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The importance of interpreting the commercial contract in scheduling the production of a Romanian business operator

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Abstract: *Part of scheduling the production is complying with the conditions of the commercial contract, which is the foundation of the relation between the client and the business operator that performs its activity in the area of the industrial production. In case the compliance with the contractual obligations raises issues, it is required to interpret the commercial contract according to the provisions of the Romanian Civil Code. This work aims at presenting and analyzing these rules of interpreting the commercial contract, which are not provided in the special stipulations of the law applied to the business field, so that one shall consider the rules common to the private law, i.e. the juridical norms provided by the legislation of the civil law.*

Key-words: *business operator, scheduling the production, interpreting the commercial contract*

1. Commercial contract

The profit ids the main purpose of any economic activity. As happened in practice, it is possible that certain companies perform commercial activities recording loss. (Turcu 2008, 54)

The commercial activity means concluding commercial contracts. These contracts are concluded, between (two or more) business operators or between a business operator and consumer/consumers. (Poţincu 2015, 154-161)

Commercial contract we consider it can be defined reporting to the legal definition of the civil contract [Law no. 287/2009, Title II, Chapter I (art. 1166)], as being the will agreement between two or several persons in order to constitute, change or extinguish between them a commercial juridical relation, where at least one of the contractual parties has the quality of business operator, as can be seen in figure no. 1.

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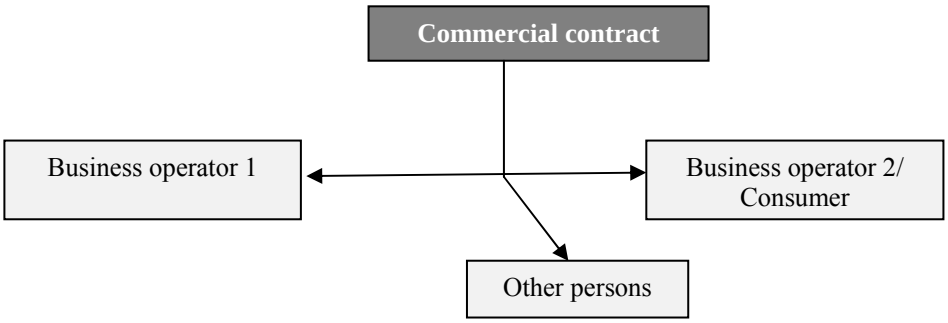

Fig. 1

The Civil Code in force uses the term professional. Considering that this normative document regards the entire field of the private law, including commercial or business law, we consider that the term "professional" can be used, besides the term "business operator", in the law applied to the production field. However, the term "**business operator**" seems to be adequate to us in order to be used in the commercial law or business law field, especially because it is used by the Romanian consumer protection legislation, particularly by the Consumption code, which defines it, in the Annex, as the "**individual/natural or legal authorized person**, which **within their professional activity, manufactures**, imports, stores, transports or commercializes products or parts of them, or provides services".

Although both the business operators/professionals, and the non-professionals can be subjects of the commercial relations, the commercial and production activity is mainly performed by the business operators/professionals.

Also, the business operator is one of the subjects of the relation pertaining to the consumer protection juridical institution.

The business operators are divided into: individual traders (individual business operators) and companies (collective business operators). Although these are the main categories of business operators, they are not the only categories. Art. 1 align. (2) of Law no. 26/1990, republished in 1998, adds the self-governed companies and corporate organizations. Law no. 161/2003 regulates a new category of business operators: economic interest groups.

The New Civil Code, in art. 3, stipulates its express enforcement in the field of the commercial law: "the dispositions of this code are also applied to the relations between professionals, as well as to the relations between them and any other civil law subjects".

The New Civil Code further offers a legal definition of the term "professional", a term which replaces the term "trader". Thus, the professionals are all those who exploit an enterprise, while the exploitation of an enterprise is the systematic exertion, by one or several persons, of an organized activity which

consists in the manufacturing, administration or alienation of goods or provision of services, irrespective of whether it has a lucrative purpose or not.

Therefore, we consider it adequate for this study, aiming at the special field of commercial law or business law, applied to the commercial production, the use of term ”**business operator**”, a term specific to the business area, not the term ”professional”, a general term referring to the entire private law.

1.1. General elements on commercial contract

Companies become professionals as soon as they "emerge”, i.e. as soon as they fulfill all actions required by their valid incorporation. From that moment on, they shall sign several commercial contracts – written or unwritten – both with other business operators, and with consumers – natural persons as provided by the consumer protection legislation.

This definition for commercial contract highlights the juridical nature of the contract: the commercial contract is a bilateral juridical act or, if it is about more than two parties, multilateral, its nature being to produce juridical effects followed by contractual parties in accordance with the provisions of commercial law.

Juridical effects can consist of initiating, changing or, as applicable, extinguishing commercial juridical relations, as shown by figure no. 2. (Poțincu 2013, 112-127). We consider that, in case one of the contractual parties is an individual/natural person, consumer according to the legislation for consumer protection in Romania, this is not applied the commercial legislation, but civil and consumer protection laws.

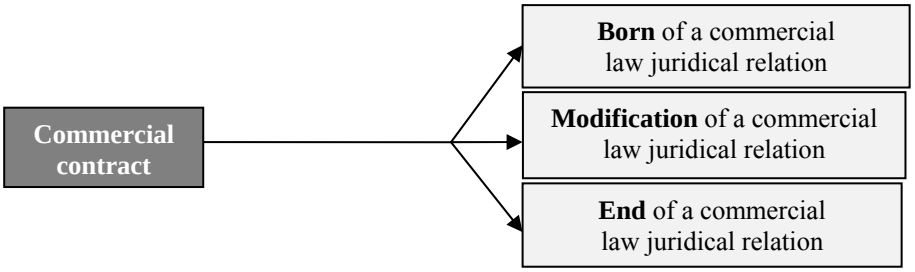

Fig. 2

As far as the contract analysis is concerned – both the civil contract, and the commercial contract – it is important to emphasize that it is not possible to limit the freedom of each contracting party to decide about the conclusion of a certain contract with a certain person, following to negotiate the main and circumstantial contractual clauses, the conditions to modify and cease contractual relations etc. These aspects concretize the **principle of liberty of will** in the contract matter. (Bîrsan, Beleiu, et al. 2006, 247-248)

The Civil Code provides this principle related to the freedom to contract within the content of art. 1169 NCC. The civil law stipulates that the parties, individuals/natural and legal persons, are free to conclude any contracts and to determine their content. This freedom is limited only by law, by public order or by appropriate behavior.

Thus, as long as law does not set forth certain obligatory aspects, the subjects of a contract can negotiate their clauses as they want to. Also, the clauses of the contract concluded must consider public order and appropriate behavior.

The parties of the contract must act in good faith during the contractual negotiation step, during the one for contract conclusion, and during all its execution. This aspect is obligatory and cannot be derogated by contractual negotiation from it. In this respect, art. 1170 par. (1) thesis 2 NCC stipulates "they [parties] cannot remove or limit this obligation" to act in good faith for carrying out and applying the contract. Thus, the insertion by one of the co-contracting parties of unclear contractual clauses which would be favourable to him against the knowledge and will of the other con-contracting party is a violation of the law, which could easily be corrected by the court or arbitration committee, in case the parties have chosen this fast way of solving the disagreements in executing the contract. (Poțincu 2015, 161-164)

1.2. Interpreting the commercial contract

As for interpreting the contract, one shall enforce the general provisions of the Civil Code, provided in Section 5, in the absence of any special provisions of the commercial field.

Art. 1.266 CC stipulates in its first paragraph that "contracts are interpreted according to the concordant will of the parties, and not according to the literal meaning of the terms". Thus, it is important which rights and obligations both parties have understood to provide in the contract, and not which grammatical subtleties one of the parties has used in order to try to deceive the other party. In the business field, this provision is a protection of a normal correct and commercially reasonable contractual relation. An abnormal attitude is the violation of this provision, and could easily be corrected by the court or arbitration committee, in case the parties have chosen this fact way of solving the disagreements in executing the contract.

Paragraph 2 completes the previously analysed provisions, and aims at the wish/will test of the co-contracting parties. Thus, the proofs which can test the will of the parties regard: the purpose of the contract, the negotiations between the parties, the practices settled between them, and the behavior of the parties after signing the contract. These aspects can test the entire context of signing the commercial contract by any business operator, including the one operating in the industrial production field.

Also, in interpreting the commercial contracts they shall consider the provisions of art. 1.267 CC ”the clauses are interpreted one through the other, giving each of them the meaning resulting from the whole of the contract”. Thus, it would be obvious that one of the parties shall attempt at grammatically manipulating the will of the other party by analyzing the entire contract, where an obligation assumed by one of the contractors in another direction than the rest of the contractual obligations would be bizarre.

As for the doubtful clauses, they are interpreted in the sense provided by art. 1.268 CC. ”The clauses susceptible by several meanings are interpreted in the sense that best meets the nature and object of the contract” provides paragraph 1. Thus, such a purchase agreement (onerous agreement by its very nature) of a computer, for instance, cannot include a contractual clause which is specific to the donation contract (gratuitous contract), so the business operator manufacturing that computer cannot oblige itself to sell that product for a much lower price than that of the components of the product.

Moreover, paragraph 2 substantiates the direction aimed at by the legislator in the private law field: ”the doubtful clauses are interpreted considering, among others, the nature of the contract, the circumstance under which it has been signed, the previous interpretation given by the parties, the meaning generally attributed to the clauses and expressions in the field and customs”. Thus, in case the used terms can have several meanings, and one of the parties would take advantage of this aspect, the court would consider their general meaning used in a field or in the custom of that field. Moreover, one shall consider the nature of the contract, the circumstances under which it has been concluded and the interpretation of these terms within the negotiation process.

Obviously, ”the clauses are interpreted in the sense that they can produce effects, not in that in which they would not produce any”. The very meaning of signing a civil/commercial document is producing juridical effects; in this respect, it would be nonsensical that one of the clauses be inserted in the contract without producing an effect.

Also, in interpreting the commercial contract concluded by the business operator, the object would be the one negotiated between the parties, even though the general terms used within the contract would also allow the inclusion of other products and/or services. In this respect, paragraph 4 of art. 1.268 CC stipulates that ”the contract only includes the thing on which the parties have set themselves to contract, no matter how general the used terms would be”.

Thus, if paragraph 4 does not allow the extension of interpreting the contract regarding its object, paragraph 5 does not allow the restriction of interpreting the contract to the examples included in it: ”the clauses meant to exemplify or remove any doubt of applying the contract to a particular case do not restrict its application in other cases which have not explicitly been provided”.

As a final rule in interpreting the commercial contract – including the one signed by a business operator performing in the industrial production field – a rule which is only applied after using the ones previously provided in Section 5 of the Civil Code, we keep in mind: ”the contract is interpreted in favour of the one who obliges itself”. The justification of this manner of interpretation consists in the fact that the weight of bearing the concluded commercial contract lies on ”the shoulders” of the one who obliges itself, and the issues to arise aim at the execution of the obligation which provides a benefit to the other party.

Paragraph 2 of art. 1.269 aims at a certain type of contracts in the case of which one of the parties has not negotiated certain clauses, namely the membership agreements. They are interpreted against the party which has suggested the clauses of the membership agreements. The justification resides precisely in the lack of negotiation, i.e. the will expressed by one of the co-contracting parties, which only accepts the clauses imposed by the other co-contracting party.

2. Scheduling the production of a business operator which performs on the Romanian market and the contract interpretation process

Scheduling the production of a business operator is a detailed activity, which aims at breaking down the production tasks into short intervals, with reference to products, subassemblies, references. (Limbăşan 2014, 150-155)

The time frame considered in the case of scheduling is short and very short, varying from one hour to one month or decade.

Scheduling is subject to planning; the entirety of the manufacturing schedules from a certain time frame shall provide the fulfillment of the indicators stipulated by the plan, for the set period.

In scheduling the production, the production capacity is considered to be given and sufficient, while the issue of balancing it with the loading is solved at the previous level of planning.

The scheduling of production is a form of planning whose objective is the time phasing of certain activities (operations) and allocating available resources (machine tools, work force, financial resources) under the conditions of complying with certain performance criteria.

The main objective of scheduling production is to perform the production task defined by the loading plan, within an optimal time frame and with the best use of resources.

Scheduling production is the distribution in time and space of the production tasks for a certain time frame. This distribution is made while complying with the structure of the products and manufacturing technologies of these products. One shall also consider the rational use of the resources and compliance with the contractual conditions. (Abrudan 2002, 473-558)

However, complying with the conditions of the commercial contract is not everything, because there can be several problems in executing the contract, which shall lead to the interpretation of the contract. In this case, one shall consider the previously analysed rules, provided by the Civil Code.

Scheduling production aims at all the activities involved by the production system: manufacturing, supply, retail, transportation, etc. Scheduling the manufacturing retains the largest weight of all.

3. The influence of enforcing the contractual clauses in the process of scheduling the production of a business operator performing his activity on the Romanian market and the process of interpreting the contract

As for the contractual relations between the business operators performing their activity on the Romanian market and to whom the Romanian law is applied, we consider that the manner of interpreting the contract, in case less clear contractual clauses occur (deliberate or not), can have a strong limitation role in the process of scheduling the production of those business operators.

Part of scheduling production is complying with the conditions of the commercial contract, which is the foundation of the relation between the client and the business operator performing his activity in the industrial production. Normally, complying with the contractual provisions should not raise any issues, but there can be cases in which it is required to interpret the commercial contract according to the provisions of the Romanian Civil Code.

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