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CONTENT

ASPECTS REGARDING THE RIGHT TO A FAIR TRIAL ACCORDING TO ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE CASE OF UNDERCOVER INVESTIGATORS

Prof. Ph.D. Alexandru BOROI[*]

ABSTRACT

In this research we have examined the essential elements of a fair trial that would lead to the guarantees of a fair trial. The results of the research are highlighted by some dispositions of ECHR in order to clarify and interpret correctly.

KEYWORDS

Trial, defence, judgement, guarantees

According to the Convention, the right to a fair trial has several components: free access to justice; hear the case in a fair and public trial within a reasonable time line; hear the case by an independent and impartial tribunal, established by law; the judgment shall be pronounced publicly. As a guarantee of human rights, the Convention provides in art. 6, paragraph 1, the right of everyone to a fair trial[1].

All guarantees established by art. 6 of the European Convention on Human Rights and Fundamental Freedoms, as those with general character of the first paragraph of the text and as those established specially only for criminal proceedings included in the other paragraphs aim "to respect the

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[1] "Everyone has the right to be examined in a fair and public hearing within a reasonable time limit by an independent and impartial court established by law that shall decide upon the breach of rights and civil obligations, or the fairness of an accusation in a criminal matter. The decision shall be pronounced publicly but the courtroom may prevent the media and public from taking part during the proceedings in the interest of morality, public order or national security in a democratic society, when the interests of juveniles or the parties so require, or to the extent strictly required by the court, when due to special circumstances publicity would prejudice the interests of justice".

right to a fair trial to every person ", this right to a fair trial is the expression of the" rule of law "[2].

In a summary the European Court of Human Rights has shown that art. 6 par. 1, together with par. 3 of the same article have established the essential elements of a fair trial, but the very notion of "fair trial" has seen, in time, a notable development in its jurisprudence, in particular, the importance given to the appearance and increasing public awareness given to the guarantees of a fair justice. As shown by the European Court of Human Rights, the principle of "equality of arms" means equal treatment of parties throughout the proceedings in the courts, without any of them to be advantaged against the other party or parties in the process.

This principle, in fact, is only one element of the broader concept of "fair", one of the guarantees relating to the proper conduct of the judicial process which aims at a "fair balance" between litigants (both in civil and in the criminal cases so that litigants be able to support a point of view so as not to be put in a situation of net disadvantage to each other) [3].

The right to defense has in the Romanian law the value of a constitutional principle, given that Art. 24 par. 1 of the Constitution which establishes that the right to defense is guaranteed and par. 2 of the same article provides that any time during the trial the parties have the right to be assisted by a lawyer, elected or appointed.

In the material sense, this right includes all rights and procedural safeguards that provide parties an opportunity to defend their interests and in the formal sense, it includes the right of the parties to hire a lawyer. The right to defense is ensured by the organization and functioning of courts, which is based on principles of legality, equality of parties, collegiality, transparency, judicial control, and the active role of the court[4].

By Law no. 30 of 18 May 1994, Romania ratified the European Convention on Human Rights (ECHR) and its additional protocols no. 1, 4, 6, 7, 9. 10.

In this way, according to art. 11 and 20 of the Constitution, the Convention and its additional protocols have become part of the domestic law, having priority over it, in other words, ECHR and its additional protocols have become a source of compulsory national priority which,

[2] Vasile Pătulea, *Fair trial, commentaries on the ECHR jurisprudence* – Romanian Institute for Human Rights, I.R.D.O. Publishing, 2007, p.116.
[3] Vasile Pătulea, op. cit., p.117.
[4] Raluca Moglan Culea, Nina Ecaterina Grigoraş, *The right to a fair trial and free access to justice* , www.inm-lex.ro.

nationally, has resulted in immediate enforcement of the Convention and Protocols by the Romanian courts and at international level the acceptance of control by the ECHR on national court sentences. Protocol no. 11 of the European Convention of Human Rights, which entered into force on November 1st, 1998, generated a reform of the control system before the Court. It was intended to maintain and enhance the effectiveness of protecting human rights and fundamental freedoms under the Convention.

Regarding the principle of contradictory, this procedural requirement is not expressed in civil procedural law in a direct form, but is derived from numerous legal provisions (Art. 85, Art. 107, Art. 112, Art. 114, Art. 115, Art. 128, Art. 12 Criminal Procedure Code). Instead, in the Criminal Procedure Code this principle is expressed directly in Article 289[5]. Neither the European Convention on Human Rights and Fundamental Freedoms expresses directly this principle; it appears – together with equality of arms, reasons for decisions and the right of the accused to remain silent and not to incriminate oneself - among the implied warranties of conducting fair process.

Moreover, the European Court of Human Rights has already made such a distinction, ruling that "the right to adversarial proceedings" means, in essence, the opportunity for litigants in criminal, civil or disciplinary proceedings to become aware of all the "parts and observations" presented to the judge, even those that come from an independent magistrate and are likely to influence the decision[6]. Referring to national legislation, the European Court made it clear that compliance with this requirement (contradictory) can be achieved in different ways, but what is required is that the alternative method ensures that the other party is informed about the submitting of comments and has opportunity to comment[7].

Moreover, during criminal investigation the authorities shall inform the defense about all evidence in their possession, both those that incriminate or are in favor of the defendant[8].

Regarding the latter requirement it was stated that "indirect and purely hypothetical possibility for the accused or defendant to discuss the

[5] The cause is tried in the open court.
[6] See ECHR, decision of 27 March 1998, in the case J.J. v. Netherlands.
[7] See ECHR, decision of 29 August 1991, in the case Brandstetter v. Austria.
[8] See ECHR, decision of 16 February 2000, in the case Fitt v.UK.

arguments against him inserted in the text of a judicial decision cannot be accepted as equivalent with his right to address them directly[9]".

Obviously, in order to meet the requirements of a fair trial, national courts must give defendants the opportunity to ask for the use of every piece of evidence[10].

Contradictory is the essence of trial. It is the mandatory prior discussion between parties with conflicting interests about a request or issue concerning the trial. The criminal court cannot rule on an application without putting it in advance under discussion between the prosecutor and the parties with opposing interests. During the trial there are some opposing parties[11]:

- the prosecutor, the victim and civil party;
- the defendant and the civilly liable party.

Even the process of administering evidence during the trial cannot take place without in the absence of the contradictory principle.

Hearing a person shall not be valid during the trial unless there is the contradiction. Either side of the process and their advocates must be able to question the prosecution and defense witnesses under the same conditions. The legal rules do not allow direct interrogation of witnesses by the prosecutor and parts, but only through the president of the panel, which is a limitation of contradictory.

Article 11 of the Constitution establishes as a principle the obligation of the Romanian state to meet accordingly and in good faith the duties derived from the treaties it is party, and that treaties ratified by Parliament are part of national law. The constitutional text is set on one of the principles of trust between states of the international community - *pacta sunt servanda* - and expresses at the same time, the correlation between international law and domestic law, incorporating international law into the national law.

Integration of the consensual international regulations into the domestic law is carried out through the ratification of the international legal instruments (agreement, convention, protocol, statute, etc.). Pursuing this procedure these international instruments become mandatory, because the

[9] See ECHR, Decision from 28 August 1991.

[10] See the High Court of Casation and Justice, decision no. 1847 from 2000, in George Antoniu, Adina Vlăsceanu, Alina Barbu – *Criminal Procedure Code*, Hamangiu Publishing, 2006, p.288.

[11] Raluca Moglan Culea, Nina Ecaterina Grigoraş, *The right to a free trial and free access to justice*, www.inm-lex.ro.

ratification is performed by law and the requirements of the ratified instrument are integrated within the national system of regulations and shall have the legal force of a law.

Distinctive to the implementation of international regulations in the national legal system, the constitution of Romania contains specific rules on international human rights treaties.

Thus, Art. 20 determines that the interpretation and application of rights and freedoms are in accordance with international treaties to which Romania is part and that international regulations on human rights contained in treaties ratified by Romania have priority over national regulations provided there are no disagreements between them.

Art. 6, par. 1 of the Convention stipulates that for a cause to be considered in a fair manner it must be interpreted to ensure respect for fundamental principles of any process, namely, the contradictory principle and the principle of defense, both ensuring full equality of parties in court proceedings[12]. Trial in a criminal case is the stage taking place in the courts of law and is composed of a complex process and specific procedural acts that are meant to achieve, not indirectly, as the prosecution, but directly, the aim of the criminal proceedings, i.e. that the conviction of the one who committed an offense under criminal law.

Contradictory is the principle that allows parties to actively and equally participate in the presentation, argumentation and proof of their rights throughout the process, specifically, to discuss and refute the allegations made by each of them and express their opinions on initiatives of the court to establish the truth and to pass a legal and solid sentence[13].

Under the contradictory principle parties inform themselves on the claims, defenses and evidence they intend to use in the proceedings by written request to the court; the trial cannot be done until a court warrant has been issued. During trial all parties are heard equally, including the circumstances raised by the court, in order to establish the truth, consent of evidence is performed within a public hearing, after the preliminary discussion between the parties and court decisions are communicated to the parties to allow them to appeal.

There are, therefore, no legal differences between the Convention and the provisions of the national law and the guarantees that the latter sets to ensure contradictory. There are all requirements that, in their decisions,

[12] Vasile Pătulea, op.cit, p.127.
[13] Idem, p.124.

national courts do not violation the right to a fair trial by disregarding the principle of contradictory.

The right to a fair trial means the opportunity for each party to present the court with its cause, under conditions that do not disadvantage it in front of the other party, which is achieved by ensuring the right to defense[14]. The right to defense has, in the Romanian law the value of a constitutional principle taking into account that, through art. 24, par. 1 of the Constitution it is established that the right to defense is guaranteed, and by paragraph 2 of the same article, it is provided that any time during trial the parties shall be assisted by a lawyer, elected or appointed.

The requirement to hear the case publicly provided by art. 6 pct. 1 of the Convention means that debates are made public, on the one hand, by allowing the parties take part in the debate, which is an inherent condition to exercise their procedural rights, consisting of the right to defense and the right to debates, and on the other hand, by providing access to discussion for any person.

In the European Convention, the contradictory principle has acquired a deeper meaning appearing as another component of the guarantees to a fair hearing under Art. 1, par. 6 of the Convention. In synthesis, the European Court of Human Rights noted that the right to adversarial proceedings means, essentially, the possibility for parts in criminal, civil or disciplinary trial to be aware of all pieces of evidence presented to the judge, even those that would come from an independent magistrate likely to influence the decision and shall be allowed to discuss them; this principle is one of the "main guarantees of judicial proceedings."

The European court ruled that national legislation can achieve this requirement in different ways. The method adopted shall ensure that "the adversary party has been informed on the submitting of observations and the possibility comment on them."

In addition, Art. 6, par. 1 requires that, within the criminal procedures, investigative authorities shall notify the defense all relevant evidence in their possession, both those that incriminate the defendant and those in his favor. Indirect and purely hypothetical possibility for the accused or defendant to discuss the arguments of the prosecution against him, inserted in the text of a judicial decision cannot be accepted as a valid equivalent of the defendant' right to fight them directly. The European

[14] Raluca Moglan Culea, Nina Ecaterina Grigoraş, op.cit..

Court shows that the principle of contradictory and equality of arms result from the general guarantee of the right to a fair trial.

Article 68 par. 5 of the Statute of the International Criminal Court[15] adopted in Rome on 17 July 1998 regulates the situation where disclosure of evidence and information might seriously endanger the witness or his family. In this case, the prosecutor may, in any proceedings taking place before the beginning of the trial refrain from disclosing such evidence or information and present a summary.

Such measures should be implemented in a manner that does not prejudice or is contrary to the right of defense and the requirements of a fair and impartial trial. For this reason, one of the features of recent trends in criminal proceedings in all Member States of the European Union is the right to require contradictory from the initial stage or during investigation, which, as general rule, cannot be achieved without being known to the defendant, without giving the defense the opportunity to intervene and influence the outcome of investigations[16].

However, we must take into account when obtaining evidence by authorizing the use undercover investigators and their collaborators that their life and physical integrity as well as of their relatives is essential. Through the decisions issued ECHR has drawn a set of rules, lax enough, so as to ensure a right to fair and proportionate defense, but also to address the lack of any contradictory discussion.

Thus, the Court has left open the door to other forms of hearing than the hearing in public, for instance allowing the accused to hear the "witness", without revealing his identity, indirect interviewing in which the accused asks questions and receives written or oral response through a system that changes his voice, authorizing the defendant to ask questions in writing by the judge who heard the prosecution witness or the witness to be heard directly by the accused lawyer, in the absence of the latter[17].

It is worth mentioning, in this respect the jurisprudence of the European Court of Human Rights, which, by decision of 30 September 1985 in the case Can v. Austria (with reference to the Annex on the Commission' opinion of 12 July 1984), indicates that, despite the guarantees contained in

[15] The statute of the International Criminal court was ratified in Romania by the Law no. 111/2002.
[16] Vasile Pătulea, op.cit., p.129.
[17] Gheorghiță Mateuț, *Undercover agents and their use in the early stages of criminal investigation*, Law Magazine no. 1/2005, p.161.

various paragraphs of art. 6.3 do not have the same status and that, consequently, they are not applicable in earlier stages of the trial itself, undoubtedly art. 6.3 b (the right to have adequate time and facilities for preparation of defense) is not strictly limited to the trial, but also in its earlier stages. It's about putting into practice the principle of equality of arms, even in the preliminary stage[18].

In relation with court order, hearing and interview of witnesses, in terms of fair trial rights, the text of art. 6 of the European Convention on Human Rights refers to both the prosecution witnesses and the defense witnesses in this respect being expressed the need for a court order and hearing requirement of these two categories of witnesses "under the same conditions" to be provided a balance (equivalence) between prosecution and defense, an indispensable condition to achieve a fair trial. The principle of avoiding, not taking into account the testimony on which defendant was unable to exercise the right to examine witnesses and present more sophisticated applications, such solutions that the European Court of Human Rights ruled, referring, among others, to the anonymous testimonies and reports of undercover agents[19].

Thus, in a case[20], the accused-complainant invoked breach of art. 6 par. 3d of the Convention, in that neither he nor his lawyer could interview an "anonymous witness", whose testimony was nevertheless used as evidence to prove his guilt. In this case, the Court first held that the accused-complainant was the subject of "credible suspicions" in that he was a member of a criminal organization involved in very serious crimes, like drug trafficking and trafficking in weapons, and, at the time of his arrest he was armed with a loaded pistol. Therefore, reasonably he should have expected to be perceived as a threat by those who knew his criminal activity and national courts cannot be considered in these circumstances, to have acted unreasonably when deciding witness' anonymity (an informant used by the police).

Secondly, the Court found that, apart from the anonymous witness statements, national courts have ordered other evidence which incriminated the defendant: the police reports written when the accused was arrested (when they found that he was armed); conducting a search that resulted in

[18] Sorin Fusea, *Comparative view on the limits of the right of defence in the criminal investigation stage*, www.scribd.com.
[19] Vasile Pătulea, op.cit., p.173.
[20] See ECHR, decision of 4 July 2000, in the case *KOK v. The Netherlands* – www.jurisprudentacedo.com.

finding a large quantity of drugs and weapons, forged documents, large amounts of cash; in the report it is mentioned that fingerprints of the accused were found on the weapons hidden in underground storage etc.; all these evidence were correlated with the anonymous witness statements.

Thirdly, the judge heard the anonymous witness in the presence of other persons: the clerk and a police officer and the defense had the opportunity to ask the witness questions, in writing, others could have been asked during the hearing, under the control of the judge who was supposed to ensure the anonymity. Moreover, the defense could listen the hearing from another room, when the witness was under oath.

In relation to all these circumstantial factors, the Court concluded that, on the one hand, the defense witness was able to ask questions to the witness, as the defense was informed indirectly about the hearing, but did not do this, on the other hand compared to other existing evidence in the case file, it cannot be argued that anonymous testimony lead alone to the defendant's conviction, so the hypothetical imbalance produced by the impossibility of a direct questioning of the witness was not decisive. European court's conclusion was that the procedure followed in this case came as close as possible to the one used to hear a witness in open court so that the rights of defense have been obeyed.

In another case[21] it was about the intervention of a infiltrated police agent. On March 15, 1984, the judge from Laufon (Berne Canton), receiving information from the German police according to which L.L. intends to buy drugs in Switzerland and opened a preliminary inquiry against the concerned citizen, having his telephone tapped.

In turn, the police have infiltrated one of their agents who had to be a potential buyer of cocaine; after five meetings with this agent, LL was arrested on August 1st, 1984 and charged with drug trafficking. And, on June 4th, 1985 the district court from Laufon sentenced L.L to three years imprisonment for crimes against federal law on drugs. In order to preserve anonymity of the police agent infiltrated in the network, the court refused to hear him as a witness on the ground that the reports and minutes of telephone tapping show clear intention of the accused, regardless of intervention of the undercover agent, who acted as an intermediary in the delivery of large amounts of drugs. The accused addressed to the European court, arguing that the decision of his conviction is based only on reports of

[21] See ECHR, decision from 15 June 1992, in the case Ludi v. Switzerland– www.jurisprudentacedo.com

the undercover agent thus, violating his rights to interview or have witnesses of the prosecution heard. The Court held, in this case that the use of an undercover agent does not do, in itself, or combined with telephone taping, any prejudice to the privacy of the accused. The use of an undercover agent was in connection with a transaction of 5kg of cocaine and was aimed to arrest the dealer. L.L. should have realized that committing a crime that falls under the law on drugs and that, consequently, he would risk while performing this illegal activity to meet an undercover police officer tasked with his apprehension.

In terms the provisions of art. 6 par. 1 and par. 3d of the Convention, the Court announces, first, its jurisprudence in similar cases, namely that the evidence must be introduced to the accused in a public hearing for further discussion.

But this principle does not work without exceptions, but such exceptions may be accepted only subjected to the right of defense. In this case, sentencing the accused did not rely on anonymous witnesses, but the written testimony of a police officer under oath whose mission was known the judge. But the accused also knew this officer, if not by his real identity, at least his physical description, because he met him several times. However, the court (and the judge) could not or did not want to hear the undercover agent and have the confrontation meant to compare his statements with those of the accused, neither him nor his counsel being allowed to do that, in any stage of the procedure to interrogate and to question his credibility.

However, this could have been done in a way that takes into account the legitimate interests of police authorities in a drug trafficking case, keeping their agent undercover, not only to protect, but also to use him for other missions. In conclusion the Court held that the rights of the defense were limited defense because the accused had not received a fair trial and there was a breach of art. 6 par. 3d of the Convention. Moreover, he was paid expenses in the amount of 15,000 Swiss francs.

ECHR made important remarks on "anonymous witnesses".

In criminal proceedings, for various reasons, usually to protect them, there are used "anonymous witnesses" (or "undercover"). They can be used by the investigating authorities in the investigation stage and trial stage. The European Convention on Human Rights contains no provision which prevents the use by the prosecution of certain sources of information including that provided by anonymous witnesses.

However, further use of anonymous statements as sufficient evidence to justify a conviction, raises issues, the European court ruling that use of such testimony, to actually motivate conviction is, in principle, incompatible in any circumstances with the Convention[22]. Discussing in detail the above solution the Court also stated that a conviction cannot be, indeed, based solely or in a decisive extent on anonymous statements because keeping anonymity faces defense with many difficulties and therefore, normally, such statements should not be used in a criminal trial. But it is still possible to conclude that the provisions of art. 6 of the Convention haven't been violated if, in such a situation, it can be established that the procedure followed by the judicial authorities have compensated sufficiently obstacles encountered by the defense.

Going further with the statements the Court emphasized that, if indeed it is always preferable for the accused to attend the hearing of witnesses, it is not excluded any situation in which the national courts decide that the interests of the accused "are less important than ensuring the safety of witnesses"[23].

In this way, the Court clearly demarcates its jurisprudence. Thus, it has not objected when states use, in their fight against crime, undercover agents. However, failing under the sanction of breaching the rights of defense guaranteed by the Convention, is not an issue to make these undercover agents witnesses and the information they gather used as evidence[24].

But, provided that the rights of defense are respected, it can be legitimate that police authorities wish anonymity for their undercover agents used for secret activities, for security purposes and also to not compromise their use in future operations[25].

A more special situation exists when the conviction was based on some statements made by police officers, undercover agents that took part in some criminal activity undertaken by the individuals that are prosecuted, these statements being made to the judge, but witnesses remain anonymous,

[22] See ECHR, decision from 20 November 1989, in the case *Kostovski v. The Netherlands*; EChR, decision from 23 April 1997, in the case *Van Mechelen and others v. The Netherlands* – www.jurisprudentacedo.com

[23] See ECHR, decision of 26 March 1996, in the case *Doorson. The Netherlands* - www.jurisprudentacedo.com.

[24] Gheorghiță Mateuț, *Witness protection, the use of anonymous witnesses before the criminal investigation authorities*, Lumina Lex Publishing, Bucharest, 2003, p.48.

[25] Idem.

as they have not been heard in open court or in the presence of the accused. In such cases, the Court held that the interests of such witnesses, and their families, must be protected as we are talking about individuals that belong to the police authorities, but their situation is different from that of disinterested witnesses or of that of the victim . This category of witnesses are, indeed, subordinates, have a general duty of subordination to the state executive authorities, usually in connection with the Public Ministry. As such, their testimony, under these conditions, seems to be considered "exceptional circumstances", because, by the nature of things, among their duties (as police officers invested with power to arrest a person) appears that to testify in court[26].

In this regard the Constitutional Court decided by decision no. 11 from 9 January 2007[27], regarding the exception of unconstitutionality of art. 86.1, art. 86.2 and art. 149 par.1 Criminal Procedure Code[28]

Anothe exception of unconstitutionality[29] was discussed in connection with art. 22 par. (2) from the Law no. 143/2000 regarding preventing and combating trafficking and illicit consumption of drugs[30] which stipulates that „*reports made by police officers and their collaborators, under par. 1 can be used as evidence*".

Furthermore, by Decision 1318 of 12 December 2008 the Court ruled that the provisions subjected to criticism of unconstitutionality is materialization of constitutional provisions because the need to protect personal data of the witness results in a limitation of the right of defense of the person subjected to prosecution.

This measure is dictated by the necessity of ensuring, for witness and other citizens who would be exposed by declaring the real identity of the witness, the right to life, physical integrity and individual freedom, supreme values enshrined in the Romanian state of law in accordance with Article 1. (3) of the Constitution.

Restricting the right of defense is proportional to the situation that caused it, realizing only when there is evidence or data that by declaring the real identity of the witness or his residence would be threatened the rights

[26] Vasile Pătulea, op.cit., p.130.
[27] Published in the Official Gazzette no. 89 from 05 February 2007.
[28] Exception brought into discussion by Ioan Clămparu and Ovidiu Constantin Pop in file no.1803/R/2006 Sibiu Court – Criminal section.
[29] Rejected by Decision no.1068 of 14 October 2008 – published in the Official Gazette no. 769 from 17 November 2008.
[30] Exception brought into discussion by Marius Iulian Avram and Lenuța Soare in file no.17769/91/2007 Tribunalului Court – Criminal Section.

and freedoms mentioned above and does not violate this law, contrary to the authors that support the exception. The Court also held that this issue has been examined by the European Court of Human Rights, which, in its jurisprudence has held that there are allowed exceptions to the principle according to which, the evidence must be produced in front of the defendant in open court for the purpose of contradictory discussion.

This, however, subjected to the rights of defense, which require, as a rule, to ensure the accused during the stages of the procedure adequate and sufficient opportunity to challenge a statement and interview the witness under the condition that, in the event that the defendant throughout the proceedings was not given the opportunity to question the witness and his testimony, the sentence should not be based entirely or decisively on this account (Case *Kostovski v. Holland*, 1989).

Contradictoriality is a basic principle in a trial, which consisted of the right of the parties to be present at the trial, to be aware of the claims or charges against them, to discuss in court all the facts related to the case, being able to give their evidence and combat that brought by opponents.

This principle reflects the adverse interests of the parties, their equality before the law and separation of the prosecution from the defense.

The analysis of various decisions given in similar cases shows that **the use of anonymous witnesses resist censorship from Strasbourg if three cumulative conditions are met**[31]:

1. there are enough reasons to preserve witness anonymity;
2. the procedure followed in the courts shall compensate the difficulties faced by the defense;
3. the conviction shall not be based exclusively or decisive on anonymous statements.

All three conditions were expressed synthetically in *Van Mechelen v. Netherlands* on April 23, 1997 and *Doorson v. the Netherlands* on March 26, 1996, after the matter of anonymous testimony was first discussed in *Kostovski v. the Netherlands*.

The jurisprudence can be summarized as follows: anonymous testimony is not, in principle, incompatible with the imperatives of a fair trial, but the requirements of Article 6 of the Convention are, however,

[31] Gheorghiță Mateuț, *Witness protection, the use of anonymous witnesses before the criminal investigation authorities* , Lumina Lex Publishing, Bucharest, 2003, p.56.

ignored if the anonymous testimony served as the sole or main basis for the conviction[32].

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[32] EHCR, Decision of 20.11.1989, in the case Kostovski v. The Netherlands, in w.w.w.coe.int.

PLACE AND ROLE OF POLITICAL - DIPLOMATIC MEANS WITHIN THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

Lecturer Felicia MAXIM*

ABSTRACT

The peaceful settling of international disputes is a priority of contemporary international law and, implicitly, a fundamental obligation of the states and also of the other subjects of international law. Used as of ancient times, the peaceful means of settling international disputes have become subject to international codification much later. The political-diplomatic means of peacefully settling disputes fall into the category of peaceful means of settling disputes together with jurisdictional means (arbitration and jurisdictional settlement) and the procedures established at the level of international organizations or under regional agreements. The category of political-diplomatic means include: negotiations, good offices, mediation, international investigation and conciliation.

KEYWORDS

Negotiations, good offices, mediation, international investigation and conciliation

1. Negotiations

Also known under the name of diplomatic negotiations, negotiations are considered the oldest means of settling international disputes. Negotiations comprise direct discussions between the litigating parties conducted in various ways and forms aiming at identifying a reciprocally acceptable solution.[1]

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[1]Ionel Cloşcă, *Despre diferendele internaţionale şi căile soluţionării lor (On International Disputes and Ways of Settling Them,* Editura Ştiinţifică, Bucureşti, 1973, p.50;Ionel Cloşcă,

Referring to negotiations, the International Court of Justice (I.C.J.) has noted that it is not needed to insist on the fundamental character of them, which was also acknowledged in the practice of its predecessor, namely the Permanent Court of International Justice (P.C.I.J.). In *Mavrommatis Case* , the PCIJ claimed that "an unfair agreement is worth more than a fair judgment".[2]

The fundamental character of negotiations in the process of settling international disputes is evinced by shaping the characteristic features of them, such as: they are previous to the other means (anteriority principle), their flexibility and effectiveness.

With regard to the previous character of negotiations, it is claimed that the states between which a dispute arises are obligated to use first of all negotiations, subsequently having the option to resort to other means, including jurisdictional means. Although frequently used in international practice, the anteriority principle has not been expressly regulated, but only implicitly. In this respect, we can indicate articles 9, 38 and 41 of the Hague Convention regarding the peaceful settlement of international conflicts of 1907.[3] Under art. 13 para.1 of Nations League Pact of 1919, it is established that: "The members of the Society agree that in the event of a conflict arising between them, which according to their opinion can receive an arbitral or judicial settlement and if such dispute cannot be settled in a satisfying manner by diplomatic means, the matter shall be referred in full to an arbitral or judicial regulation. "The anteriority of the negotiations can also be depicted from the provisions of the General Act of 1928, which indicates them as a preamble of the procedure of resorting to an international court. The interpretation of the provisions of art.33 of the UNO Charter shows that although it is not intended to make a hierarchy of the

Dicționar de Drept Internațional Public (Dictionary of Public International Law), Editura Științifică și Enciclopedică, București, 1982,p.192.

[2] Grigore Geamănu, *Drept Internațional public (Public International Law)*, vol. II, 1983, p.397; C.P.J.I., Serie C, nr.5, p.51.

[3] The Hague Convention of 1907-Art.9 "In international disputes that do not affect either honour or the essential interests and which arise from divergent opinions on factual circumstances, the contracting powers acknowledge as useful and desirable that the parties that do not reach an agreement by diplomatic means should set up, to the extent where circumstances allow, an international commission of investigation having the obligation to facilitate the settling of these disputes by clarifying the problems in fact by means of unbiased investigations in good faith.";Art.38-"In the problems of a legal character and, first of all, in the problems of interpreting and applying international treatises, arbitration is recognized by the contracting powers as the most effective means and, at the same time, the most equitable way of settling unsolved disputes by diplomatic ways...".

peaceful means of settling disputes, it cannot be disregarded the fact that negotiations come first. Thus, according to the article mentioned above "The parties to any dispute whose extension could jeopardize the safekeeping of international peace and security shall try to settle it, first of all, by negotiations, talks, investigation, mediation, conciliation, arbitrage, legal means, resorting to regional organizations or agreements or by other peaceful means at their choice." The regulation of the negotiations as coming first in the category of means of peaceful settling disputes has been a rule in the process of preparing many international or regional instruments. The importance of negotiations has also been reiterated in the practice of PCIJ and also of ICJ. In all eight cases where it has been requested to rule on the matter of the anteriority of negotiations, the PCIJ has had a constant position regarding the obligation of prior talks.[4] The ICJ has maintained the rule promoted by its predecessor by formulating various mentions on the form and subject of the negotiations.

The Manila Declaration on the peaceful regulation of disputes in 1982 underscores the flexible character and effectiveness of negotiations as a peaceful means of settling disputes. In this respect, section I, para.10 states that: "Without prejudice to the right to a free choice of means, states shall consider that direct negotiations are a simple and efficient way of regulating their differences. When they choose to resort to direct negotiations, states shall negotiate in a meaningful way such as to rapidly reach a settlement acceptable to the parties." The flexibility of negotiations confers the parties to a dispute the possibility to use them irrespective of the nature of the dispute.[5] Even if, usually, the existence of a dispute, of the subject of the dispute is unchallengeable, there are uncertain cases where the role of diplomatic negotiations is relevant. Negotiations can aim at a final resolution to the dispute or only at clarifying certain elements in order to determine a procedure that the parties will apply in the future.[6] The lack of rigidity and formalism of the negotiations procedure, as well as the possibility to express directly without reserves show the advantages from which the parties to an international dispute would profit. The conducting in good faith of the negotiations is an obligation of the parties to litigation and a guarantee of the effectiveness of such negotiations. The parties to an

[4] See in this respect Ionel Cloşcă, op.cit.,1973, p.61-63.

[5] *Handbook on the Peaceful Settlement of Disputes Between States*, United Nations, New York, 1992, p.9

[6] Raluca Miga Beşteliu, *Drept Internaţional public(Public International Law)*, vol.II, Editura C.H.BECK, Bucureşti, 2008, p.4.

international dispute must act in such a way as to make the negotiations meaningful, to identify the possibility of a compromise. They are not obligated to settle the dispute by negotiations, but must make efforts in this regard and should not use he negotiations in an abusive, purely formal way. Negotiations give the possibility to reach, in a relatively short time, an equitable solution jointly agreed by the parties involved, without being necessary to resort to an arbitral or judicial procedure, which involves a mandatory decision pronounced by an independent body.

With respect to the position of participants in the negotiations, we can say that such a capacity is held by the parties to the international dispute, mainly the states. In order to determine the categories of persons that have the capacity of representing a state in the negotiations, reference is made to the domestic law of each state. Generally, the category of persons entitled to conduct negotiations on the behalf of a state includes: the head of state, the head of the government, officers of the Ministry of Foreign Affairs, members of the diplomatic missions, but also persons of good standing and experience in the field. Also, representatives of movements of national liberation and high officers of international organizations as representatives of the former may have the capacity of participants in the negotiations.[7]

Specialized literature distinguishes between bilateral negotiations, plurilateral or multilateral negotiations, as well as collective negotiations. Bilateral negotiations are conducted by direct contacts between representatives of the states that are parties to the dispute or by exchange of notes or letters. In case of plurilateral or multilateral negotiations, the larger number of parties to the dispute requires the organization of an international conference, considered to be the propitious basis for conducting the negotiations. The category of participants in the conference, besides the parties to the dispute, can include also the states that have a certain interest, but are not parties to the dispute, the latter, however, are not to take part in the talks regarding the dispute. Negotiations cannot take place if a part of the parties to the dispute are absent from the conference, but the points of view presented in the conference can be taken into consideration. Collective negotiations are conducted under the auspices of international organizations. If in case of collective negotiations the place of the negotiations is clearly set, being the place of the premises of the organization in charge of the

[7] Grigore Geamănu, op.cit.,1983, p.396.

relevant field, in case of bilateral or multilateral negotiations, the place is established based on the agreement of the states involved in the dispute.

With regard to the duration of the negotiations, we mention that there is no rule in the international law setting a fixed period of time. Thus, negotiations can be conducted in a few days, months or even years, according to the specific circumstances of each case. Extending the negotiations for a long period of time without justified reason, only to delay the settling of the dispute is a breach of the obligation to negotiate in good faith.

2. Good Offices

Classified at first as a secondary means of peacefully settling international disputes, good offices have proven their effectiveness over the years, being regulated by many bilateral and multilateral international treaties.[8] In this regard, we can mention the following international instruments: a protocol of the 1856 Congress in Paris, the General Act of the 1885 Conference in Berlin, as well as the two Hague Conventions in 1899 and 1907, considered to be the most complete regulation of good offices.[9] The omission of good offices from the list made in art.33 of the UNO Charter has not affected the role of good offices in the evolution of international law, as they have been subsequently mentioned in other international instruments. Thus, under the Declaration on the peaceful settlement of international disputes, it is established that: "*The states must seek in good faith and in a spirit of cooperation a rapid and equitable solution to their international disputes by any of the following means: negotiations, investigation, mediation, conciliation, arbitrage, legal settlement, resorting to regional bodies or agreements or any other means, at their choice, including good offices...*"[10]. Under UNO Resolution no. 43/51 of 1988 regarding the Declaration on the prevention and elimination of disputes and cases that can jeopardize international peace and security, and the role of UNO in this regard, it is established the possibility of the

[8] Ion Anghel, Alexandru Bolintineanu, Ionel Cloşcă, Ion Diaconu, Mircea Malița, Dorin Rusu, Ioan Voicu, *Mecanisme de reglementare pașnică a diferendelor dintre state (Mechanisms of Peaceful Settlement of Disputes between States)*, Editura Politică, Bucureşti, 1982,p.83.

[9] Grigore Geamănu, op.cit.,1983,p.401.

[10] UNO Resolution no.37/10-Declaration on the peaceful settlement of intrnational disputes, 1982,para.5.

UNO Security Council to resort to good offices, beside other means, in order to prevent the deterioration of the conflict situations.[11]

Considering the opinions expressed in the specialized literature, we can define good offices as being the efforts undertaken by a third party with the parties to a dispute in order to create conditions favorable to conducting direct talks or resuming talks if such have been discontinued.

The definition above helps us identify the particularities of good offices as a political-diplomatic means of settling international disputes. As a result, we note that the impossibility of the parties to a dispute to sit at the negotiations table require the intervention of a third party. Thus, most of the times, good offices are offered by a third party, but can be requested by one of the parties to the dispute or by all of the parties to the international dispute. A third party can act only if there is an acceptance by the parties to the dispute. If the states involved or only one of them do not accept the good offices initiative, the procedure will not take place. The right to offer good offices belongs to a third party to the conflict, third party which may be a state or a group of states, an international organization or several international organizations, as well as one or several persons of international prestige. Usually, on the behalf of a state, the person entitled to offer good offices is the president, but also persons responsible for conducting the foreign affairs of a state, such as the minister of foreign affairs or diplomatic representatives. In respect of the international organizations, their articles of association state the body that can conduct such an activity and the case where such an action is necessary. The UNO Secretary General often offers good offices. Irrespective of the capacity of the third party, their action needs to be limited to creating a climate of understanding, to establishing a communication channel between the parties to the dispute. In conclusion, the third party does not participate in the negotiations between the states, its function ending as at the time when the parties have begun talks or when talks have been resumes in case where such talks have been discontinued. In a completely unbiased manner, the third party can, however, send proposals to the parties involved in the dispute, under such circumstances acting as a mere sender and not as negotiator.[12] If the third party participates directly in the negotiations, it becomes a mediator, thus exceeding the scope of good offices. According to the particularities of each case, good offices can be conducted in written or verbal form. Good offices cease as at the time when the purpose pursed has been achieved, namely, the negotiations have been

[11] Para.12.
[12] Ionel Cloşcă, op.cit.,1982,p.43.

accepted. However, it is possible that the third party should renounce when noting that the purpose pursued is not achieved or even that the parties involved act in a contrary manner.[13] It is claimed that "*the result of good offices depends on the prestige and respect of the party that conduct them and especially on the flexibility, tact, discretion and impartiality of the application of good offices*".[14]

3. Mediation

Although history mentions from ancient times the practice of mediation, the instatement of mediation in international law took place much later. The same as in the case of good offices, mediation was fully regulated by the Hague Conventions, when it became a unanimously recognized procedure. According to art.2 of Convention I of Hague regarding the peaceful settlement of international conflicts of 1907, it is recommended that in case of serious disagreement or conflict, before resorting to armed forces, the parties should resort to mediation. Art. 3 mentions that the right to offer mediation belongs to the powers that do not participate in the conflict, even during military operations. Also, it is mentioned that the exerting of this right cannot be considered by any of the litigating parties as an unfriendly act.[15] Mediator has the role of helping the parties deeply examine the conflict in order to identify an equitable and reciprocally advantageous solution. The instatement of mediation as a means of peaceful settling the disputes has also been achieved by other multilateral treaties, such as: UNO Charter, the Arab States League Pact, the Charter of the American States Organization, the Bogota Pact of 1948, he Statement of 1970 regarding the principles of international law, the OSCE Final Act of 1975, the Declaration regarding the peaceful settlement of disputes of 1982.[16]

The above show that mediation, very much like good offices, has the same trigger mechanism, namely the intervention of the third party in the

[13] Ionel Cloşcă, op.cit, 1973, p.89.

[14]Ion Anghel, Alexandru Bolintineanu, Ionel Cloşcă, Ion Diaconu, Mircea Malița, Dorin Rusu, Ioan Voicu**,** op.cit.,1982,p.88.

[15]Adrian Năstase, *Documente fundamentale ale dreptului internațional şi ale relațiilor internaționale (Fundamental Documents of International Law and International Relations)*, 1b, Regia Autonomă ,,Monitorul Oficial '', Bucureşti, 1997, p.810.

[16] Alexandru Bolintineanu, Adrian Năstase, Bogdan Aurescu**,** *Drept internațional contemporan (Contemporary International Law*), Ediția a 2-a revăzută şi adăugită, Editura ALL BECK, 2000, p.187.

existing conflict. However, as different from good offices, the mediator actively participates in the negotiations, proposing solutions and aiming at reaching an agreement between the parties.[17] Consequently, mediation appears to be an autonomous procedure of settling international disputes, characterized by the intervention of a third party aiming at the creation of an adequate framework to support the parties in deeply examining the dispute between them and identify an adequate solution.

Mediation can be conducted either at the request of the litigating parties, or as a result of accepting a proposal of a third party, from this point of view the specialized literature distinguishing between requested mediation and offered mediation.[18] Mediator can be one or several states, an international organization or a person selected by taking into account their personal qualities or the office they occupy. Establishing a mediator in case of requested mediation or accepting the mediator in case of offered mediation is a rather difficult problem determined by the suspicion and distrust of the parties. Irrespective of case, the mediator needs to be accepted by the litigating parties**.** Any action of mediation requires the consent of the parties regarding the acceptance of mediation, as well as the acceptance of one mediator or another. Mediation should take place under equal conditions to all the litigating parties. When identifying solutions, there need to be considered the interests of all the parties involved, in this respect being necessary the correct definition of the objectives invoked. The mediator aims at putting in agreement the interests of the parties to the international dispute and can propose concrete solutions. The success of mediation depends to a large extent on the qualities of the mediator, of which we mention: international prestige, experience, trust inspired to the parties, impartiality, independence from the conflicting states or other entities, as well as the level of information and knowledge of the problems related to the respective case.[19] Eventually, the conflicting parties can accept or decline the solution proposed by the mediator. According to art. 5 of Hague Convention I of 1907, the functions of the mediator cease as of the time when one of the parties to the dispute or the mediator themselves note that the proposed means of settlement have not been accepted.

[17] Patrick Daillier, Mathias Forteau, Nguyen Quoc Dinh, Alain Pellet, *Droit international public*, LGDJ, Paris, 2010, p.929.
[18] Ionel Cloşcă, op.cit.,1973, p.97;Ionel Cloşcă,op.cit.,1982,p.180.
[19] Ion Anghel, Alexandru Bolintineanu, Ionel Cloşcă, Ion Diaconu, Mircea Malița, Dorin Rusu, Ioan Voicu**,** op.cit.,1982,p.110.

In international practice, mediation has been used in various international disputes. In this respect, we mention the mediation by the USA of the disputed between Israel and Egypt, completed by the Camp Davis Agreement dated 17 September 1978; the mediation by Javier Perez de Cuellar[20] regarding the settlement of the Rainbow Warrior dispute of 1986 between France and New Zeeland, the mediation by the European Union of the political conflict between Hungary and Slovakia with regard to the dam on the Danube at Gabcikovo-Nagymaros etc.[21]

4. International Investigation

Started at Russia's initiative by adopting the Convention on the peaceful settlement of international conflicts in 1899, the regulation of international investigation was reconfirmed by the Hague Convention I regarding the settlement of international conflicts of 1907. According to art.9 of the Convention adopted in 1907 "*in international disputes that do not affect either the honor or the essential interests and that arise from divergent opinions on factual circumstances, the contracting parties recognized as useful and desirable that the parties that fail to reach a diplomatic agreement should set up, to the extent where circumstances allow, an international commission of investigation in charge of facilitating those disputes by clarifying the factual problems by means of impartial investigations conducted in good faith.*" Consequently, the investigation commissions mainly aim at establishing facts and clarifying the circumstances which have triggered the international dispute.[22] Such commissions are set up by the parties to the international dispute based on an express agreement in order to investigate concrete cases. The agreements regarding the investigation should include a precise determination of the facts subject to the investigation, the way and term of setting up the commission, the scope of empowerment to the members of the commission, the working procedures, as well as the obligations of the litigating parties. The commission is entitled to request to each party the information it deems necessary. The parties to the international dispute are obligated to present the international commission of investigation all the data necessary for a full

[20] ONU Secretary General between 1982-1991.
[21] Dragoş Chilea, *Drept internațional public (Public International Law)*, Editura Hamangiu, Bucureşti, 2007, p.128.
[22] Grigore Geamănu, *Drept internațional contemporan* (Contemporary International Law), Editura didactică şi pedagogică, Bucureşti, 1975,p.304

clarification and exact appreciation of the litigating facts. Each party shall communicate to the commission, but also to the opposing party the acts and documents they deem useful for finding out the truth, the list of the witnesses and experts whose hearing is necessary to correctly establish the factual circumstances. In the event where the investigation commission decides that it is required an investigation on site, there will have to be obtained the permission of the state on the territory of which the investigation is to be made. The works of the international commission of investigation are complete with a report limited to ascertaining the facts, without presenting settlement solutions. The parties are free to accept or reject the findings presented in the report prepared by the investigation commission, this being optional.

Consequently, the international investigation is a peaceful means of settling the disputes, which comprises the designation by the litigating party of a person or commission for the purpose of exactly establishing the facts that have given rise to the disputes between the parties and the ascertaining of such facts in a report which the parties are free to use as they will.

The first application of the procedure took place in the Hull case (Dogger Bank) in 1904[23], followed by the cases Tavignano (1912)[24], Tubantia (1921)[25], the Red Crusader case (1962)[26] etc.[27] Subsequently, various treaties aimed at enlarging the competencies of the investigation

[23] During the night of 20 to 21 October 1904, in full-fledged Russian-Japanese war , further to erroneous information, the Russian fleet opened fire against British fishing vessels, believeing that they were Japonese torpedo boats. The investigation commission establishyed that the Russian party had to pay the British goverment an indemnity of GDP 65,000.

[24] During the Italian-Turkish war, an Italian warship captured a French ship. The investigation commission had to establish the place where it was captured.

[25] In 1912, a Dutch ship disappeared in the North Sea. The investigation commission set up in 1921 established that the Dutch ship shipwrecked because of a torpedo lauched fropm a German submarine.

[26] Red Crusader, a Scottish trailer was arreested in 1961 by Danish firgate Niels Ebbesen, as the crew had fished illegally in the maritime areas of the Foroes, a Danish autonomous territory.

A Danish crew was placed aboard the Red Crusader to guide it to the port of the Feroes, but nevertheless, the ship continued its course to Aberdeen, Scotland, in spite of the efforts made by the Danish frigate top revent such action. Among other things, the Danish frigate shot warnings shots in the bow of the Red Crusader.
In order to identify the concrete circumstances of the dispute, the governments of Great Britain and Denmark agreed to appoint a neutral commission in the Hague.

[27] For details, see Ionel Cloşcă, op.cit.,1973,p.106-116.

commissions, for instance the Knox Treaties (1911) and the Bryan Treaties (1913-1915), which have never been applied.[28]

Although it has been found the conclusion of a number of treaties between states[29] regarding the resorting to international investigation as a means of settling the disputes, the frequent use has been recorded as part of the activities conducted by international organizations. It is claimed that after the World War II investigation has disappeared from bilateral relations and continue to exist within the international organizations or universal or regional vocation.[30] Currently, UNO constantly resorts to the mechanism presented above, but only as a means prior to other means of peaceful settlement of international disputes.[31]

5. Conciliation

Conciliation is a diplomatic means of settling the disputes between states, comparable to the international investigation and arbitration, but not identical to them. The purpose of designating the international conciliation commissions is the examination of the dispute, under all aspects and the proposal of a solution that is not mandatory. Thus, conciliation differentiates itself from the international investigation by a larger scope of action. As different from the international investigation commissions which aims only at establishing the facts, the conciliation commission starts from matters of fact and law and continues with making proposals of settlement.[32] As

[28]The Knox Treaties- agreements concluded between France and Great Britain regarding the extension of the competencies of the investigation commission;The Bryan Treaties – treaties concluded at the initiative of the USA, under which the parties undertook not to resort to war until such time as the commission presented its report and a certain time afterwards.

[29]The Montevideo Treaty of 1915 concluded between Chile and Uruguay, The Buenos Aires Treaty of 1915 concluded between Argentina, Brazil and Chile; the Washington Convention of 1923 between USA, Guatemala, Salvador, Honduras, Nicaragua and Costa Rica, the Bogota Pact of 1948, the Buenos Aires Protocol of 1967. Also, the first such aditional Protocol of 1977 to the Geneva Conventions provided for the setting up of an international commission in order to concretely establish the state of fact.

[30] Ion Anghel, Alexandru Bolintineanu, Ionel Cloşcă, Ion Diaconu, Mircea Malița, Dorin Rusu, Ioan Voicu**,** op.cit.,1982,p.130.

[31] Stelian Scăunaş**,** *Drept internațional public (Public International Law)*, Ediția 2, Editura C.H.BECK, Bucureşti, 2007, p.322.

[32]J.G.Merrills, *International Dispute Settlement*, 5th edition, Cambridge University Press, 2011, p.58; Ionel Cloşcă,op.cit.,1973,p.117.

mentioned above, the proposed solution is not mandatory, which makes the difference between conciliation and jurisdictional means.

Conciliation, as in the case of the other diplomatic means, starts on the basis of the expressed agreement between the parties, most of the times prior to the occurrence of disputes by concluding bilateral and multilateral treaties, which establish this means of settling the disputes. There is a possibility of expressing the parties' agreement subsequently to the occurrence of the dispute.[33] The conciliation commission comprises the litigating parties and can be permanent or ad-hoc, in the latter case the commission being set up for a determined dispute. Generally, the conciliation commission comprises several persons, in the international practice being identified cases where the parties to the dispute have designated one single person to perform the conciliation.[34] The designation of a single conciliator is an exception, the conciliation commissions being collective, as indicated by the name, the number of the members being different from one treaty to another. Usually, the conciliation commissions comprise three or five members elected based on the criterion of nationality, of equal representation of the parties and of the lack of direct interest in the dispute to be settled.[35] Most of the times, the multilateral treaties which establish the conciliation as a means of settling disputes provide for the obligation to make a permanent list of conciliators. For instance, the provisions of the Annex to the Vienna Convention on the treaties law of 1969 comprise mentions regarding the preparation of a list of conciliators based on which the conciliation commission will be set up for the cases mentioned by the respective Convention. Usually, the conciliation commission comprises an odd number of members, and the nationals of the conflicting states are part of the conciliation commission as a mandatory condition, thus eliminating the reserves of the parties with regard to the proposed solution.[36] Also, under the Convention regarding the conciliation and arbitration adopted by CSCE[37] and enforced in 1994, the conciliation commission comprises designated conciliators from the list prepared by the

[33] Raluca Miga Beşteliu, op.cit.,2008,p.7.

[34] We mention in this respect, the *East African Community* case of 1977 when Kenya, Ugandaand Tanzania requested the services of the Suedish diplomat Victor Umbricht in order to settle the dispute regarding the claims of these states on the patrimony of the East African Community.

[35] Alexandru Bolintineanu, Adrian Năstase, Bogdan Aurescu, op. cit.,2000,p.190.

[36] In the commissions comprising five members, two are appointed by the states from their citizens and the rest of three are designated in a mutually agreed manner.

[37] At the time, OSCE was known as CSCE.

designation by each state part to the convention of two conciliators, of which at least one is a citizen of the state that has designated them. In case of setting up the conciliation commission, each litigating party shall appoint a conciliator from the respective list to be part of the commission. When more than two states are parties to a dispute, the parties that have the same interest can agree to appoint a single conciliator. Otherwise, each party shall appoint an equal number of conciliators and the Bureau shall appoint other three conciliators to be part of the commission.[38]

The start and conducting of the conciliation procedure are made according to the provisions existing in the agreements concluded between states. The conciliation procedure is confidential and is performed in contradiction. The works of the commission and the documents remain secret, the publication is allowed only with the parties' consent and based on a decision of the commission. Although the contradictory character has been subject to disagreements in the studies conducted, the conventional provisions have instated it as a characteristic of the conciliation procedure, the confrontation of arguments and evidence of the litigating parties determining the facilitation of identifying an equitable solution. The conciliation commission aims at establishing the facts that have triggered the conflict and also at identifying the problems of law trying to achieve a full and final conciliation between the parties by proposing a solution accepted by the parties to the international dispute. The conciliation procedure is complete by the preparation of a report by the commission presenting the conclusions grounded in fact and in law and the solution proposed. The report of the commission is not binding for the parties, which are free to accept or reject it.

Consequently, the conciliation can be defined as a way of peacefully settling international disputes by means of a commission of a permanent or ad-hoc character, set up by the parties to the international dispute based on an agreement between them, in order to clarify all the circumstances that have triggered the conflict and to recommend an equitable solution to the parties involved.[39]

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[38] See art.2, art.3 and art.21 of the Convention regarding the conciliation and arbitrage adopted in 1992 by OSCE.

[39] A definition often used in the specilaized literature is the one formulated in the Regulation regarding the conciliation procedure, adopted by the Institute of International Law in the 1959-1961 session. Art.1 states that : "For the purposes of this provision, conciliation means a way of settling international disputes of any kind, under which a commission appointed by the parties, either with a permanent character or ad-hoc, performs

As a means of peacefully settling international disputes, conciliation was provided for in various treaties concluded in the first decade of XX century. By the beginning of World War I, 150 bilateral conciliation treaties were concluded, starting the practice of the multilateral conciliation treaties.[40] It was of a considerable importance the adoption in 1922 by the League of Nations of the resolution under which the states were encouraged to settle their disputes by resorting to international conciliation commissions. Then, there were the Locarno Agreements of 1925 and the General Act for peaceful settlement of international disputes of 1925, revised in 1949. The conciliation is provided for in art.33 of the UNO Charter and also in the Declaration regarding the principles of international law of 1970, as well as in the Manila Declaration of 1982. Apart from the Vienna convention on the treaties law of 1969, we can indicate also other instruments of major importance to the international law providing for the resorting to conciliation, as follows: the Vienna Convention on the representation of the states in their relation with the international organizations of universal character of 1975; the Vienna Convention regarding the succession of states to treaties of 1978; the Convention on the sea law concluded at Montego Bay in 1982; the Vienna Convention regarding the protection of the ozone layer of 1985 etc.[41] In 1990, the UNO General Assembly prepared and submitted to the attention of the member states draft articles regarding conciliation as a means of settling disputes between the states. Based on the draft articles prepared in 1990, the UNO General Assembly adopted in 1995 a Regulation comprising 29 articles, their contents covering all the aspects of conciliation from the start of the procedure to the preparation of the report.[42]

Currently, conciliation is not used very often, although it is a means of peaceful settlement of disputes stated in many bilateral and multilateral treaties.

In doctrine, the authors of international law identify **the characteristics of the political-diplomatic means of settling the**

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an impartial examination of the disputes and tries to define the terms of an agreement that can be accepted by the parties or giving the parties with a view to a settlement any recourse required from them."

[40] Ion Anghel, Alexandru Bolintineanu, Ionel Cloşcă, Ion Diaconu, Mircea Malița, Dorin Rusu, Ioan Voicu, op.cit.,1982,p.155.

[41] The list is presented as a matter of example, for details see Handbook on the Peaceful Settlement of Disputes Between States, op.cit,1992, p.54; J.G.Merrills, op.cit., p.59-83.

[42] J.G.Merrills, op.cit., p.74; Ion Diaconu, *Manual de drept internațional public (Handbook of Public International Law),* Editura Lumina Lex, Bucureşti, 2007,p.330.

international disputes, thus shaping the advantages of using such a procedure. [43] Firstly, it is underscored the parties' liberty to choose or combine within the same dispute the means described above. Secondly, it is stressed the anterior (prior) character supported by the presentation of the international practice band the interpretation of the provisions regarding the political-diplomatic means. Thirdly, it is invoked the lack of formality, which determines a better communication between the parties involved in the dispute and the identification of an equitable solution that can be reached by reciprocal concessions. Fourthly, it is mentioned the optional character of the findings and solutions recommended in case of an intervention by a third party.

Conclusions

Considering the characteristics of the political-diplomatic means of settling international disputes in the doctrine of international law, it can be recommended a frequent use of such means given the advantages presented by them. In fact, the practice of the states shows that the resorting to the means descried above could result in more solid relations between the subjects of international law. The resorting to the political-diplomatic means proves the availability of the states to settle the disputes between them in a relatively short while, excluding the judicial procedures, which although efficient, take longer periods of time and involve the compliance with clearly determined rules. Consequently, the lack of formalism and the recognition of the litigating parties' liberty to resort to the means that they see fit do nothing else than prove their efficiency at international level. The parties can reach a reciprocally advantageous agreement based on reciprocal concessions, which represents in fact the essence of international law.

[43] Raluca Miga- Beşteliu, op.cit., 2008, p.4.

SECOND APPEALS IN THE INTEREST OF THE LAW WITH INFLUENCE ON THE NOTARIAL ACTIVITY

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ABSTRACT

This article is an effort to present, based on arguments, unitary answers that legal practice has given to various fundamental questions regarding issues of interest in the notarial field, such as the sale of real estate from the dwellings class, acquiring ownership through purchasing statute of limitation or the contractual accumulation of penalties and interests under certain contracts, analysing the second appeals in the interest of the law made in this field, according to which "the resolution of legal issues judged is mandatory..." not only for courts, but also for any litigant that may claim a right or an interest in this field.

KEYWORDS

Sale of real estate from the dwellings class, penalties and interests, appeals in the interest of the law

I

Although most of the times the sale-purchase agreements concluded on the basis of special laws (such as Law no. 114/1996, Law no. 112/1995, Law no. 85/1992 or Decree-Law no. 61/1990) have been concluded under the form of documents under private signature, in the light of the new amendments to Law 114/1996[1], it is worth noting a diverse practice of solutions in the application of the provisions of *Law no. 85/1992 as revised, regarding the sales of dwellings and of spaces of different destinations from*

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[1] Emergency Ordinance no. 210/04.12.2008 regarding the completion of Dwellings Law no. 114/1996 (Official Gazette no. 835/11.12.2008), which provides, under the sanction of absolute nullity, for the obligation to conclude the sale-purchase agreements based on this normative act in an authentic form.

state ownership or from the ownership of state owned companies or units, in case where the leases have been concluded after the effective date of the law, that is after 29 July 1992.

Thus, the High Court of Cassation and Justice, under Decision no. 5 of 21 January 2008[2] stated that all holders of leases for their dwellings, irrespective of the time when such leases have been concluded, are entitled to purchase the dwelling built from state funds on the basis of Law no. 85/1992, under the conditions where the law does not expressly provide for the interdiction of purchasing for the lessee that has concluded a lease after the effective date of the law.

However, the practice has considered that the holders of the leases for dwellings built from the funds of the state, of state owned companies or units concluded after 29 July 1992, the effective date of Law no. 85/1992, are not entitled to benefit from the provisions of this normative act.

This solution is grounded on a historic interpretation of the intention of the lawmaker, which claims that the benefit of the possibility to purchase (which corresponds to the imperative correlative obligation of selling) was devised only in favour of the holders of the leases legally concluded before the effective date of Law no. 85/1992.

In practice, a contrary opinion has arisen, claiming that the provisions of Law no. 85/1992 are also applicable to the leases concluded after the effective date of the law.

The grounding of this resolution comes from the logical-rational and systemic interpretation of the provisions of Law no. 85/1992, which in art. 1 para (1) states that "the dwellings built from state funds can be purchased by the holders of the leases, on condition that the price is paid in full with a down payment or in instalments..." Accordingly to art. 7 of Law no. 85/1992, "the dwellings built from the funds of state owned companies or units before the effective date of this law, other than the special purpose dwellings, shall be sold to the holders of the leases, at their request...", also stating that these "shall be sold, ..., to the holders of the leases and the dwellings that before 6 March 1945 belonged to independent corporations, institutions and companies with state, mixed or private capital, which ceased to exist after that date or, as the case may be, became, by reorganization, state owned commercial companies or units", and then in par. (6) of the same article, it is stated that "there are entitled to benefit from the provisions

[2] Published in the Official Gazette no. 673 of 30 September 2008.

of par. 1 also the lessees that are not employed by the units owning of the dwellings".

The text of these legal norms states that the law instates in an imperative manner the in rem obligation to sell (the option to decide whether to concluded such sale-purchase agreement bearing exclusively with the beneficiary, which must be a lessee at the time of their offer to contract the purchase) and instates as a condition for concluding the sale-purchase agreement only that the dwellings should be built prior to the effective date of the law which does not condition the obligation to sell on the existence of a validly concluded lease as at the effective date of the law.

This theory is also supported by the historic interpretation of the law-making policy which under successive normative acts (Decree-Law no. 61/1990, Law no.85/1992, Law no.114/1996), undoubtedly express constant and continuous measures of social protection, which allow all tenants to buy the dwellings inhabited by them.

II

As most often, the heirs' certificates, the estate also includes the buildings held in fact by the deceased, we appreciate that it is useful to know the unitary interpretation of the Supreme Court in respect of the possibility to acquire ownership over land by usurpation, in case of taking possession which had commenced before the effective date of Law no. 58/1974 regarding the improvement of land and urban and rural localities, as well as Law no. 59/1974 regarding the land.

The High Court of Cassation and Justice, under Decision IV of 16 January 2006[3] ruled that in case of taking possession that commenced before the adoption of Laws no. 58/1974 and no. 59/1974, the statute of limitation of acquiring land has not been interrupted by the coming into effect of these laws, so it is only after their abrogation, that the holders of that land can invoke the right to acquire ownership.

Thus, in practice, various courts, and also doctrine makers have considered that, *given the purpose pursued, Laws no. 58/1974 and no. 59/1974 have established a natural interruption of the course of the statute of limitation of acquisition for the taking possession commenced before their effective date*, so that, only after their abrogation[4] there starts to elapse

[3] Published in the Official Gazette no. 288 dated 30 March 2006.
[4] Under Decree-Law no. 1/1989 and Decree-Law no.9/1989.

the term of a new statute of limitation. In grounding this point of view[5], it has been pointed out that the adoption of Laws no.58/1974 and no.59/1974 a has led to removing land from the scope of civil law[6], so that no ownership could be acquired by means of usurpation.

In grounding this thesis, it has also been pointed out that although the normative acts invoked do not expressly state the removal of land from the scope of civil law, the circulation of such land under civil law has become impossible as a result of the restrictive norms included in the normative acts invoked, land becoming not only inalienable, but also not subject to any statute of limitation, such as the possession exerted during the period of validity and applicability of the two laws is not in a position to lead to acquiring ownership through usurpation.

Also, it has been pointed out that the legal effects of a purchasing nature recognized under the old law could not have been amended after the coming into effect of the new provisions, unless by violating the non-retroactivity of the new civil law, which supports the conclusion that possession has become able for usurpation only as at the date of abrogation of the two laws.

Other doctrine makers[7], practitioners and other courts, have claimed, on the contrary, that under the provisions of art. 30 par. (1) of Law no. 58/1974 and of art. 44 par. (1) of Law no. 59/1974, land has not been removed from the scope of civil law, but that under the two **regulations *a legal means has been created to limit the attribution of disposing of land, which cannot be equated to the cancellation of the effects of the civil institution of possession that has never been cancelled*, as the** impossibility for land to change hands under legal documents concluded between living individuals has not prevented the possession over such land.

Thus, the provisions of art. 30 par. (1) of Law no. 58/1974 point out that "*the acquiring of land part of the buildable area of urban and rural*

[5] In this regard, as a completion, see also C. Bîrsan, V. Stoica, or C Turianu, *The interruptive effect of laws no. 58/1974 amd no. 59/1974*, in the magazine Law no. 9/1992.

[6] According to art. 30 para (1) of Law no.58/1974 and of art. 44 par. (1) of Law no.59/1974, land of any kind, could be acquired only by legal inheritance.

[7] I.C. Vurdea, "Evoluția legislației privind circulața imobilelor" (The Evolution of Laws regarding the Circulation of Real Estate), magazine Law no.6/1990, p 45, M. Scheaua, "Dobândirea dreptului de proprietate asupra terenurilor prin prescripție achizitivă" (Acquiring Ownership over Land by Statute of Limitation for Purchases), magazine Law no. 5-6/1993, p. 62-65 or Liviu Pop, - „Dreptul de proprietate si dezmembrămintele sale" (Ownership Rights and Its Dismemberships), Lumina Lex, 2001, p. 242-244.

locality can be achieved only by legal inheritance, being forbidden the alienation or acquiring by such land by legal documents".

Law no.58/1974 limits the rights of transferring land under legal documents concluded inter vivos, however, it does not include any provision regarding the interdiction of possession or its effects on the land, a civil institution recognized and protected throughout the validity period of the two laws.

Mention must be made that although art. 1864 point. 2 of Civil Code states that it is interrupted the natural course of the statute of limitation *"when the item is declared as not being subject to any statute of limitation resulted from a legal change of its nature or destination", laws no.58/1974 and no. 59/1974 limited only the ways of acquiring land* and their nature or destination have not been changed at all so that we are not under the scope of the institution of interrupting the course of the statute of limitation.

Noting therefore that during the period of application of Laws no. 58/1974 and Law no.59/1974, there was not been removed the private character of ownership over land, which could be transferred/acquired by succession, it is beyond doubt that in this premise case, there are not applicable the provisions of art. 1844 of Civil Code, according to which "*it cannot be subject to statute of limitation the field of things, which given their own nature or by a statement of the law cannot be subject to private property, but are removed from trading".*

Therefore, it results that the holders of land during the period of application of Laws no. 58/1974 and no.59/1974 benefited not only from the *presumption of non-precarity* regulated by art. 1854 of Civil Code, but also from the provisions of art. 1858 of Civil Code, regarding the *presumption of non-inversion* of title deed, so that it is beyond doubt that in the calculation of the term of completion of the statute of limitation for purchases there can also be invoked the term of the possession conducted during the period of application of the two laws mentioned above.

Such a solution is also confirmed by the subsequent law-making policy of the Romanian state which under the provisions of Law no. 18/1991 regarding land, as revised, art. 36 para (3), has established that the land attributed for use during the existence of the buildings shall be transferred to the ownership of the ones that held their use rights, *recognizing the effects of long possession over land* and the capacity of owners which this possession, uninterrupted and public, effects.

III

The issue of the penalizing contractual clauses is one of big interest and reality of notarial, legal etc. practice, especially in the current economic-financial period, however, in the application of the provisions of Government Ordinance no. 9/2000, approved under Law no. 356/2002, and revised, regarding the accumulation of delay penalties and the contractual interest agreed or the legal interest, as the case may be, practice has given different solutions.

The High Court of Cassation and Justice, under Decision no. XI dated 24 October 2005[8] ruled in the second appeal in the interest of the law formulated in this field that it is unlawful the penal clause establishing the obligation to return when due the amount borrowed under the sanction of delay penalties, and also with the payment of the contractual interest agreed or the legal interest.

Certain practioners and some courts[9] have appreciated that the obligation of the borrower to return when due both the receivable borrowed, under the sanction of delay penalties and the interest (contractual or legal) is legally admissible as the legally made conventions have power of law between the contracting parties, and it insertion does not regard but the sanctioning of the debtor in case of failure to meet the obligation of returning the receivable when due.

Another practice consisted in obligating the debtor to return the borrowed amount, the interest and the delay penalties, amounts updated to the inflation rate and the increase in the consumption index, basing their position on the same provisions of art. 969 par. 1 of Civil Code.

Other practitioners, doctrine makers and courts have appreciated as null and void the penal clause stating delay penalties, apart from contractual or legal interest, saying that such clause is forbidden by the law, as according to the provisions of public order of Law no. 313/1879, any penal clause in lending contracts is forbidden[10].

Thus, according to art. 1 of Government Ordinance no. 9/2000 as amended by Law no. 356/2002, "parties are free to establish under conventions the interest rate for a delayed payment of a money obligation".

[8] Ruled in the Official Gazette no.123 dated 9 February 2006.

[9] See in this respect C.S.J., s. com., dec. nr. 249/29 February 1996 in Manuela Tabaras, "Contractual Liability. Damages", Ed.All Beck, 2005, p 72.

[10] In this regard also C.S.J. , s. com., dec. nr. 445/29 June 1995 in Manuela Tabaras, *Contractual Liability. Damages*, Ed.All Beck, 2005, p 46, p. 70.

Under art. 2, "in case where, according to the legal provisions or contractual provisions, the obligation bears interests, but the interest is not specified, the legal interest shall be paid"[11], and art. 3 regulates the method of setting the legal interest in commercial subject matter. Art. 5 par. (1) of the ordinance limits the level of the interest pointing out that "in civil rapports, interest cannot exceed legal interest by more than 50% per year", the sanction for breaching this limit being the absolute nullity according to art. 1089 par. (2) of Civil Code[12],

Thus, the penal clause which sets the obligation of returning when due the amount borrowed under the sanction of delay penalties, beside the legal interest is unlawful in respect of the legal provisions invoked, the regulations of art. 1 of Government Ordinance no.9/2000 limiting the setting of interests to the ceiling of 50% of the legal interest by norms of public orders, which cannot be derogated according to art. 5 of Civil Code by conventions.

It is worth mentioning that our civil law has been enriched since last fall with new institutions in the field of executing by equivalent the obligations, being obvious the intention of the lawmaker to protect the contractor which in good faith has performed its contractual obligations, by ensuring a full coverage, which is but natural in a modern state, of the entire prejudice. When reading the provisions of the new legal instrument, we can but note that the doctrinal culture in this field and also the studies and proposals of *lege ferenda* of those dedicated to the doctrinal study of this field, have recognized in full in the new provisions the right of the citizen harmed by the breaching of the contractual obligations to claim damages to cover the prejudice created with guilt, even in the lightest for of guilt, by the debtor, but also to receive coverage for all losses and benefits collateral to the main failure to perform.

[11] *A*rt. 3 of Government Ordinance no.9/2000 as amended by Law no. 356/2002, regulates the method of setting the legal interest in commercial law.

[12] "The clause which, before and at the time of issuing a convention, other than a commercial convention, states an interest to the interests due for one year or for less, or for more than one year, shall be declared null land void".

THE ADMINISTRATOR'S CIVIL LIABILITY FOR BREACHING THE DUTIES OF PRUDENCE AND CONFIDENTIALITY AGAINST THE TRADING COMPANY

Carmen TODICĂ*

ABSTRACT

Law no.31/1990 states that, the duties of prudence and diligence, overly disputed in the legislative forum[1], shall lie on the trading company's administrator. Thus, according to art. 144[1] of the Law, "the members of the board of directors will exercise their term of office with loyalty in the company's interest".

The provision is not limited to the board of directors, but also considers the managers, respectively the members of the leadership and the members of the supervisory board from the dual system[2] of the trading company, as well as any other manager regardless of the company type where he exercises his terms of office.

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[1] We say overly disputed due to the lawmaker's inconsistency that swayed between establishing by law or to suppressing it. In its original form the project for amending Law no.31/1990, adopted by the government on June 14th 2006, suggested the amendment of art 144 of the Law in the sense of establishing the duties or prudence and diligence of the administrators. ("The members of the board of directors shall exercise their term of office with the prudence and diligence of a good administrator") and establishing the duty of loyalty was made separately by art. 144[1] ("the members of the board of directors shall exercise their term of office with loyalty, in the company's interest"). Later, in the Senate's drafting adopted in session of August 30th 2006, art. 144 was repealed, and art. 144[1] established the triple duty of the administrator or prudence, diligence and loyalty. The Chamber of Deputies amended the provisions of the mentioned article, removing the duties of prudence and diligence such that on the enactment date of Law no. 441/2006 in the session of October 31st , 2006, art. 144[1] par. 1 had the following content "the members of the board of directors shall exercise their term of office with loyalty, in the company's interest." By the Emergency Ordinance no.82/2007 the Government intervened establishing the duties of prudence and diligence in the actual form of the reviewed article.

[2] In accord with art. 152, art. 153[2] par.6, art 153[8] par. 3 which order that art. 144[1] shall apply accordingly.

The obligation to keep the business secrets of the company is in essence a detailed description of the duties of diligence and prudence. From this point of view the lawmaker's approach is interesting, approach which regulates the confidentiality duty in art. 144[1] par. 5 and 6, together with the duties of prudence and diligence (par. 1-3) and the duty of loyalty (par. 4).

KEYWORDS

The duty of prudence and diligence, the duty of loyalty, the responsibility of the administrator, business secrets of the company

1. THE DUTY OF PRUDENCE AND DILIGENCE

Long disputed in the legislative forum, the duty of diligence and prudence of the administrator in a trading company has found a well deserved regulation, both within the body of the Law on trading companies no. 31/1990[3]. Thus, according to art. 144[1] paragraph 1 from the Law "*The members of the board of directors shall exercise their term of office with loyalty, in the company's interest*". The regulation, however, is not limited only to the members of the board of directors, but, it also considers the managers, respectively the management and the supervisory board from the dual system[4] of the joint-stock company, as well as any other administrator, regardless of the company type where he exercises his duties which their position involves.

The text above mentioned has a dual role: as an establishment, as a source for the duties of prudence and diligence, but also as an objective criterion for evaluating the administrator in question, with specific reference to a standard conduct as a "good administrator".

Under the first aspect of the concept duties of prudence and diligence, in theory[5] it has been defined by reference to the obligation of loyalty, being considered as bipolar obligations. The loyalty duty implies the exercise of the mandate, without the involvement of the personal interest of the manager; on the contrary, by virtue of the prudence and diligence duty, the administrator must be involved in the activities of the company

[3] Law on trading companies republished in the Official Gazette no. 1066/17.11.2004, including subsequent amendments

[4] According to art152, art. 153[2] paragraph 6 and art. 153[8] paragraph 3, that provide that art. 144[1] shall apply accordingly.

[5] Radu Catană, *quated work*, p. 189.

and must manage them as a good professional and based on profitability criteria.

In the American law, the duty of diligence concerns the administrator task to fulfill his mandate in good faith in a manner in which he considers to be appropriate for the company's interests and with prudence which would reasonably be expected from a good owner acting under similar conditions. The Spanish law establishes as falling in the administrator's duties the general duty of diligence, under which he performs his duty with the care of a tidy entrepreneur and a loyal representative.[6]

In terms of evaluation criteria the US law envisages the prudent owner, while the Spanish law envisaged the tidy entrepreneur. The English law[7] relates the standard of duty of diligence to the conduct a person that has the knowledge, the skills and experience should reasonably have from the moment it holds the position as an administrator.

Under the Romanian law, the standard for appreciating the manner of implementation of the duty of diligence is the one of the "*good administrator*". Until the amendment of the Law on trading companies, and the establishment of the *"good administrator"* criterion, the principle of aggravation of responsibility of the administrator was based on art. 1540 Civil Code from 1864 (currently repealed), under which the representative with pecuniary interest was responsible for failure of the mandate for any fault, negligence or imprudence, which was assessed in abtracto, in relation to the conduct of a good owner, honest and diligent, found under the same circumstances as the one incumbed upon the concerned administrator.

This criterion for assessing the fault. according to art. 144^1 par.1 from the afore mentioned law is nothing more but the lawmaker's desire to regulate the accountability of the administrator for the slightest fault – imprudence and negligence. But the accountability of the administrator for the duties of diligence and prudence is engaged in accordance with the predictability of the consequences of the administration act. Thus predictability is analyzed in relation to the good administrator model, respectively to an abstract person who has the knowledge, the experience

[6] M. Eisenberg, „The duty of care and the business judgement rule in american corporate law*"*, *Company, Financial and Insolvensy Review*, (1997), p. 185. ; L.F. De La Gandara, „Le regime de la responsabilite civil de l' administrateur selon la loi espanole sur les societes anonymes*"*, *Gazette du Paris*, (2000) p. 165

[7] Art. 158 of Companies Law Reform Bill, November 2005, on www.dti.gov.uk/bbf/co-law-reform-bill/.

and the skills of a good administrator under the same circumstances. If the abstract model of the good administrator should or could have foreseen the injurious effects of the management actions, then the liability of the administrator concerned shall be engaged[8].

The law on trading companies, as is the law of other states, limits itself to establishing the duties of prudence and diligence, without giving any details. Thus, the doctrine has the task to analyze the elements which constitute these duties.

According to the German doctrine[9], the duty of prudence and diligence provided by art. &93 para.1 AktG[10], contains three obligations. Therefore, the requirement determines the administrators to act in accordance to the legal norms and on the provisions of the constitutive act (legal obligation) and to exercise their mandate with conscientiousness and professionalism, based on adequate information (duties of prudence and diligence in the narrow sense) and to make sure that the other administrators or staff are fulfilling their own obligations (duty to monitor).

In the US[11] doctrine it is assessed that **the diligence has three constitutive elements: the duty to monitor the company's activity, in general and of the directors in particular (duty to monitor/oversight), duty to inquiry and the care required to make decisions**.

The same three requirements can be found in the Romanian legislation, as it will be shown in the following, and it outlines as we believe, a broader outline for the duties of diligence and prudence of the company's administrator. Thus, the duty to monitor the directors and the staff is established in several legal provisions. In this sense, art. 142 letter d) lists among the basic skills of the administrators' board, "duty to monitor the directors".

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[8] Radu N. Catană, *quoted work,* p. 193. The author lists several cases of Belgian jurisprudence where the administrator hasn't been held responsible. Thus, the administrators couldn't be held responsible even though their acts lead effectively to the cessation of payment of the company because at the moment when the decisions were made, the prospect of their catastrophic effect could not be foreseen by a prudent and vigilant individual. To the same extent, the act of the administrator can't be held culpable if the shareholders claim that he was supposed to take all the necessary precautions to avoid the harmful effects, but the effects could not be normally and rationally established before.

[9] H. Fleischer, *Handbuch des Vorstandsrechts*, (Munchen: C.H. Beck 2006):, p. 237.

[10] Under the German law, &93 paragraph 1AktG applies both to the administrators from the unitary system and leadership (vorstand) and to the supervisory board (aufsichtsrat) from the dual system, according to &114 AktG.

[11] M. Eisenberg, *quoted work*, 945

The duty to monitor doesn't necessarily involve a review of daily activities in a detailed manner, only a periodic inquiry being sufficient in order to identify the significant issues related to the company's management.

Similarly the duty of monitoring must also span to the management bodies of the dual system of management of a joint-stock company. Thus, according to art.153[9] letter a) *"the supervisory board has the following main attributions : a) exercise the permanent control over the leadership". In agreement with this provision, art. 153[1] para.3 expressly establishes that "the management shall exercise their powers under the control of the supervisory board*". And according to art. 153[4], paragraph 3 of the Law " *the supervisory board may request to the management any information that it deems necessary for the exercise of its control attributions and may carry out appropriate check-ups and investigations"*. At the same time, the law establishes also the responsibility of the administrators towards the company for the acts of the managers or of the staff. According to art. 144[2] paragraph 2 " the administrators shall be liable towards the company for the prejudices caused by the acts of the managers or of the staff, where the damage would have occurred if they had exercised the supervision by virtue of the duties which their position involve. The liability for failing to comply with the supervision of the managers and of the staff rests solely with the administrators from the unitary system for the joint-stock company management. In doctrine[12] it has been argued that such a liability is based on the administrator's fault regarding the duty to monitor *(culpa in vigilando*), and not on the warranty idea, so that the plaintiff company must prove the fact that the administrators haven't fulfilled the supervision duties that were likely to avoid the harm brought to the company through the staff's acts.

Closely related to the duty to monitor, the administrator must be well informed also about the progress of the company. The duty to inquiry is mandatory and prior to taking any decision. The administrator's duty to inquire is also established in art. 143[1] paragraph 3 and art. 153[4], paragraph 3 of the Law. According to the afore mentioned texts, by virtue to the exercised control, as noted above, the administrators/members of the supervisory board are obliged to request to the management the information that it deems necessary. According to art. 143[1] paragraph 3 *" any administrator may ask from the manager information with regard to the*

[12] Radu N. Catană, *quoted work*, 196.

operational management of the company. The manager shall inform the board of directors of the operations undertaken and on those had in view, on a regular and comprehensive basis". According to art. 153^4, paragraph 3 "*the supervisory board may request to the management any information that it deems necessary for the exercise of its control attributions and may carry out appropriate check-ups and investigations*".

At the same time, the directors/leadership members also have the correlative duty to inform regularly the board of directors/supervisory board regarding the company's activity. Therefore according to art. 144^2 paragraph 3 "*the managers shall notify the board of directors of all incongruities established while meeting their attributions"*. Correlatively art 153^4 paragraph 1 and 2 regulates the duty to inquiry of the supervisory board by the leadership on all the activities of the company and the modalities by which this information is made. Consequently, " *at least once in 3 months, the management shall submit a written report to the supervisory board with regard to the company's management, to its activity and its possible evolution"*. Besides the periodical information, *"the management shall communicate in due time to the supervisory board any information with regard to the events that might have a significant influence over the company's condition"*.

The lack of information or insufficient inquiry of the administrators for the undertaken management acts can seriously injure the company, engaging their liability for the lack or prudence[13].

Another obligation of the company's administrator is the duty to show care in decision making. By virtue of this obligation, the management decision must be motivated and preceded by effective discussions and debates within the management board respectively the supervisory board.

Also in the decision making process the corporate interest is most important, in the sense that it must be favorable, useful to the company and therefore to the shareholders. In other words, before adopting a decision regarding the company's management, the administrator must allow sufficient time and must have access to all relevant information, which should be provided in due time. Also at the time of the adoption of the

[13] In the case *Smith v. Van Gorkom*, the Supreme Court of Delaware found the directors' negligence – general manager who contracted the credit despite the reservations, given over the telephone, of the rest of the board members, on the possibilities of repaying the loan on time, and took the decision to commit in less than three hours, during a representation at the Chicago Lyric Opera. R.W. Duesenber „Duty of care, duty of loyalty and the business judgment rule", *Company Financial and Insolvency, Review* (1997), p 486.

decision, he must have acted in good faith, respectively with the belief that the actions are taken in the company's interest without entailing his personal interest.

Considering the relatively recent introduction in the legislation of the duty of diligence and prudence to which the administrators and directors are held against, respectively the management and supervisory members, currently, the Romanian law hasn't given us case laws for the breach of the administrator's duty of diligence and prudence. Instead, theory jurisprudential examples were cited from the common-law states. Thus, it is considered to be a breach of the administrator's duty of diligence and prudence the action where the administrators concludes contracts under unfavorable conditions for the company without a prior inquiry regarding the market demand; engages the company in an unprofitable operation, operation which is instead profitable for a third party[14]; allows withdrawals from the liquid assets of the company, in order to pay for a contract which clearly was no longer carried out by the contracting partner[15], or confides the liquid assets to a bank whose bankruptcy is imminent. In the same context, of breaching the duty of prudence and diligence lies also the action o f the administrator which carries out groundless investments, concludes credit sales contracts, for long periods, bringing the company to cessation of payments, or doesn't take part in the company's activities (doesn't participate to the board of directors meetings, fails to act in case of nonpayment of a debt by a debtor, doesn't improve the services provided by the company).

2. THE DUTY OF CONFIDENTIALITY

Art. 144^1 of the Law establishes the duty of loyalty provisioning that „ (5*) The members of the board of directors shall not be allowed to disclose confidential information and business secrets of the company, to which they have access in their capacity as administrators*.

[14] In this case, the liability of the directors has been held for negligence, given that they incurred a report on the securities which they bought giving the seller the possibility to repurchase them within 6 months at the original sale price, without any gain in the favor of the company from this transaction (case law Litwin v. Allen, 1940 New York Supreme Court, in R. Duesenberg, quoted work, p.200).

[15] O. Caprasse , *La responsabilite civile profesionnelle des administrateurs. Actualite du Droit*, (Liege, 1997), p. 486.

(6) The content and length in time provisioned by par. 5 shall be provided in the contract."

The managers in the unitary system are *also bound* by the same obligation**,** but also the members of the board of directors and of the supervisory board of the joint-stock company under the dual[16] system and thus any other administrator form the other types of companies.

We believe that, the duty of confidentiality as regulated constitutes more that a limit for the duty of disclosure. Generally, the duty of disclosure is associated to the duty of discretion regarding the confidential information, by their nature or claimed as such by the company's bodies.

The commercial secrets of the company as provisioned by art. 144^1 par. 5 are those of technical nature (production and processing methods, recipes), and the confidential information are those regarding the business affairs of the company (development and investment plans, including personal data of the customers). Even the ordinary information becomes confidential to the extent that disclosure would harm the company as loss of some business opportunities or as the deterioration of the company's image. Moreover the company itself through its bodies, for example through the decision of the board of directors or through the resolution of the supervisory board they can classify an ordinary information as confidential or as a business secret, the administrator therefore being held not to disclose it.

Also, under the incidence of art. 144^1 par. 5, fall the information declared as confidential by special regulations (competition law or the legislation concerning the protection of personal data) specifying that the rule of commercial law, as shown, has a much wider scope of application.

Against the provisions of art. 144^1 par. 6, the duty of confidentiality should be expressly stipulated in the commercial administration contract (the term is improperly used by the lawmaker, the correct term being management contract) therefore being mandatory to mention its actual content, and also the duration, after the termination of their term of office. Thus, a question arises on what kind of liability- contractual or criminal, will entail its breach by the administrator? This is because, by its nature, the duty to maintain the business secrets is a legal one, expressly provisioned by the Law on trading companies.

Compared to the two provisions „ *the members shall not be allowed to disclose confidential information or business secrets… to which they have*

[16] In accord with art.152, art. 153^2 par.6 and art. 153^8 which order that art. 144^1 will apply accordingly.

access in their capacity as administrators" and *"this obligation rests even after the termination of their term of office",* the content and its duration (after the termination of their term of office) being stipulated in the management contract we believe that the grounds of liability for breaching the duty of confidentiality are different. Thus, as long as he is exercising his duties, the administrator is **criminally liable** for breaching the legal obligation of nondisclosure to which he has access in his capacity as administrator. The fact that, the obligation is detailed in the contract, doesn't change, during the contract development (as long as he exercises his administrative duties), the criminal liability into a contractual liability, the grounds of its engagement remaining art. 144^1 par.5 of the Law. In our opinion, the contractual provisions (related to its content and the duration of the duty of confidentiality) applies only after the termination of the term of office.

After the termination of the management contract, the liability of the administrator for confidentiality remains, however, it cannot be employed according to the Law on trading companies (the law doesn't apply to the person in question, he no longer having the capacity of administrator). In this case the responsibility is based on breach of contract clauses regarding the duration, after the termination of the management contract, and the content of the duty of confidentiality. Therefore **the responsibility of the administrator**, this time, will be **a contractual one,** for breaching a duty, stipulated in detail regarding the content and the duration, in the contract. The liability will exist for the duration of the contract and only for the confidential information and business secrets namely provided, for this situation the obligation having a limited content. It is natural because as long as he exercises the administrator duties the content of the duty is wide and concerned all the information to which he has access by virtue of his capacity. After the termination of the contract, the liability will be reduced to few confidential information and business secrets already owned during the exercise of their function, whose subsequent disclosure could harm de the company.

It should also be noted that, the community practice stated that the administrator shall not be held liable for breaching the duty of confidentiality if the disclosure of information is necessary in exercising his

professional duties or if there is a direct connection between disclosures and exercising his duties[17].

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[17] The responsibility was not engaged when by disclosing the information concerning a merger which determines the rise in the value of shares in a company, a personal profit has been obtained (Knud Grongaard, Allan Bang, in case C- 384/02, citat de N. Dominte, The organziation and functioning of trading companies, C.H.Beck publishing house, Bucharest 2008, p.288). Similarly, the European Court held that the liability is not breached when the members of the board of directors and their major shareholders carry out stock exchange transactions with the shares of that certain company based on inside information, privileged, which they own with the purpose to artificially increase or maintain the value of shares price.(Judgement of the court – Third Chamber, 10 May 2007 in case C-391/04, Ipourgos Ikonomikon, Proistamenos DOI Amfissasv. Charilaos Georgakis, www.curia.eu.int.)

THE (IN) ADMISSIBILITY BY JUDGE'S DECISION OF THE TRANSACTION MADE BY FORMER HUSBANDS ON PAYING BACK A BANK CREDIT CONTRACTED DURING MARRIAGE

- CASE STUDY -

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ABSTRACT

It is analised the practical application of the transaction contract, for the liquidation, with respect to the divorce, on the community property but especially on obligations. Since, in many cases, the partition by agreement of the former spouses is an accessory to the main suitors for dissolution of marriage, we examine the role of judge, who finding the will of the parties on this occasion, must show his active role in deciding validation of this agreement.

How do the judge courts deal such cases, can they "censorship" the contractual freedom enjoyed by the parties in private law, freedom that allows them to amicably solve their legal dispute as they think is proper? In other words, in this matter, which are the limits of contractual freedom whose overflow forms the judges' belief in the refusal of taking note of such a procedural transaction?These are some of the initial questions that will guide us in the research approach to jurisprudence.

The submission for analysis of such issue proves its utility and timeliness. In the current context of economic crisis, banks may face a new problem, the customers who have taken loans obligations contracted together, being married, but who at the end of their marriage have to share both their common assets and liabilities

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involved in the signing of credit agreements, to meet the needs of their marriage.

KEYWORDS

Transaction contract, consent judgment, amicable partition, bank loan

1. Case law examination

In this research we have identified in judicial practice two opposite solutions, presented in what follows, solutions that involve interpretation and additional specifications.

Thus*, in a first orientation of jurisprudence (civil sentence no. 1399/2011 of Alexandria Court of justice), it was rejected as inadmissible the request to acknowledge the transaction of former spouses on sharing the common debt (credit agreement during the marriage).*

To deliver the sentence, the court considered the following *reasons*:

1) in this case the parties have made a transaction which covers patrimony liabilities, the loan contracted during the marriage, being not a matter of rights the parties may have; in substantiation of this view, the court took into account the provisions of Article 36 paragraph 1 of the Family Code (provisions of Family Code are currently abolished by Law no.71/2011 for the implementation of the New Civil Code) and art. 673^1 of Civil Procedure Code;
2) from the Civil Code provisions (Civil Code from 1864, in force at the analyzed sentence delivery) related to civil obligations, the court held that it allows only the assignment of claim, and not the debt, debtors are allowed to be changed only through ways of transformation of civil obligations, which all require creditor's approval. However, reported to the data of case law, the court considered it could not take note of this transaction, as long as the banking institution has not consented the change of the credit debtors.

In a second case law orientation (the Court from Sector 5 Bucharest, second civil section, civil sentence no.1666/2007), the chosen court to

decide though a consent judgment the amicable partition of former spouses on common property obtained during the marriage, and parties' understanding regarding the bank loan refund, taking note of the plea agreement in this respect, noting that the agreement of the parties regarding the loan repayment is enforced against them and not against banks that are not parties to the agreement concluded by the parties.

The claim from transaction related on the loan division during marriage, which is found in the consent judgment, has the following content: "The parties declare that - during their marriage - have contracted these bank loans, exclusively used for arranging the apartment from street ...., the property of Z.D.N.'s parents: […]. The parties agree that all bank rates to be paid only by Z.D.N., given the fact that arrangement of the property made from loans from the mentioned banks belongs to his family, being his home in the present moment and in the future. Z.D.N. agrees to pay monthly rates of loans contracted from [the banks] without delay in payment, at the due dates, listed in the payment schedule attached to this convention and to submit to Z.D.M. evidence of payment of rates in each case until 30th of the month for which he paid the rates (or until the last day of the month, for months that have more or less than 30 days). The parties agree that payment by Z.D.N. of monthly rates of the above loans to be guaranteed by Z.A.V. with whom Z.D.M. completed a separate convention."

Consequently, starting from these two judicial solutions that reflect the differences in legal reasoning on the same issues, we raise the question of legal issues related to:

- the status of common debts of spouses in the Bank judicial report
- the defining element that certifies a contract of transaction-mutual concessions; we will specifically examine what these mutual concessions consist of in the two cases, subject matter of the interpretation;
- the change of issues of the legal civil report, considering this is the effect of material law produced by the conclusion of such transaction;
- the active role of the court to validate such a legal transaction
- the effect of (in)opposability of the consent judgment in relation to Bank, being the third party to the judicial transaction contract of the former spouses;

In our review we will take into account the relevant provisions of the New Civil Code[1] [3] relative to the issues highlighted above.

[1] Law no. 287/2009, republished in M. Of.(The Official Gazette) nr.505/15.07.2011

2. Common debt regime of spouses in the judicial report with the Bank

There are two categories of liabilities of spouses: personal debt and common debt (these are limited determined by law[2]) [4].

Therefore, in the regulation of the old family code, the legislative has provided in Article 32 the following charges as common duty of spouses:

- expenses incurred in the administration of any of the common good;
- obligations of spouses together;
- obligations of both spouses to meet common needs of marriage;
- the obligation to repair the caused damage by illegal acquisition of assets from public property.

Corresponding with the old regulations, art.351 of the New Civil Code[3], called "common debts of spouses" provides the fact that spouses shall bear with common goods for:

- obligations related to conservation, administration and acquisition of common properties;
- obligations they have contracted together;
- obligations assumed by one spouse for covering ordinary expenses of marriage;
- fixing the damage caused by ownership, by a spouse, of assets belonging to a third party if they have increased the common properties of spouses.

It is easy to understand that common assets of spouses can be traced by common creditors using the following procedure of subsidiary liability for common debts: if common goods are not enough to cover the loan, then creditors may subsidiary pursue the personal assets of spouses and depending on the nature of the assumed obligation (divisible, solidarity), from the phase of tracking common assets, the creditors divided or not the tracking.

Currently, there is a legal text which provides that spouses are jointly liable with their assets (art.352 para.1 New Civil Code), the purpose of the

[2] Filipescu I.P, Filipescu A.I., *Tratat de dreptul familiei/Treaty of family law,* 7th edition, All Beck Publishing House , 2002, p.163

[3] According to law no.71/2011, art. 35, these provisions are applicable to the "marriages that were at the date the Civil Code entered into force, if the debt was made after this date".

text is to protect the interests of creditors, because the insolvency risk of one spouse is first of all, in the charge of the other spouse[4] [5].

Moreover, in connection to the analyzed practical cases, the credit contracts being commercial, considering the quality of the merchant of the bank, under the former Article 42 of Commercial Code, the obligations assumed by the debtor are united, so that each party undertakes it on his own behalf to refund the entire debt. This is the meaning given in article1446 of the New Civil Code ("Solidarity is presumed between debtors of a liability having been contracted in exercising the activity of an enterprise, unless otherwise provided for by the law").

This community subsists, in the matter of assets and liabilities, until the completion of liquidation by the court order or authentic notary document (in this sense there are the provisions of art.355 par. 2 of the New Civil Code). Consequently, when the community liquidation and debt settlement take place, especially when it occurs by way of a transaction showed to a court, the judges must show active role in verifying whether the completed transaction does not consist a fraud to the interests of creditors.

The Family Code did not contain any provisions on the contribution of former spouses to pay the common debt, so the role to outline solutions in this respect was given to the theorists, by way of interpretation. The expressed views[5] [4] were concerning the application of common law, concluding that each spouse will have to contribute to the common debt in proportion to the community part he deserves. Following this conclusion, it results that the final liquidation of the contribution of assisting common debts will be made only when sharing common assets, until this date each spouse equally contributes to the common debt[6] [4].

This is the vision of the new legislative, for which we quote the provisions of the New Civil Code art.357, paragraph 1: "in the liquidation of the community, both spouses take his own goods, then will proceed to the division of joint property and the regulation of debt" and paragraph 2: "for this purpose it is first determined the share that each spouse should take, based on its contribution, both when acquired common goods and the

[4] A. Bacaci, V. C. Dumitrache, C.C. Hageanu, *Dreptul familiei în reglementarea Noului Cod Civil/Family Law in the New Civil Code Regulation,* 7th edition, C.H. Beck Publishing House, Bucharest, 2012, p. 117

[5] See, for example Filipescu I.P, Filipescu A.I, *Op. Cit*., pag.172

[6] *idem*

fulfillment of common obligations. Until proved otherwise, it is presumed that the spouses had an equal contribution."

In our opinion, by the transaction completed on the loan payment, the obligation undertaken jointly by the former spouses is transformed into a divisible obligation, which has the nature of reducing the guarantees offered to creditor regarding the execution of his claim. In this way, the creditor is exposed to the consequences of insolvency of his debtor. It just might be the main argument which can stand for the decision of refusing the sentence request that should take into account the parties' transaction presented in court.

3. Analysis of the mutual concessions

Mutual concessions, which distinguish this type of contract, outlining its legal aspect, are the means that put to an end the dispute between the parties.

Although in the creation of the old legal definition it was omitted to reveal the specific differences of the transaction contract, in relation to the acts that are relatively closed to a dispute, the requirement of mutual concessions was constant highlighted by the doctrine[7] [6; 7; 8; 9; 10] and imposed by the common law[8] [11] ; the specific condition of mutual concessions could be inferred from the interpretation of art. 1709 of Civil Code which was related to disclaimers made in all claims and actions.

In a comparative analysis, we see that this requirement of mutual concessions, considered the "heart of the transaction" is accepted by many foreign laws. For example, we refer to regulation of transactions in German law, where it is decided that the transaction is a contract through which the dispute between the parties or their uncertainty related to the legal report is

[7] F. Deak, *Tratat de drept civil. Contracte speciale/Treaty on Civil Law. Special Contracts*, 3ed edition, Universul Juridic, Bucharest, 2001; I Dogaru, E.G. Olteanu, L.B. Săuleanu, *Bazele dreptului civil. Volumul IV Contracte speciale/The Basis of Civil Law.4th volume. Special Contracts,* C.H. Beck Publishing House, Bucharest, 2009, C. Toader, *Drept civil. Contracte speciale/ Civil Law. Special Contracts,* 3d edition, C.H. Beck Publishing House, Bucharest, 2008, T. Prescure, A. Ciurea, *Contracte civile/Civil Contracts,* Hamangiu Publishing House, 2007, C. Macovei, *Contracte civile/Civil Contracts,* Hamangiu Publishing House, 2006

[8] The cited common law from *Annotated Codes. Civil Code. Volume III (art.1405-1914),* edition annotated by V. Terzea, ed. C.H. Beck, Bucureşti, 2009

removed by mutual concessions (*gegenseitigen Nachgeben = mutual concessions)*[9] [12].

Also, in the British literature[10] [13], confirmed by the common law[11] [14], the compromise or transaction is seen as representing the dispute through mutual concessions, reaching an agreement, settling a dispute by mutual concessions.

To overcome the shortcomings of the legal definition of transaction, the new legislative was referring, specifically, in art. 2267 of the New Civil Code to concessions or reciprocal renouncing of rights or transfer of rights from one party to another.

Because the aim of this paper is not to theorize too much the problem of "mutual concessions" and to discern whether they consist of an "abandonment" of subjective rights, or rather should be viewed as mutual waiver of claims, we will only admit that mutual concessions can be of great diversity. Moreover, mutual concessions face with multiple possibilities the contractual freedom offers. We appreciate, therefore, the issue to know what are really the concessions based on, is left more or less open. Consequently, let's keep the flexibility of this notion as French doctrine decided[12] [15], otherwise we risk to limit the transactional freedom.

Turning to the analyzed practical cases, the conclusion is that to achieve separation of assets by agreement, by way of transaction, former spouses make mutual concessions, meaning that one of them give up a part that rightfully belonged to the community of goods, the other one assuming the obligation to cover the debt contracted together during their marriage. Thus, the entire loan repayment obligation is the counterpart of returning by the other party of his part from the community of goods. This is how the parties have agreed to realize the partition.

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[9] In this sense Frédérique Ferrand in *La transaction, regard comparatif* , published in the collective paper « *La transaction dans toutes ses dimensions* », Dalloz Publishing House, 2006, p.188-189

[10] D. Foskett, *The law and practice of compromise. With precedents*, Thomson Reuters (Legal) Limited, 2010, pag.3

[11] Gurney v. Grimmer (1932) 38 Com. Cas. 12 at 18: *when a matter has been compromised it assumes that a mutual concession has been made by both parties and that each party has got something less than he claimed*, quoted precedent in the already cited thesis of D. Foskett

[12] B. Fages, *Equilibre et transaction: l'exigence de concessions réciproques*, in« *La transaction dans toutes ses dimensions* », collective paper, Dalloz Publishing House, 2006

Therefore, we cannot join the view of the court which found that this presented transaction is related to the obligations not to rights the party may have. Mutual concessions, through which the litigation is closed, involve the assumption of obligations, in these cases being the case of the obligation to pay the common debt. We therefore believe that this consideration, the court's argument, cannot stand, and is not valid.

We are interested in clearing, on the occasion of this analysis, if by the phrase "mutual concessions" we must understand equivalent concessions.

For the case law it is sufficient for the transaction to contain mutual concessions regardless of their relative importance. In other words, "reciprocity" is not necessarily synonymous with "equivalence". Judges do not go so far to require a perfect balance between each concession.

The French law[13] [16] came also to this conclusion, where it was stated that if reciprocity requires that all concessions of one should match the other's concessions, it is not required a strict equivalence. Moreover, rescission for lesion is expressly excluded in terms of the transaction by the French Civil Code Article 2052[14]. Accordingly, in the Romanian law, the New Civil Code provides in paragraph 2 art.2273 the transaction "cannot be canceled for an error of law regarding matters subject to misunderstandings of the parties, nor for damage" and also art.1224 of the New Civil Code which regulates the lesion inadmissibility of the transaction.

Does it mean that no control is performed? Is it, in other words, possible for the derisory character of concessions to be punished?

Although this issue is rarely emphasized, it is clear that the judge has the power to review the legality of the concessions agreed in part, as a matter of verifying the legality of the transaction. To emphasize these aspects we refer to an example[15] [17] in this respect, through which the court decided: "If rates and balancing payment agreed by the parties in the transaction presented in court, are manifestly disproportionate, creditors will oppose and even trigger forced execution proceedings, the court is entitled not to legalize the agreement of former spouses on contribution rates and the method of common goods allocation, admitting it is made with the obvious purpose to fraud the personal interests of creditors of the

[13] see *Enciclopedie Dalloz. Repertoire de droit civil*, Tome XI, publié sous la direction scientifique de Eric Savaux, pag.6

[14] „*Elles ne peuvent être attaquées pour cause d'erreur de droit, ni pour cause de lésion”.*

[15] C.A. Bucureşti, 3rd Civil section for minors and family issues, decison no.1954 from 31 October 2006, in „*Judicial Partition. Judicial Practice*.”, author M. Paraschiv, Hamangiu Publishing House, 2009

claimant, and to order that at the division of common goods to consider the real contribution of each to their acquisition and the value of circulation".

Our conclusion is that such an analysis would have weighed the legality of mutual concessions and would have given weight to turn in substantiation of solution to reject the concluded transaction.

4. Changing the parties of the legal relationship, the effect of the concluded transaction. Terms

In the law of obligations the assignment of determined debt was not provided, as a particular title, the explanation given in the doctrine[16] [18] being that the legal relationship on a claim "is a personal relationship, in which the personality of the debtor (solvency, honesty, etc..) has a primary interest, so it would be unconceivable for a creditor to be given, without his will, another debtor."

However, legal procedures were established, to indirect change the passive entity from the judicial report, means through which were produced effects similar to assignment of debt and for which the creditor's consent was necessary: novation by change of the debtor, delegation, stipulation for another.

The New Civil Code regulates in a distinct chapter the "taking over the debt", which can be achieved, according to art.1599 letter a) through a contract between the former and new debtors, subject to art.1605, which refers to creditor agreement. Moreover, this mechanism was admitted by the doctrine[17] [18] even before the entry into force of the New Civil Code

Through the new regulation, the Romanian legislative took the standards of Principles of European Contract Law (art.12.101 and 12.102) and the UNIDROIT Principles (art.9.2.1.-9.2.8), and solutions from other European civil legislations, particularly the Swiss Code of Obligations (article 175-183) and the German Civil Code (BGB, § 414-419) [18] [19].

The rule of releasing from the debtor's liability is limited by[19] [19]: responsibility of the new debtor insolvency at the date of debt takeover (art.1601[20]) and inefficiency of debt takeover (art.1604[21]).

[16] G. Boroi, *Civil Law. General Part. Persons,* All Beck Publishing House, 2001, p.51
[17] *idem*
[18] *The New Civil Code. Commentary of article,* coordinators F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing House, Bucharest, 2012, pg.1690
[19] *idem*

From our point of view, a solution for the smooth conclusion of transactions on all credit payment to the Bank, would involve the presence and the agreement creditor Bank, at transaction conclusion, to remove any doubt about the fraudulent interests of creditor.

5. The active role of the court in verifying the legality of judicial transaction

The judicial transaction represents the agreement between all parties in a dispute, in presence of the court, agreement which is admitted by the court.

This feature of the agreement, which occurs during legal proceedings, has established the qualifications of judicial transaction in the category of judicial contracts concluded on the basis of law, in which the judge's activity, essentially jurisdictional, is the "second phase" in the performance of the contract[22] [20]. In other words, if the judge admitting the parties agreement, validates it and forms the basis of his decision[23] [20].

More recently, it has been written about the judiciary contract[24] [21], that "is a legal agreement by its object and conventional by its source." Consequently, by its conventional nature, the transaction is subject to common law rules of conventions formation, but by its function fulfilled by the produced effect, it is closed to the jurisdictional act.

With all these features, it must be pointed out that "the court does not judge and do not add anything to the effects of the transaction agreement, but only checks the legality of the agreement between the parties, the consent decree having the function of authenticate the agreement, because any judge decision is treated, in terms of view proved by an authentic document"[25] [22].

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[20] *"the original debtor is not free by taking over the debt, if the debtor proved to be insolvent that the date when it took over the debt, and the creditor has agreed at the takeover, without knowing the circumstances"*

[21] "*when the takeover agreement is canceled, the obligation of the former debtor raises, with all its terms, subject to the gained rights of third parties in good faith".*

[22] see M.G. Constantinescu, *Judicial Contracts,* „Universul" Printing House, Bucharest, 1983, p.95

[23] *Idem,* p.89

[24] I. Deleanu, *Treaty Civil Procedure,* volume I, All Beck Publishing House, 2005, p.478

[25] C.A. Craiova, civil section, decision no.8683/1999, in 4th Law, decision cited by V. Terzea, *Op. Cit*., p.200

In the case law[26] [23] it was pronounced that related to the legality examination of transaction by the court, the judge is obliged to see if the parties have the legal capacity and quality to make a transaction, if the act is the expression of their own free will and if by the transaction no violation / no circumvention of imperative provision of law take place, if the purpose is not to accomplish of illicit objects such as for example frauding the parties' creditors.

If following a check it is determined the existence of such situations from those mentioned above, the court is obliged to remove the document of procedural disposition of the parties, in other words, it must reject the request for delivery the consent decree and continue the trial of the cause[27] [23].

In other words, by virtue of the availability principle established in the Civil Procedure, parties are entitled to have their rights and all procedural means established by law in this respect. But, as it is well known, no principle in law should be interpreted in an absolute manner, in this case, the availability of parts having the main limit the active role of the judge in the process.

6. The effects of the consent decree in relation to third parties of the transaction contract

Before concluding the issues announced in the title of this case study, it is necessary to examine the effects of the consent decree, with special regard to the third parties who did not participate in the transaction. This, especially, in the second jurisprudential orientation the court noted the transaction completed on common debt from banks, noting that both parties agreement on the loan repayment is not enforceable against the creditor banks.

The doctrine noted that according to the relativity principle of contract's effects, the transaction has no effect against third parties[28] [6]. The meaning of relativity rule of legal documents is that they can neither benefit nor harm third parties.

But what will be the effect of the consent decree? To answer this question, we refer to the grounds of a decision of the High Court of

[26] C.S.J., civil section, decision no.552/1990, in „Law" no.1/1991, p.70
[27] *idem*
[28] see, F. Deak, *Op. Cit.,* pag.564

Cassation and Justice[29], which established in the sense that *jurisdictional action, (as any judicial action, in general) produces besides the imperative effects between parties, based on the principle of relativity, also effects that may be invoked against third parties. As a new element appeared in the social and legal order, the decision cannot be ignored by third parties, claiming they had not participated in the trial completed by its adoption. The decision will stand against them, with the value of a legal fact and value of evidence, (i.e, presumption).*

In conclusion, the transaction confirmed in consent decree, creates in relation to third persons, an opposable situation, third parties not being able to ignore the existence of this legal act. In this respect, we consider as legal irrelevant the mention inserted in court in the consent decree, according to which "the parties' agreement on the loan payment is enforceable only to them and not to banks that are not parties to the agreement of the parties". Such claim would affect the effectiveness of the transaction, even validated by the court, because without the creditor bank's assistance, effects that are taken into account by parties at the final transaction would not be possible, which would be nonsense.

Final Conclusions

The availability principle of parties, reflected in the civil trial by the possibility of "opponents" to use the available procedural provisions, to reach a compromise, finds its main limit the active role of the judge during the civil legal procedure.

In this respect, at the presentation of any transaction, the court is obliged to verify its legality, searching all relevant aspects in this study. Specifically, relative to the issues raised by us, the court must consider if the transaction does not circumvent the mandatory provisions of law, if the purpose is not to accomplish of illicit objects such as frauding the parties' creditors.

In relation to the real facts of the analyzed cases, the first observation that is required and which appears, in our opinion, the main reason of the court's refusal to take note of the transaction, is that by the agreement between former spouses the possibility of loan return of creditor Bank is limited, since by the conclusion of such transaction the obligation assumed

[29] Decision no.2351/14 March 2007, available on www.scj.ro

jointly by former spouses became divisible, the agreement being liable of reducing the established guarantees to meet claims.

Even in the case of the rejection of decision request for consent decree, we disagree with the court decision which did not continue the trial on the merits of the dispute, leaving unsolved the problem of the parties' division at the termination of legal community.

The optimal solution would be seeking the agreement from creditor Bank at the termination of the transaction, a solution that is necessary and as a result to the interpretation of the relative provisions in changing the passive entity in the judicial report.

Solution to acknowledge the transaction of parties and establish it as such into the consent decree, noting that the agreement on credit payment is not enforceable to creditor, does not prove its viability because it would affect the effectiveness of the transaction, even validated by the court, because without the creditor bank's assistance, effects that are taken into account by parties at the final transaction would not be possible, which would be nonsense.

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THE ROLE OF CODEX ALIMENTARIUS COMMISSION IN REGULATING FOOD SECURITY AT INTERNATIONAL AND EUROPEAN LEVEL

Anamaria TOMA-BIANOV *

ABSTRACT

This article examines the way in which Codex Alimentarius Commission played an important role in adopting international food standards, and also the way in which the Codex affected the European food policy and law. The Codex standards are considered the benchmark for international food standards; still this situation gave rise to remarkable political and legal consequences for the members of European Union who were also members of the Codex Commission and who were obliged to comply with the EU food regulations. Some of the consequences were surpassed after EC accession to Codex Alimentarius Commission; still there are important issues to discuss with regard to EU role on the international stage, and in particular with regard to EU role in setting international food standards. Since EU's voice can be heard nowadays in the Codex committees there is a question to be answered: is the European food law influenced by the Codex, or the Codex is influenced by EU law food?

KEYWORDS

Codex Alimentarius, food, safety, security

INTRODUCTION

Dramatic episodes of food-borne disease accidents and outbreaks have raised concerns about the effectiveness of current food control systems in protecting consumers and have drawn increased attention to the regulatory frameworks that govern food safety and food trade, and therefore food security also. Food-borne diseases, pesticides residues, obesity and nutrient deficiencies are among the numerous pathways in which food

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impacts health. At the same time, population growth, urbanization and new technologies are influencing food production in unprecedented ways, thus requiring more vigilance by all those involved in the food chain – from primary producers to the consumer – to ensure food security.

"Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life"[1]. The concept of food security was developed in the 1970s, and has acquired by now a number of different meanings and definitions[2]. As already observed by Francis Snyder, the definition of food security adopted by the 1996 World Food Summit encompasses two related aspects: food supply security and food safety[3].

Since 1980s, the globalisation of food risks, together with recent and notorious food incidents, such as BSE crisis and dioxin in Europe, or food contamination in China, USA or Canada, has placed food safety on the international agenda. In this context, The World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) named the Codex Alimentarius as the source of international standards on food safety, which has had a profound impact on the status of Codex standards, guidelines and recommendations in international food trade, particularly among members of the WTO. In addition, there is an increasing recognition of the need to integrate and improve coordination of regulatory activities among national and international bodies to better protect human, animal and plant life and health, as well as the environment, without creating unnecessary barriers to trade.

These developments have given rise to new legislative needs and the national regulatory frameworks have to be adjusted to meet international and regional obligations for the following reasons: first, food safety is a matter of public health and food supply security; food safety plays an increasingly important role everywhere in domestic marketing of food; third, food security is an important factor in international trade, because in order to be accepted by importing countries, food exports must usually meet specific safety standards, the significance of which has been accentuated by

[1] World Food Summit Plan of Action, World Food Summit, Rome, 13-17 November 1996, <http://www.fao.org/docrep/003/w3613e/w3613e00htm>

[2] Sage, C., "Food Security" in E. Page, M. Radcliff (eds.), *Human Security and the Environment - InternationalComparisons*, Elgar, 2002, pp.128-129

[3] Snyder, F., "Editorial: The Second WISH/RIJC: Food Security in Europe and in the World" in *European Law Journal*, Vol. 10, No.5, September 2004, pp.495-498

the internationalisation of the agro-food sector. All countries today have broadly similar concerns, even though the relative importance of food risks may differ between countries[4].

In this particular context, the Codex Alimentarius Commission of the United Nations creates a particular opportunity structure for the conduct of external food-safety policy. Still, there is important issue to discuss here with regard to the interference of the international food standards and the regional, in particular the European food standards. In the European Union case, for example, the *acquis communautaire* encompasses many legal provisions which, although they are directly addressed to EU member states, have important consequences beyond European borders, and especially upon the international trade. Thus for exporters from non-EU countries, European food regulations can constitute a significant non-tariff barrier to trade. Since Codex standards are considered the benchmark for international food standards, they play an important role in World Trade Organization litigation, since they have been invoked by WTO members in disputes before the Appellant Body of WTO. In the *EC–Hormones* case, the Codex standards were confronted with EU food standards for the first time, and the result was not very satisfactory for the European Union since it could not justify its measures, which resulted in a higher degree level of health protection than that ensured by measures based on the relevant Codex standards. The role that Codex standards played in WTO disputes which EC lost increased the EU determination to obtain full membership.

European Union has been a recipient of Codex standards, since they were taken into account in the adoption of EU food legislation with the condition to be compatible with EU food objectives. References to Codex standards were also found in European case law. The Court of Justice used Codex standards to clarify the meaning of certain expression used by EU food law.

Since EC accession to Codex Commission, European Union plays in important role in influencing the Codex standards. Thus EU gained strength in negotiating Codex standards; the opposition of EC to the adoption of a standard would prevent consensus from being reached, and conversely, draft standards supported by the EC would stand a greater chance of being adopted.

[4] Snyder, F., *op. cit.*, p.496

In the following, we shall describe the role played by Codex Alimentarius Commission in the World Trade Organization legal system, and also European Union dual relationship with the Codex Commission.

CODEX ALIMENTARIUS COMMISSION AND THE WORLD TRADE ORGANIZATION LEGAL SYSTEM

In 1962, it was created the by Food and Agriculture Organization (FAO) and World Health Organization (WHO) the Codex Alimentarius Commission, in order to develop food standards, guidelines and codes of practice under the Joint FAO/WHO Food Standards Programme. The Codex Commission main goals were to protect health of the consumers, to promote fair trade practices in the food trade and to promote coordination of all food standards. Codex Alimentarius is the main instrument for the harmonization of food standards, and constitutes a collection of internationally adopted food standards, codes of practice and maximum residue limits of pesticides and veterinary drugs in food. The objectives of Codex are to protect the health of consumers, to ensure fair practices in food trade and to promote the coordination of all food standards work undertaken by national governments.

The Codex Commission has played an increasingly important role[5] in the international food trade since 1995, the year in which the World Trade Organization was created.

The Uruguay Round of Multilateral Trade Negotiations in 1986-1994 and the earlier negotiations under the General Agreement on Tariffs and Trade led to the establishment of the WTO in January 1995. Agriculture became an important topic within the trade discourse and as a consequence it was agreed to reduce tariff barriers for many agricultural products in order to encourage free trade. Two agreements relevant to food, the Sanitary and Phytosanitary Agreement (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement), were concluded within the framework of the WTO. These agreements set important parameters governing the adoption and implementation of food quality and food safety measures. Strictly speaking, Codex standards were not binding as such, and acquired binding force only as a consequence of explicit adoption by

[5] Romi, R., "Codex Alimentarius: de l'ambivalence à l'ambiguité", in *Revue Juridique de l'environment*, No.1, 2001

individual members. However, the legal status of these standards has increased significantly by virtue of being referenced in the SPS Agreement.

The TBT Agreement, which had been in existence as a voluntary agreement (the "Standards Code") since the Tokyo Round (1973–1979), was converted into a binding multilateral agreement through the Uruguay Round. It covers all technical requirements and standards (applied to all commodities), such as labelling.

The SPS Agreement was drawn up to ensure that countries apply measures to protect human and animal health (sanitary measures) and plant health (phytosanitary measures) based on an assessment of risk, or in other words, based on science. The aim is the establishment of a multilateral framework of guidelines and rules that will orient the development, adoption and enforcement of harmonized sanitary and phytosanitary measures and minimize their negative effects on trade. The use of international standards is intended to allow countries to prioritize the use of their often limited resources and to concentrate on risk analysis.

Under the SPS Agreement, Codex standards, guidelines and recommendations have been granted the status of a reference point for international harmonization. They also serve as the basic texts to guide the resolution of trade disputes. WTO members are called upon to base their national food safety measures on international standards, guidelines and other recommendations adopted by Codex where they exist, and so long as a country employs these standards, its measures are presumed to be consistent with the provisions of the SPS Agreement. (Countries may also apply stricter standards than the Codex standards, so long as those are based on science.) Thus, while Codex standards in and of themselves are not binding, they have become binding on WTO members through the SPS Agreement.

The advantages of having universally agreed food standards for the protection of consumers, with a view to facilitating trade, are acknowledged by two important WTO Agreements: the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement). These Agreements recognize that international standards and technical regulations bring benefits to both producers and consumers; their objective is to facilitate secure and predictable access to markets ensuring that health regulations do not create unnecessary obstacles to trade[6]. In particular, the SPS Agreement

[6] See Snyder, F., "Toward an International Law for Adequate Food," in Mahiou A., Snyder F., *Food Security and Food Safety,* Leiden/Boston: Martinus Nijhoff Publishers, 2006,

provides a multilateral framework of rules applying to all measures which may affect negatively the freedom of international trade, in particular to any trade-related measure taken to protect human life or health from risks arising from additives, contaminants, toxins, veterinary drug and pesticide residues, or other disease-causing organisms in foods or beverages. Building on the provision of Article XX(b) of the General Agreement on Tariffs and Trade[7] and the terms of its *chapeau* – which predated the first reference to the precautionary principle by almost 40 years – the SPS Agreement incorporates elements of precaution, setting out the right of Governments to restrict trade to pursue health objectives, provided that the measures adopted be based on scientific evidence or on an appropriate risk assessment and according to the principles of non-discrimination and proportionality[8]. Scientific justification (as provided in Article 2.2 and as backed up by the risk assessment discipline under Article 5) is, in point of fact, the pivot of the Agreement's management of the health-trade interface[9]. Hence, while in Article XX of GATT restrictive measures are an exception, in the SPS Agreement "there is a right [under article 5.7], albeit a conditional right, to take provisional measures subject to the requirements for risk assessment laid out in Article 5.1, 5.5 and 5.6"[10]. Therefore, the Agreement tries to balance two conflicting interests: the sovereign right of Members to

pp.123-133; Shaw S., and Schwartz R., *Trading Precaution: The Precautionary Principle and the WTO*, UNU-IAS Report 2005, available at http://www.ias.unu.edu/binaries2/Precautionary%20Principle%20and%20WTO.pdf, at 7.

[7] General Agreement on Tariffs and Trade (GATT), Geneva, October 30, 1947 (incorporated into GATT 1994), Article XX: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: … (*b*) necessary to protect human, animal or plant life or health."

[8] Shaw S., and Schwartz R., *Trading Precaution: The Precautionary principle and the WTO*, United Nations University, Institute of Advanced Studies. November, 2005, p. 6: "As stated in the Preamble, the SPS Agreement is an elaboration of Article XX (b). However, while the SPS Agreement permits Members to enact SPS measures if specific obligations are met, Article XX (b) sets out general exceptions for violations to the GATT. The 'necessity test' is a much higher threshold, which does not seem to allow for preventative action when there is a lack of scientific evidence. The term 'necessary' places the burden of proof squarely on the Member taking the action, and, until recently in *EC–Asbestos*, no WTO Member has been able to pass the 'necessary' hurdle" (footnotes omitted

[9] Button, C. *The Power to Protect: trade, health and uncertainty in WTO*, Hart Publishing, Oxford and Portland Oregon, 2004, p. 228.

[10] Shaw S. and Schwartz R., *op. cit*, p 6

determine the level of health protection they deem appropriate, on the one hand, and the need to ensure that a sanitary or phytosanitary requirement does not represent an unnecessary, arbitrary, discriminatory, scientifically unjustifiable or disguised restriction on international trade, on the other. In order to achieve this goal, the SPS Agreement encourages Members to use existing international standards, guidelines and recommendations; it acknowledges the authority of Codex standards by making express reference to them as a privileged basis for internationally harmonised regulation[11].

The relevance of Codex standards is further confirmed by the case law of the WTO Appellate Body, which considers them as the international benchmarks against which national food measures and regulations are evaluated within the legal parameters of the WTO Agreements. Most important of all, in the disputes concerning the *EC–Sardines*[12] and the *EC–Hormones*[13] cases, the Appellate Body Reports pointed to the recognition of Codex standards as "relevant international standards" to be used by States as a basis for their technical regulations, and hinted to the possibility that such standards might be adopted without consensus[14]. In admitting such possibility the Appellate Body is said to have sensibly contributed to a greater politicisation of Codex decision processes and standard setting

[11] See SPS Agreement, Preamble and Annex A, paragraph 3 (a).

[12] WTO Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, Report of the Appellate Body, September 26, 2002

[13] WTO Appellate Body, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R - WT/DS48/AB/R, Report of the Appellate Body, January 16, 1998. In the *EC-Hormones* dispute between the United States, Canada and the European Union, the issue relevant to human health, trade and food safety has gone through the entire dispute settlement process. Like the cholera case, the beef hormone case underscores the importance of basing food safety regulations on scientific evidence and international food safety standards

[14] See *EC–Hormones*, para. 166; *EC–Sardines*, para. 227: "we uphold the Panel's conclusion, in paragraph 7.90 of the Panel Report, that the definition of a 'standard' in Annex 1.2 to the *TBT Agreement* does not require approval by consensus for standards adopted by a 'recognized body' of the international standardization community. We emphasize, however, that this conclusion is relevant only for purposes of the *TBT Agreement*. It is not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the *TBT Agreement* does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe an international standardization body should not require consensus for the adoption of its standards."

procedures, since adoption of standards without consensus approval implies the possibility that Member States be required to conform to standards they have not supported with their vote.

Moreover, the Codex Alimentarius is backed up by the trade sanctions of the WTO, since any non Codex-compliant nation would automatically lose in any food-trade dispute with a Codex compliant country, unless it were in a position to justify a possible ban on food products on the basis of a risk assessment rigorously supported by adequate scientific evidence. This approach was laid out in both the *EC–Asbestos*[15] and *EC–Hormones* cases, where the Appellate Body established some basic principles in matter of trade restrictions on products that are likely to pose a health hazard: first and foremost it recognized that public health interests must always take precedence, unless unilateral precautionary measures, not supported by the protection afforded by international standards or risk assessment, disguise protectionist interests; second, it established that the right to fix a higher level of national protection be justified through available, pertinent scientific information, which implies that there exists a rational relationship between the measure and the risk assessment; third, it stressed that States putting in place a measure based on the precautionary principle must continue their scientific research and perform serious reviews of the precautionary measure to show evidence of their good faith[16]. Through this approach, the Appellate Body showed that "the WTO cannot and does not stand for free trade at any cost"; it rather emphasised the importance of international standards for "uphold[ing] a rules-based multilateral trading system that ensures secure and predictable market access, while respecting health and [safety] concerns."[17]

Be that as it may, it is necessary to highlight the fact that many global food safety issues still lie beyond the reach of international trade

[15] Helfer L.R., *Intellectual property rights in plant varieties: an overview with options for national governments*. FAO Legal Papers Online No 31, July 2002. Food and Agriculture Organization of the United Nations, Rome, 2002, available on http://www.fao.org/Legal/Prs-OL/lpo31.pdf

[16] For much deeper insights in the findings of the Appellate Body in these reports, refer mainly to Shaw S. and Schwartz R., *Trading Precaution*, p.7-8; Button, C., *The Power to Protect*, and further bibliographic references indicated by these authors. In WTO-EC comparative perspective, see mainly Chen Weidong, "Food Safety and Trade: How to Decide the Appropriate Level of Food Safety? A Comparative Study of Trade Dispute Settlement about Food Safety in the WTO and the EC," in *La sécurité alimentaire en question: Dilemmes, constats et controverses*, Karhala, 2000, p.725-752

[17] Shaw S. and Schwartz R., *op. cit*, p.11.

agreements[18]. Actually, it has been observed that, depending on their focus and characteristics, health regulations may fall under the SPS Agreement, the TBT Agreement or the GATT alone, and that this fragmentary approach is really disadvantageous, especially in view of the need to manage the challenges posed by "the latest frontier[s] of the contested trade-health relationship." This is one of the main reasons why the most important international organizations involved (mainly WHO, WTO and FAO) are steadily improving coordination of their activities and complementing each other's work in the field of health and trade issues. Together with national governments they are also furthering efforts to protect consumers across the globe from threats to food safety due to the most diverse causes.

EUROPEAN UNION PARTICIPATION IN INTERNATIONAL FOOD STANDARDS BY CODEX ALIMENTARIUS

In 2003, after ten years of internal and external negotiations, the European Community[19] (EC) joined the member states in becoming full member of the Codex Alimentarius Commission in its own right. The reason for EC accession seemed at the time redundant, since most of EU members were also members in CAC. Not to mention the fact that EU participated in Codex meetings as an observer, represented there by European Commission. In this capacity, EU was entitled to speak only if invited by the chair, and after all Codex members had spoken, and also it was not entitled to vote. This situation was considered unsatisfactory, and it created the impression of persistent national competencies, while food-safety legislation in fact was increasingly harmonised within EU. The famous *Hormones* case also demonstrated the possible consequences of not being able to assert the European position in Codex Commission. The terms

[18] Button, C. *op. cit*, pp.228-229, with special reference to the contested trade of genetically modified organisms. On questions concerning trade of GMOs, see also 107, 230-232; also Estelle Brosset, "Le commerce international des produits biotechnologiques," in Maljean-Dubois, S. ed., *La société internationale et les enjeux bioéthiques*, Paris, Pédone, 2006, pp. 165-202; *Ibid*., "Le cadre juridique international en matière de produits alimentaires génétiquement modifiés: entre pénurie et sur-alimentation," in *La sécurité alimentaire*, pp. 265-321.

[19] Given the contested legal personality of European Union and its resulting incapacity to conclude international agreements, it had to be the European Community that joint the CAC, see Marchisio, S., "EU's membership in international organization" in *The European Union as an Actor in International Relations*, edited by E. Canizzaro, Den Haag: Kluwer Law International, 2002

of EC membership in the Codex, as agreed after long and disputed negotiations, follow the example of its membership in the FAO in most respects. The core principle is that the Community and the Member states exercise their membership rights on an alternate basis, which means that on any given issue on the agenda of a Codex meeting, either EC or the Member States are considered to have competence. The EC has exclusive competence for Codex agenda items if relevant European legislation is harmonised either completely or to a large extend. Competence is shared in only partially harmonised area and Member States have competence in areas where no harmonisation exists on the European level.

While the division of competence follows the FAO model, there is a difference regarding the right to vote in the Codex Commission. Thus, in cases where the EC has competence and subsequently, the right to vote, the number of EC votes is equal to the number of member states present in the meeting at that time[20].

We shall point the fact that different European and international actors had some concerns and expectations with regard to EC membership in the Codex. Some EU member states were anxious that their role in Codex Commission would be downgraded as a consequence of EC membership. Still, the EU member states had the interest to increase the common European influence in the process of setting global food-safety standards, given the fact that some EU regulations did not conform with the Codex standards. In pre-accession period, nobody could have prevented individual EU member states from arguing their opinion in a Codex committee, even if it diverged from EU majority view. Under the present conditions, if an EU member states disagrees with the dominant EC point of view, it is obliged to passively support the common position. This dilemma may be solved by the existing EU food law, also used in the EU's external regulatory relations. As a consequence, where a European standard already exists in an area under discussion in the Codex, this standard automatically constitutes the EC's default negotiating position. Under these circumstances, it is quite uncommon for an existing EU standard not to be accepted by all member states as basis for negotiations with other Codex members.

Despite the impressive scope of current EU food law, it still happens that the Codex debates draft standards for which there is no European precedent. The simplest way to handle this situation is to restrict the

[20] Hüler, F.; Maier, M.L., "Fixing the Codex? Global food-safety governance under review", in *Constitutionalism, Multilevel Trade Governance and Social Regulations*, edited by C. Joerges and E.U. Petersman, Oxford: Hart, 2006

common position to the least common denominator, namely to include only those elements which are consistent with every single member state's preferences.

The effective EU influence upon the Codex standards can be observed in a number of cases, where EU was forced to resist the USA position. For example, in the famous hormones case the EU lost, afterwards, under a period of investigation, a most attention was drawn upon the institutionalization of the precautionary principle. The precautionary principle became an issue in the context of Codex negotiations aiming at the formulation of guidelines for risk analysis. A first set of guidelines, namely "Working Principles", to be applied by the various Codex committees, was agreed in 2003, just before the process of EC accession was completed. A second related set of risk-analysis guidelines to be applied by Codex members has been under consideration in the CCGP and has also created debate on the precautionary principle, the inclusion of which in the guideline is still considered a European key interest.

After analyzing the impact of EC accession to the Codex Commission, the European Commission claimed that there are few cases where existing EU standards may have to be changed as a consequence of the new Codex standards, the only mention cases explicitly mentioned being the aflatoxins in nuts, and benzoates in soft drinks. This is quite outstanding since the previous analyses mentioned more examples of codex standards which were significantly less stringent than parallel EU standards, sometimes allowing up to hundred times the amount of a particular substance in the food concerned. As we can observe, from European Commission point of view, it seems that European interests were successfully promoted in the Codex before and after EC accession. In any case, the divergence or convergence of substantive standards provides a relatively objective indicator of international influence that ought to be exploited more systematically.

CONCLUSIONS

The article emphasised the importance of Codex standards in WTO legal system and litigations and therefore it described the reasons for EU desired and finally succeeded to become an important actor in the Codex Commission. Like the other Codex members European Union is a policymaker, while being at the same time a policy recipient. Thus, Codex standards are agreed upon with the participation of the EU in the Codex

decision-making process and are incorporated in the EU legal order[21]. But most of all we must observe that the Codex Commission is useful in that that it provides a political forum to debate issues that go to the heart of Codex members' sovereignty, such as the level of consumer protection[22]. This organization is very important since it is a unique global forum in which the different states attempt to harmonise positions that are very divergent otherwise.

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[22] Poli S., *op. cit.*, p.630

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SHORT CONSIDERATIONS REGARDING THE PREVENTION OF ENTERING THE INSOLVENCY PROCEDURE

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ABSTRACT

It belongs to the records field the fact that, with the imposition of the communitarian judiciary system in the Romanian domestic judiciary landscape appear serious mutations as well with respect to the reorganization and judiciary liquidation field, under a triple perspective: legislative, jurisprudence and doctrine. On the one hand, there are performed modifications of substance even in the philosophy of the judiciary system and at the same time appears a standardization of the organization and operation rules in this field.

Given the negative and chain consequences of the failure to recover the debts by the crediting business entities, it is necessary to consider, also in the insolvency field, a principle according to which it is easier to prevent than to cure.

The prevention of insolvency is based upon a timely detection of the causes of difficulties and prompt interventions, supplemented by a quick treatment of difficulties.

KEYWORDS

insolvency proceedings, legislative prevention actions, publicity registries, privileges and real guarantees

1. General considerations regarding the legal institutions and the actions that might prevent the insolvency status

The obvious purpose of the insolvency proceedings is to recover in full all receivables owned by the creditor of the entity that entered payment suspension, not enforced on the due date, and to avoid any loss that might occur in their patrimony.

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As most of the times the default in fulfilling the financial obligations on the due date is generated by the debtor's insolvability, namely by the higher amount of the debts as compared to the assets, the full recovery of all receivables becomes impossible, so that at least a part of it shall remain the final loss of the creditors.

On the other hand, however in a small share, the insolvency proceedings are finalized by a judicial reorganization and the pursuit of the debtor's activity, the causes thereof being various and complex, being subject particularly to a negative general perception as related to the insolvency phenomenon or to the essence of the negative perception of the business environment consisting in the fear of fraud, raised to the status of presumption.

Given the negative and chain consequences of the failure to recover the debts by the crediting business entities and the low degree of salvation of the debtor by reorganizing its activity, it is necessary to consider, also in the insolvency field, a principle known in the medical field, according to which it is easier to prevent than to cure.

The prevention of insolvency is based upon a timely detection of the causes of difficulties and prompt interventions, supplemented by a quick treatment of difficulties.

2. Legislative prevention actions

2.1. The increase of the minimum threshold of the companies' registered capital

The legislative solutions must start from the observation that, on one hand, the primary cause of insolvency of legal entities is the undercapitalization thereof and the insufficiency of funds and, on the other hand, that the financial difficulties can be detected by a strict administrative control.

The legally tolerated undercapitalization represents one of the causes of the debtor's vulnerability facing the risk of insolvency. Not only the size of the registered capital, but mostly the quantum of the financial funds established as capital contributions or reserves are relevant for the probable short-term solvability of an entity underlying the legal provisions pertaining to the insolvency procedure[1].

[1] Ion Turcu, Payment suspension – the insolvency test – a possible balance solution between the premature and the belated opening of the procedure, RDC No. 10/2005, p. 9.

In the Romanian legal company system, according to the Companies' Law No. 31/1991, the minimum amount of the registered capital is RON 200 for limited liability companies, specifically EUR 25,000 for companies limited by shares.

By comparison, as shown in a certain work,[2] the minimum level of the registered capital (in EUR) in 14 countries of the European Union before its expansion were extremely heterogeneous, starting from the lack of any minimum threshold[3], up to higher values[4] or comparable amounts[5]:

It is obvious that a undercapitalized entity or an entity having a rather small capital, in lack of such „anchor" shall be far more exposed to „financial storms", and the risk of entering a payment suspension shall be in inverse ratio.

In this context, it is clear that a first and essential action to consolidate the collective law participating in the legal circuit and, therefore, to prevent potential insolvency statuses represents the appanage of the national lawmaker, that must institute a minimum threshold for the registered capital of various association forms, at such level as to create the reasonable assumption that such action is likely to represent an efficient protection measure against predictable financial risks.

The increase of the minimum level of the registered capital does not represent, however, the only action in the hand of the national lawmaker for securing the civil legal circuit, as there is also a possibility of imposing under the law the establishment of reserve funds especially created to cover insolvency risks.

The establishment of such special funds against insolvency may be determined either in a compelling manner or in a stimulating manner or as a combination of the two methods.

Thus, one can imagine a legislative situation imposing a minimum threshold of such funds, while stimulating, for the excess thereof, higher levels of that quantum by classifying the entities participating in the legal circuit of good standing categories (for instance A, B, C etc), so that the co-contractors shall enter legal relationships in awareness and allowing only

[2] Ion Turcu, Law on insolvency procedure, Publish. C.H. Beck, Bucharest, 2007, page 15, quoting F. Lemeunier, *SARL Société a responsabilité limitée, Création, Gestion,Evolution*, 25e édition, Delmas, 2006, page 13.
[3] France, Great Britain, Sweden.
[4] Germany – 25,500; Austria -35,000.
[5] Greece – 23,477; Portugal – 19,900; Belgium -18,500

such entities having a maximum level of good standing to participate in the public acquisitions system.

2.2. Imposing the compulsory use of accounting documents having an informative character

The preventive actions against insolvency may be taken also by measures related to the internal accounting information of economic operators, by the extension of distribution and publicity of retroactive accounting data.

Starting from the analysis of real legislative experiences of other internal legal systems, one should retain the ones crystallized in the French legislation by the Law dated June 10, 1994 imposing certain accounting requisitions, whereof at least two might constitute at any time a representative guiding mark in any legal system.

Hence, on one hand, we are talking about the obligation of the economic operators to publish the annexes of the balance sheet regarding the consolidated accounts and the extra-balance sheet commitments.

On the other hand, one must take into consideration also the obligation for certain categories of legal entities[6] to keep new accounts, in this case the provisional result account and namely the provisional financing account.

2.3. Imposing the compulsory use of publicity instruments

This form of prevention of the insolvency is manifested by the maintenance of publicity registries by the specialized institutions, speaking hereby of a general trade registry, but also of special registries, among which the registry of real mobile guarantees, the registry of payment incidence or the registry of protests.

In the same note, one must regard and analyze the purpose of real estate publicity registries, land books, having in mind that real estate is usually owned by economic operators.

In this manner any trader shall have more complex data about the patrimony, legal relationships or economic operations in which a potential co-contractor is involved.

[6] Regarding the traditional conception of the notion of legal entity, see I.L. Georgescu- *Romanian Commercial Law*, vol. 1, Bucharest, 1946, page 247, while regarding the modern conception: St. D. Cărpenaru- *Romanian Commercial Law*, Publish. All, Bucharest, 1998, page 30; O. Căpătână-Commercial Companies, Publish. Lumina Lex, Bucharest, 1996, page 294.

2.4. Enacting efficient legal institutions having a preventive effect against insolvency. Guarantees

In a wide meaning, this is among the legislative actions shaping the range of means available to the authorities for securing and crystallizing the legal circuit and preventing the frequent and facile landing in the situation of insolvency.

If the insolvency status represents the consequence of the failure by the debtor to perform its obligations on the due date, the necessity of the insolvency procedure is determined by the fact that the creditors do not have other more facile and fast means to recover their receivables from the debtor.

In all law systems, the obligation is guaranteed by various accessory legal instruments referred to as "*guarantees*". The guarantee for the performance of the due obligations might be achieved by virtue of two categories of legal means: general and special means.

By guarantee of the obligations we understand the aggregate of the legal means, namely of the rights and actions directly recognized under the law or arisen upon the will of the parties involved in the obligation relationship, by which the achievement of the rights upon the receivables is secured.

The general legal means are recognized as concerning all debtors based upon the right to a general pledge over the debtor's patrimony, according to the art.1718 of the Civil Code: "anyone that is personally liable is held to fulfill his duties by means of all his movable or immovable, present and future goods". The creditors benefiting only from the general means of guarantee as regarding the enforcement of their rights over receivables are referred to in the specialty literature as „*chirographer creditors*" (creditors holding a personal right based upon a deed under private signature).

The guarantees are the legal means offering the owning creditors either priority against the other creditors as concerning the forced pursuit of a determined good from the debtor's assets or the option of a forced pursuit of another person/entity that has taken a commitment jointly with the debtor.

The essential function of guarantees is to decrease or eliminate the risk of loss arisen for the creditor from the debtor's insolvability.

The same function is fulfilled also by other legal means available to the creditor and that are not actual guarantees: solidarity, indivisibility, the

reserve of ownership, the retention right, retainer/advance money, penal clause, current account, documentary credit etc.

The fundamental classification of guarantees is the one distinguishing personal guarantees from real guarantees.

The sole personal guarantee is the bond, however, the same role is held by the solidarity of co-debtors, although it is not a guarantee in the strict meaning of the term.

Real guarantees: pledge, mortgage and real privileges consist in affecting a good in order to guarantee the performance of an obligation. The pledge or mortgage may be established not only over the goods from the debtor's assets but also over the goods of other people (real bonds). Also the retention right is a variety of an imperfect real guarantee.

The debtor or guarantor agreeing on the establishment of a real or personal guarantee in favor of the creditor must be accurately aware of the extent and duration of the effects thereof.

In his turn, the creditor in which favor the guarantee is established must be aware that in the event of enforcing the procedure of judicial reorganization or liquidation, his guarantee might be cancelled or advanced by the receivables arisen prior or subsequent to the launching of such proceedings.

At the same time, the creditor must have an accurate perception regarding the market value and the liquidity degree of the guarantee, to be informed about the other existing and concurrent guarantees previously established on the same asset and to use simultaneously a plurality of real and personal guarantees, accompanied also by other means securing the performance of the debtor's obligation, such as the joint bill of exchange, the reserve of ownership etc.

Along with the traditional purpose, the one of securing the debtor's obligation, the guarantees have gained new functions: they are contributing to the credit's security and are sometimes replacing the actual credit, as a substitute to the actual fund transfer, as it is happening, for example, in the case of bank guarantee letters.

The basic regulation on guarantees is to be found in the new Civil Code[7], in[8] Book V, Title XI, „*Privileges and real guarantees*".

[7] Adopted and enforced by the Law No. 71/2011.

[8] Prior to the enforcement of the new Civil Code, the provision regarding guarantees could be found in the former Civil Code- Book III, Title XIV ,,About fidejussio (bail/bond)", Title XV ,,About pawn" and Title XVIII „About privileges and mortgage", in the Commercial Code Book ll, Title I (art. 495 - 500 about the pledge on the ship) and in Title

The New Civil Code provides **the following types of real guarantees and privileges**: special privileges, mortgage loan, mobile goods secured loan (including on accounts and receivables), pledge (as a real guarantee with dispossession), as well as the retention right (as an imperfect real guarantee).

As concerning the personal guarantees, the New Civil Code recognizes two major types of personal guarantees: accessory guarantees (fidejussio/bond) and autonomous guarantees (being in the bank practice instruments already used, the regulation thereof representing an appreciated action securing the commercial transactions, particularly international ones).

With regard to the new aspects against the former regulation, in the field of real guarantees, the notion of mobile mortgage stands out, which is similar, *de lege lata,* except for the conclusion thereof, to the pledge or the mobile real guarantee (MRG) regulated under the effect of the former law by the Law No. 99/1999, Title VI, which it is replacing for that matter.

In the field of personal guarantees, we note the entry of the institution of autonomous Guarantees (as species of personal guarantees), in its two forms, the bank guarantee letter (guaranteeing the payment of a certain amount of money) and the letter of comfort (guaranteeing the performance of an obligation to act or not to act), but also the entry, in the field of bonds, of the assimilated bond and the anticipated regress.

Moreover, **the retention right** benefits from an **express regulation** in the new Civil Code, being defined as the right of oneself, being liable to remit or return a good, to retain such good for as long as its creditor fails to compensate him for the necessary and useful expenses made for such good or the prejudices caused by the same.

3. Administrative prevention actions

Due to the economic and social role of economic operators, the functioning or collapse thereof within the framework of a state organized society is of interest for the public order and, consequently, the central or local administrative power cannot remain in expectation.

The means by which the government or the local power may intervene are various, coagulating in two major categories, in the form of a support granted to legal entities in difficulty or encouraging the takeover of such entities by other persons or entities.

VI of the Law No. 99/1999 repealing the provisions of the art. 478 - 489 of the Commercial Code, as well as in the Law No. 190/1999 regarding the mortgage loan.

As concerning the support granted to the entities in difficulty, it may be actively manifested, by public support or passively, by the decrease or cancellation of the debts of such entities, the consequences being similar, specifically the unburdening of the economic operator and release thereof from the „chains" of a negative economic situation and clearing its activity.

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CONTRACT PARTIES OF THE FIDUCIARY CONTRACT

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ABSTRACT

Fiducia (trust) is a new institution in the Roman civil law governed by the provisions of the new Civil Code Articles 773 -790. For Anglo-Saxon origin and tradition, fiducia is a legislative innovation in European legal systems by the changes it produces especially in the property right. In the regulation of the new civil code, the fiduciary institution has a contractual nature, being established by the trust contract between settlor and trustee. This paper aims to make an analysis of part of a complex institution that the parties fiduciary contract and the conditions that they must meet under of the new civil code regulations. This paper aims to make an analysis of a part of the complex institution of fiducia, respectively of the parties from the fiduciary contract and the conditions that they must comply under the new Civil Code regulations.

KEYWORDS

Fiduciary agreement, the settlor, the legal person settlor, credit institutions

Fiducia is defined by the new Civil Code as " the operation whereby one or more settlors transfers interests, claims to money, securities or other property rights or a set of such rights, present or future, to one or more fiduciary to exercise their in a purpose, for the benefit of one or more beneficiaries. These rights form an autonomous patrimonial mass, distinct from the other rights and obligations from the fiduciary parties patrimonies ". (Art. 773 new Civil Code.). The law provides in art. 774 new Civil Code that "fiduciary may be established by law or contract concluded in authentic form." This paper aims to make an analysis of contract parties trust that the parties' agreement concluded in authentic form by fiduciary own will

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referred to the second part of Article 774 new civil code. The notion of part of a civil legal act means the person who ends civil legal act, personally or by representative, in person or property occurring effects of that act. It should be noted that some fiduciary contract can be made from more natural or legal persons who have a common interest and promote a common position, the legal text that defines the fiduciary institution mentioning the possibility a plurality of persons in forming of a single part of the contract.
Fiduciary Contracting Parties are: the settlor, the fiduciary and the beneficiary, each part of the contract will be analyzed in terms of legal texts in the field in terms of general conditions that must be fulfilled including conditions regarding capacity and consent.

SECTION 1. THE SETTLOR

Regarding the settlor person art. 776 Civil Code provides that "any person or entity may be settlor in a fiduciary contract". Thus fulfilling the law provides special conditions for the settlor person, but some clarifications are required on capacity arising from the fiduciary nature of the contract as an act of disposal, as the settlor is a person or entity.

The private person settlor

In terms of individual's settlor as the contract has a disposal character; he must have full legal capacity. A controversial situation can be the minor with limited exercise capacity with regard to the provisions of the new Civil Code, which states in art. 41 *"legal acts of the minors with limited exercise capacity can by ending with the consent of the parents* or, where *appropriate, of a tutor, and in cases stipulated by law also with court authorization*," and in "... however, the minor with limited exercise capacity may be conclude alone conservation acts, acts of administration which do not prejudice him and acts of disposal of low value. ". With regard to the provisions of Article 41 paragraph 3, arise the question of whether minor with limited exercise capacity alone may conclude the fiduciary contract only with the condition that would have the quality of its beneficiary, in which case this contract may be considered as an act of administration and a disposal one. Although this discussion has more theoretical value being unlikely that in practice the child with limited exercise capacity to be interested in a so complex contract, we believe that given the legal provisions of the new Civil Code, the fiduciary contract can be considered

as a administration act in case the child with limited exercise capacity when he meets both the quality of settlor and the beneficiary. Given the quality of a professional fiduciary imposed by art. 776 of the new Civil Code, it is assumed that such a contract can only take into account of the minor.

The legal person settlor

The new Civil Code in Article 187 defines legal entities by its constituents, "*any legal person must have an independent organization and a heritage to achieve a specific purpose affected legal and moral, in agreement with the general interest"*. In terms of acquiring the use of legal capacity, the new Civil Code provides in art. 205 1 and 2: "Legal persons who are subject to registration have the ability to have rights and obligations of their registration date. Other legal persons have the capacity to have rights and obligations of the date of their establishment or authorization from the date when any other requirements prescribed by law ".

In order for a valid conclusion of the trust contract the settlor legal person must have full legal capacity, capacity that is acquired under new Civil Code at the date of its management bodies. Until the establishment of the administrative, exercise rights and fulfill obligations relating to the legal person shall be made by the founders or by natural or legal persons designated for this purpose. Have quality management bodies, individuals or legal persons who, by law, articles of incorporation or status, are entitled to act in relations with third parties individually or collectively, in the name and on behalf of the legal person. Be taken into account the provisions contained in special laws applicable to legal persons, depending on their form of organization as well as statutory provisions, especially in case the settlor legal person is not c beneficiary of trust contract, in which case it s get the character of a disposal act.

SECTION 2. THE FIDUCIARY

Regarding the fiduciary the new civil code contains provisions strict and limited, so art. 776 paragraph 2 provides that "*can act as a fiduciary in this contract only credit institutions, investment firms and investment management, financial investment company, insurance and reinsurance company legally established*" and in par. 3 is provided "*may also have fiduciary status the public notaries and lawyers irrespective of the form of organized of profession*". Therefore the chosen solution for the new Civil

Code envisages a qualified fiduciary nature, express and limitative excepted people under the Code, any other person having no right to sign a contract as fiduciary. Dedicated solution and in the French legislation differs from the original Anglo-Saxon form of trust in which no special quality is not required for fiduciary person, and takes into account primarily trying to reduce use of fiduciary contract activities such as tax evasion and protect the interests of the beneficiaries through or quality of fiduciary qualified persons who are at least in theory a good capacity of the heritage entrusted administrator. Can be so fiduciary by law: a) the investment company; b) investment management company, c) financial investment company; d) insurance and reinsurance company; e) notaries public; f) lawyers. Description of organization and operation conditions set forth for each category in specific laws need an ample space, which is why in this article we present.

a) **Financial investment companies** are regulated by Law 297/2004 on the capital, Title II; Chapter III-financial investment services companies, art. 6: "*Society for financial investment services, referred to as firm, are legal entities established in the form of joint stock companies, issuing nominal shares, according to Law no. 31/1990, which main activity is the provision of financial and investment services that only work under C.N.V.M authorization* "Although the general organization and functioning of financial investment company is established by Law 31/1990, Law 297/2004 provides special meeting conditions that must be fulfilled for them: initial capital (Section 1, Art. 7 Law 297/2004), obtaining the CNVM authorization (section 2, art. 8, art. 9, art. 10 art. 11, Art. 12, Art. 13 Law 297/2004), leadership, management, internal control and actioners (Section 3 - art. 14 - art. 21 Law 297/2004). Are provided on the company's investment and subject to certain prudential rules (Chapter IV art. 22 - art. 25) and ethics rules (Chapter V Art. 26 - art. 28). Law 297/2004 provides regulatory and the financial investment services in Chapter II 5, making them a division into two categories: the main work and related services. In the category of the main services between: a) reception and transmission of orders received from investors in connection with one or more financial instruments; b) execution of orders in relation to one or more financier instruments, other than self, c) financier trading instruments, d) manage portfolios of individual investors' accounts on, with respect to the mandate given by them, when such portfolios include one or more financial instruments; e) underwriting of financial instruments on a firm commitment

and / or placing of financial instruments. In the category of law related services include: a) the custody and administration of financier instruments, b) renting safe deposit boxes; c) Granting credits or loans from financial instruments to an investor in the execution of financier transactions instruments, in which that company investment services is engaged in transactions d) advising on any issues related to the capital structure, industrial strategy and services relating to mergers and acquisitions of companies, e) other subscription services on financier tools in a firm commitment basis; f) investment advice regarding financial instruments, g) foreign exchange services in connection with the activities of financial investment services.

b) **Investment management company** is also regulated by Law 297/2004 in Title III - Undertakings for collective investment, Chapter I. The law defines management companies investing in art. 53, Section 1: "investment management company, hereinafter referred to SAI, the legal entity established as a joint stock company, according to Law no. 31/1990, republished, with subsequent amendments, and works only under CNVM authorization." Investment management companies are regulated like financial investment company, the law regarding them asking for special rules on initial capital (Section 3 Art. 57), obtaining the CNVM authorization (Section 4 of Art. 58 and art. 59), management, shareholders and internal controls (Section 5 of Art. 60 Art. 63). The law also requires and about their compliance with prudential rules (Chapter II art. 64 - art. 67) and rules of conduct (Chapter II art. 68). Law 297/2004 defines different services but the investment management company in Section 2, art. 54 - Art. 56). Legal text provides that investment management companies will be the objects of activity management in collective investment securities, referred to as OPCVM. Administration companies can manage, subject to CNVM authorization and other collective investment called AOPC . Besides the above-mentioned services and activities subject to normal investment management company that can as art. 54 paragraph 3 to perform, notwithstanding activities: a) individual investment management, including by funds, on a discretionary basis, in accordance with mandates given by investors where such portfolios include one or more financial instruments, defined in art. 2 1, p. 11, b) related services: such as investment advice concerning one or more financial instruments as defined in art. 2, paragraph 1, point 11. Investment Management Company may be authorized to do activity for individual investment portfolio management only if authorized

in advance to do OPCVM. Management activities and AOPC , and may be authorized to perform services related only if they are authorized to manage individual investment portfolios. Article 55 defines, as example but not limited to, the activity of collective portfolio management consisting of: a) investment management; b) activities relating to: legal and accounting services for portfolio management, market research, portfolio assessment and determination value securities, tax, monitoring compliance with regulations, maintain a register of holders of equity, income distribution, issuance and redemption of units, keeping records, c) marketing and distribution.

c) **Credit institutions** are regulated by GEO 99/2006, and divided into categories: a) banks; b) savings and credit cooperative organizations in housing, d) mortgage banks, e) electronic money institutions. Credit institutions are authorized and supervised by the National Bank of Romania. For the activity in Romania, each credit institution must meet the minimum requirements established by GEO 99/2006 and obtain a permit from the National Bank of Romania. In Section 2, art. 18 to 22 are included activities that can take place within the limits of credit institutions the authorization granted.

d) **The insurance and reinsurance companies** are regulated by Law no. 32/2000 regarding the insurance companies and insurance supervision. Insurance and Reinsurance Company's activity is monitored and controlled by the Insurance Supervisory Commission. All the Insurance Supervisory Commission authorizes the establishment and operation of performing insurance companies in Romania, an activity that can be made only by joint stock companies, mutual companies, branches of foreign insurers, constituted as legal entities Roman branches of insurers, foreign legal entities. The authorization procedure is provided in art. 12 of law, and cumulative minimum criteria to be fulfilled are: presentation of a feasibility study which shows that the company has legal solvency margin, i.e. capital reserve fund for the mutual free to be in accordance with the law the company has a satisfactory reinsurance program for its activity or insurance that is not necessarily justify such a plan, company presents specific calculations for life insurance business; name of the society not mislead the public, the company will carry out activities only about insurance, in case of a foreign insurer, if he proves that the country is legally constituted and

registered to carry out at least five years an activity similar to that for which authorization is sought Romania.
The question of use of fiduciary capacity, namely whether it should have specifically mentioned the objects of trust activity, in which case it must be entered in CAEN code specific business object, or fiduciary may operate under specifications of art. 776, which allows the development of such activities.

SECTION 3. THE BENEFICIARY

Regarding the beneficiary person the new Civil Code provides in art. 777 "the beneficiary may be the settlor, the fiduciary or other person". If the beneficiary of the contract is a person other than the settlor or the fiduciary we are facing an exception to the principle of relativity is assembling contracts with the benefit of any third party contract or stipulation for another.

Relativity of effects of a contract expresses the idea that rights and obligations arising from contract directly belong to the Contracting Parties. If nobody can be forced by the will of another, is possible that a person total foreign from a contract to acquire rights under the contract that is not a party. Appropriate contract in behalf of a third party, called the stipulation for another. Neither the old nor the new civil code and civil code there is a settlement of the contract on behalf of a third party, but both codes expressly provides its applications in various specific areas. When the contract is designated as beneficiary a fiduciary other than the person or fiduciary or settlor we find ourselves in the presence of the stipulations for other applications. If another third party stipulations for beneficiary is able both to accept and waive the right to the benefit or stipulated. It is considered that acceptance has no effect on the right of association; it is not acquired by virtue of accepting, but under the contract concluded between the stipulated and promissory. In Article dedicated to the beneficiary of trust (art. 787 new Civil Code) there are no special rules on third-party beneficiary status. The law still makes reference to the situation in art. 789 - denunciation, amendment and revocation of fiduciary contract, paragraph 1: "*How long was not accepted by the beneficiary, the contract may be terminated unilaterally by the settlor*" and paragraph 2 "*after acceptance by beneficiary, the contract may be amended or revoked by the parties or terminated unilaterally by settlor only with beneficiary acceptance or, in his*

absence, with court approval. " From the text it is therefore necessary legal acceptance by the beneficiary, otherwise settlor has the possibility of revocation. But the law does not make any statement regarding the fiduciary contract acceptance form to third parties, which raises the question of whether it is possible to contract a tacit acceptance of fiduciary (the facts of the beneficiary to indicate intention to accept fiduciary instituted in favor) or required a written acceptance which establishes unequivocally its acceptance. Nothing in paragraph 2 of art. 789 does not have a clear content, providing that after acceptance by the beneficiary, the contract can be terminated unilaterally by settlor only with the agreement of, or in his absence (no agreement of the beneficiary) with court approval. The question is under what conditions the court may permit withdrawal by settlor without the beneficiary, doing any legal text mentions this situation. If the beneficiary of the contract is even the settlor or fiduciary in this situation cannot question under article acceptance. 789 new civil code.

As in settlor situation, the new Civil Code contains no special rules regarding the beneficiary making a single statement of a general nature, in art. Article 779 e): " *sanction of absolute nullity is required under identify the beneficiary or beneficiaries or at least rules that allow their identification*. "In order to establish the beneficiary is allowed that contract to be valid it must be determined fiduciary or at least determinable. This contract will be valid fiduciary beneficiary has not been determined from the beginning, but the parties have established sufficient evidence for determination when the contract is executed. For example it may be indicated as entitlement the heirs of the settlor, setting their nominal and will be made after settlor death, but that was suitable for quality customer heir settlor constitutes a sufficient determinability them in the future.

It can also be accepted fiduciary agreement with the beneficiary of a future person; the person that at the time the contract was signed didn't exist. In this case the settlor may example, it designated as a beneficiary of fiduciary contract, which will be the first child born in the future or a legal entity that is being set up. In the event that the forecast will not happen will question the validity of the fiduciary agreement will analyze how this situation could be resolved

An interesting hypothesis to be mentioned consists of a special form of trust in Anglo-Saxon system, namely Honorary Trust for animals - fiduciary for animals. Fiduciary for animals is a type of mortis causa applicability cash changeover is made to ensure that maintenance resources for settlor favorite animal after he will die. In principle, given that the law

provides another requirement for the beneficiary to be determined or determinable than can be accepted as a beneficiary the pet. This first conclusion in principle that can be combated by art. A new Civil Code Article 789 which refers to acceptance of the fiduciary contract by the beneficiary, the beneficiary under these conditions without possibility of rejection or acceptance of any contract and the fact that animals cannot be our law topics as making them incapable of to benefit directly linked. Given that the law is at least elusive in regulating acceptance by the beneficiary, in the absence of legal provisions expressly prohibiting such fiduciary fiduciary believes it may be available for animals, in this case the recipient can accept be considered tacit. However, it is unlikely that such a fiduciary to find applicability in our system of law considering its own legal culture and other provisions, although such an application of the fiduciary contract would be an upgrade and also a breakthrough in our right.

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CONDITIONS OF CIVIL LIABILITY REGARDING ENVIRONMENTAL LAW SPECIFIC REGULATIONS

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Silviu DEACONU[**]

ABSTRACT

The following study is aiming to analyze the conditions of civil liability that are specific to legal reports of environmental law and also to debate upon the classic conditions of liability as illegal deeds, prejudice and causal report, as provisioned by the assumed Civil code, furthermore discuss the specifics of such liability applied to the laws that apply to environment protection. Debates regarding the judicial nature of these specific liabilities will be presented, beginning with their objective or subjective nature.

KEYWORDS

Environmental law, civil liability, prejudices brought to environment

1. INTRODUCTORY CONSIDERATIONS REGARDING CIVIL LIABILITY IN DIRECT CONNECTION WITH THE PRINCIPLE OF A SAFE ENVIRONMENT

The environment protection issue became in the past 40 years an immediate reality, one which requires immediate solutions. It is the reason for which at a global level, the principle of the right to a safe environment is best confirmed through the sanctions imposed by the legal provisions meant to insure effective judicial protection of the environment, sanctions which are presented under the form of civil, contravention and penal liabilities. In environmental law, liability has become, under the impact of scientific and technical revolution a ”hot zone” because of the global environmental situation seriously affected by the consequences of industrialization and

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automation, the irrational exploitation of natural resources and other factors.[1]

To be able to analyze one of the judicial means of protection of the environment, and implicitly of life itself, meaning civil liability in legal reports that are specific to environment protection, for a start, there should be given a definition to the notion of "environment".

In the hereby study, we shall direct our attention towards an "environmental" notion that is internationally accepted, from a legal point of view.

Thus, inside the European Community, environment represents the ensemble of elements which, in their relations complexity, constitute the frame, ambiance and conditions of human life, as it is or as they are perceived. [2]

The notion of *environment* has been defined in Italian law starting with the Law 349/1986, the Constitutional Court of Italy stating, through Decision nr. 210 of 1987, the following : "Environment means preserving, rationally managing and improving the conditions of the environment (air, water, soil and all other components), the existence and conservation of the genetic patrimony, terrestrial and aquatic, of all vegetal species and animal species, that live in the environment in a free condition and a natural state, and in the end, the human being, with all its manifestations".

A different legal definition of the environment is given by the Convention regarding civil liability for prejudice caused by activities that are dangerous to the environment, redacted by the Council of Europe and signed at Lugano at 21st of June, 1993 and which, as a part of the definitions stated by the second article, at point 10 underlines: "The environment includes natural resources, biotic and abiotic, as air, water, soil, fauna and flora, and also interactions between these factors; the goods that compose our cultural heritage; and also characteristic aspects of the landscape".

In Romanian law, the notion of environment has been defined by the 137/1995 Law, modified through the Emergency Ordinance of the Government no. 91/2000 and approved through the 294/2003 Law. It explicitly states now that "environment is the ensemble of natural terrestrial conditions and elements, air, water, ground, underground, specific elements of the landscape, all atmospheric layers, all organic and inorganic matter, as well as living beings, natural systems that interact – comprised of all the

[1] Neagu, M. M., *Răspunderea juridică în dreptul mediului înconjurător* în Revista Drept-Series Jurisprudentia nr. 10/2007.
[2] Prieur, M., *Droit de l'Environnement*, Ed. Dalloz, Paris, 1991, p.2.

elements shown before, including material and spiritual values, quality of life and the conditions that may influence health and wellbeing of the human kind".

The first Principle of the Declaration of Rio, defines in a different way the human right to environment proclaimed at Stockholm (16th of June, 1972): "The human kind, is at the center of all concerns regarding lasting development, having the right to a healthy and productive life, in harmony with nature".

The UNESCO Convention of 1970, reiterates the principle that regards the general obligation of environment and natural resources protection, and which manifests, all along, by the human right to a safe environment, an obligation to protect the environment for the future generations and to preserve all common natural resources (UNESCO Convention, 1972).

If the 1991 Constitution presented protection of the environment as one of the nations' social obligations regarding rebuilding, protection of environment and maintaining an ecological equilibrium, the right to a healthy environment is acknowledged "in terminis" by the Law – frame of environment protection law – nr. 137/1995, then by the Romanian Constitution revised, implying the obligation of all persons, physical or juridical, to comply and cooperate.

The actual Constitution, in Title II, Chapter 2, "Fundamental rights and liberties", Art. 33, provisions a right to a safe environment and an obligation of cooperation of all people and companies at the side of the authorities in this matter: "**Individuals or companies, have the duty to protect and improve the environment** … 2) The state **must** insure… **e) recovery and protection of the environment**, and also **maintain environmental equilibrium**… "

Also, following UE pattern, which was a condition of Romanian adherence to UE, the principle of the right to a safe environment is understood, among other meanings, as through the three fundamental rights: 1. The right to knowledge regarding environment; 2. The right of the individual to participate in debates regarding environmental issues; 3. The right to request the repair of environmental prejudice or the annulment of illegal administrative provisions.

2. SPECIAL CIVIL LIABILITY VERSUS CLASSIC CIVIL LIABILITY REGARDING JUDICIAL REPORTS IN THE ENVIRONMENT AND RIGHT TO LIFE PROTECTION DOMAIN

One of the base forms of judicial environment protection and implicitly life protection, is constituted by the civil liability for the caused prejudice, and mostly tort liability.

The problem of civil liability in this domain stirred interest and curiosity of doctrine which debate the idea of an autonomous liability versus a classic civil liability.

The tendency is to acknowledge a special type of liability inside the civil liability, autonomous towards the classic civil liability, even a public law liability, and not a private one, and that would be shaped out of the principles and rules that apply in restoration of environment prejudice.

It's all about the constrain to repair the environment prejudice and thus it's not seen as a faculty of the legal provisions, an integral repair of the prejudice brought to the environment and not just the possibility to negotiate the quantum of the compensation, but a constrain to repair the environment prejudice as a public interest response, which is not left to be appreciated and followed only by the victim of this prejudice, victim that in this case would be the entire society.[3]

Civil liability, specific to this type of legal reports is funded, not only in Romanian law, but also in comparative law, on the classic principle according to which the person that causes a prejudice to another person, with a certain degree of guilt, is held to repair the caused prejudice.

The classical civil liability systems in a number of countries have been developed to introduce forms of strict liability for environmental damage where, for example, hazardous activities are being undertaken.

Some countries have enacted specific laws to provide a basis for claiming compensation for environmental damage suffered. The first countries to take this step were Norway and Sweden. Significantly, the other Scandinavian countries have also now introduced specific environmental civil compensation laws. Among others, Germany also has such a law and Austria is due to introduce one based mainly on the Lugano Convention of Civil Liability for Damage Resulting from Activities

[3] Trofimov, I., *Răspunderea civilă în raporturi de dreptul mediului,* Ed. Sibimol, Chisinau, 2006

Dangerous to the Environment 1993. Many of these laws are recent and therefore experience of their use is limited. The German legislation has been particularly under-used. The specific environmental compensation laws impose strict liability and are directed towards environmental issues. Some are made to apply only to certain industrial activities or installations. This is, for example, the case with the Danish and German legislation, both of which list in an annex the industries to which the legislation applies. In contrast, the Finnish and Swedish legislation applies to any activity which results in damage to the environment.[4]

To be able to offer a possible answer to the question whether common law civil liability is sufficient to meet the complex judicial reports that are born in the purpose of environment protection or the elements that are specific to this matter have transformed it in an autonomous liability, one must analyze the classic elements that are remains from common law and the elements that are specific to common law.

Civil liability is the mechanism that contains the elements required to be met in order to sanction the party that is guilty of producing a prejudice with a certain form of guilt. In order to have this mechanism working, a multitude of conditions must be met.

The conditions of civil liability, present only small differences in the case of tort liability and contractual liability.

Regarding the issue of the general conditions, the specialized doctrine considered that general requirements of tort liability have as a basis provisions of art. 998 and 999 of the Civil Code. Thus, art. 998 states: "any deed of the individual that causes another a prejudice, coerces the individual who's action caused the prejudice, to repair it." And according to art. 999 "the individual is responsible not only for the prejudice caused by its deed, but also for the prejudice caused by its negligence or imprudence".

The new Civil Code, clarifies the situation of the general conditions of tort liability and on a separate note those of the contractual liability, providing distinct articles for every one of them, followed by a marginal title towards tort liability for the individual deed.

So, general provisions in the case of tort liability, presented by art. 1349, state the following: "(1) All individuals have the duty to respect rules of conduct that the law or the custom of the place impose and not to harm, by its actions or inactions, the rights or legitimate interests of other individuals. (2) The individual that, being in complete control of its actions,

[4] *Study of civil liability systems for remedying environmental damage, Final report, 1995, p.65*

breaks this duty is liable for all caused prejudice, being bound to fully repair. (3) In situations specifically provisioned by the law, an individual is bound to repair the prejudice caused by another's individual deed, by the things or animals that are under its protection, and also by the ruin of the building. (4) Liability for caused prejudice of defective merchandise is provisioned by special law."

In the same manner of regulation, the new code also presents general dispositions of contractual liability, article 1350 stating that: "(1) Any individual must execute its contractual obligations. (2) When, with no justification, the above duty is not met, the individual is liable for the prejudice caused to the other party and is bound to repair that prejudice, within legal terms. (3) If the law does not provide differently, none of the parties may avoid provisions of contractual liability rules in order to choose other liability rules that are more favorable.

General conditions of tort liability are considered to be the following: existence of a prejudice, existence of an illicit deed, existence of a connecting report between the illicit deed and the existence of the guild of the individual that caused the prejudice, that being intent, negligence or imprudence of its actions. In direct connection with the latter condition of liability – guilt – appears another condition, the existence of the tort capacity of the individual that causes the prejudice.

a. Prejudice – essential condition for civil liability incidence

Prejudice, as an essential element of tort liability, defines as the result, the negative effect brought by a certain individual, as a direct follow up of an illicit deed of another individual, or as a follow up of the "deed" of an animal or thing, for which is held responsible a certain individual.[5]

Base provisions for the civil liability in environmental law is O.U.G. 195/2005 regarding environment protection, which modifies and updates Law 137/1995, which doesn't actually explain the term of "environmental prejudice", fact that fueled doctrine debates on this matter.

Art. 80 points. d of Law. 137/1995, modified and republished, establishes individuals and legal entities obligation to repair the damage that includes not only actual damages but also the costs of prevention and restoration of ecological balance.

[5]Stătescu, C., Barsan, C., *Drept civil. Teoria generală a obligațiilor,* ediția a IX-a, Ed. Hamangiu, 2008, p. 145

Given the need to harmonize national legislation with Community legislation and to transpose the Directive no. 2004/35/EC on environmental liability relating to the prevention and remedying of environmental damage was adopted Emergency Ordinance Government. 68/2007 approved by Law nr.19/2008 on environmental liability with regard to the prevention and remedying of environmental damage, which established the legal framework for polluter liability for damage caused and also the measures to be taken by any person who has been contaminated. Damage is defined in the same ordinance as "a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may arise directly or indirectly."

The diverse and multiple prejudices brought to environment and to humankind determined doctrine to characterize and consecrate the notion of environmental prejudice as a distinctive notion to that of ordinary prejudice. Environmental prejudice goes beyond the usual prejudice of goods or individuals. Environment – as a victim, is considered independent from the right to propriety and from individuals, itself having to be the subject of a specific type of protection.[6]

Thus, in essence, ecological damages, as a basis element of civil liability in environmental legal provisions, represents the damages caused to the wild nature, un-appropriated – res nullius – or to collectivity interests, throughout the receiving medium, air, water, soil, independently of the direct harm brought to a human interest.[7]

b. The illicit deed, producer of prejudice in the ecological domain

Here too, the illicit deed consists in a harmful act of conduit manifested as an action or inaction which contravenes provisions regarding conservation and protection of the environment which is the cause for producing ecological prejudice.

In what regards the illicit deed, if the civil provisions imply the rule of responsibility for illicit deeds only, as a report to the dispositions of art. 998-999 from the Civil Code, the environment legal provisions the deeds that create prejudice include either illicit behavior which produces a prejudice to the environment by their character, implying liability on the ground of fault (subjective liability), either the normal current activities

[6]Uliescu, M., *La responsabilite pour le dommage ecologique,* Revue Internationale de Droit Compare nr.2/1993, Paris, p. 392.
[7]Duțu, M., *Tratat de Dreptul mediului,* Ed. Economică, 2003 , p. 58

(licit per se) which might constitute into probable causes that harm the environment, implying liability on the ground of risk[8] (objective liability).

c. Causality report between illicit deeds and generation of prejudice

Initiating from the provisions of 998-999 of the Civil Code, which provision the causality report between the deed and the prejudice, in order to establish the causality report both the illicit deed and the licit deed are taken into consideration, respecting the following premise: establishing a causality report between the illicit deed and the prejudice and not a general causality report; selection of factors to establish which of them has a causal role and may be retained in the area of causality specific to the tort liability; establishing a mediate report when the causality report is not direct between the deed and the prejudice.

The notion of ecological prejudice is debated in community law as being a distant category from other types of prejudice, precisely to ensure a proper repair.

Thus, the Directive regarding civil liability for prejudice caused by toxic waste, makes a clear distinction between prejudice brought to individuals and assets of the prejudice created to the environment, underlining, in the exposure of motives, the necessity to isolate that type of prejudice as a new category in report with the precedent.

d. One of the essential conditions, required, generally, by the common law civil liability is the guilt of the originator by doing the illicit act, may it be intentional, or unintentional, with no difference for its weight.

Nevertheless, civil law acknowledges that in certain domains, objective liability, independent of the heavy burden of proof towards the guild of the originator of the prejudice, founded on different grounds: risk, warranty etc.

In the field of environmental protection, subjective civil liability, grounded on guilt, would assume an extremely difficult probation which would delay or render impossible the repair of the prejudice.

It is the reason for which most international legal provisions, as ours, underline that civil liability for ecological damage is expressly provisioned as an objective liability, beyond any notion of guilt, being enough to probate

[8] Marinescu, D., *Tratat de dreptul mediului,* Ed. All Beck, Bucure□ti, 2003, p. 75 şi urm.

the existence of the illicit act and a provided prejudice, and for those reason, doctrine consider that civil liability in this domain is first of all a form to repair the prejudice.

Most legal provisions have the tendency to make a passing towards an objective liability, outside the notion of guilt, yet this fact is not a total success, thus, nowadays, compared law applied to legal environment protection knows both subjective and objective liabilities.

Thus, in France, articles 1382 to 1386 of the Civil Code provide for two different types of liability, namely liability for negligence (for individual actions or omission) (1382 and 1383 and 1384 at line 2); and non-fault (strict) liability for persons, things or animals in one's custody (1384 to 1386). Liability for negligence has three essential elements, namely: a harmful event resulting from a wrongful act or omission, damage suffered by the victim and a causal connection between the harmful event and the damage suffered. Strict liability arises where a harmful event results from a potentially dangerous thing or activity; a victim suffers damage, and a causal link exists between the harmful event and the damage suffered.[9]

Italy, acknowledges in legal provision regarding the environment protection, as a principle, subjective liability, based on guilt, which should be proven by he who invokes it, the plaintiff, yet in certain cases, the work of the plaintiff is eased, as legal provisions institute a presumption of guilt, stating that the other party that must make the proof.

The basic principle of civil liability is contained in Article 2043 of the Civil Code. The main characteristics of such liability are the degree of intention or negligence of the action, the causal link between the action and the event and the unlawful damage (for example, the breach of some legally protected interest), all of which must be proven by the plaintiff. Generally, all industries are subject to the general civil liability regime. Whereas Article 2043 of the Civil Code generally applies, Article 2050 and 2051 of the Civil Code provide a presumption of (somewhat stricter) liability for activities specified as "dangerous" and for damage caused by "things kept in one's custody".[10]

Governmental emergency Ordinance nr. 195/2005 consecrates in Article 95, first line, two principles that govern civil liability for illicit acts harming environment, objective liability independent of guilt and joint liability in the case of multiple originators.

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[9] *Study of civil liability systems for remedying environmental damage, Final report, 1995, p.66-69*

[10] *Idem, p.66*

Doctrine, has stated, that in the understanding of Article 1000, first line, of the Civil Code, both subjective concept of tort civil liability, based on the presumed guilty of the individual called to answer for the act of the thing (polluting activity), as also objective concept which excludes guild, funding the obligation of repair to risk. The concept of the objective liability has been argument for the first time in modern legal provisions by German doctrine, and later was presented by French doctrine, having as a basis for the risk theory the idea of justice, in a report which, since any human activity is following a profit, is normal that any prejudice that it provokes might be repaired (*ubi emolumentum, ibi onus*).[11]

Although this theory has been criticized, as it was founded on the idea of risk, considering that negligence can be covered, the liability for the risk created towards the environment and ecological equilibrium does not diminish its preventive-coercive role, which it points to in what regards guilt liability[12], pollution being determined firstly by general activity of companies.

Doctrine[13] underlined the advantages of risk civil liability, in ecological matters, as reported to guilt: victim compensation will always happen; situations exist when true identity of the originator cannot be established, and thus produced consequences would be aggravated when remained unknown; regarding pollution it is necessary that legal provisions to insure a fully repair, efficient and opportune of any prejudice brought to the environment; it is stimulated the diligent and prudent attitude to rationally use the ecological factors.

Thus, special provisions of Law 137/1995 modified and updated, consecrate objective civil liability, grounded on risk, regardless of the fact that there is a high risk of pollution, for which the owners of these activities are coerced to have insurance policies, according to article 80, second line of the Law, or a normal risk, for which the victim must prove only the existence of the prejudice and of the causality bond.

In the domain of contractual liability, guilt can never be anything else than a violation of an obligation born out of the contract. Obligations that might be security, informational or counseling of the beneficiary in the

[11] Marica, A., *Considerații privind răspunderea civilă în dreptul mediului, in Revista de Științe Juridice, nr. 2/2006, p. 76*
[12] Duțu, M., *op.cit. p. 75 şi urm.*
[13] *Idem , p. 77*

case of supplying with toxic or dangerous products, may, also, open a new field of contractual liability for eventual ecological damages.[14]

Conclusions

Analyzing the issues rose by the "ecological damage" notion, we concluded that giving a definition to the above mentioned notion would be a very difficult task, as it brings up very complex issues. Various laws, domestic and international have tried to define this notion, but without giving a proper complex definition.

The need to separate the categories of damages that form from the ecologically pure form of damage or environmental damage occurs as a separate category because of dissatisfaction caused by the classic damage repair system, which is founded on the principle that the victim which suffered the injury has the right to compensation only if the prejudice is certain and the victim is subject of the law.

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5. Prieur,M., *Droit de l'Environnement, Ed. Dalloz, Paris, 1991*

[14] *Idem, p. 68*

6. Stătescu, C., Barsan, C., *Drept civil. Teoria generală a obligațiilor, ediția a IX-a, Ed. Hamangiu, 2008*
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8. Uliescu,M., *La responsabilite pour le dommage ecologique, Revue Internationale de Droit Compare nr.2/1993, Paris.*

GENERAL CONSIDERATIONS ON CIVIL LIABILITY IN THE NEW CIVIL CODE

Florin LUDUŞAN[*]

ABSTRACT

Civil liability is one of the most important manifestations of legal liability as well as a fundamental institution of civil law and one of the basic forms of legal liability, which has aroused the interest of doctrinaires and practitioners worldwide. At the same time, civil liability is a fundamental category and a very large and complex institution of civil law.

The place of civil liability among all forms of legal liability is determined by its theoretical and practical importance. Civil liability is central to the legal liability in general.

KEYWORDS

Civil liability, Civil Code, prejudice, functions of civil liability, principles of civil liability

1. The notion of civil liability

The Civil Code of 1864 did not provide an adequate and general definition of the notion of civil liability. At the same time, the new Civil Code does not include a text where the legislator defines civil liability in general, as concrete manifestation of legal liability. Under these conditions, the legal doctrine has formulated several definitions of civil liability notion. The most quoted definition in the civil law doctrine is that according to which: "*Civil liability is a kind of legal liability that consists of obligations based on which a person has the obligation to repair the prejudice caused to another by his action or, in the cases provided for by the law, the prejudice for which he is liable.*"[1] Another formulation provides that: "*Civil*

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[1] I. Albu, V. Ursa, *Raspunderea civila pentru daunele morale*, Editura Dacia, Cluj – Napoca, 1979, pag. 24.

liability is a kind of legal liability, representing the obligation according to which the person who has caused a damage to another has to repair the prejudice suffered by the victim.[2]

As legal institution, civil liability is *made* of the entire of law standards that govern the obligations of a person to repair the damage caused to others through his extra-contractual or contractual action for which he is called to respond.[3] This responsibility is not exercised ex officio against the author of the illicit action, but upon the persistence of the person whose right was breached. As a whole, this liability refers to the whole legal order, because it assures the security of one category of social relations of the ensemble of the values defended by the law.[4]

Civil liability, contractual or criminal, according to its principles and functions, according to the conditions it establishes and its finality, ***represents*** the common right in the field of patrimony liability, contributing to the protection of the subjective rights and lawful interests of natural and legal entities.[5]

Characteristic of civil liability. The characteristic of civil liability that makes it different from other kinds of legal liability is the obligation to fully repair a prejudice, obligation that rests with the author or the person who is liable according to the law.[6]

Patrimonial character and finality of civil liability. Civil liability has a patrimonial character, as legal sanction applicable to the author of the illicit action aims, on the one side, his patrimony, and on the other side, the removal of the damaging consequences suffered by the victim.[7]

As related to the *finality* of civil liability, we may say that the finality of civil liability is to satisfy the patrimonial interests of the person

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[2] M.N. Costin, C.M. Costin, Dictionar de drept civil de la A la Z, editia a 2-a, Hamangiu Publishing House, Buchasrest, 2007, pag. 815

3 A.V. Farcas, Teoria generala a dreptului, Universul Juridic Publishing House, Bucharest, 2011, pag. 381.

4 Lidia Barac, Elemente de teoria dreptului, editia a II-a, C.H.Beck Publishing House, Bucharest, 2009, pag. 229

5 E.C.Verdes, Raspunderea juridica. Relatia dintre raspunderea civila delictuala si raspunderea penala, Universul Juridic Publishing House, Bucharest, 2011, pag. 75

6 A se vedea: I.Albu, V. Ursa, Raspunderea civila pentru daunele morale, Dacia Publishing House, Cluj-Napoca, 1979, pag. 24-25; L. Pop, Teoria generala a obligatiilor, Lumina Lex Publishing House, Bucharest, 1998, pag. 165

7 A se vedea: E.C.Verdes, Raspunderea juridica. Relatia dintre raspunderea civila delictuala si raspunderea penala, Universul juridic Publishing House, Bucharest, 2011, pag. 78; E. Lupan, Raspunderea civila, Accent Publishing House, Cluj-Napoca, 2003, pag. 28-29.

damaged through the illicit action; it may be operated only if, by such action, a material prejudice has been caused to the victim.

2. Particularities and functions of civil liability

The doctrine[8] points out several particularities related to the essence of civil liability. *The first characteristic* of civil liability results from the fact that the victim of a damaging illicit action is faced with the author of the action. The society is interested in obliging the violator of the law order to repair the prejudice caused to the victim, only if the victim has such interests, seeking the enforcement force of the state. *Another characteristic* of civil liability is that the sanction applied to the author of the damaging illicit action is essentially as an obligation to repair and its role is to satisfy the personal interests of the damaged victim. At the same time, it is accepted that it may be seen as a prevention factor, seeking to hinder other future damaging actions to take place.

2.1. Educational – preventive function. This function exercises a very important role by the influence it has on the consciousness of the people.[9] It is determined by the nature of civil liability, which is a specific sanction of civil law, sanction that has a repair character, it is made against the patrimony of the persons who commit illicit actions that cause prejudices and because of this, it has an educational, and at the same time preventive purpose. The educational function is achieved by impregnating in the consciousness of the people the need to action permanently very carefully not to prejudice the interests of others.[10]

2.2. The repairing function. The repairing function comes from the provisions of article 1349 of the new Civil Code, which provides that: (1) "Any person has the duty to comply with the conduct regulations that the law or custom of the place require and not prejudice, through his actions or inactions, the legitimate rights or interests of other persons" and (2) "The one who, having sane judgment, breaches this duty, is liable of all prejudices caused, being obliged to fully *repair* them."

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[8] M.N.Costin, *Raspunderea juridica in dreptul Republicii Socialiste Romania*, Dacia Publishing House, Bucharest, 1974, pag. 64-67; C. Statescu, C. Barsan, ***Drept civil.*** *Teoria generala a obligatiilor*, 9th edition, reviewed and added, Hamangiu Publishing House, Bucharest, 2008, pag. 127-135

[9] C. Statescu, C. Barsan, *Drept civil. Teoria generala a obligatiilor*, 9th edition, reviewed and added, Hamangiu Publishing House, Bucharest, 2008, pag. 127-135

[10] E.C.Verdes, *Raspunderea juridica. Relatia dintre raspunderea civila delictuala si raspunderea penala,* Universul juridic Publishing House, Bucharest, 2011, pag. 80

In the Civil Code of 1864, this repairing function of civil liability comes from articles 998 – 999, which provided that "Any action of a person, which causes a prejudice to another, obliges the person in default *to repair* it" and "the person is liable not only for the prejudice caused by his action, but also for that caused by his negligence or lack of caution."

3. Principles of civil liability

3.1. The principle of full repair of the prejudice. The principle of full repairing of the prejudice represents a fundamental principle of civil liability and expresses the idea of removing the damaging consequences of an illicit action, for the purpose of reinstating the previous situation of the victim. For the full repair, it is needed to remove all damaging consequences of the action that has generated the prejudice.

The author of the prejudice has the obligation to cover not only the prejudice (damnum emergens), but also the benefit not achieved by the victim (lucrum cessans), as a consequence of the illicit action causing the prejudice. At this moment, the victim of the prejudice has to be reinstated in his previous situation.[11]

The repair should be fair and full, namely, it should cover the whole prejudice, because only this way the prejudiced person may be reinstated in the situation previous to the damage (restitution in integrum).[12]

The repair may be granted in kind or by equivalent, namely a certain amount of money, and in this case, we are talking about damages. The extent of the repair is determined exclusively by the extension of the prejudice.

The principle of full repair of the prejudice is mentioned expressly in article 1385 of the new Civil Code, which, in the first paragraph, provides as follows: "The prejudice is fully repaired if, according to the law, it is not provided differently."

First of all, the full repair involves to take into consideration the extent of the *certain prejudice;* by *certain prejudice* we understand the certain prejudice as related to its existence and possibility of evaluation. The present prejudices *are always certain*, namely those that have taken place totally until the moment their repair is requested. The future prejudices are also *certain*, although they have not taken place yet, it is sure that they will

[11] C.Statescu, C.Barsan, *Drept civil. Teoria generala a obligatiilor. 9th edition, reviewed and added,* Hamangiu Publishing House, Bucharest ,2008, pag. 159

[12]Gabriela Vintanu, *Prejudiciul element al raspunderii civile in dreptul roman si comparat*, Ph.D. Thesis defended at Bucharest University, 2011, pag. 147.

take place, being able to be evaluated at present, based on sufficient elements.[13]

This principle was also discussed in the Civil Code of 1864, in articles 998 – 999, which provided that "Any action of a person, causing to another a prejudice, obliges the person in default to repair it", respectively "The person is responsible only for the prejudice caused by his action, and also by the prejudice caused by his negligence or imprudence."

According to the old regulation, respectively the Civil Code of 1864, the general obligation to repair the prejudice is also provided in article 1073 and 1084. Thus, according to article 1073 "The creditor has the right to receive the exact fulfillment of the obligation, otherwise, he has the right to receive damages", while article 1084 stipulated that "The damages that are debits to the creditor generally include the loss he has suffered and the benefit he missed, but the exceptions and modifications mentioned below."

The content of this principle is given by the following aspects:[14] a) both the loss suffered by the damaged person, namely the damage (damnum emergens), and the benefit, which under normal conditions he would have achieved but of which he was deprived, so the benefit not achieved by the victim as a consequence of the illicit action (lucrum cesans), as well as the expenses made for the avoidance and the limit of the prejudice are subject to repair; b) if the illicit action has determined the loss of the chance to obtain an advantage or to avoid a damage, the repair will be proportional with the probability of obtaining the advantage or, as the case may be, to avoid the damage, taking into consideration the circumstances and the actual situation of the victim; c) both the predictable and the unpredictable prejudice are repaired, namely the damage whose occurrence the author could not anticipate on the date of committing the illicit action; d) establishing the quantum of the compensation, neither the material state of the victim, nor that of the author of the illicit action was not revealed; e) the prejudice is fully repaired, irrespective of the form of the guilt.

3.2. The principle of repairing in kind of the prejudice. The prejudice should be repaired in kind and only if this is not possible, the repair is paid for.[15] First of all, the prejudice should be repaired in kind.

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[13] L.Pop, *Tabloul general al raspunderii civile in textele noului Cod civil*, article published in the Romanian magazine of private law no. 1/2010, pag. 190.

[14] G.Boroi, L.Stanciulescu, *Institutii de drept civil in reglementarea noului Cod civil,* Editura Hamangiu, Bucuresti, 2012, pag. 242.

[15] M.Eliescu, *Raspunderea civila delictuala*, the Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1972, pag. 449

The principle of repair in kind of the prejudice is made by giving back the goods taken in an unfair way, the replacement of the item destroyed by another of the same kind, the remedy of the deteriorations or damages caused to an item, the destruction or taking over the works made by breaching the right of another person, being possible to consist even of a legal operation.[16] The purpose of the repair in kind, no matter if it is a material or legal operation, is that of eliminating the prejudice suffered by a person, and thus to reinstate that person in the previous situation.[17]

The new Civil Code, establishes in article 1386 that (1) "The repair of the prejudice is made *in kind,* by restoring the previous situation, and if this is not possible, or if the victim is not interested by the repair in kind, by the payment of compensation, established according to the parties' consent, or if there is no consent, according to the decision of the judge; (2) When the compensation is established, the date of the prejudice should be taken into consideration, if the law does not provide differently; (3) If the prejudice is continuous, the damage is granted under the form of periodical services; (4) In the case of a future prejudice, the compensation, irrespective of the way it was granted, may be increased, reduced or suppressed, if, after it has been established, the prejudice is increased, diminished or has stopped."

Therefore, in principle, the repair of the prejudice is made in kind, by restoring the previous situation.

When the repair in kind is not possible, or when the damaged party expresses his disagreement to be compensated in this way, the repair is done by payment. The form and extent of the compensations shall be established either conventionally or in court.

The modalities to reinstate the previous situation are various:[18] services, disappearance of the damaging consequences, termination of a right of receivable, ordered by the court, obligation of the person liable to pay a debt in the place of the victim, enforce an obligation to the person in charge without his consent, in the benefit of the victim.

In the old regulation, respectively in the Civil Code of 1864, there was no provision regarding expressly the obligation to repair in kind a

[16] E.C.Verdes, Raspunderea juridica. Relatia dintre raspunderea civila delictuala si raspunderea penala**,** Universul juridic Publishing, Bucharest, 2011, pag. 79.
[17] L. Pop, Teoria generala a obligatiilor, Lumina Lex Publishing House, Bucharest, 1998, pag. 169.
[18] I. Turcu, Noul Cod civil. Law no. 287/2009. Cartea V. Despre obligatii art. 1164-1649. Comentarii si explicatii. C.H. Beck Publishing House, Bucharest 2011, pag. 510

prejudice. Even in these conditions, the repair in kind was recognized as having the principle value of the entire civil liability, the legal practice being the one that by the solutions given emphasized on the advantages that the repair in kind has, as related to the repair by money equivalent.

The provisions of article 1386 of the new Civil Code are in accordance with article 1381 paragraph (2), according to which "The right to repair begins the very day when the prejudice was caused, even if this right may not be valued immediately."

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CONSIDERATION ON THE LEGAL VALUE OF CONTRACTUAL FREEDOM

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ABSTRACT

This paper addresses the issue ,,contractual freedom" of individual legal concept frequently used language as right as it is now acute in its dynamics, but equally surrounded by certainties and uncertainties.
Contractual freedom in its dual specificity as social reality constantly practiced, namely the construction of Romanian legal culture, the private law, public law that is accompanied by significant points of approach between Romanian legal system and the French system.
After the brief historical evolution of the concept of autonomy of will, of Romanian law and to positivist theories contractualiste, we proceeded on to include some general considerations on the autonomy of the will and the conditions that must be met to ensure the validity of the agreement between the contracting parties.
The work addresses ,,contractual freedom" as a natural consequence of autonomy of will and its legal limitations: public order and moral and contractual dirigisme problem and its consequences.

KEYWORDS

Contractual freedom, will, contract, consent, public order

1. INTRODUCTION

De lege lata, *the principle of "contractual freedom"* is not consecrated, ,,*expressis verbis"* like a subjective right, it results in default of many legal provisions: constitutional, civil and commercial law, inserted in the organic laws, in international documents etc..

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The contractual freedom is a principle that is governing civil and commercial contracts (*mutatis mutandis*, the provisions of the Civil Code applies to commercial contracts because, according to art. 1-2 of the Romanian Commercial Code, the rules of the Civil Code it represents the common law, which means that commercial provisions are to be rounded with the provisions of civil law). According to the Civil Code, natural or legal persons have the right to contract freely. Thus the principle of contractual freedom can be applied.

Civil law recognizes the **contractual freedom** - will prevail in the interpretation of international legal acts the inner will of the contractors and fundamental will be *the autonomy of the will*. In commercial law will always prevail the declared will, using inscribed documents, printed forms, and draft contracts.

Romanian Constitution expressly, does not guarantee like a fundamental right or fundamental freedom or as a constitutional principle the freedom of contract. Any analysis of this concept is opposed to trivialization notion of freedom of contract itself, by using metaphorical and often they rarely considered the consequences of avatars clarified autonomy of will.

The contract is the main source of obligations. Its importance as an instrument of establishing the various relationships between individuals and legal persons discloses in all fields, from the simplest needs of the people, to professional business activities.

Contract, the agreement between two or more persons to establish or overtake between them a civil-legal report "covered by Civil Code art. 942, requires *the consent of the parties and the production of legal effects (birth, modification, transmission or extinction of a duty report).* A contract is considered concluded when the wills of the parties' are to be so with respect of fond and content requirement of the law, in relation to each specific contract.

Essential factor for the conclusion of the contract is the agreement of the parties – **judicial will**.

The contractual freedom is expressed in terms of form in the consensus rule conventions, according to which, for the validity of an agreement is sufficient the agreement between the parties except the moment when we take in discussion real or formal contracts and when the execution of obligations is made as they were assumed (*pacta sunt servanda*).

The fundamental principle of contractual freedom is the so-called theory of autonomy of will expressed by the French jurist Charles Dimonliu that on its creation wanted to find solutions for Interprovincial law conflicts that came in the –XVI th century in France.[1] Since the human will is free, the contractors, exclusively through their will can give rise to a contract that will produce the effects desired by the parties.

As a philosophical argument of this theory was said that when people bound by their contract, they limit the freedom of its own will ... so, individual will power draws its creative duties from itself, not from the law and in this case she is so creative.[2]

If treating on contract freedom is a sensitive approach, risky even, the obligation to address the most visible view legitimize not only theoretical, technically, but especially connotatively and psychologically: as long as the Romanian constituent seem to ignore this freedom, speaking of it equalling with approaching it.

2. AUTONOMY OF WILL. CONCEPT EVOLUTION

The theory of autonomy of will, inspired by individualism that strongly marked the philosophical thinking of the past centuries has been transformed by the current realities of a genuine myth or dogma, many authors are denying to this theory the possibility of fundament the contractual freedom due to the restrictions that have suffered and suffers this kind of freedom.

Analyzing in terms of conceptual history, Roman law did not know a principle of the autonomy of will[3], because Roman law was strictly formalist, that's why could not recognize the will as the only possible, without being seen outside forms of it in order to produce legal effects.

Was promoted even the idea that the moment of conceptualizing the autonomy of will by the juridical doctrine, and practically the moment of the expression itself is relatively new, placed on the late nineteenth century, and producing a direct result of the appearance of first signs of threat of its main consequences - freedom of contract – that are developing new types of contract, different from the classic ones, negotiable, adhesion contract.[4]

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[1] I. Filipescu, *Drept international privat,* Ed. Procardia, Bucuresti 1993, p.88

[2] L.Pop, *Teoria Generala a Obligatiilor, Tratat,* Ed. Chemarea, Iasi, 1994, p.31

[3] R.Tison, *Le principe de l'autonomie de la volonte dans l'ancien droit francais,* Ed. Domat-Montchrestien, Paris

[4] V. Ranouil, *L'autonomie de la volonte: Naissance et evolution d'un concept, Travaux de l'Universite de Paris*, II, 1980 in Marie Laure Izorche p. 656

The classic contract taken into consideration in drafting the French Civil Code of 1804 and which representing an normal operation, in which two identical juridical persons and equal economic power expose and discuss in a free debate the claims that they are opposing, are making a concessions each other and end up concluding an agreement with all terms that are representing a genuine expression of their common will[5], "was followed by the appearance of a category of contracts of adhesion, drawn unilaterally by one party only, defined by a ,,will unilateral contract that fixes the economy of the contract in one of its elements, will adherents, does no more than will give unilateral juridical effectiveness."[6].

For unnamed contracts when they were recognized as binding, their strength comes not from the fact that there were agreements of will, but from the fact (outer of them) that one party has already executed a performance and so one they are relying on the principle of unjust enrichment cause, and not on *assumed will principle*".

The will have to obey the law, because he could contract neither against the law nor in defiance of morality.[7]

The formalism specific to Roman law is continued in Germanic law, were is cultural dominated even if its real manifestations gets some changes.[8]

Even the rule, ,,*solo consensus obligat*" hadn't the legal valences that have in present. It doesn't designate the autonomy of will - this having the origin in the practice of canon law, which consecrated the **promissory vow** [9]practice. The *,,solo consensus obligat* principle", is rather the evolution of the of Roman law formalism to ,,Christianisation of law and convention".

From religious promissory oath to the secular one was only one step that apparently was made by Grotius.[10] The same principle will be used to explain the cancellation of the contract in case the word was not kept, so

[5]E. Gannout, *Le pricipe de L'autonomie de la volonte en Droit prive,* These Dijon 1912, p.13 in Pascal Lotriec, *Contract et Pouvoir,* Ed. LGDJ Paris 2004, p. 59

[6] G. Berlioz, *Le contract d'adhesion,* Ed. LGDJ, 1973, P.13 in Pascal Lotriec p. 60

[7] R.Tison, op. cit. p. 16

[8]R. Tison, op. cit. p.17-19 Thus, expressions like, fides factor ",,, Festuca 'and vadium" are specific to Germanic custom. They were taken also by old French law, but in time they were replaced by the handshake and oath - gesture that exists today, but without the same legal content.

[9] R. Tison po. Cit. p. 19, prin care Dumnezeu era valorificat conventional in dubla ipostaza

[10] Grotius, *Le droit de la guerre et de la paix, t.II, cap. XIII, Du sermet,* Paris 1865, Grotius's contribution to the secularization of natural law of his time was essential….see E. Gounot – *Le principe de l'autonomie de la volonte en droit priv*e, Dijon, 1912, p.3

usually; *solo consensus obligat* "will explain ***not only the end or the contract structure***, but also its avoidance, no matter whether he was or not a called one.

The most important implication of the rule is the principle „convienances vainquent loi". This principle would be deducted from the interpretation of art. 5 and art. 969 of the Civil Code.

History brings into question the origin of the concept of ***autonomy of will*** "that is not the civil law, but the international private law. Waiss and Brokers doctrines use for the first time this term to describe the possibility of parties to choose the law applicable to their contract with an international element. In the same area appears also the first limitation of will autonomy effects – namely the public order.

The will can be considered the only source of justice. The contract is not only a source of rights and obligations, but it made also the idea of justice, because only by limiting auto agreement contract – provides the free conscious will. The contract is generally above the law, so the law cannot limit individual freedom but it can insure freedom of others by it.

3. CONTRACTUAL FREEDOM - A CIVIL RIGHT?

Specialized juridical Romanian literature gives us some brief definitions of the concept of *contractual freedom* involving the same coordinates: freedom of contract consists of an abstract possibility circumscribed by the legal framework available to both individuals and legal person, on one hand to contract, so to engage in a contractual relationship by creating the contractual association, which means the contract itself, determining the actual content of this report and on the other hand the decision of not contracting, that means the refusal of engaging a determinate contractual relationship.

Professor I. Albu believes[11] that the freedom of contract consists on the possibility of individuals and legal persons have by law, to make contracts and to determine its content.

Another Romanian author[12] sustain that „freedom of contract can result in the possibility of concluding a contract as per the parties will, but also by refusing to contract".

[11] I. Albu, *Libertatea contractuala,* Revista Dreptul nr. 3/1993, Buc, p.29
[12] Gabriel Olteanu, *Autonomia de vointa in dreptul privat,* Ed. Universitaria, Craiova 2001, p. 49

If any contract is considered just by own nature and the obligation that arise from the parties wills, it becomes normal for them to establish its content [13]and also the form of legal expression of their will. Fund freedom is limited by the good mores and by public order. In fact, the contractual freedom express itself that a convention will be born valid doesn't matter the form of manifestation of the parties: „*solo consensus obligat*"[14]

The only obstacle that holds the way of freedom of choosing the fund and the type of the contract is respecting the public order and the morality.

Contractual freedom can be expressed also like the freedom of will. The will have to be conscious and rational. The consent must be uncorrupted and knowingly.

Regarded the economical part, the contractual freedom, especially in a market economy, is the most appropriate way to meet the legal interests of person and to ensure the general welfare, explicitly the social progress.

The contract is the principal source of obligations, most regulations that are governing material the contracts are devices and / or supletive (auxiliary)[15], and the parties may freely agree on some of the derogatory clause rules, mandatory rule in contract law (prohibitive and / or on charge) are very small like number, it meant having to defend public order and protect the fundamental interests of the parties.

A particular importance is given by the definition offered by the constitutional court to the concept of freedom of contract.

From the Constitutional Court point of view, contractual freedom is only a type of freedom whose nature is only legal and not constitutional.

The decision 365 of 5 July 2005 provides the current constitutional definition, 'freedom of contract is the recognized possibility of any legal subject to conclude a contract within the meaning of ,,mutuus consensus,, like product of its manifestation convergent with the other party or parties, the determinates its content and determinate its object, acquiring rights and assuming obligations whose compliance is mandatory for contracting parties. "

[13] L. Pop, *Tratat de drept civil. Teoria generala a obligatiilor, Ed. Chemarea Iasi 1994, p. 60*

[14] Dicton origins study – see A. J. Armand, *Les Origines doctrinales de code civil français,* Ed. LGDJ, Paris 1963

[15] Applicable if the parties doesn't agree otherwise by legal acts, optional. - From Fr. supplétif.

Romanian civil doctrine[16] consists on art. 970 al. 2 of the Civil Code express that the general auxiliary rule of interpretation of the contract, under which, besides the effects shown explicitly by the parties, the contract may have other effects related to the nature of it own, but that have as source and foundation **not the will of freedom of the contracting parties, but equity, custom or law.**

So, while the interpretation of the contract is a process that determines the exact meaning of the contract clause, with the favourite research tool willingness in relation to international *will* of the parties, art. 970 seems to bind the two parties to contracts, legitimized by its nature, but no less restraints on freedom of contract.

The same civil law doctrine defines (with small fluctuations sometimes, due to terminological confusion between the autonomy of will and freedom of contract, not all authors distinguishing between the two concepts), freedom of contract as *subjective right* for contractual actions action, in accordance with objective law and with the limits set by itself.

4. WILL, FUNDAMENTAL ELEMENT OF THE CONTRACT

Psychology as science is the one that provides data and information necessary to the construction and training of the **legal will**. These data show a high degree of generality, of schematics and mobility to be inserted in the middle of ,,life shifting fluidity"[17]

Will study by lawyers is an imperative one[18]. Lawyers must have knowledge of various fields: social sciences, medical equipment, financial and accounting, eco-economic, etc., and serious knowledge of psychology in general and especially about the will, because in law, the will be an omnipresent factor.

Legally and in terms of its intensity, the will is pointed as a process through which the man regarded as individual or collective, as a legal person, assume his commitments that go beyond mere convenience and that aren't a simple courtesies.

[16] C. Statescu, C.Barsan, *Drept civil. Teoria generala a obligatiilor,* Ed. a IIa, Ed. All Beck, 2000, p.54 and; I. Dogaru, P.Draghici, *Teoria generala a obligatiilor,* Ed. Stiintifica, 1999, p.127-128

[17] Th. Ribout, *Vointa si patologia ei*, Ed. IRI Bucuresti, 1997, p. 141-142

[18] I. Dogaru, *Valentele juridice ale vointei,* Ed. Stiintifica si Enciclopedica 1986

In this area of the event, the will get equivalent with legal arrangements and become a juridical act between parties throw which an individual or a collectivity is undertake its legal commitments.

Will is defined as ,, man's capacity for and to achieve these goals on their way for activities that involve overcoming certain obstacles and by introducing in an activity his mental and moral resources. *Will* is man's capacity to plan, to organize, to perform and to control his activities in order to achieve his goals."[19]

Consequently, judicial will, represent an manifested attitude of a subject of law that has the right to participate in civil legal acts conclusion, in whose content should be included elements that have led to the decision to have such conduct.

Some events cannot be qualified as legal acts, because their components are simply expressed and are not intended to produce legal effects. Here are some specific example like *acts of complacency, the free assistance acts and honour commitments.*[20]

In conclusion, if legal will is the engine that protrudes into motion a whole volition and intellect complex processes that generate the legal act; however this is not enough to do it, if it's clear purpose is to produce legal effects. Legal act is an act of will due to the fact that the person, who seeks for it, is actually seeking for a change of her legal situation.[21]

According to article 948 Civil Code, the essential conditions for the validity of a convention are:

1. Capacity of contracting;
2. Valid consent of the party that undertakes;
3. Determined object;
4. Bid cause

The **juridical will** is a decision, a choice of one person to commit an act or a fact that actually producing legal effects. In order to acquire a juridical will character, the psychological will of a person need *to be deliberate in a conscious way, to be free and, manifested outwardly.*[22]

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[19] Zorgo Beniamin - ,,*Ce este vointa?",* Ed. Enciclopedica Romana, Bucuresti, 1969, p. 12

[20] Fr. Terre, Ph. Simler, Y. Lesquette, *Droit civil. Les obligations,* Dalloz, Paris, 1999, p. 58*;* I. Reghini, S. Diaconescu,

[21] O. Ungureanu, *Drept civil. Introducere ,* Ed. All Beck, Bucuresti, 2000, p.97; E. Poenaru, *Drept civil. Teoria generala. Persoanele,* Ed. All Beck, Bucuresti 2002, p. 106-107; G. Boroi, *Drept civil. Partea generala. Persoanele,* Ed. Hamangiu, Bucuresti 2008, p. 185-186

[22] M. Costin, M. Muresean, V. Ursa, *Dictionar de drept civil,* Ed. Stiintifica si Enciclopedica, Bucuresti 1980, p. 547

In a narrow sense, **the consent** represent a party will as is manifested in the moment of contracting. Should also be taken into consideration the conditions that the will has to meet in order to ensure the validity of the agreement between the parties:

a. Expressed will should be aware. Consent must be given by a person who has legal consciousness of the consequences, either rights or obligations which arise from the contract; the one that gives a valid consent must have the capacity required by law to contract (mental maturity.

b. The expressed will should be free. The will mustn't be wrong or caused by a defect of consent: an error, an act of violence or a deceptive manoeuvres; the expression of the will must be the result of their own decision of autonomy, without being influenced in any way, without being the result of a compulsion or a collector.

c. The will should be manifested with the intention to be bound. The desire manifestation is the intention of making an act with juridical value, with the intention to be bound. The exception is the situation where parties wish to conclude only an apparent act, simulated, which in reality do not express the true will and which not necessarily produce legal effects. Even in *unilateral contracts*, the party will be obliged to show their intention to be bound, to take a legal commitment. Consent must be given seriously, not as a joke.

d. The parts will must be externalized., expressed in such form, in order to be shown each will incorporated in the contract but also their union, but also the moment when the wills will come together (at the time of contract creation) as at this time they begin to produce the legal effects envisaged by the parties.

The form of expression of the will once a contract is signed is analyzed closely with its formal requirements, taking into account that in our Law system is entitled **the consensus rule** that in order to shape a valid contract, is sufficient the agreement between the parties.

We cannot neglect the problem of the operation legal proof in respect of ,,negotium jurisdiction", in such purpose is required the written approval of the will of the parties (the document is called ad validitatem) and began to prove the existence of a written, completed with other evidence, proof this operation.

In cases the written contract is required under the sanction of absolute nullity (ad validitatem) contracting parties will is expressed in writing and is compulsory.

5. LEGAL, MORAL AND JUDICIAL LIMITS OF CONTRACTUAL FREEDOM

Some authors consider sacrosanct the principle of freedom of will. In fact, the content of the contract was never been built by the exclusively contracting parties will. Freedom of will is established by law, but we cannot say that it is absolute due to the fact that it is still limited.

In terms of form, the contractual freedom of the legal act is expressed like a consensus rule of conventions, according to which, for the validity of a convention, it's sufficient the will agreement between the parties, except real and solemn contracts and the execution of its obligations is made as they were assumed: *pacta sunt servanda*.

As legal texts mentions the principle of freedom of will, far from being a sacrosanct principle, it become only an illusion, a deceptive appearance as not being absolute; *since the origins of contract the law limited its effects, by prohibiting the individuals to derogate by conventions the public interest order rules* (to which it belongs also Consumer Protection), the rules that governing the economical, social and political order of state; law imposed the rules of morality, good mores, civil mandatory rules, to which a derogation is not permissible.

Principle of contractual freedom is simultaneously a fundamental right of law subjects which belongs to each person's ability to use.

Romanian Civil Code, by the provisions of art. 5 brings an important restriction of the principle of contractual freedom in the sense that, by exercising the right to terminate any contract you should not prejudice the public order and morality. The notion of *public order* benefit received a series of definition given by Romanian and foreign doctrine[23] and however, all of them are conceptual circumscribing to mandatory rules of public law.

About *good mores*, it is underlined that these are nothing else that moral side of public order, in its traditional acceptance of public policy, in fact a set of ethical rules, well-known and accepted as they are by society members.

Currently it can be hold the intangible and the freedom characteristics of the contract, given the phenomena of global expansion and concentration of economic power of trade professionals, phenomena exacerbated by the global economic crisis.

[23] J. Ghestin, *Traite de droit civil. La formation du contract, LGDJ, Paris 1993, p.86*

Negative manipulation of the law can be corrected if to the law is given his profound meaning, like: equity, common sense that legitimizes the law, the contract and judges decisions. Contract, as the law and the judiciary system can be manipulated. These manipulations of the contract are negative and cannot be protected by law or by rights, because the chances of becoming successful people in a society are equal and the principle of equal rights is enshrined at constitutional and conventional level, being a category of the human rights.

The contract may be handled also in a positive way: the legislature may declare the contract null and void all its clauses, because are contrary to *public order and morality*, and the judge may cancel totally or partially the contract, or he can rebuild it in order to correct the contractual imbalance or to reconcile the parties.

The French doctrine stated that far to create a legal balance, the autonomy of will result is the fact that, the powerful are prodding the weakest law "and often the contract devote, crushing the weak by the strong one." [24]

In our modern Law System, the gravity centre of the contract has moved increasingly from its formation to its implementation and its effectiveness on the court; the consent for the conclusion of the contract, although formal suffrage in some cases does not comply with the general interest and neither with the justice, and **therefore we cannot always say the contract is always just but contrary in some cases the contract show selfishness, inequality and the purely individual interests of each part of the contract.**

Professor Liviu Pop shows that, when, due to economic phenomena, comes a serious imbalance in the contract between contracting parties, the judge may order its modification or its termination.

Courts may order for example, rescheduling or deadlines, the removal of some contractual clause (abusive clauses), or even completing contract clauses that will supplant the parties[25].

Courts have jurisdiction to review the conduct of the parties and their obligation to accomplish fair and cooperative relation so that each can get the benefits envisaged in the contract.

[24] Fr. Terre, Ph. Simler, Y. Lesquette, *Droit civil. Les obligations,* Dalloz, Paris, 2005, p. 38
[25] I.F.Popa, *Reprimarea clauzelor abusive,* in PR nr. 2/2004, p.195 and next.

6. CONTRACTUAL LEADING

The theory of autonomy of will has as we have shown, a lot of critics, which are arguing one against the other, considering it outdated in light of the contracting institution developments in the last centuries, due to state intervention in economic life.

Along with adhesion contracts, limiting contractual freedom is achieved through imposed contracts[26], controlled[27], prohibited[28], typed[29] and consuming ones[30], standard as a result of intensification of production and consumption goods, but also as a change of ideological optical legislature. Due to limitations of the new principle of contractual freedom, which tend to deny the existence of the principle, we believe that it is not without interest considering the possibility of legal and institutional isolation of those types of contracts and understanding as a distinct reality from the contract, classical just to protect and perpetuate the principle in question.

On the other hand, proliferation of these types of contracts would seem to represent one of the symptoms that is defeating the principle of autonomy of will by another social, economical and legal phenomenon, that of **leading**[31] in fact, the state intervention in economy, resulted in the enactment of new regulations or in the modifying existing ones or by sanction of the court to the new interpretations of old legal institutions[32].

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[26] For example, compulsory vehicles insurance contracts, in which the owner is obliged to conclude contracts having only the freedom to choose the insurer.

[27] The necessity of an authorization or a clearance prior to signing the contract.

[28] Penalty clause in the mortgage contract is prohibited (HCCJ, dec. Civil no. 1839/2004, in BJ 2004, p. 297)

[29] Most of the contracts of services provided to the public.

[30] It was shown that the impact of consuming contract was so powerful for the traditional understanding of the legal act that turned in the key of public policy analysis, being responsible for the effect of its separation in the direction of public policy and public order protection. (J. Carbonnier, Introduction a la Theorie du general contract, L'evolution du droit des contrats contemporaine, PUF, Paris, 1985, p. 36)

[31] There is a new term, namely, contractual leading "in L. Josserand in *Les tendances actuelles de la theorie des contrats,* in RTD civ, 1937, p. 1-30

[32] Contractual leading appearance is due to the fact that the present economic activity is dominated by large existing companies or groups of companies, with great economic power whose interests are focused on deepening economic circuit celerity and flexibility.

The State, who organized economic activity, even in the broad sense, by creating the legal framework, has finally enacted the perceived interests of these participants to the economic circuit, all leading to removal of more or less of the principle of autonomy of will, a principle that corresponding to the modern period, when economic activity was left largely

This conduct know also another manifestation, that of broadening the notion of public order, as if in the previous phase (the dominance of the principle of autonomy of will) it was limited to the political and moral view,, in present, the concept includes also the economic and public policy but not only at national level but at European one chic it in the context of creation and enlargement of the EU. Moreover, the notion of public policy extends to issues of social and public order which are designating certain state measures relating to the regulation of employment contracts, rental, etc.

This led to a decrease in importance of the autonomy of will of the contracting parties, as some theorists appreciate and to a crisis of the contract, at least as it was designed.[33]

CONCLUSIONS

Due to the fact that economic and social development changes the directions of the old civil codes, the question is whether the principles which are governing the legal act, the contract in particular are up to date, and therefore applicable.

I tried in the above work, to increase the need of maintaining the principle of autonomy of will and the freedom of contract in discussion as constantly research topics for lawyers, hoping all personal and fanciful, a more consistent reception of contractual freedom in the legal culture of the Romanian law system, but also in the French legal system, the distances between those current systems in the field of contractual freedom, proved impossible to remove its convergence in the same area as were imposed in a traditional area of legal freedom which have shape and strengthened civil codes and modern constitutions.

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to private initiative and which will correspond, in fact to economic liberalism (C. Statescu, C. Barsan, op cit. p. 17-19.

[33] G.Marty, P. Raymond, *Droit civile,* vol II, *Les obligations,* Sirey, Paris, 1945, p.35

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AUTHORIZATION PROCEDURE ON THE MARKET OF GENETICALLY MODIFIED ORGANISMS AND THE PRECAUTIONARY PRINCIPLE

Mădălina DINU [*]

ABSTRACT

In recent years the phenomenon of domestic market introduction of GM products has grown, organic products are growing fewer and more and more products that attract buyers through their aesthetical result of genetic changes that have been subjected. In this context, it is necessary for activities with genetically modified organisms to be conducted in accordance with the precautionary principle to protect human health and the environment. European consumer groups and environmental groups, who have already raised concerns about trade liberalization, have played a central role in raising awareness about genetically modified crops and food.

Central pawn of the Romanian legislation in the field is the Emergency Ordinance no. 43/2007 of 23/05/20071 on the deliberate release into the environment and the marketing of genetically modified organisms, the bill was necessary to be implemented following the entry into force of Directive 2001/18/EC on the deliberate release into the environment genetically modified organisms.

Regardless of the position which we stand, that the producer or consumer, we consider useful to know the steps to be followed when the market wants to introduce a product that contains genetic changes. This is because the consequences they can produce genetically modified organisms, when not required by law to obtain authorizations for placing on the market, are devastating.

KEYWORDS

Organic products, genetically modified organisms, the precautionary principle, Emergency Ordinance no. 43/2007

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[1] Published in Official Gazette, Part I no. 435 of 28.06.2007 and entered into force on June 28, 2007

The precautionary principle

The precautionary principle is one that governs the entire activity of the marketing of genetically modified organisms, wishing to avoid adverse effects on human health and the environment. In this respect, placing into the environment of a genetically modified organism for research and development or for any other purposes than placing on the market, without authorization by the competent authority.

In resonance with the precautionary principle, international law establishes the following steps in the process of marketing GM products:

I. Notification
II. Procedure licensing standard, in turn, takes place in three stages, namely:
1. Conditions of acceptance of notification
2. The Committee on Biosafety and the authorities involved
3. Public consultation
4. Decision

I. In terms of notification, mention that the operator prior to the time of the release of a GMO or combination of such bodies in Romania, must submit a notification to the competent authority for authorization, notification, as provided 13 of the Emergency Ordinance no. 43/2007, shall contain the following elements:
- request for authorization, specifying the type of genetically modified organisms and the proposed activity;
- proof of payment of the fee for processing the application for notification;
- the technical file containing the information required to achieve specified risk assessment on human health and the environment as a result of the deliberate release into the environment of a GMO or combination of such bodies, namely:
- general information;
- information on genetically modified organisms;
- location / locations where he / place entry / intentional introduction/ deliberate on average, details of land, a detailed plan of the area for testing and a plan for employment in the area, showing neighborhoods, distances to protected areas and list of neighboring landowners and the type of business or agriculture that you practice organic or conventional, respectively;

- information concerning the conditions of entry and potential receiving environment;
- information on the interactions between genetically modified organisms and the environment;
- a monitoring plan in accordance with relevant parts of Annex. 3 to identify the effects that GMO s may have on human health and the environment;
- information on internal control, monitoring, remediation methods, waste management plans in case of emergency and, where appropriate, reports the notifier;
- an attachment containing any confidential data;
- information from the experience gained from the introduction of the same genetically modified organism or the same combination of such bodies, whose / which notification is being or notification has been sent or transmitted, inside or outside the European Community.
- Summary of the notification, issued under Community and national rules;
- risk evaluation to human health and the environment and conclusions together with all references and indication of the evaluation methods used;
- declaration on his own responsibility completed and signed by the notifier, which assumes full responsibility for any harm human health or the environment of material goods, which would result from the proposed introduction;
- information to the public electronically and on paper;

II.1. Regarding the first stage of the standard procedure of authorization, checking the conditions for acceptance notification, the competent authority shall decide within 15 days of receipt of notification of the conditions laid down by law. Basically, the authorization procedure begins after the notifier informs the competent authority shall communicate the acceptance case and registration number of the notification. It is worth mentioning that, absent a response from the Authority shall be interpreted in terms of tacit acceptance of the notification .Authority, when the conditions are fulfilled in writing inform the notifier and communicate the registration number of the notification, and the number of copies of the notification file.

II.2. In a period of 60 days from when the authority announced the acceptance file notifier or the Commission shall forward its opinion

Biosafety scientifically competent authority and to each of the authorities concerned, the latter and shall notify the competent authority if they need additional information from the notifier, information which the Authority will require the notifier and may require suspension of the procedure until such time as you receive the information. After completing the file and explanations of all aspects of substance and form, authorities concerned shall send their opinion to the competent authority within 15 days of receipt of the Committee on Biosafety.

II.3. Also, within 5 days notify the Authority file notifier on acceptance or competent authority shall initiate the procedure of public consultation, the procedure that lasts 30 days and shall result in publication of a summary on the website and publication notification at the Agency environmental protection in the region /county or municipality of the city where deliberate release is to take place in the environment. Interested public has the opportunity to submit its observations to the competent authority during the consultation by e-mail or by mail with return receipt requested, and may consult the file of notification, except for confidential data, based on an address sent to the competent authority in this so. After completion of the consultation, within 10 days from the time of its completion, the competent authority shall inform the central authority for environmental protection, the authorities concerned and the Committee on Biosafety of the public comments.

II.4. Regarding the last stage of the authorization decision no later than 90 days[2] from the date when the authority announced the acceptance file notifier, the competent authority takes a decision based on advice from Scientific Committee on Biosafety of the opinions authorities involved and motivated public consultation summary.. Response by the decision may be positive, the competent authority and the authorization issued by intermediate conditions are established the deliberate release into the environment, the notifier must comply or the answer may be negative, in which case the competent

[2] In calculating the 90 days are not taken into account the period of notification is expected to file copies and the time the competent authority is awaiting further information from the notify person and organize a public debate

authority shall reject the application for authorization if the proposed introduction satisfies the conditions of legal provisions in the field.

Conclusions

Although apparently the result of the authorization procedure raises enough questions, so as to conclude that only those GM products safe for health and food safety will be sold, though their long-term safety raises many questions in the context in that GM products have been equated by some authors as "a genetic experiment on the public, which could have unpredictable and irreversible consequences"[3]. As such, although most of the citizens and the public expressed their disapproval of the import of genetically modified economic criterion4 is the one who makes the internal market to "explode" products whose genetic material has been altered in a different way natural one, other than cross and / or natural recombination.

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[3] „The Regulation of GMOs in Europe and the United States: A Case-Study of Contemporary European Regulatory Politics" de Diahanna Lynch si David Vogel.
When the European Union banned imports of U.S. beef (animals being raised by administering hormones), this measure drastically reduce exports of U.S. beef in the EU, with the financial repercussions of 100 million U.S. dollars on the very dee Union of European agricultural exports imposed by the U.S. – in „The Regulation of GMOs in Europe and the United States: A Case-Study of Contemporary European Regulatory Politics" de Diahanna Lynch si David Vogel, p.7

THE LONG WAY FROM INTERCONNECTION TO UNIFICATION. PROJECTIONS AND POLICIES OF THE EUROPEAN UNION ON RAIL TRANSPORTS

Dorin STĂNESCU*

ABSTRACT

The author presents analyze some aspects of railroad history in terms of international relations, commences with a short presentation of the stages that marked the existence of this remarkable form of transport – the train, continues with a series of analyses on the currents of thought regarding this field through the 20th century, on the projections and policies of the European Union on rail transport, and, naturally, closes with a series of conclusions on their perspectives.

KEYWORDS

The rail transport policy of the European Union, White Paper of Transports, Romanian railway system

The European Union. Rail transport policies and projections

1. The EU and EEC legislation: plans, directives, legislative packages, adopted between 1957 and 2011.

a. 1957-1991. The concept of a common transport policy

The rail transport policy of the European Community and subsequently of the European Union has an interesting history, because it essentially reflects the evolution process of the European construction by passing through the same stages of founding the legislative framework, the institutions and the action conducted in pursuance of the principles that underlie the European idea. Through the Treaty of Rome, the signatories committed to create the necessary conditions for the development of the

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common market in the field of transports and included these desiderata in a common transport policy document.

The first documents[1] on railroads were elaborated at the beginning of the 60s and addressed the wish to facilitate the free movement of citizens and goods inside the EU. They were based on the liberalization-harmonization[2] binomial of transports, as pledged by the signatory nations when they had adhered to the idea of a *CTP*. We could affirm that during the 70s and the 80s the interest to create a common rail policy came to a halt, with a series of factors obstructing this process: defense reasons, the layout of the rail network which chiefly served national interests etc.

In fact, after 1975, the liberalization-harmonization binomial was abandoned in favor of market liberalization[3]. The period between 1969 and 1991[4] was characterized by the creation of a number of commissions[5], the suggestion of a series of ideas, the adoption of a number of legislative bills regarding a common policy for rail transport, in the absence of a too coherent and focused policy in this area. The nation-states were not yet ready to move to a different logic of transports.

b. 1991-1998. The EU Directive No 91/440, the White Paper on CTP – 1992, the Pan-European corridors, TEN-T, Decision No 1692/96/EC. *A strategy for the revitalization of railroads* - the 1996 White Paper.

The beginning of the globalization-liberalization process, initiated by the USA and Great Britain, as well as the end of the Cold War led to a reevaluation of the entire European policy, to the transformation of the institutions and laws of a possibly united Europe and to the initiation of a dialogue with the former communist countries. These discussions led to the idea of the Pan-European corridors, which would play a major role in shaping the political leaders' continental vision. Between 1990 and 1991, following the example of the French system of high-speed lines, European officials began to plan the building of similar lines. Thus, the concept of the trans-European network was born. It would have a spectacular success in

[1] In 1961, a new CTP memorandum was adopted: Council Decision No 65/271/EEC of 1965.
[2] Mannone Valerie, *op.cit.*, p.78.
[3] *Ibidem*,p.81.
[4] Among them: Regulation No 1191/69/EEC, on the obligations inherent in the concept of a community public service in transport, including by rail; Directive 75/130/EEC, on the establishment of common rules for combined rail-road freight transport etc.
[5] For example, the Joint Committee on Social Problems of Railroad Workers of 1972.

European rail policies, by being included in all the documents of the last two decades.

The period under analysis here, 1991-1998, was characterized by an unprecedented acceleration of the crystallization process of strategies and concrete actions, which would contribute to an increase in funding and the growth political factors' interest. The commissioners for transport, especially Karel Van Miert[6] (1989-1992), had an important role: they were vital catalysts to the transformation of the sector.

The theoretical basis of these policies required the development of transportation scientific research, which materialized into reports and quantitative analysis statistics. The data they provided became ever more worrying – accidents, over-crowding, pollution, bottlenecks -, which meant huge costs and setbacks for the European economy, by comparison with its worldwide competitors; the alternative solution was to generate a coherent transport policy, which concerned the restructuring and development of the railway system, and the revitalization of the sea and river transport. The reference points of this policy will be analyzed and synthesized hereafter.

In 1991[7], *the first EU directive, 91/440*, was adopted; it offered a unitary innovative vision for railroads. It recommended five objectives: the accounting separation within the rail companies of the member states; financial and accounting independence from the state; the accounting distinction between exploitation and management of the national rail network; open access to the national network for similar European companies; the creation of international railroad companies to make use of intra-community connections. Basically, through this directive, the rail transport policy was revolutionized and the concepts of globalization were

[6] Karel Van Miert (1942-2009), nicknamed *the little Belgian*, had a remarkable political carreer: he was member of the European Parliament (1975-1985), European Commissioner (1989-1999), rapporteur and leader of a European committee. As stated in the British magazine *The Guardian* of June 25 2009, Van Miert was one of the most powerful European politicians, he had charisma and was fluent in four languages, he was an advocate of the policy of open markets, he infuriated governments, politicians, but his convictions stuck.

[7] This directive was adopted at the initiative of the European Parliament, who opened procedure C13/1983 at the European Court of Justice against the European Council who opposed the CTP. Two years later, the Council was found guilty. As a consequence, beginning with November 1985, a programme for the development of a free market was adopted. It was completed in 1992.

introduced to Europe, at a macro scale. The effects of the directive materialized as follows[8]:

- the Channel Tunnel[9] was the first creation of this directive, and the Eurostar, which manges the rail that lies underneath the water of the English Channel and connects Great Britain with France, is a company created as per the directive by BR, SNCF and SNCB.

- Thalys[10], another international company, was created in order to connect Paris, Brussels, Cologne and Amsterdam; in fact, it is more of a French project, launched in 1999, as illustrated by its shareholders: SNCF – 62% of the shares, SNCB – 28%, DBAG – 10%. Based on the successful project of the Eurostar, Thalys, SNCF expanded with subsidiaries and partners all over Europe: Artesia (Paris-Venice), Alleo (Paris-Munich-Stuttgart), Elipsos (Paris-Barcelona-Madrid). A very interesting case is that of Alleo, whose shareholders are SNCF and DBAG with equal percentages. Alleo is described as a symbol of the amity between France and Germany.

The results presented above are only some of the positive effects. There is also another side of the coin: it was difficult to transfer into practice[11] and there was a legitimate opposition of the employees between 1980 and 1990[12]. In the French railroad sector for example, 32,000 workers were dismissed, and between 1990 and 1996, the number rose to 66,000. It was difficult to convince politicians[13] to apply the provisions of the directive

[8] Alexandre Lankiewicz, *op.cit.*, pp.91-98.

[9] The project dated back to the 19th century, was constantly under debate in the 20th century, but it was approved only in 1981, after a French-British summit. On February 12 1986, in Canterbury Cathedral, François Mitterrand and Queen Elizabeth II signed the treaty for the building of the tunnel, sumptuously inaugurated on May 6 1994 and opened in the same year on November 14.

[10] Thalys counted on a patronage made up of businessmen, member of the European Parliament, officials etc. It brough a very successful and innovative system: tickets were sold online and via SMS.

[11] The White Paper on Transport of 1996, in Annex II, mentioned that Belgium, Italy, Luxembourg, Portugal and Spain had only partially respected the provisions of the directive, while Greece failed to apply it altogether. See http://europa.eu/documents/comm/white_papers/pdf/com96_421_en.pdf., accessed on 2.04.2012.

[12] But the most drastic social costs were registered in the USA, where, in 1980, the railway system had 458,000 employees, and in 2000, just 168,000 – cf. Olli-Pekka Hilmola, Bulcsu Szekely, *Deregulation of Railroads and Future Development Scenarios in Europe*, Research Report 169, p.13.

[13] In France, for example, only on May 9 1995 did the directive enter French law, through decree 95/666, after the political class had constantly been under the threat of a massive SNCF strike, and divided between different approaches: the right wanted full liberalization

and to transpose them into national legislation[14]; the abuse of dominant position had to be deterred[15] etc. A former director of the SNCF stated that, basically, the directive is an instrument that encourages commercial war within the EU, by allowing access to the internal market to privately owned operators, with both internal and external capital, which is an attack against railroad companies[16].

At the beginning of the 90s, Jacques Delors came up with the idea of a European single market, meant to bring together the Member States. Thus, it was strictly necessary to come up with a new strategy for transports, which were to become one of the key factors of this project. 1992 was a crucial year for transport policies, including rail policies, and marked the beginning of a new stage of the CTP[17]. The signing of the Maastricht Treaty in February led to the creation of the EU, but also to the enactment of community transport policies by encouraging *the establishment and development of trans-European networks*[18].

Title XII of the Treaty defined the concept of trans-European transport network and its principles: interconnection, interoperability, standardization. *The Maastricht Treaty* – the document states – *gave the European Union the task of establishing and developing trans-European infrastructure networks (TENs) in the areas of transport, telecommunications and energy. These networks must contribute both to the development of the internal market and to the consolidation of economic and social cohesion. Moreover, trans-European networks need to link island, landlocked and peripheral regions with the central regions of the European Union, as well as the EU territory with third party neighbouring countries. The creation of trans-European networks aims at promoting the interconnection and interoperability of national networks, as well as access to such networks*[19].

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and drastic restructuring, the left was opposed and demanded that only minimal provisions of the directive were adopted.

[14] Alexandre Lankiewicz, *op.cit*., p.114.

[15] This was at the origin of the essential facilities doctrine.

[16] *Ibidem*, p.85,86.

[17] http://aei.pitt.edu/1116/1/future_transport_policy_wp_COM_92_494.pdf, accessed on 6.01.2012.

[18] http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html, accessed on 12.12.2011.

[19] http://www.europarl.europa.eu/ftu/pdf/ro/FTU_4.7.1.pdf , p.1, accessed on 02.04.2012.

The inclusion of a title regarding transports generated an encouraging signal for the evolution of transport policies. The treaty, in addition to the new concept, announced in fact the establishment of the EU as the main authority in the field of trans-European projects planning and financing.

In December, the European Commission adopted *The future development of the common transport policy* (Com(92) 494 final) which stipulated: the elimination of the barriers that restricted the circulation of freight and citizens, the support of mobility throughout the European community; the revitalization of some transport modes neglected for the last three decades: by rail, inland waterway, sea; the technical harmonization, the creation of an intermodal transportation network; the allocation of 1000-1500 ECU, representing 10% of the EU GDP between 1990 and 2000; the promotion of an ecological transport; safe transports and a decrease in the number of accidents. The priorities of this document were: the creation and development of a European transport system; transport safety, environment protection; social protection; foreign relations.

The first years after 1989 were also marked by a dialogue between the Member States and the countries of the former communist bloc. Hence, in 1991, the Pan-European Transport Conference was held in Prague, with the participation of the European ministers of transport; they defined the concept of transport corridors, in order to facilitate the interconnection of European networks. The next conference, held in Crete in 1994, established the creation of nine pan-European corridors[20] that required high-priority investments. After the Helsinki conference of 1997, a tenth corridor was added, as a result of the Balkan states' lobbying. The role of these corridors – to integrate the road and rail networks of the two Europes – anticipated in some way the two waves of enlargement, of 2004 and 2007 respectively, that would integrate the Eastern European countries.

In 1993, the *Commission White Paper* was adopted and a working group, Christophersen, was set up. The next year, in Essen, this group selected 14 priority projects, of the 34 submitted, for high-speed trans-European networks. In 1995[21], the European Commission issued a new document *CTP – Action Program 1995-2000*, which suggested a strategic

[20] See Addendum.

[21] Besides the documents already enumerated, the Directives No 95/18/EC and 95/19/EC were also adopted that year. The first one regulated rail operators' licenses, allowing an unbiased treatment for all operators wishing to access foreign markets, the second, the conditions of access to the infrastructure.

intervention, in a program called TENT; also, it elaborated the *Council Regulation 2236/95* of September 18 1995, which established general rules for the granting of financial aid in the *TENT* field. These rules were put into practice by the European Parliament and the European Council through *Decision No 1692/1996*, which established a map of development to be reached until 2010[22]. *The White Paper on Transport* of the same year is significant. *A Strategy for Revitalising the Community's Railways* emphasized the commitment of the Commission to revitalize railroads, to reduce their debts, to liberalize the rail market, to separate rail infrastructure from transport operations, to create a European Rail Agency, to integrate national railway systems, to create a rail equipment single market, the concept of public service and safe transport, to promote intermodal transportation and to encourage research and promote innovation. Its contents were to be submitted for enactment to the European Parliament in the next years. If we consider 1991-1998 in retrospect, important steps have been made for the revitalizion of railroads: a clear European policy was outlined, with accurate directions and objectives, more funds were earmarked for this field, new concepts emerged, the decline stopped and the market share of railroads stabilized. At the same time, there were still enough difficulties to be overcome in the next decade: bottlenecks, project delays, strong national opposition against railroad liberalization and the opening of the market, the lack of technological compatibility, different railroad signaling systems[23], which cause holdups, different procedures etc. So they do not become insurmountable, the next years were dedicated to their redress.

c. 1998-2007. The White Paper 2001 – *Time to decide.* Railroad legislative packages (2001, 2004, 2007).

The proposals of the 1996 *White Paper of Transports* were enacted two years later by the EP and became operational in 2001. They materialized in a so-called rail legislative package, which consisted of four directives: 2001/12/EC[24], 2001/13/EC, 2001/14/EC[25], 2001/16/EC[26]. The

[22] Andrea Nuzzi, *op.cit*., p.13,14.

[23] For example, Thalys operates on the territory it services with seven different signalling systems.

[24] The directive provided that the European market for freight transport would open progressively for all operators between 2003 and 2008.

[25] Directives 13 and 14 modified the directives of 1995 regarding the validity of licenses in Europe, freight transport and its costs.

provisions of the first legislative package aimed to restructure railroads and to liberalize and open the European market, as well as to make them more efficient and more competitive.

In 2001, *the White Paper – European transport policy for 2010 – Time to decide* was also adopted. It served as a policy agenda for the first decade of the 21st century. The 124 pages of the document synthesized the vision on the transport sector. 60 proposals, which became part of a long term strategy, were summarized in Addendum I: to revitalize railroads, to progressively open up the passenger transport market, to promote safety measures for freight and passenger transport, to redirect customers to this type of transport, to develop intermodal connections, to develop new rail lines (the Pyrenees route for freight transport, Paris-Stuttgart-Vienna, Verona-Napoli), the interoperability of the Iberian high-speed rail network, to place customers at the heart of transport services, to manage the effects of the globalization of transports[27]. The document led the way for the next two legislative packages.

The period 2002-2004 was characterized by the submission of proposals meant to improve community legislation, which led to the second rail legislative package. The directives 2004/51/EC and 2004/50/EC were the basis of this second package. They stipulated: an accelerated opening of rail markets, the creation of the European Railway Agency which was to elaborate technical standards in order to reach the main objective: interoperability. European officials were optimistic about these first two packages, and the vice-president of the EC, European Commissioner for Transport (2004-2008) Jacques Barrot declared: *"Implementation of the first railway package is crucial for revitalizing the EU railway sector. Together with the 2nd railway package of 2004, the basic regulatory framework is now in place. Market integration in the rail freight sector already shows positive results in some Member States - we have witnessed new market entry and improved traffic performance. The modal share of rail freight has stabilized in Europe. It gives me hope for the future. The changes which have been started must now be completed in order to put the finishing*

[26] This directive made provisions insuring the interoperability of transport networks, by laying down standards and procedures meant to raise governments' awareness.

[27] See http://ec.europa.eu/transport/strategies/doc/2001_white_paper/lb_com_2001_0370_en.pdf, accessed on 18.12.2011.

touches to a European railway area which will serve European mobility and competitiveness."[28]

The interval between the first two legislative packages, 2003-2005, registered other accumulations – new agencies began their activity: ERA; TEN-T EA (2006); in 2003 a commission led by Van Miert was created. It analyzed 169 project proposals for the TEN-T programme, of which 30 priority projects were selected[29]. The recommendations resulting from these debates were included in Decision No 884/2004/EC, which stipulated that priority projects must be completed by 2020, defined the European rail network as comprising high-speed lines, equipped for speeds of 125-155 mph, and conventional lines, as well as the main objectives of interconnection and interoperability. Subsequently, the financing mechanisms were developed or maintained: Regulation (EC) No 680/2007 laid down general rules for funding, there were also ERDF, the Cohesion Fund etc.

The adaptation process of the rail legislative framework went on with a third legislative package, which was approved and came into force in 2007. Its provisions continued the previous ones and, in addition, emphasized the market liberalization for passenger transport. Its linchpin was Directive 2007/58/EC, which stipulated a gradual liberalization of the market since 2012 until the beginning of 2015[30].

An overview of the period analyzed above shows the massive optimism of the European establishment, also determined by the two EU enlargement waves of 2004 and 2007, and by the sustained economic growth of those years, which contributed to the establishment of a number of very bold objectives, of which only 30-40% have been reached. The strengths of these policies were: an ascending trend and the stabilization of the values of freight transport, the growth of the high-speed networks, some politicians' crucial involvement in this process. Some weak points: the delay in adopting the provisions of the first package forced the EC to open 56 infringement procedures, of which 12 concluded with decisions of the European Court of Justice. The fact that other states only partly adopted the

[28]http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/564&format=HTML&aged=0&language=en&guiLanguage=en, accessed on 2.04.2012.

[29] They were defined as being of European interest and were going to be opened by 2010; they also were to include routes in the new Member States, which had accessed the EU in the two enlargement waves of 2004 and 2007.

[30] *Memoria e Ricerca*, nr.30/2009, Michèle Merger *La politica ferroviaria europea: dalla prudenza alla liberalizzazione (1957-2007)*, p.105.

provisions led to the opening of 55 other actions, of which 13 were referred to the Court of Justice. A series of difficulties became apparent: a number of states adhered only superficially to the provisions of European legislation; the projects encountered financial bottlenecks; moreover, the commitments of the White Paper 2001 had to be periodically revised, modified and adapted to the social and economic dynamics of the European space. In a speech[31] given in Brussels, on May 21 2002, and entitled *Effective competition in the railway sector: a big challenge*, Mario Monti, European Commissioner for Competition, emphasized the chief challenges of the rail sector: the complete liberalization of the rail market, as the only solution for the progress of railroads. Monti noted three impediments that hindered the development of the sector: the separation of essential functions (the infrastructure), flaws in policy coherence due to the diverging interests of the states, bilateral agreements between business operators that can restrain competition. His speech concluded with the following comment (suggestive for the period under analysis): *There are many barriers – structural, legal and technical – which we have to remove before we have a properly functioning internal market for railway services.*

d. EU projections 2011-2050. The White Paper on Transport – *Roadmap to a single European transport area. Towards a competitive and resource efficient transport system.*

In the period after 2007, the Commissioners for Transport[32] were tireless in their efforts to carry on the political objectives and priority projects, as well as to adapt to the new economic realities brought about by the global economic crisis which has progressively manifested itself since 2008. New directives on interoperability were adopted – 2008/57/EC, 661/2010/EC -, the TEN-T plan was continued with a series of amendments.

The Treaty of Lisbon, adopted in 2009, renewed and synthesized[33] the essence of the transport policies of the last two decades: continuation of the CTP, trans-European networks as means of creating an area without internal borders, open and competitive markets, allotment of funds in order to accomplish the European desiderata in this sector.

[31] http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/216&format=HTML&aged=0&language=EN&guiLanguage=en. Accessed on 26.02.2012.
[32] Antonio Tajani (2008-2010), Siim Kallas(2010-present)
[33] Title VI – Transports, art. 90-100, Title XVI – Trans-European Networks, art. 170-172.

A decade after the adoption of the second white paper, the Commission approved a new document, the third white paper, which, analyzing the results of the previous decade, observed some progress (the development of TEN-T, the creation of new high-speed lines), but also some weak points (the unsustainability of transports, pollution, high fuel consumption – which deepens Europe's oil dependence). Similarly to the previous documents, this one also lays down a number of bold objectives for the next decade[34]: developing transports and supporting mobility, while reducing carbon emissions by 60%; increasing the market share of freight and passenger transportation on long distances – over 50% of the road transport market share should shift to railroads or inland waterways by 2050; introducing technical innovations – trains with silent brakes and automatic couplings; finalizing a European high-speed rail network by 2050; tripling the length of the existing high-speed network by 2030 and maintaining a dense network in all Member States; by 2050, most of the passenger transport on medium distances should be shifted to railroads; the implementation, by 2030, of a multimodal and entirely functional TEN-T "core network" in Europe, and of a high-quality and capacity network by 2050, along with a corresponding set of information services[35].

The proposed strategy has the following reference points: to eliminate all residual barriers that delay the creation of a single European transport area, technical innovation, to earmark substantial funds – EUR 1500 billion for 2010-2030, with a positive impact on economic growth in Europe[36].

The results of this policy will become apparent by 2021. Until then, the EU will have to solve a number of issues in the field of transport: to build the missing links at cross-border sections, which are a major obstacle to free movement within the Union and between Member States; to mend disparities in the quality of infrastructure between the Member States (the east-west connections) and within the Member States (the former communist countries), to develop intermodal connections, because the existing ones are few and fragmented (Siim Kallas noted that there are only 20 major airports and 35 major ports intermodally connected, and that

[34] In some cases, there were later target dates: 2030-2050.
[35] See the White Paper of Transport, pp.10-12.
[36] It is estimated that every million Euros spent in Europe will yield five million Euros from Member States and 20 million from the private sector.

European railways use seven different gauge sizes[37]), the persistence of regulations and operational requirements that hinder interoperability[38].

2. Romania. A conflicting railroad area: a legislation adapted to community requirements and an outdated transport system.

Infrastructure is key to mobility. If we used this assertion to analyze our rail sector, we would conclude that the Romanian mobility rate came to a standstill: present-day society is as mobile as it was between the two world wars, and the average speed of trains falls within similar (or just slightly higher) limits, 21 mph for accommodation trains and 54 mph for express trains[39], while statistics and the press constantly confirm the array of problems in the rail sector. There are two types of causes, of mechanisms, that led to this deadlock: the destruction of the corporate culture of railway[40] and the perpetual Romanian social and economic crisis of the last three decades[41].

The analysis of the evolution of CFR from its origins to the present day shows that it followed closely the same stages of the universal paradigm: creation-diffusion-culmination-decline-, with the side note that, in 1980, it derailed from this path and entered a prolonged crisis that lasts to this day and that widened the technological gap between us and the Western world with three-four decades. Perspectives show that the disparity might

[37]http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/706&format=HTML&aged=0&language=RO&guiLanguage=en, accessed on 3.04.2012.

[38]http://www.cdep.ro/afaceri_europene/CE/2011/COM_2011_650_RO_ACTE_f.pdf, p.3, accessed on 3.04.2012.

[39] The main cause is the chronic underfunding of the sector, which caused safety issues on many sections where no capital repairs were made; thus trains traveled with restricted speeds.

[40] This process took place between 1980 and 2000, hindering the innovation capabilities of the CFR engineers, which never attained the level of those of 1880-1940, bringing about a lack of technological innovation, vision and solutions, which would have contributed to the revitalization of CFR, as it happened in France.

[41] The economic crisis of the 80s meant an intensive and depleting exploitation of the network and a lack of investments; the crisis of the 90s translated into a chronic underfunding of the sector and massive employment restructuring (from 250,000 employees in 1989, to approximately 130,000 in 1998 and 64,000 in 2010), which threaten safety on railroads, as the lack of personnel was not balanced out by technological innovations; scandals and accusations of embezzlement of CFR.

continue to deepen in the next decades[42]. The paradox is that from the point of view of institutions, legislation, currents of thought, Romania is connected to the trends and the transformations of the contemporary world[43]. Skipping the natural stages through which the other societies had passed led to instabilities and the incorrect perception of the phenomenon by the public opinion[44]. This illusory synchronization could be explained by the mimicry of the political class whose main goal during the last two decades was European integration.

The main reform factors of the Romanian railway system were external: WB, IMF, EC, EU, EBRD, EIB. Through a series of agreements, financing programs, loans, pre-accession mechanisms, they impelled restructuring, and the successive Romanian governments put the commitments made into practice.

An enumeration of *the phases through which the Romanian railway system passed during its process of accession to the EU* shows that there are four stages:

I. the initial stage – 1990-1995, marked by: the participation at the Pan-European Conferences (when Romania was included in corridors IV and IX), getting the attention of the European factors – the CTP of 1992 (it mentioned that Romania and Bulgaria were participants to the European process and involved in accession negotiations, that they began restructuring the sector etc.), applying for accession in 1995;

II. the intermediate stage of restructuring 1995-2002: the signing of agreements with IMF and WB, which led to significant restructurings and the reorganization of CFR in 1998, following the principles of Directive No 91/440/EC[45];

[42] For a better understanding of this assertion, we could note that Romania does not have high-speed lines, nor similar projects, and the maximum speeds reached on the rehabilitated sections are of 85-100 mph, comparable to the western ones of the 80s.

[43] The EU monitoring reports on Romania have always noted the dissonance between the European-like legislation and the lack of financial resources required to operationalize the objectives presented in legal texts.

[44] For example, the lack of technological innovation and performance of CFR hinders it from obtaining satisfactory financial results, and the closing down of unprofitable secondary lines, a process which took place in 1960-1990 in the West, is perceived as an embezzlement of the economy (at times, rightfully so) and not as a natural economic phenomenon, also caused by the population's mentality of traveling fraudulently and by the exponential increase of the number of automobiles.

[45] Thus, the following entities were created: CFR - Infrastructură, CFR - Călători, CFR – Marfă, SAAF, SFT-CFR, AFER.

III. the pre-accession stage – 2001-2007: negotiations on Chapter 9, regarding transports (2001-2003), the implementation of the community acquis, applying for pre-accession funds – ISPA, EBRD loans, which made possible the rehabilitation and the upgrading of the railway system[46].

IV. the post-accession stage of 2007, when the Romanian government committed to reach the community objectives, although the economic crisis caused delays in the progress of rail projects.

An overview on the present state and on the development perspectives of the European railway system, along with its situation in our country, leads to a series of conclusions which are also at the basis of our treatise. **Thus, for us, an inevitable conclusion is that the revitalization of railroad transport is possible, subject to: the existence of external pressure factors, which will force the government to act for the development of the sector, the creation of a group of engineers able to submit and to construct rail projects similar to the TGV, the construction of LGV between large urban centers, meant to revolutionize passenger transportation on medium and long distances and to boost mobility.**

3. Final conclusions

The facts and ideas presented in this study lead to the following impartial observations:

- during the last three decades, an ample process of railroad transformation began all over the world;
- the main cause of this transformation process was brought about by: the loss of the majority market share in the transport sector, due to the lack of technical innovations, mismanagement, the intrusion of the political factor, with a direct consequence: the accumulation of massive deficits;
- the nation-states were repositioned in the decision-making process, due to the appearance of new actors imposed by the globalization process: supranational bodies (EU), international organizations (IMF, WB, EBRD, EIB etc.) with decision-making

[46] For the analysis of the economic situation of the railroad sector during 1998-2005, see Caraiani Gheorghe, Ambroziu Duma, Andrei Horia Georgescu…, *Aquis-ul comunitar şi politica sectorială din domeniul transporturilor în Uniunea Europeană*, Pinguin Book, Bucureşti, 2006, pp. 351-389.

powers that surpass or tend to be greater than the traditional ones of the nation-state;
- the transformation process is based on the neoliberal ideas – privatization, deregulation, liberalization – and takes place through a mixture of actions: implementation of legislation, by virtue of the concepts above, and technological innovation;
- railroads have a number of advantages which, in the following decades, could eliminate their competitor, road transport: the ecological dimension (low CO2 emissions); the energy dimension (the use of renewable energy sources, low resources consumption by comparison with road transport); the higher degree of safety (road accidents cost the EU 2% of its GDP);
- during the last two decades, in Europe, the lead actor in railroad transformations became the EU;
- the transport sector is key to the idea of creating a single European market, the engine of the unification process and of the European integration;
- the EU action in the railroad sector has two dimensions: one is conceptual, creative, and it manifests itself at a legislative level (creating specific legislation: directives, regulations, legislative packages, white papers), at an institutional level (creating institutions, agencies meant to manage policies), at a technical level (planning routes, European transport networks), and the other implements and supervises, i.e. puts legislation, policies and priority projects into practice and manages the relation with the Member States;
- the EU is interested in the future of the transport sector and tries to use predictive studies[47], theoretical breakdowns, researches in the field of technology and consumer behavior, in order to identify and create viable paradigms;
- There is a series of impediments to the application of these policies: economic gaps between the Member States, opposition of the nation-states, different stages of institutional and technical development of the European railway systems, different mentalities etc.;

[47]See http://ec.europa.eu/transport/wcm/infrastructure/studies/2009_12_ten_connect_final_report.pdf.

- The Romanian affiliation, not only *de jure*, but also *de facto*, to this system unanimously designed by the Member States should not drag on, since the economic and social usefulness of rail transport is evident and it efficiently and harmoniously satisfies the requirements of modern society.
- The key to success of all policy lies in financing, and in Brussels the railroad sector, as well as other sectors, has its lobbyists who take the necessary steps in order to obtain substantial funds.

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CULTURE IN THE OLD ROMAN SETTLEMENTS IN LODOMERIA AND IN ORLEANS IN THE MIDDLE AGES

Mihaela ŞTEFĂNICĂ [*]

ABSTRACT

Considered an ancient direct source of the law, the customary law or the judicial custom, has traversed centuries becoming today a mandatory norm of conduct in the relationships between states. In the area of public international law, the customary law keeps its material element, which consists of a constant practice of the states.[1]

After a review of the diverse theories regarding the origin of the Romanian customary law, this paper is meant to create a parallel between the customary law in the Romanian settlements of Lodomeria in Medieval Poland and the customary law in Orleans region from the same period.

Based on a study from the early works of B. P. Hasdeu, this paper tries to find particularly the differences between two customary systems. This can be considered a true challenge due to the fact that the two situations have very different circumstances. In addition, the object of customary laws was quite different, the work of Pothier, „Coutume d'Orleans", annotated by M. Bugnet and published in 1845, being very thoroughly detailed.

KEYWORDS

The customary law, customary law in the Romanian settlements of Lodomeria, the customary law in Orleans region

Culture is the oldest source of law**.** It is a direct, unwritten source. It is also considered a judicial custom.[2] From a historical point of view the

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[1] N. Popa, M. Ctin. Eremia, Simona Cristea, *Teoria generala a dreptului,* Ed. All Beck, Bucuresti, 2005, pg. 169.

[2] N. Popa, M.C. Eremia, Simona Cristea, *Teoria generala a dreptului,* Ed. All Beck, Bucuresti 2005 pg. 166

judicial custom or the consuetudinary right has formed the first form of positive right, which is a type of rudimentary right. This represents a practice well embeded in the conscience of the people so that through them, the people believe they are exercising a positive right. Various schools and currents have associated the origin of common law either to the thracian-dacian background (I. Nadejde)[3] or to the Roman and Slavic-Byzantine (I. Peretz)[4] borrowings. In the paper entitled „The Description of Moldova" („Descrierea Moldovei")[5], Dimitrie Cantemir speaks about the existence of some customs with power of law in the Dacian culture that were replaced after the Roman conquer with Roman laws; and after the retreat of the Romans from Dacia „the Roman laws have started to deteriorate and be altered by the Dacian people."

In his theory about the origin of ethnic stratification B.P. Hasdeu[6] mentions the Pelasgian people, that was considered by Herodot as the first ethnic layer and was followed by the Thracian people, becoming at their turn a sub-layer, and were followed by the Latins, who were seen as another ethnic layer. All of them have contributed to the forming of the Romanian people and to the making of its judicial laws. N. Densusianu[7] later develops the theory of B.P. Hasdeu. The novelty of his theory resides in denying any contribution of the Roman law because it represented just a fragment of the Tracian law. This aspect would explain the similarities between the Romanian law and the Roman law. By comparing the laws of Bellagines with the Law of XII Tabule and with the Statues of the Fagaras Country from 1508, N. Densusianu brings out the similarities between them through the existence of a common background, the common origin of the Dacian and Roman peoples, who further on have split and developed seperately. Thus, in his opinion the similarities between the two institutions were not given by the merging of the two peoples. G. Fotino[8] also supports the thesis regarding the origin of the Thracian people, by speaking about the existence of a pre-Roman background, based on the analysis of the joint proprietor, intestate succession, witnesses, dowry.

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[3] I. Nadejde, *Din dreptul vechiu roman*, 1898, pg. 115, 118

[4] I. Peretz, *Histoire de la vente en droit roumain,* Paris 1904 ; *Curs de istoria dreptului roman,* Ed. II, vol. II, 1928, pg. 3-4; *Precis de ist. dr. rom,* 1931, pg 8

[5] Dimitrie Cantemir, *Descrierea Moldovei,* Bucuresti 1961, pg. 135

[6] B.P. Hasdeu, *Etymologicum magnum Romaniae*, 1976, pg. 8

[7] N. Densusianu, *Dacia Preistorica*, 1913, pg. 864, 868, 892

[8] G. Fotino, *Contribution a l'etude des origines de l'ancien Droit Coutumier Roumain,* Paris 1926, pg 118, 164, 170, 187, 207, 254, 307, 366

We can say that between the IV – VIII centuries the specific organisation of Romanian joint proprietor villages was created along with the according laws. The differences and the social imbalances that have started to develop during the time, created the premises for the future feudal relationships. The village community was the foundation of the pre-state formations named „countries", that formed throug the unification of several villages. An important aspect is that the term „country" („Țară") was kept until today, for example, „Țara Bârsei", „Țara Făgăraşului", „Țara Haţegului", „Țara Lăpuşului". The newly formed social ranks, such as „juzi, jupâni, cnezi, voievozi, duces, potentes, maiores terraie, vatamani", generated the conditions neccesary for the forming of the political system specific for the feudal state. The term „jude" or "judex" was used to define the status of judge and military leader of the community, considering the communities were forced to organize themselves the means of defense against migrators. The name of the local administrative constituency „județ" (county) comes from the term „jude" used in the old times. The term „cneaz" was used to define the position of the person who had the same responsibilities as the judge, having the right to convict or punish people, as well as to lead the army for several villages. Some of the „cnezi" („princes"), named by B.P. Hasdeu „chinezi", became landowners or patrons in the developed Romanian feudal states and others became only free peasants, or in Ardeal they have fallen to the status of serfs. The voivodes were judges and military commanders over a confederation of „cnezi". Even though the name has a slavic origin, the institution of voivodeship is Romanian. For the slavic people, the voivodeship did not have judicial attributions and its status was inferior to the principality. Meanwhile for the Russian, Serbian and Bulgarian people the term used to define this status was „cneaz" the synonim being the term „prince". The voivode was a type of „belli dux", who was subordonated to the prince/"cneaz". In the developed feudalism, the title voivode is joined with the title of gentelman, used by the princes of the Romanian countries.

Another term used to define a master was „jupân", therefore „jupânii" had judicial and military attributions, the term comes from an ancient thracian-geto-dacian noble title given to patrons (landowners) from the Romanian feudal states. All these rulers, who had judicial and military command, who had the priviledge to be judged with a special procedure (registered in the Ioaniti Diploma 1247) and who could benefit from having land and income from the population, formed the beginning of the feudal aristrocracy. This aspect was noted by B.P. Hasdeu in his article „Vechile

aşezări române din Lodomiria" („The old Romanian settlements in Lodomeria"). The study was published in the magazine „Romania" (1858-1859) at the beginning of the permanent column „Ethnography".

Through its romantic character, even though censored by the positivist formation and method, Hasdeu based his opinions on an ample documentation that is sometimes pushed to the extreme. The thirst for origins, rounded in the shadows of history and linguistics, can be found in the folkloristic studies. His interest in ethnography, customary law and mythology, further materialized in a distinct field, imbedded in the Romanian culture. Having ample knowledge of the Slavic languages, as well as the Latin, Hellenic and German languages, he conducted studies for all the documents he could find in the original languages. Hasdeu places the first Romanian settlements in Poland, and mainly in Galitia between the XIII and XIV centuries: in 1378 the Romanian village of Hodlau and in 1420 another Romanian settlement called Lubic. There is an increase in the number of documents that make reference to the Romanian settlements in Galitia during the XV, XVI, and XVII centuries. After this period of time the Romanian migration towards Poland and their settlement in Galitia had either stopped or lost its Romanian character. This is due to the fact that the Romanian "Cnezi" were obliged to give up the right to lead their subjects only by following the Romanian customary laws, and forcing them "to turn to the Polish customary laws, along with their subjects", as the law sanctioned by the Polish kings stated. In the short study, we find the names of the 82 Romanian localities, organized in three circles: The "Sanocean" (64) circle, The "Sândecean" (3) circle and the "Sâmbărean" circle (15). As the information came from Polish documents, the names of these settlements keep the Polish method of writing, which is very difficult to pronounce.

Through this study we learn that the Romanian inhabitants were led by a Romanian "Cneaz" that often fulfilled the role of judge and military leader but also the role of a religious leader (priest) that followed the Romanian laws and the Orthodox religion.

Here is a short list of the exemptions from taxes that the Polish Royal treasury accepted, and the way cattle, vegetables, fruits, wine and cereal could be paid as taxes instead of money.

1. The tax (one of three) – "gloaba" – did not go to the imperial treasury, but instead stayed in the village community, being used for the satisfaction of the villagers needs.
2. The judging was made by those chosen by the Romanian people, as the Romanian cultural laws stated.

3. The town gatherings were exempted from taxes, if they had the role of "removing household needs".
4. The other two taxes (the "Bir" and the "Belici") were paid as metayage.

Between 1552 and 1629, the Romanian villages, had to pay between 2 and 30 "groszy" (polish currency) as taxes for their plows, houses or cattle. The "Cneaz" was empowered to watch over the lives and needs of his subjects, gather taxes and keep a share for himself and to guard the roads, borders and the woods of the district that he governed. For these duties, the „cneaz" was the heir and the only judge of the settlement and he had the same attributions as te „soltuz" (scholtz) of the German settlements. The common penalties in the Romanian customary law were regarding money. If the married couples got separated they were also obliged to pay a fee: „scultetul divortii grosz accepiet". Regarding inheritance, the youngest of the children was exempt from inheritance. From all the taxes paid by his subjectss, the "cneaz" had the right to keep the third part, "tertium denarium". In the case the sentence given by the "cneaz" was contested, it was judged by the "cnezi" communities from the surrounding Romanian settlements. If this second judgment was contested, or "fell in wandering", as Hasdeu said, they would resort to a third judgment, the king's court, for which they would have to pay quite an expensive fee of 150 "zlotich polskych" (polish currency).

From the details above we can conclude that the Romanian settlements in Polish Lodomeria of that time were very independent, similar to a state inside a state, where the ruler was elected with democratic methods. In time, the "cnezi" and the voivodes of the Romanian countries had the tendency to build permanent positions, leaning towards a hereditary-elective system. In Lodomeria (Galicia and surrounding areas), some of the "cnezi" had given up their independence and their subjects' independence, from various reasons, enslaving themselves to the aristocracy or to the king of Poland. This information revealed by young B.P. Hasdeu's short study, would not have become known if it was not collected in documents and books such as: the tax memorandums (1552-1629) gathered in "Volumina Legum" and in the papers of the Polish historians Anton and Alesandr Stadnicki; the first was published in Krakow in 1837 and the second was published in 1848 in Lwow.

Because each field has its own customary laws, in Medieval France, the fact that what was permitted in one part was restricted in another part led to the necessity of collecting and publishing everything in a code. The

Settlements of Louis the Saint" 1270 ("Aşezămintele lui Ludovic cel Sfânt" 1270) illustrate this situation very well. The same situation convinced king Carol the VII to order writing and publishing all the customary laws in a code, in 1453. These customary laws have been harmonized by jurists specially named by the king. Although they have lost their fundamental particularity of unwritten law, the customary laws have constituted the Code of Laws of France from the Middle Ages to the 1789 Revolution and further to Napoleon V era. Even nowadays the existence of customary law in different areas of the law reflects its longevity and also its conservative power.

The customary laws in Orleans refer to individuals, possessions and actions.

a. The status of an individual includes: the paternity right, the custody of underage children, the age at which a person can testify (20 years old), marital right.
b. Customary laws regarding possessions reflect the possibility of their transfer through will, donations, etc.
c. The third type refers to the format of legal documents.

A particularity of Orleans customary laws is that they do not exempt anyone, locals or foreigners. Through a very rigorous social stratification any democracy attempt seems superfluous, the aristocrat acts on his domain like an absolute master often disobeying the customary laws. The taxes were paid by all the members of a community to their master as a fee or through labor for a certain number of days, only the priests and the monasteries were exempted from the payment. The women were considered inferior and after marriage women lost their individual status and received the status of their husband. Despite the fact the customary laws in Orleans were more detailed than the Romanian ones, they can be considered a lot stricter. This does not mean the customary laws could not be disobeyed, but the strict character is reflected in the harsh punishments applied by masters to their subjects.

Conclusion

Born from the necessity of instituting order and justice in the relationships between members of a community, customary laws have been generally respected for a period of time and then broken by the rich and powerful at first and then by anyone, but the simple people have paid the price for their actions, sometimes even with their life.

Customary laws have passed the test of time, being changed at times and have influenced private law (civil and commercial), as well as the

public law (constitutional and administrative). Customary laws are present in constitutional law through the existence of traditions (constitutional, parliamentary, republican and monarchical) and through the tradition of administrative territory organization.[9]

Therefore this is how customs and traditions that appeared in a very distant past have a power of preservation that can make them last for centuries, until today.

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SHORT CONSIDERATION ON NATIONAL AND INTERNATIONAL LAW ON FOOD SAFETY

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ABSTRACT

EU food strategy is based on three main elements: food safety legislation and feed, a fundamental scientific advice necessary in the field of decision making and policy implementation and control. The legislation covers multiple areas, feed and food to food hygiene, applying the same high standards across the Union. In Romania, food safety tends to reach the European level, but requires the involvement of law enforcement authorities and as accurate consumer information.

KEYWORDS

General obligations in the food trade, European Food Safety Authority, Romanian National Sanitary Veterinary and Food Safety Authority

General principles

The objectives pursued by means of food law are: protection of human life and health, and protection of consumers' interests, with due regard for the protection of animal health and welfare, plant health and the environment, EU-wide free movement of human food and animal feed and consideration of existing or planned international standards.

Food law is based mainly on risk analysis drawing on the available scientific evidence. Under the precautionary principle, the Member States and the Commission may take appropriate provisional risk-management measures when an assessment points to the likelihood of harmful health effects and there is a lack of scientific certainty.

There is a requirement for transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law. When a food or feed product is deemed to constitute a

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risk, the authorities must inform the general public of the nature of the risk to human or animal health.

General obligations in the food trade

Food and feed imported with a view to being placed on the market or exported to a third country must comply with the relevant requirements of EU food law.

The European Union and its Member States must contribute to the development of international technical standards for food and feed, as well as for animal health and plant protection.

General requirements of food law

Food must not be placed on the market if it is unsafe, if it is harmful to health and/or unfit for consumption. In determining whether any food is unsafe, account is taken of the normal conditions of use, the information provided to the consumer, the likely immediate or delayed effect on health, the cumulative toxic effects and, where appropriate, the particular health sensitivities of a specific category of consumers. If food which is unsafe forms part of a batch, lot or consignment, the entire quantity is presumed to be unsafe.

Feed must not be placed on the market or given to any food-producing animal if it is unsafe. Feed is deemed to be unsafe if it has an adverse effect on human or animal health. The entire quantity of a batch, lot or consignment is considered unsafe if any part of it fails to satisfy the requirements.

At all stages of the food production chain, business operators must ensure that food and feed satisfies the requirements of food law and that those requirements are being adhered to. The Member States enforce the law, ensuring that operators comply with it and laying down appropriate measures and penalties for infringements.

The traceability of food, feed, food-producing animals and all substances incorporated into foodstuffs must be established at all stages of production, processing and distribution. To this end, business operators are required to apply appropriate systems and procedures.

If an operator considers that a food or feed product which has been imported, produced, processed, manufactured or distributed is harmful to human or animal health, steps must be taken immediately to withdraw the product from the market and to inform the competent authorities

accordingly. In cases where a product may have reached consumers, the operator must inform them and recall the products already supplied.

EUROPEAN FOOD SAFETY AUTHORITY (EFSA)

A European Food Safety Authority ("the Authority") will provide scientific advice and scientific and technical support in all areas impacting on food safety. It constitutes an independent source of information on all matters in this field and ensures that the general public is kept informed.

Participation in the Authority is open to the Member States of the European Union and to other countries applying EU food safety law.

The Authority is endowed with legal personality. The Court of Justice of the European Communities has jurisdiction in any dispute relating to contractual liability.

The Authority's tasks

In the areas within its sphere of competence, the tasks of the European Food Safety Authority are as follows:

To provide the European institutions and the Member States with the best possible scientific advice on its own initiative or at the request of the Commission, the European Parliament or a Member State. The Authority's independent scientific opinions have to do with matters of food safety and other related issues (animal and plant health, GMOs, nutrition, etc.). They serve as a basis for policy decisions in respect of risk management. As regards the scientific evaluation of substances, products or processes which are subject to a system of prior authorization or registration on a positive list under EU law, sectorial Regulations or Directives of the European Parliament and of the Council lay down the procedures whereby the Authority's scientific opinions are delivered.

To promote and coordinate the development of uniform risk assessment methods;

To provide scientific and technical support to the Commission. Scientific and technical assistance involves scientific work for which the expertise of the Authority's Scientific Committee and Panels is not needed (e.g. evaluation of technical criteria).

The Authority will also provide scientific support in connection with crisis management.

To commission scientific studies necessary for the accomplishment of its mission, whilst avoiding any duplication with European or national research programs.

To search for, collect, collate, analyze and summaries scientific and technical data in areas relating to food safety (exposure of individuals to risks arising from consumption of foodstuffs, biological risks, contaminants and residues).

The Commission is required to publish a report on the existing data collection systems at European level.

To take action, to identify and characterize emerging risks, The Authority will establish monitoring procedures geared to searching for, collecting and analyzing information and data with a view to the identification of emerging risks.

To build up European networks of organizations operating in the field of food safety, The Authority will participate in the rapid alert system linking the Commission and the Member States. It will encourage the exchange of information, knowledge and good practice, the coordination of action and the implementation of joint projects.

The Commission is to create an inventory of European-level data collection systems.

To provide, at the request of the Commission, scientific and technical support aimed at improving cooperation between the Commission, the candidate countries, international organization and third countries.

To ensure that the general public and other interested parties receive reliable, objective and comprehensible information, to express its own conclusions and ideas on matters within its remit.

Organization

The main components of the Authority are:

Management Board. The 14 members of the Management Board are appointed by the Council, in consultation with the European Parliament, from a list drawn up by the Commission. Four of the members are required to have a background in consumer organizations and other interests in the food production chain. The Commission is represented on the Management Board. Although the members' term of office is four years, which may be renewed once for a maximum of five years, the initial term of office for half of the members is six years. The Management Board elects its Chairperson for a two-year period, which is renewable. It adopts the rules of procedure, the work programme, the preliminary draft budget and the final budget (following the Budgetary Authority's vote on the general budget), and the general activity report. The Management Board must ensure that the

Authority performs the tasks assigned to it under the conditions laid down in the founding Regulation.

Executive Director. The Executive Director is appointed by the Management Board, on the basis of a list proposed by the Commission, for a period of five years which may be renewed for a period not exceeding five years, and is the legal representative of the Authority. Prior to being appointed, the nominee is invited to make a statement before the European Parliament and to reply to questions put by its Members. The Executive Director is responsible mainly for the day-to-day administration of the Authority and for implementation of the budget. He or she draws up a proposal for the work programme, in consultation with the Commission, and implements it, maintains contact with the European Parliament and forwards the general report on the Authority's activities to the European institutions and bodies by 15 June of each year at the latest.

Advisory Forum. Comprising one representative per Member State (representing national bodies responsible for risk assessment), the Forum advises the Executive Director in the performance of the latter's duties, particularly in connection with drawing up the work programme and main requests for scientific opinions. Chaired by the Executive Director, the Forum meets at least four times a year. It encourages the European networking of national bodies operating within the Authority's fields of activity: exchanging information, pooling knowledge and making the most of the available resources.

Scientific Committee and Scientific Panels. These are composed of independent scientific experts appointed for three years by the Management Board on a proposal from the Executive Director. They are responsible for adopting the Authority's scientific opinions within their respective spheres of competence.

Scientific Committee. Composed of the chairpersons of the scientific panels and six independent experts. Responsible for general coordination with the scientific panels, it may also organize public debates and set up working groups on matters which do not fall within the competence of the scientific panels.

Scientific Panels

The ten Scientific Panels are: 1) Panel on additives, flavorings, processing aids and materials in contact with food; 2) Panel on additives and products or substances used in animal feed; 3) Panel on plant protection products and their residues; 4) Panel on genetically modified organisms; 5) Panel on dietetic products, nutrition and allergies; 6) Panel on biological hazards; 7) Panel on contaminants in the food chain; 8) Panel on animal health and welfare; 9) Panel on plant health.

The Executive Director and the members of all the bodies of the Authority undertake to act independently in the public interest. They must make a declaration of commitment and a declaration of interest indicating any interests, whether direct or indirect, which might be considered prejudicial to their independence.

The Authority will carry out its activities with a high level of transparency. In this connection, it will make public the agendas and minutes of meetings of the Scientific Committee and the Scientific Panels, the opinions adopted, the results of scientific studies, its final accounts, the annual report of activities and the annual declarations of interest made by the aforementioned parties. The Authority must ensure that the public is given objective and accessible information. The decisions it takes pursuant to Regulation (EC) No 1049/2001 regarding access to documents may form the subject of a complaint to the Ombudsman or an action before the Court of Justice.

Financial provisions

The Authority's budget, presented by 31 March each year at the latest, consists of revenue (contributions from the European Union and from any candidate country or third party involved, charges for publications, conferences, training, etc.) and expenditure (staff, administrative, infrastructure and operational expenses, contracts entered into with third parties). It must be in balance.

In Romania, the main authority involved in food safety is National Sanitary Veterinary and Food Safety Authority. The law related on food safety is Law no. 150/2004, republished in Official Gazette no. 959/29.11.2006. By adopting this law, authorities from Romania tried to follow the European policy on food safety.

Food Law meets one or more of the general objectives at a high level of protection of life and human health and consumer protection, including fair practices in food trade, taking into account any protection for animal health, plant health and the environment.

Where international standards exist or when their establishment is absolutely necessary, those will be taken into consideration in the development and adoption of food law, except the situation when such standards are ineffective or inappropriate means for accomplishing all objectives or when there is a scientific justification.

National Sanitary Veterinary and Food Safety Authority developed an action plan for 2010-2011. By this plan, Directorate General Food Safety has the following objectives: ensuring the legal framework, procedures and guidelines for regulating food safety, ensure coordination of regional activities on food safety structures, the development of cooperation and coordination with other competent authorities involved in food safety, continue to develop training programs for staff of the Food Safety Services, the development of national Code of activities, to improve the cooperation with European structures to ensure uniform legal framework in the member states, to develop cooperation with European Food Safety Authority.

In this action plan, Directorate General Food Safety adopted the following measures designed to standardize food safety in Romania with the European food safety. Therefore, the measures adopted in the action plan 2010-2011 are:

Initiating, completing and amending legislation for specific activities, ensuring the national legislation adopted at Community level, analysis of legislative projects initiated by other competent authorities on food safety, coordination the Program of Surveillance and Control(PSC) on food safety, initializing action of cooperation and coordination with other competent authorities for food safety enforcement, participation in meetings organized by European Food Safety Authority, participation in the EFSA working groups, collaboration with the European partners in the development of EFSA etc.

As we can see, in Romania, National Sanitary Veterinary and Food Safety Authority has very important tasks to accomplish. In our country, food safety tends to reach the European level, but this requires time and involvement of Romanian authorities.

It is very important for Romania, as a member of European Union, to follow European decision-making process and to translate those decisions into national legislation.

Conclusions

As a conclusion to all the aspects presented above, Romanian authorities should be more careful at the extremely important implications

on food safety. If we would have a better law, we could say that we are able to protect people from risky factors that are likely to produce harmful consequences, consequences that may be easier to prevent than to treat. Implied authorities on food safety should be more preventive on aspects regarding food safety and consumer protection and, by adopting a law regarding on those 2 aspects, to really try to protect Romanian population.

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RECENT EUROPEAN STANDARDS AND POLICIES ON FORESTS PROTECTION-A CHANCE FOR ROMANIAN WOODS

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ABSTRACT

The article presents the most important European Union policies and standards aimed to assure a high degree of protection for the forests against illegal logging. There are severe problems in Romanian forests, following the massive, illegal and uncontrolled deforestation. As result, the forests surface in Romania considerably decreased. That why, the author appreciates the importance of dissemination and integration of European standards in national juridical framework.

KEYWORDS

International Year of Forests, Resolution on the EU 2020 Biodiversity Strategy, concerns in Romania, Regulation (EC) No 2152/2003, Regulation (EU) No 995/2010

Although the Treaties for the European Union make no provision for a common forest policy, there is a long history of EU measures supporting certain forest-related activities, coordinated with Member States mainly through the Standing Forestry Committee.

The United Nations has declared year 2011 as the *International Year of Forests*. Following this important decision, the objectives of the International Year on Forests are reflected in the EU's Forestry Strategy and Forest Action Plan which aim to:

- improve and protect the environment
- contribute to our quality of life
- improve the long-term competitiveness of the forest based sector
- foster coordination and communication

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Forests are one of Europe's most important renewable resources and provide multiple benefits to society and the economy. They are also important for the conservation of European nature. Forests and other wooded land in the EU cover approximately 177 million ha (over 40 % of the EU territory), of which 130 million ha are available for wood supply. As a result of forestation programs and due to natural regeneration on marginal lands, forest cover in the EU has increased over the past few decades[1].

However forests are affected by a broad array of EU policies and initiatives arising from diverse EU sectorial policies. For several decades now, environmental forest functions have attracted increasing attention mainly in relation to the protection of biodiversity and, more recently, in the context of climate change impacts and energy policies. In public perception, apart from the traditional production of wood and other forest products, forests are increasingly valued for their role as public amenities, biodiversity reservoirs, regulators of climate and local weather, sources of clean water, protection against natural disasters and renewable energy sources.

On 1st march 2010 the European Commission adopted a *Green Paper "On Forest Protection and Information in the EU: Preparing forests for climate change"*[2].

This Green Paper is an important document because:

- identifies briefly the general situation and global relevance of forests;
- describes the characteristics of EU forests and their functions;
- identifies the main challenges faced by EU forests in a changing climate and how they could compromise forest functions;
- presents an overview of the tools available to ensure forest protection, and of the existing forest information systems that could be used to address the challenges and monitor environmental impacts and effects of actions.

In addition, it raises a series of questions relevant to developing options for future forest protection and information in the EU under a changing climate. The responses from EU institutions, MS, EU citizens and other interested stakeholders will inform and guide Commission considerations regarding any additional action at EU level to better prepare EU forests for climate change, and enhance the fulfillment of their functions (Preamble).

[1] More general information on: *http://ec.europa.eu/environment/forests/home_en.htm*
[2] COM(2010)66 final

Recently The European Parliament adopted *Resolution on the EU 2020 Biodiversity Strategy*[3].

This resolution calls for specific action with a view to achieving Aichi Target 5 , whereby the rate of loss of all natural habitats, including forests, should be at least halved by 2020 and where feasible brought close to zero, and degradation and fragmentation significantly reduced.

In the same time, the Resolution Calls on the Commission, once the study on the impact of European consumption on deforestation has been completed, to follow up its findings with new policy initiatives addressing the types of impact identified.

The Member States have to adopt and implement forest management plans taking account of appropriate public consultation, including effective measures for the conservation and recovery of protected species and habitats and related ecosystem services (pct.73-75).

Based on these ideas, The European Commission has adopted an ambitious new strategy to halt the loss of biodiversity and ecosystem services in the EU by 2020[4]. There are six main targets, and 20 actions to help Europe reach its goal. Biodiversity loss is an enormous challenge in the EU, with around one in four species currently threatened with extinction and 88% of fish stocks over-exploited or significantly depleted. The six targets cover:

- Full implementation of EU nature legislation to protect biodiversity
- Better protection for ecosystems, and more use of green infrastructure
- More sustainable agriculture and forestry
- Better management of fish stocks
- Tighter controls on invasive alien species
- A bigger EU contribution to averting global biodiversity loss

The strategy is in line with two commitments made by EU leaders in March 2010. The first is the 2020 headline target: "Halting the loss of biodiversity and the degradation of ecosystem services in the EU by 2020, and restoring them in so far as feasible, while stepping up the EU

[3] *European Parliament Resolution of 20 April 2012 on our life insurance, our natural capital: an EU biodiversity strategy to 2020* (2011/2307(INI))

[4] Communication from the Commission to the European Parliament, the Council, the Economic And Social Committee and the Committee of the Regions "*Our life insurance, our natural capital: an EU biodiversity strategy to 2020*" Brussels, 3.5.2011 COM(2011) 244 final

contribution to averting global biodiversity loss"; the second is the 2050 vision: "By 2050, European Union biodiversity and the ecosystem services it provides – its natural capital – are protected, valued and appropriately restored for biodiversity's intrinsic value and for their essential contribution to human wellbeing and economic prosperity, and so that catastrophic changes caused by the loss of biodiversity are avoided."

Unfortunately, *in Romania* the concerns on forest protection are limited only to the obsolete strategies. If we are regarding the information on the site of Ministry of Environment we will find only a Strategy for 2001-2010, which includes some strategic objectives, including "the harmonizing of the national legislation with specific EU legislation, international conventions and agreements to which Romania is a signatory"[5]. But, no legislation adopted in this respect is mentioned.

However, there are severe problems in Romanian forests, following the massive, illegal and uncontrolled deforestation. As result, the forests surface in Romania considerably decreased. That why, we appreciate the importance of dissemination and integration of European standards in national juridical framework.

One of these standards is the *Regulation (EC) No 2152/2003 of the European Parliament and of the Council of 17 November 2003 concerning monitoring of forests and environmental interactions in the Community (Forest Focus)*[6].

The purpose of Regulation (EC) 2152/2003 is the establishment of a Community scheme on monitoring of forests and environmental interactions to protect the Community's forests.

To implement forest monitoring activities, in particular in the following areas (art.1):

-monitoring and protection of forests against atmospheric pollution;

-monitoring and protection of forests against fires;

-monitoring of biodiversity, climate change, carbon sequestration and soils.

It also supports the establishment of forest fire prevention measures.

But, for Romania, confronted with the phenomenon of illegal logging, an important impact is expected to have the *Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber*

[5] http://www.mmediu.ro/beta/domenii/paduri/politici-forestiere/

[6] Published in OJ L 324, 11.12.2003, p. 1–8

products on the market[7]. It shall apply as from 3 March 2013, except the articles 6(2), 7(1), 8(7) and 8(8) which are in force from 2 December 2010.

Illegal logging is a pervasive problem of major international concern. It poses a significant threat to forests as it contributes to the process of deforestation and forest degradation, which is responsible for about 20 % of global CO2 emissions, threatens biodiversity, and undermines sustainable forest management and development including the commercial viability of operators acting in accordance with applicable legislation. It also contributes to desertification and soil erosion and can exacerbate extreme weather events and flooding. In addition, it has social, political and economic implications, often undermining progress towards good governance and threatening the livelihood of local forest-dependent communities, and it can be linked to armed conflicts. Combating the problem of illegal logging in the context of this Regulation is expected to contribute to the Union's climate change mitigation efforts in a cost-effective manner and should be seen as complementary to Union action and commitments in the context of the United Nations Framework Convention on Climate Change.

The Regulation (EU) No 995/2010 is a follow-up *of The Commission Communication of 21 May 2003 entitled "Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan"* which proposed a package of measures to support international efforts to tackle the problem of illegal logging and associated trade in the context of overall efforts of the Union to achieve sustainable forest management.

Given the major scale and urgency of the problem, it is necessary to support the fight against illegal logging and related trade actively, to complement and strengthen the FLEGT VPA initiative and to improve synergies between policies aimed at the conservation of forests and the achievement of a high level of environmental protection, including combating climate change and biodiversity loss.

On the basis of a systemic approach, operators placing timber and timber products for the first time on the internal market should take the appropriate steps in order to ascertain that illegally harvested timber and timber products derived from such timber are not placed on the internal market. To that end, operators should exercise *due diligence* through a system of measures and procedures to minimize the risk of placing illegally harvested timber and timber products derived from such timber on the internal market(art. 4(2)).

[7] Published in OJ L 295, 12.11.2010, p. 23–34.

An *obligation of traceability* is retained for traders which shall, throughout the supply chain, be able to identify (art.5):
(a) the operators or the traders who have supplied the timber and timber products; and
(b) where applicable, the traders to whom they have supplied timber and timber products.
Traders shall keep the information referred to in the first paragraph for at least five years and shall provide that information to competent authorities if they so request.

The due diligence system includes three elements inherent to risk management: access to information, risk assessment and mitigation of the risk identified. The due diligence system should provide access to information about the sources and suppliers of the timber and timber products being placed on the internal market for the first time, including relevant information such as compliance with the applicable legislation, the country of harvest, species, quantity, and where applicable sub-national region and concession of harvest. On the basis of this information, operators should carry out a risk assessment. Where a risk is identified, operators should mitigate such risk in a manner proportionate to the risk identified, with a view to preventing illegally harvested timber and timber products derived from such timber from being placed on the internal market.

1. The due diligence system referred to in Article 4(2) contain the following elements(art.6(1):

(a) measures and procedures providing access to the following information concerning the operator's supply of timber or timber products placed on the market:

- description, including the trade name and type of product as well as the common name of tree species and, where applicable, its full scientific name,
- country of harvest, and where applicable:

(i) sub-national region where the timber was harvested; and

(ii) concession of harvest,

- quantity (expressed in volume, weight or number of units),
- name and address of the supplier to the operator,
- name and address of the trader to whom the timber and timber products have been supplied,
- documents or other information indicating compliance of those timber and timber products with the applicable legislation;

(b) risk assessment procedures enabling the operator to analyze and evaluate the risk of illegally harvested timber or timber products derived from such timber being placed on the market.

Such procedures shall take into account the information set out in point (a) as well as relevant risk assessment criteria, including:

- assurance of compliance with applicable legislation, which may include certification or other third-party-verified schemes which cover compliance with applicable legislation,
- prevalence of illegal harvesting of specific tree species,
- prevalence of illegal harvesting or practices in the country of harvest and/or sub-national region where the timber was harvested, including consideration of the prevalence of armed conflict,
- sanctions imposed by the UN Security Council or the Council of the European Union on timber imports or exports,
- complexity of the supply chain of timber and timber products.

(c) except where the risk identified in course of the risk assessment procedures referred to in point (b) is negligible, risk mitigation procedures which consist of a set of measures and procedures that are adequate and proportionate to minimize effectively that risk and which may include requiring additional information or documents and/or requiring third party verification.

In order to facilitate the ability of operators who place timber or timber products on the internal market to comply with the requirements of this Regulation, taking into account the situation of small and medium-sized enterprises, Member States, assisted by the Commission where appropriate, may provide operators with technical and other assistance and facilitate the exchange of information. Such assistance should not release operators from their obligation to exercise due diligence.

Competent authorities should monitor that operators effectively fulfill the obligations laid down in this Regulation. For that purpose the competent authorities should carry out official checks, in accordance with a plan as appropriate, which may include checks on the premises of operators and field audits, and should be able to require operators to take remedial actions where necessary. Moreover, competent authorities should endeavor to carry out checks when in possession of relevant information, including substantiated concerns from third parties.

A monitoring organization shall:

(a) maintain and regularly evaluate a due diligence system as set out in Article 6 and grant operators the right to use it;

(b) verify the proper use of its due diligence system by such operators;

(c) take appropriate action in the event of failure by an operator to properly use its due diligence system, including notification of competent authorities in the event of significant or repeated failure by the operator.

Member States should ensure that infringements of this Regulation, including by operators, traders and monitoring organizations, are sanctioned by effective, proportionate and dissuasive penalties. National rules may provide that, after effective, proportionate and dissuasive penalties are applied for infringements of the prohibition of placing on the internal market of illegally harvested timber or timber products derived from such timber, such timber and timber products should not necessarily be destroyed but may instead be used or disposed of for public interest purposes.

The penalties provided for must be effective, proportionate and dissuasive and may include, inter alia (art.19(2):

(a) fines proportionate to the environmental damage, the value of the timber or timber products concerned and the tax losses and economic detriment resulting from the infringement, calculating the level of such fines in such way as to make sure that they effectively deprive those responsible of the economic benefits derived from their serious infringements, without prejudice to the legitimate right to exercise a profession, and gradually increasing the level of such fines for repeated serious infringements;

(b) seizure of the timber and timber products concerned;

(c) immediate suspension of authorization to trade.

In the processes supervision of the Regulation the Commission shall be assisted by the *Forest Law Enforcement Governance and Trade (FLEGT) Committee* established under Article 11 of Regulation (EC) No 2173/2005[8].

[8] Published in OJ L 347, 30.12.2005, p. 1-6.