In BGB Article 242

According to an opinion in the German doctrine, the obligation to renegotiate does not need to be specifically regulated in the law. This debt is a natural consequence of the rule of integrity regulated in Article 242 of the Code of Obligations (Belling, 1996: 908).

An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration. Therefore, the obligation to renegotiate is present even before the time of law reform and derives its source from the rule of good faith.

Thus, If circumstances that became the basis of contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this changes, they should make a renegotiation. In order to do that, they may determine this changes as a basis of contract and decide to adaptation or revoke.

If there is not a positive result at the and of renegotiation process, adaptation of the contract may be demanded to the extent from the judge. In this case the conditions of Interference with the basis of the transaction must be observed. Another expression, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. That means one of the parties cannot reasonably be expected to uphold the contract according to contractual or statutory distribution of risk.

2. Opinions That Accepts A Renegotiation Of The Contract As An Obligation

In German law, most of authors do not accept the obligation to renegotiate as a contractual obligation (Bayreuther, 2004: 27; Hey, 2002: 36). The point of departure of the authors defending this view is the letter of Article 313 of the BGB, which is the legal regulation on the adaptation of the contract. According to this, there is no regulation regarding the renegotiation of the parties before demanding the adaptation of the contract to the changing conditions. It is unfair to impose a debt or liability that is not regulated by law to the parties to the contract (Bayreuther, 2004: 28). Admittedly, renegotiating the contract is not a foreign concept to German law. Re-negotiation was adopted in administrative law, especially the German administrative law, and was regulated by law. Therefore, foreseeing the obligation of renegotiation in terms of some contractual relations is an existing system in German law. On the other hand, the fact that the re-negotiation obligation is not envisaged during the adaptation of the contract to the changing conditions should be understood as the lawfulness of the legislator not to make an arrangement (Hirsch, 2005: 124; Bayreuther, 2004: 27).

3. Estimation Of Renegotiation In Scope Of Contractual Distribution Of Risk (Renegotiation Clauses)

According to BGB Article 313 “adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration”.

For adaptation of contract under BGB Article 313, It is not sufficient that the conditions change severely, and the commitment to the contract must at least be an unbearable situation for one of the parties. Non-folding is an important principle that must be taken into account both in the conditions of the deterioration of the transaction base and in the legal result (Bender, 2004: 50).

The regulation of risk distribution by the parties usually occurs as adaptation records. The term adaptation clauses is an upper concept, which includes both positive adaptation records for adaptation or complete termination of the contract; and negative adaptation records that the contract will not be adapted in any way.

Another positive adaptation clause is the obligation to renegotiate. With this registration, the parties are obliged to re-negotiate the agreement they made in case the conditions change later. There are two types of this. In the first, the parties did not make any arrangements for their failure to agree on the amendments. This situation is referred to as a simple renegotiation obligation. For example,” each contracting party may, on the other hand, require a review of the rent amount if the general economic conditions change substantially during the continuation of the contract”.

In some other clauses, which are referred to as the clause of a qualified renegotiation obligation, a secondary adaptation mechanism is envisaged for the parties not to agree on the adaptation. For example,” if the parties to the contract cannot reach an agreement upon the renegotiation of the contract, the party of the contract who has the right to determination of performance shall be adjusted according to the increasing or decreasing value of the real estate“.

Another issue that is problematic in the interpretation of adaptation clauses is related to the contracts where the obligation to renegotiate is recorded. In the case of contracts where such records exist, whether or not the parties are obliged to adapt the contract in any case is open to interpretation according to the present case. In our view, this issue should be considered separately for both types of re-negotiation obligation. There is a secondary adaptation mechanism in the records of qualified redistribution obligation. The parties shall first try to renegotiate the contract and carry out the adaptation of the contract. If, as a result of these interviews, the adaptation of the contract cannot be achieved, the secondary adaptation mechanism (eg registration of unilateral identification of the act or automatic registration) takes place. As a result, adaptation takes place. However, implementation of the adaptation depending on the secondary adaptation mechanism is not an adaptation, in fact, based on the obligation to rediscover. Since the re-negotiation obligation does not result in adaptation, the contract is adapted based on a secondary adaptation record. Therefore, the legal result of the obligation of qualified redistribution is adaptation.

In the case of simple redistribution, there is no second adaptation mechanism for the parties' disagreement regarding adaptation. Another common problem encountered in the interpretation of adaptation records is the general adaptation clauses. In such adaptation records, because the adaptation record is expressed in a ın general way, there is a contractual gap about which contract risks enter the subject of the adaptation record. For this reason, general adaptation records are the subject of the complementary interpretation of the contract.

In this respect, if the parties have included records of the obligation to renegotiate in the contract, this situation is evaluated within the framework of the contractual risk distribution. In this case, the parties are obliged to renegotiate the contract if a change occurs in the circumstances after the contract has been established. In this case, renegotiation becomes a contractual obligation. In some cases, the parties use the records of the obligation to renegotiate. In these records, the parties regulate both the renegotiation of the contract and the adaptation of the contract as a result. Here, there are registers that act as secondary adaptation mechanisms.

This is the case in case of unilateral determination of the act or automatic registration. For example, one party may be authorized to unilaterally determine the act. If a positive result cannot be reached as a result of the re-negotiation, the party with such authority shall determine the act and the contract shall be adapted accordingly. Another alternative is automatic recordings. For example, if the parties do not have a positive result as a result of the renegotiation of the contract, they can automatically determine the conditions for which the contract will be adapted.

If there is a qualified renegotiation obligation in the contract and any positive adaptation exist after renegotiating, what will be the result of this violation? As mentioned above, this situation becomes a contractual obligation if the parties foresee the obligation of a qualified renegotiation in the contract. The party who has acted against this obligation shall have to cover the damages arising from this behavior.

In our opinion, the legal basis for the compensation here is BGB Article 280 and 281 regulations. According to BGB Article 280:

"(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty. (2) Damages for delay in performance may be demanded by the obligee only subject to the additional requirement of section 286. (3) Damages in lieu of performance may be demanded by the obligee only subject to the additional requirements of sections 281, 282 or 283".

And BGB Article 281 is about "Damages in lieu of performance for nonperformance or failure to render performance as owed ". According to this regulation:

"(1) To the extent that the obligor does not render performance when it is due or does not render performance as owed, the obligee may, subject to the requirements of section 280 (1), demand damages in lieu of performance, if he has without result set a reasonable period for the obligor for performance or cure. If the obligor has performed only in part, the obligee may demand damages in lieu of complete performance only if he has no interest in the part performance. If the obligor has not rendered performance as owed, the obligee may not demand damages in lieu of performance if the breach of duty is immaterial.

(2) Setting a period for performance may be dispensed with if the obligor seriously and definitively refuses performance or if there are special circumstances which, after the interests of both parties are weighed, justify the immediate assertion of a claim for damages. (3) If the nature of the breach of duty is such that setting a period of time is out of the question, a warning notice is given instead. (4) The claim for performance is excluded as soon as the obligee has demanded damages in lieu of performance. (5) If the obligee demands damages in lieu of complete performance, the obligor is entitled to claim the return of his performance under sections 346 to 348".

CONCLUSION

It is not clear whether the request for adoption of the BGB § 313 should be brought directly or through the case to the other side of the contract. However, in the justification of Article 313 of the BGB, it is stated that the parties must firstly negotiate the adoption of the contract. However, it is unclear whether this is a technical renegotiation obligation. Furthermore, it is unclear what kind of sanction will be applied if this negotiation obligation cannot be sued or violated.

The question of whether the parties have a obligation to renegotiate in the event of a deterioration of the basis of the transaction is based on the controversy prior to the enactment of § 313 of the BGB. In this sense, it has been argued that the obligation to renegotiation of opinion in the doctrine in the process of the enactment of § 313 of the BGB has to be regulated under the provision of this article. However, the German legislator, in

contrast to this view, did not regulate the obligation of re-negotiation. Instead, it is envisaged that only the adaptation of the contract can be in requested in the text of the law.

In this context, according to the minority view in the doctrine, the obligation to renegotiate by 313 BGB is foreseen. In contrast to the prevailing view, despite the justification of the law, there is no obligation to negotiate the adoption of the contract in accordance with § 313 BGB. The phrase can request tut in the text of the law should be understood as the fact that the parties give a light to the parties to try a solution among themselves. Otherwise, it should not be construed as the necessity of negotiation as an obligation. Of course, the important benefits of negotiation between the parties cannot be ignored in cases of balance disruption and performance difficulties. In fact, in the event of balance distortion and difficulty in performance, the parties' deliberate negotiation between themselves in the first place is, above all, in conformity with the principle of freedom of contract. Moreover, the fact that the parties do not face the court through face-to-face interviews during the litigation process allows them to get to know each other's situation more closely and to act more creative and more flexible accordingly. Moreover, it minimizes the drawbacks caused by the fact that the parties incurred costs and extended the proceedings.

However, in spite of its benefits, the negotiation has its drawbacks as being accepted as an obligation. Above all, the parties' ability to negotiate and their powers may not always be the same in the concrete case. The demand for renegotiation is perceived, for example, as a sign of culturally severe weakness. Therefore, one side causes psychological pressure on the other side. Furthermore, if the way for re-negotiation is to be used as a means of abuse in order to prolong the proceedings, the party that requested the adaptation of the contract often causes damage due to time, trial costs and uncertainties. In addition, there is no sanction for the violation of this obligation if re-negotiation is foreseen as an obligation.

In this respect, it is not right for the parties to be forced to renegotiate. Moreover, there is no indication of the provisions of the BGB § 313. For this reason, it is not an accurate interpretation to accept the existence of a negotiation obligation on the grounds of the provision, despite the explicit regulation of § 313 BGB. It may be necessary to interpret the claim that gibi can request ıla in the case of the article, that the request for the adaptation of the contract can be used out of the case or directly through litigation.

In accordance with the request of the party requesting the adaptation of the contract, the other side of the contract must give its consent. That is, the parties need to agree on the adaptation of the contract. If the parties agree on the adaptation of the contract, there is essentially no problem. However, if the other side of the contract refrains from making an agreement on the adaptation of the contract, the last resort is to use the request for adaptation through litigation.

ALMAN HUKUKUNDA SÖZLEŞMENİN YENİDEN MÜZAKERESİNİN HUKUKİ NİTELİĞİ

ÖZ

Sözleşme hukukunun temel ilkelerinden birisi olan sözleşmeyle bağlılık ilkesi uyarınca taraflar yapmış oldukları sözleşme ile bağlıdır. Buna karşılık sözleşme yapıldıktan sonra meydana gelen bazı olaylar neticesinde tarafların edimlerini yerine getirmeleri zorlaşabilir. Bu gibi hallerde sözleşme ile bağlı kalmak dürüstlük kuralına aykırı olabilir. Bu gibi sonuçları önlemek adına taraflar sözleşmede şartların değişmesi halinde yeniden müzakere etme yükümlülüğünü düzenleyebilirler. Özellikle işlem temelinin çökmesi teorisi kapsamında değerlendirilen bu yükümlülüğün hukuki niteliğinin ne olduğu Alman hukukunda tartışılmıştır. Bu konuda doktrinde başlıca iki görüş ileri sürülür. Bunlar yeniden müzakere yükümlülüğünün bir borç olduğu yönündeki görüş ve aksi yöndeki görüştür. Sözleşme kurulduktan sonra şartların önemli surette değişmesi halinde borçlunun sözleşmenin değişen şartlara uyarlanmasını talep etmesi BGB § 313'de düzenlenen bir hususdur. Buna göre işlem temelini oluşturan olgular sonradan esaslı biçimde değişmişse ve eğer taraflar bu olguları önceden öngörebilselerdi sözleşmeyi hiç yapmayacak ya da başka türlü yapacak idilerse, ayrıca sözleşmesel ve yasal risk dağılımı ve başkaca olgular dikkate alındığında sözleşmeye bağlılık artık katlanılmaz hale gelmişse, sözleşmenin uyarlanması istenebilir. Esasen söz konusu düzenlemede tarafların sözleşmenin uyarlanmasını talep etmeden önce sözleşmeyi yeniden müzakere etmelerine ilişkin açık bir düzenleme bulunmaz. Buna karşılık düzenlemenin gerekçesinde tarafların sözleşmenin uyarlanmasından önce sözleşmeyi yeniden müzakere etmelerinin gerektiği belirtir. Sözleşmenin yeniden müzakere edilmesinin hukuki niteliği ile ilgili tartışmaların kaynağını da Gerekçedeki bu ibare teşkil eder. Alman hukukunda birtakım yazarlar, sözleşmenin yeniden müzakeresinin bir yükümlülük olduğunu ve bu yükümlülüğe aykırı davranan tarafın, karşı tarafın uğradığı zararı tazmin etmesi gerektiğini savunur. Bu görüşte olan yazarlar, yeniden müzakere yükümlülüğünün hukuki temeli olarak genellikle dürüstlük kuralını kabul eder. Buna göre yeniden müzakere yükümlülüğü kanun metninde özel olarak düzenlenmemiş olsa da yine de varlığını korur. Nitekim kaynağı BGB § 242'deki dürüstlük kuralından alır. Bunun yanında, birçok uluslararası hukuki metinde yeniden müzakere etme taraflar açısından bir yükümlülük olarak sayılır. Uluslararası metinlerde yeniden müzakere giderek sözleşmenin değişen şartlara uyarlanmasını talep etmenin bir ön koşulu haline gelmektedir. Buna karşılık doktrindeki hakim görüşe göre sözleşmenin yeniden müzakeresi taraflar açısından bir borç veya yükümlülük teşkil etmez; buna aykırı davranmanın sonucunda bir tazminata da hükmedilemez. Nitekim sözleşmenin yeniden müzakere edilmesi Alman hukukuna yabancı olmayan bir kavramdır. Başta İradi Yargılama Usulü Kanunu olmak üzere çeşitli kanunlarda yeniden müzakere öngörülür. Bu nedenle işlem temelinin çökmesi teorisi kapsamında sözleşmenin değişen şartlara uyarlanması için sözleşmenin yeniden müzakere edilmesinin kanunda yer almaması, Kanun koyucunun nitelikli bir susmasıdır. Kaldı ki yeniden müzakere yükümlülüğü, Alman Borçlar Kanunu reform çalışmalarında işlem temelinin çökmesi ile ilgili düzenlemeyle ilgili olarak ileri sürülmüş ve bu konuda bir taslak da hazırlanmıştır. Ancak bu taslak kabul edilmemiş ve kanun koyucu iradesini yeniden müzakereyi kanun kapsamına almamaktan yana göstermiştir. Bu nedenle Alman hukukundaki hakim görüş, sözleşmenin yeniden müzakere edilmesinin bir yükümlülük olarak sayılmayacağı ve tarafların sözleşmeyi uyarlamadan önce yeniden müzakere etmekle zorlanamayacağı yönündedir. Buna karşılık sözleşmenin yeniden müzakeresinin büyük faydaları da vardır. Yeniden müzakere ile hem usul ekonomisine hem de irade özgürlüğü ilkesine uygun sonuçlar alınabilir. Hatta taraflar sözleşmede yeniden müzakere kayıtlarına yer vererek, bunu sözleşmesel bir yükümlülük haline getirebilir. Bu çalışmada Alman hukuku bakımından yeniden müzakere yükümlülüğünün hukuki niteliği incelenmektedir.

Anahtar Kelimeler: Yeniden müzakere, uyarlama, şartların değişmesi.

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