

Theoretical and Practical Matters Regarding the Price Determination in Commercial Contracts

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Abstract

In any contract, the price must be determined or at least determinable. The parties may specify in the contract the essential elements by which the price could be determined in the future.

The determination of the price cannot be left to the subsequent appreciation of the parties or of one of them and not even the court cannot determine the price.

Key-Words: Contract, Contractual Price, Determination, Criteria, Reference, Plaintiff, Defendant

1. Introduction. Presenting the Case

The plaintiff companies V and A took legal action, by means of different, but similar trials, against the Agricultural Development and Research Institute of Fundulea (ICDA Fundulea) and both claimed compensation and asked for the defendant to be compelled to pay the counter-value of the products arising from the execution of several contracts. Thus, the plaintiff companies on the one hand, and the defendant, on the other hand, concluded contracts for the proliferation of inbred lines of sorghum, whereby the said commercial companies, as multipliers-providers, undertook to multiply the seeds provided for a price by the beneficiary (in our case Fundulea Institute), according to the specialized technology indicated by the said. Moreover, the providers also undertook to deliver the crop obtained to the defendant.

According to the contractual clauses, the beneficiary's obligations were to provide the contractor, for a price, with the pre-base sorghum seeds to be multiplied by the contractor, to ensure the specific farming technologies and to provide the technical assistance to the contractor, to check the quality of the works during the production cycle, to receive the entire quantity of products resulting from the sown area and pay the price of the products received on the basis of the quality indices. The obligations of the contractor stipulated in the contract were to inseminate the agreed area with the seed provided by the beneficiary, to provide the isolation storage, to execute all the mechanical and manual works according to the technology provided by the beneficiary, to deliver the entire quantity of products resulting from the contracted culture and to guarantee the quality of the delivered products.

As regards the price of the works that were the subject of the contract, the contract stipulated that the beneficiary had to pay the contractor, for the delivered products, the purchase price (contracted) set by ICDA Fundulea. In any contract, the price must be determined or at least determinable. As regards the regulation of the price determined in the former Civil Code, we point out that, according to the provisions of art. 964 (2) of the Civil Code, the parties were able to specify in the contract only the elements or the criteria by which the

price could be determined in the future (e.g. stock exchange quotation, the exchange rate on the date stipulated in the contract for the delivery of the goods), in which case the price is determinable.

The determination of the price could not be left to the subsequent appreciation of the parties or depend on the will of one of them, for instance the price to be applied by the seller at the time of delivery. In such a situation, the contract could not be considered validly concluded until the parties had agreed on the price and the other party accepted the price requested by the other party. The field literature shows that, under any circumstances, the court of law is not competent to determine the price in the absence of the parties' consent (Deak, 2006).

The determination of the price cannot be left to the subsequent appreciation of the parties or of one of them and the court cannot determine the price, but the price is determinable when its determination is left to the discretion of a third party according to art. 1304 of the Civil Code, chosen by consent by the parties or a person designated by the parties. The determination or setting of the price by a third party is currently regulated by art. 1232 of the new Civil Code. Provided that the price is determined by an expert appointed by the court, the price is mandatory both for the parties and the court (Dogaru *et al.*, 2009).

Provided that the price is determined between professionals, the determination of the price is made in consideration of the counter-service, work or service. If a contract between professionals does not determine the price and does not indicate a way to determine it, it is assumed that the parties have considered the price normally practiced in the field for the same services provided under comparable conditions or, in the absence of such a price, a reasonable price (art. 1233 of the Civil Code). The determination of the price is a condition for the validity of the contract, but there are also situations in which the price will be determined after the contract has been executed by the court. Thus, such determination is postponed for the parties' agreement after the execution of the contract (Terzea, 2014).

Moreover, according to art. 1234 of the new Civil Code, on the reference to a reference factor, it is stipulated that where, according to the contract, the price is determined by reference to a reference factor, and this factor does not exist, has ceased to exist or is no longer accessible, it will be replaced, unless otherwise agreed, by the closest reference factor (Turcu, 2011).

2. Arguments sustained by the parties

The price had to be determined through a special commission at the Institute level - which did not happen, and the price had to be paid only provided that the products had the quality corresponding to the minimum quality indices. In our case, ICDA Fundulea did not set the price of the works either during the execution of the contract or during the trial as required by the contractual clause, for which reason the plaintiffs had to relate to the prices charged by the same Institute for similar products, while executing other contracts with third parties. Although they disputed the price requested by the plaintiff, the defendant did not specify the price considered due for each type of product (corn and sorghum).

It is true that the parties agreed that the price of the products would be set by ICDA Fundulea, but this does not mean that the Institute is exempted from the contractual obligation

to pay. Based on the evidence submitted (documents, witnesses and expertise report) as well as from the parties' statements, it was obvious that the contractors fulfilled all their contractual obligations in due time and properly, and the products were delivered to the Institute and from that moment the payment obligation rose.

At the time of the conclusion of the contracts, the parties agreed for the beneficiary to set the price, and that it would be paid to the contractor after the delivery of the products, subject to the verification and determination of the quality indices. In our case, although in one case the qualitative indices corresponded, the defendant did not set the price of the products and did not make any payment to any of the contractors. In the second case, the qualitative indices did not correspond, but the plaintiff company claimed that this was due to the fault of the defendant Institute. The refusal of the Institute to set the price and consequently the non-fulfillment of the payment obligation led to the legal action before the court, the price being determined by the plaintiff companies, which thus quantified their claims.

Considering that these seed varieties are not included in the varieties nomenclature and have no equivalent in terms of market price, the claims were determined in relation to the price received from the same Fundulea Institute for the execution of other similar previous contracts.

The defendant claimed in their defense that the court would not have been vested with the determination of the price. Moreover, the method of calculating the price was raised by both courts of first instance, which asked for clarifications in this respect, the plaintiffs showed how they determined the price of the products delivered, referring to prices for similar products resulting from previous contracts between the same parties. Based on these arguments and given the evidence submitted in the two cases, both courts of first instance vested with the settlement of the case accepted the counts and ordered the Institute to pay the claimed compensations, representing the contractual price. The courts noticed that the defendant company had not set any price for the delivered products, although it had undertaken this obligation by contract, but did not fulfill it even during the trial.

The determination of the price by the court has the role of a sanction for the party that has culpably failed to fulfill their contractual obligations, in particular ICDA Fundulea. By means of the legal action filed before the court, the plaintiff SC A SRL took action against the defendant Agricultural Development and Research Institute of Fundulea in order to compel the Institute, under a legal ruling, to pay the total amount of 558,662.28 RON, representing:

- The counter-value of 28,000 kg sorghum seed LCF 76-99 for a price of 43,000 ROL/kg, namely 1,204,000,000 ROL (120,400 RON) and 54,990 kg sorghum seed LCF 261 for a price of 75,900 ROL/kg, namely 3,490,641,000 ROL (349,064 RON);
- 891.981.790 ROL (89,198.2 RON) as VAT for the amounts above;

To substantiate their claim, the plaintiff stated that the parties concluded the contract for the proliferation of inbred lines of sorghum from the seeds provided by the defendant beneficiary, with the obligation to deliver the crop to the defendant.

The plaintiff also stated that they had fulfilled their contractual obligations and that the sorghum crop was checked by the defendant's experts throughout the production cycle.

The crop was delivered to the defendant, who refused to pay the price on the ground that the harvested seed had an insufficient level of germination, as per the STAS stipulated by the law.

As regards the calculation of the price, the plaintiff stated: according to the contractual clauses, the defendant ICDA Fundulea had to fix that price. Since they did not fulfill their contractual obligation, the plaintiff set the price by reference to the price charged by another company from the same defendant.

In law, the provisions of art. 720 of the previous Civil Procedure Code, art. 35-59 of the former Commercial Code and art. 1073 of the Civil Code 1864 were claimed, in force at the date of submitting the legal action. By means of their the complaint, the defendant requested that the plaintiff's action to be dismissed as unfounded and unreasonable, considering that they did not owe any amount of money because the plaintiff did not fulfill their contractual obligations and the price determined by the plaintiff was random and unrealistic and did not correspond to the market.

3. Solutions given by the Courts

In relation to the documents in the case, the Court found that:

The parties acknowledged the existence of the contract and did not dispute its provisions.

As per art. 1169 of the Civil Code, the party who brings a proposal to trial must prove it.

As per art. 969 of the Civil Code, the agreements lawfully concluded are the law between the contracting parties and art. 970 of the Civil Code stipulates that all agreements must be executed in good faith.

The plaintiff, fulfilling their contractual obligations, delivering the crop to the defendant, the latter bears the obligation of compensation.

As regards the price of the goods, it had to be determined by the defendant, according to the contract. The defendant, however, did not set the price not even during the trial. In such case, the court allowed the price suggested by the plaintiff and charged by the defendant with other companies, as per the documents in the file, given that otherwise the execution of the obligation would be postponed (Călărași County Court, 2006).

According to the claim filed at the same court, the plaintiff SC V SRL took action against the defendant Agricultural Development and Research Institute of Fundulea (ICDA Fundulea) to compel the defendant, based on a legal ruling, to pay the amount of 1,055,149,200 ROL representing:

- 886,680,000 ROL – the counter-value of 5200 kg corn seeds and 4652 kg sorghum seeds, in total 9852 kg sorghum and corn seeds for a price of 90,000 ROL/kg.;

- 168,469,200 ROL – as VAT for the amount above;

The amount arises from the fault non-fulfillment of the defendant's obligation under contracts no. 3452/10.05.2004 and 3453/10.05.2004 concluded between the parties.

To substantiate their claim, the plaintiff showed that they concluded with the defendant the contracts for the proliferation of inbred lines of sorghum and a contract for the proliferation of inbred lines of corn by means of which SC V SRL, as contractor, undertook to proliferate the inbred lines of sorghum and corn from the pre-base seeds provided by the

beneficiary and delivered for a price, according to the specific technology provided by the same. Moreover, the plaintiff company undertook to deliver the crop to the defendant.

The plaintiff company fulfilled their obligations according to the contractual clauses, namely the proliferation of the sorghum and corn inbred lines and the delivery of the products obtained to the Fundulea Institute, which would set the price and start to pay from March of the following year. At the time of the conclusion of the contract, the parties agreed that the beneficiary would set the price based on older contractual relationships.

At the request of the court, the plaintiff stated their claim, namely they calculated their claims taking into account a price of 90,000 ROL/kg (9 RON/kg) for both sorghum and corn seeds delivered to the defendant, according to the contracts, the price paid by the defendant for the execution of similar contracts prior to the contracts from the present litigation. The price was paid by the Institute for seeds of the same type, but of a lower biological category.

By means of the claim filed, the defendant pointed out that the price of the sorghum and corn seeds was set randomly, did not correspond to reality and was arbitrarily determined in contradiction with the contract clauses. The expertise found that ICDA Fundulea has a committee that determines the price of the seeds produced by it. However, for the sorghum seeds, this commission did not set a price either in 2005 or in 2006, the defendant not selling these seeds. The Court, perusing the documents and the case files, found that, according to art 9 of the contract, the price was to be determined by the defendant ICDA Fundulea if the analysis certificates from the certified laboratory established that the seeds delivered corresponded to the qualitative indices. The expert appointed in the case stated that he was unable to determine a price for the seeds delivered by the plaintiff to the defendant, since they were produced exclusively by the defendant Institute and only it could determine their price without a so-called market price.

In those circumstances, the Court found that the defendant the Agricultural Research and Development Institute from Fundulea, to whom the plaintiff delivered the quantity of corn and sorghum seeds as they undertook by the two contracts concluded between the parties, had to pay to the plaintiff the price for them. As regards the price of these seeds, the tribunal found that the price of 90,000 ROL/kg claimed by the plaintiff was determined on the basis of criteria which the parties did not consider when concluding the contracts.

Thus, accepting by contract that the defendant would determine the price after the delivery of the goods, they took the risk that this price would be lower than the cost incurred in obtaining the crops or less than obtained in previous years for products of inferior biological category, criteria which the plaintiff used to justify the price of 90,000 ROL/kg.

However, since the defendant was under an obligation as per the contracts to determine the price of the products delivered by the plaintiff and in the following two years - which followed the delivery of the products and where the seeds could have been used - it did not do it, acting in bad faith - the court applied the provisions of art. 969 of the previous Civil Code, also in view of the rules established by the Civil Code for the interpretation of contracts.

In this respect, the court took into account the provisions of art. 978-979 of the Civil Code, construing the provisions of the contracts in question in terms of the price of the products in a sense that they were provided to have effects and as per the contracts' nature.

Therefore, the court, considering that in their claim the defendant stated that they had sold part of the corn crop delivered by the plaintiff for a price of 49,504 ROL/kg, considered this price as set by the defendant according to the contracts. As regards the price of the sorghum seeds, the court considered the price paid by the defendant to the plaintiff in the execution of previous contracts for sorghum seeds, namely 71,400 ROL/kg (Călărași County Court, 2006). The Institute appealed the two rulings on the grounds that the courts wrongly allowed the claims by accepting the price determined by the plaintiff companies, substituting themselves to the will of the parties.

In a file, the court accepted the appeal filed by the appellant – defendant ICDA Fundulea, and on the merits it dismissed the action of the plaintiff as unfounded.

In order to do so, the court of appeal considered that the court of first instance misconstrued the parties' intention by setting the price as claimed by the plaintiff, thus violating the will of the contracting parties, including the plaintiff's, who agreed that the price of the products delivered would be exclusively determined by ICDA Fundulea. Indeed, it is clear from the findings of the expert's report that the appointed expert could not determine the price of the seeds delivered, stating that the determination of the value of the products was the exclusive attribute of the parties and had to be established with the conclusion of the contract. In the court's view, what the plaintiff could have asked was for the defendant to comply with the contractual clauses as negotiated by the parties. Compelling the defendant to pay a price that was not unequivocally stipulated in the contract and without having sufficient criteria for its determination, the court violated the principle of the parties' free will to conclude a legal act (Bucharest Court of Appeal, 2007).

In our opinion, the admission of the claim not only did not violate the will of the parties, freely expressed at the conclusion of the contracts but, on the contrary, it was observed. Thus, the parties jointly agreed the extent of their obligations, respectively, S.C.V. had to produce and deliver, at its expense, the seeds corresponding to some crops made at the request and under the guidance of ICDA Fundulea, and it had the correlated obligation to determine and pay the price of these products. As the plaintiff fulfilled all their contractual obligations in due time, while the defendant did not fulfill their obligation to determine the price or the obligation to pay it, we consider that the plaintiff was perfectly entitled to determine the contractual price, determinable by reference to similar previous contracts.

Therefore, we consider that in this case, the Court of Appeal erroneously dismissed the claims and the perfectly legal arguments of the court of first instance regarding the applicability of the provisions of art. 978 - 979 of the Civil Code, respectively, that in the absence of clear and concise clauses (in our opinion not indicating the exact price), the construal will be made in the sense of producing effects and also in the sense that arises from the nature of the contracts. Consequently, the court of first instance enforced the legal provisions in the matter, observing the principle based on which, in the case of pecuniary agreements, when one of the parties fulfills their obligation, the other contracting party is bound to pay compensations.

In fact, the rules stipulated in art. 969, 970 of the Civil Code applicable in the case under trial, show that it was not an obligation of the parties to determine the exact price as long as they agreed that this should be done later by one of them. If the party that was to determine

the price did not, the provisions of art. 980 of the Civil Code apply and this provided that the two contracting parties had already had other similar commercial relations in the previous years. Moreover, as regards the construal of the commercial contracts, it is acknowledged that they bind not only what is expressly provided, but also what fairness and custom entail. We can say that it is fair to receive a price corresponding to the obligation undertaken and fulfilled and according to the nature and quality of the delivered products. It is known that, in the case of pecuniary contracts, when one of the parties fulfills their obligation, the other contracting party is bound to pay compensations.

Also, the contractual provision according to which the price is determined by the Institute cannot be construed in any way as prejudging the contracting party. The price was determined by reference to the price charged by the same Institute in the execution of other similar contracts, respectively one year before, when to obtain and deliver seeds of lower quality and farming technology, it received a price of 70,000 ROL/kg (excluding VAT).

In the second case, the court of appeal qualified the proliferation contract for sorghum inbred lines as an atypical services contract, according to the provisions of art. 1470 of the Civil Code, having as object the provision by the contractor for the benefit of the beneficiary of the breeding works. As regards the price of the works making contract object, art 8 stipulates that the beneficiary was compelled to pay the contractor, for the delivered products, the purchase (contracting) price, determined by ICDA Fundulea.

According to art. 1413 of the Civil Code, the price of the works must be determined or at least determinable at the time of conclusion of the contract. In this case, the price of the works is not determined, but it is determinable on the basis of the prices determined and accepted by the beneficiary for the execution of similar works. According to the contractual clause provided in art 8, the respondent-plaintiff tried to determine with the defendant the price of the works, concluding a protocol in this respect, a price that was not accepted by the representatives of ICDA Fundulea. The defendant-appellant did not determine the price of the works as compelled by the clause in art. 8 of the contract, in which case the respondent-plaintiff prepared a statement of costs for the works, based on which claimed the price shown in the claim, indicating that they referred to the prices practiced by ICDA Fundulea for similar products.

While challenging the price requested, the defendant did not specify the price considered to be due and did not prove that the price requested was higher than the price charged by ICDA Fundulea for similar works. Nor did they request an accounting expertise to determine the price of the work done by the plaintiff. In these circumstances, the Court found that the appellant-defendant had not proved that the price requested by the plaintiff was higher than that charged by ICDA Fundulea for works contracted under similar conditions and thus the appeal of the Institute was dismissed (Bucharest Court of Appeal, 2007).

4. Conclusions

We believe that the price, while not determined by contract, is still determinable after the contract is concluded. In our case, the price of the works is determinable based on the prices established and accepted by the beneficiary for the execution of similar works. The price should have been determined by a special commission at the Institute level - which did not happen.

In our case, the beneficiary did not set the price of the works either during the execution of the contract or during the trial, as stipulated by the contractual clause, for which reason the plaintiff had to relate to the prices charged by the same Institute for similar products in other contracts. It is true that the parties established by contract that the price of the products would be set by ICDA Fundulea, but this does not mean that the Institute is exempted from the contractual obligation to pay.

Of course, the pricing of a contract is the attribute of the contracting parties, but if the parties have agreed that the price should be set by one of them, and in bad faith such party has not set it precisely to avoid the payment, the other party is entitled to go before the court to ratify the price determined in relation to the price paid for the execution of similar contracts. The beneficiary's obligation to determine the price cannot be a purely arbitrary ("I undertake if I want"), it cannot depend entirely on their will, because in this case there would be an endless delay in the fulfillment of the payment obligation.

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