NON-COMPETITION CLAUSES IN COMMERCIAL CONTRACTS

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Abstract
We begin with an analysis of areas where rivalry between economic agents can not show (any act of competition committed in this area drawing the liability of the author), we will then analyze competition in relations between the trader and servant or other employees and continue with the analysis of the legal ban on competition in the limited liability companies and joint stock companies.
So, the relevant provisions of Law 31/1990 are reviewed, views of legal doctrine and practice of judicial rulings on the nature and purpose of the relevant provisions referred to, their scope, applicability of statutory prohibition against competition in the profile activity of the company, the prohibition in the liquidation phase, procedural methods which can cover damage caused to the creditor's violated rights, as well as statute of limitations for the right to action and prescription.

Keywords: *Competition Council, non-competition, commercial code, civil code, labor code*

Introduction

Given the very high interest, in the current economic context, regarding the topic proposed for the study below I considered being important the summarization of the most important and most used aspects from the field mentioned in a material as practical as possible.

Non-Competition Clauses in Commercial Contracts

Taking into account that, a functional market economy involves the existence of an undistorted competitive environment, within which the enterprises would act freely on the market, without being affected by the unequal behavior of other enterprises, possibly located in a dominant position, or by the intervention of the state.

Also that, through the competition policy is sought to maintain an efficient competition status which would lead to the achievement of the economic progress, of a favorable climate for innovations and technical progress, **the policy in the competition field** represents a major structural factor in supporting the national economy in the process to adapt to the new competition environment created in the context of globalization.

Often, the concept of competitive market was associated with that of the democratic society, where no natural or legal person is allowed to exercise unjustified his power on another natural or legal person.

In the Romanian legal doctrine, **the completion right** was defined as being the set of rules meant to ensure, in the internal and international market reports, the normal exercise of the competition between the economic operators, in the fight to win, keep and extend the customers.

The main components of the competition right are represented by a complex of specific rules, forming the legal framework; an appropriate economical ambiance, consisting of a free market, the existence and ways to exercise the economical competition, the competition relations between economic operators.

The present paper proposes to analyze the non-competition clause concept, examining this notion both for individual commercial relations as well as within legal reports regarding goods and services circulation.

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Also, will be examined by comparison other clauses frequently met in commercial contracts, like, for example, the exclusivity clause in the distribution contracts, as well as clauses inserted, in practice, in the individual employment contracts, next to the non-competition clause, thus wanting to achieve a conceptual delimitation.

However, there are also fields closed by law for the commercial competition. For example art. 2 par. 4 from the Competition Law no. 21/1996 establishes that **this law is not applied on the labor and work relations market.** They are subjected to a specific legal system, being instituted efficient measure to protect the employees, both by Labor Code, as well as by the Romanian Constitution.

According to the Constitution of the International Labor Organization, „the labor is not a merchandise", reason for which the labor is not subjected to legal regulations regarding competition or legal regulations regarding added tax value.

Art. 41 par. 2 from the Romanian Constitution provides that the employees have the right to social protection measures. These concern the safety and health of employees, the working regime for women and young people, the institution of a gross minimum salary in the country, weekly rest, paid annual leave, work provision in particular or special conditions, professional formation, as well as other specific situations, established by law.

Consequently, the competition cannot manifest regarding the following aspects: work safety and health, maximum duration of working time, annual leave, establishing the retiring age for old age, social insurances, minimum salary, all these aspects being regulated through legally binding rules from labor legislation and social security legislation.

There are also competition interdictions regarding the reports between trader and suspected or other employees.

The legal reports between trader and suspected are regulated by the provisions of art.392 – 400 of the Commercial Code.

According to art.392 from the Commercial Code, the suspected is that entrusted with the trade of his employer, whether where he exercises it, or other place. Thus, **the suspected is a trade auxiliary** who substitutes the trader, representing in a stabile way his enterprise and concluding legal documents for and on behalf of the trader. From the analysis of the legal norms results that the suspected is at the same time an enterprise leader and a representative.

The suspected acquires this quality based on an employment contract concluded with the trader, a contract by which the suspected acquires a general and permanent representation power. The supposed has the obligation to keep the commercial registers of the person who employed him, as well as the obligation not compete with him.

Thus, art.397 of the Commercial code institutes **a competition interdiction against your own employer**: the suspected cannot, without the express consent of the employer, perform operations, or take part, in his own behalf or of another, to other trades of the same nature with that he is entrusted with. Contrary, the suspected is responsible for damages, the employer also having the right to retain for himself the benefits resulting from these operations.

Thus, for the unfair competition, those facts are made on a field on which the competition is allowed, in such cases being in discussion exclusively the morality of the means used.

The essential condition for the applicability of the provisions of art.397 of the Commercial Code is that the trade acts made to be similar to the commerce performed by the employer, respectively the activity should be performed in the same specialized functional sector of goods or services production.

Art. 397 of the Commercial Code shows that it is possible an express consent of the employer to remove the legal interdiction. It was considered that this provision may be applied, by extension, to any employee, taking into account the principle of free conventions.

As for the regular employees of a trader, the interdiction is provided by art. 4 par. 1 let. a of Law no. 11/1991 regarding the fight against unfair competition and refers to ***the provision of services, by the exclusive employee of a trader to a competitor or the acceptance of such an offer.***

Thus, the legal provision takes into account both the actual performance of the fact, referring to the will agreement concluded by the employee with a competitor of the employer, as well as a simple action of the employee in this respect, unfinished, namely, the service offer not followed by acceptance.

The service offering by an exclusive employee of a trader to the benefit of a competitor or the acceptance of such offer constitutes a contravention punishable by fine, according to art.4 par. 2 of Law no.11/1991. If the employee commits such act, by which are caused patrimonial or moral damages, against the provisions of art.9 from Law no. 11/1991, the prejudiced one is entitled to address to the competent court with the appropriate civil liability action.

Consequently, the employer is entitled to formulate against the employee a civil liability action, to grant compensations for the damages produced, including the moral ones, according to art.6 and art.9 of Law no.11/1991. By Law no. 11/1991 regarding the fight against unfair competition, published in the Official Gazette no. 24 from 30 January 1991 modified by Competition Law no. 21/1996 and Law no. 298/2001, as well as Government Emergency Ordinance no. 121/2003, with the subsequent modifications it is accepted that the person who commits an act of unfair competence will be forced to stop or remove the act, to return the confidential documents illicitly appropriated from their lawful owner and, as appropriate, to pay compensations for the damages caused, according to the legislation in force.

Furthermore, according to art.4 par. 5 from Law no. 11/1991, "in the cases of unfair competition affecting significantly the functioning of competition of the relevant affected market" may be notified to the Competition council to solve the case according to the provisions of Competition Law no. 21/1996.

As for the report between the provisions mentioned of art.397 of the Commercial code regarding the suspected and the interdiction instituted by art.4 par.1 let. a of Law no. 11/1991 concerning other employees of a trader, it was considered that the restriction does not have an unitary legal regime, the regulations lacking in sufficient coordination. In this respect, it was criticized the qualification of facts provided by art. 4 par. 1 let. a of Law no. 11/1991 as being unfair competition, in reality this instituting a competition interdiction.

In case of failure to comply with the competition interdiction by the suspected, art. 397 par. 2 of the Commercial Code provides that he may be forced to repair the prejudice incurred by the employer. Thus, the suspected is responsible for damages, in the conditions of art. 1084 of the Civil Code, indemnifying the employer for the loss incurred and the benefit not achieved. Also, the employer has the power to substitute to the suspected to collect the benefits of operations concluded without right with third persons. Thus, the employer is entitled to hold for himself the benefits resulting from these operations.

We consider that, if the employer has chosen the alternative to substitute to the suspected, he losses the possibility to initiate auxiliary the compensation action, if he finds that the benefits of those operations are inferior to the prejudice incurred, although he had estimated them as superior. Thus, the purpose of the interdiction is that to protect the trader from possible loss caused to his enterprise, by committing by the suspected the prohibited actions. If the trader chooses to take over the operations concluded by the suspected with third persons, the purpose of the mentioned provision is achieved, not existing any more competition acts made by the suspected, those actions being made by the trader himself.

If the employer has exercised the action in compensations and then he finds that there are damages which were not covered, as they were not taken into account when pronouncing the decision, he may formulate a new action, to the extent in which it is about new prejudices, caused by the same fact.

If the employer understood to substitute to the suspected, as it is shown above, the operations made by the suspected, by which the competition interdiction was breached, become of the employer, who thus supports both the benefits, as well as the loss generated by those operations.

Apart from the sanctions mentioned, the fact consisting of the breach of the competition interdiction, whether it is made by the suspected or other employees, constitute a breach of the obligations arising from the employment contract being applicable the disciplinary sanction of the termination of the employment contract.

Consequently, according to art. 61 let. a) of Labor Code, the employer may decide the dismissal for grounds pertaining to the employee, if he has committed a serious breach or repeated breaches from the rules (...) established by the individual employment contract, the applicable collective employment contract, or the internal regulations, as a disciplinary sanction.

Art. 61 let. a of Labor Code should be corroborated with art. 264 par. 1 let. f of Labor Code, that provides, as the most severe disciplinary sanction, the disciplinary termination of the employment contract. Consequently, the employer may decide the disciplinary dismissal in case of repeated breaches of work obligations, like the performance of unfair competition fact or the breach of interdictions provided by the non-competition clause.

There is also a competition interdiction against joint stock companies.

Joint stock company is the company whose obligations are guaranteed with the social patrimony and the liability of the associates for the social obligations is limited, the shareholders being obligated only until the competence of the subscribed nominal share capital. The nominal share capital is divided in actions, negotiable and transferable titles.

In the previous drawing, according to art. 145 par. 5 of Law no.31/1990, the direction committee members and the directors of a joint stock company could not be, without the authorization of the administration council, administrators, members in the direction committee, censors or unlimited liability associates, in other competing companies with the same object, neither exercising the same trade or other competitor, on his own or on other person, under the punishment of cancellation and liability for damages.

This article was abrogated by Law no. 441/2006, by which was introduced art. 15315. According to this article, the directors of a joint stock company, in the unitary system, and the directorate members, in the dualistic system, cannot be, without the authorization of the administration council, respectively the supervision council, the directors, administrators, members of the directorate or supervision council, censors or, as appropriate, internal auditors or associates with unlimited liability, in other competing companies with the same activity object, cannot either exercise the same trade or other competitor, on his own or on other person, under the punishment of cancellation and liability for damages.

The compliance with this obligation means the removal or limitation of any conflict of interests between these persons and the commercial company.

The competition restriction regarding the directors is more pronounced, besides the position of administrator, as they cannot be either censors or unlimited liability associates to another competitor company with the same object. This regulation is explained in that, as the directors exercise the operative management of the company, they need enough time to be allocated to this position.

The interdiction mentioned includes the two modalities to commit the competition acts, namely, the direct competition, consisting in the fact that the persons mentioned cannot exercise the same trade or another competitor, on their own or on other person, as well as the indirect competition. The latter involves that the people mentioned cannot be directors, administrators, members of the directorate or of the supervision council, censors or, as appropriate, internal auditors or associates with unlimited liability, in other competing companies or with the same object.

There is the possibility, provided by the mentioned legal provision, to previously authorize, by the administration council, respectively the supervision council of the joint stock company, to fulfill the competitive activity by the people mentioned.

It is noted that, before being named director or member of the directorate in a joint stock company, the assigned person is forced to notify the body of the company charged with his assignment regarding any relevant aspects according to the provisions of art. 15315, as it is imposed by art. 15317 of Law no.31/1990.

As for the sanctions applicable in case of breach of the competition interdiction, under patrimonial aspect, the company may obtain the full compensation of the prejudice incurred, via the action in liability for damages, to cover the loss incurred and the benefit not achieved. The right to act belongs to the company, and not to the shareholders. Thus, according to art.155 of Law no. 31/1990, the action in liability against the directors, respectively the members of the directorate, for the damages caused to the company by them by the breach of their duties towards the company, belongs to the general meeting.

The joint stock company does not dispose of the alternative to substitute to the directors in that operation, as this possibility is not provided by law.

The Law does not provide a term to form the action, resulting that it is applied the common right in this regard, namely the general prescription term of 3 years provided by art. 3 of the Decree no. 167/195843.

If the general meeting decides to start the action in liability against the members of the directorate, their mandate ceases from the date of adopting the decision, situation in which, the general meeting, respectively the supervision council, will proceed to replace them, according to art. 155 par. 4 of Law no. 31/1990

The action in liability against the members of the directorate may also be exercised by the supervision council, after a decision of the council itself. If the decision is taken with a majority of two thirds of the total number of members of the supervision council, the mandate of those members of the directorate ceases automatically, the supervision council proceeding to replace them, according to par. 7 of the same article.

If the action is started against the directors, they are automatically suspended from their function until the irrevocable decision, under art.155 par. 5 of Law no.31/1990.

The Law provides the possibility that the action in liability be also initiated by the shareholders representing, individually or together, at least 5% of the nominal share capital.

Thus, according to art.1551 of Law nr.31/1990, they have the right to introduce an action in compensations, in their own name, but on the company's account, if the general meeting does not introduce the action in liability provided by art. 155 and does not follow the proposition of one or more shareholders to initiate such action.

However, the law provides a condition that the shareholders mentioned to be able to introduce the action in compensation, namely, the condition that they already had the quality of shareholders when it was debated within the general meeting the problem to introduce the action in liability.

The competence interdiction against the limited liability company.

The limited liability company, intermediate form of commercial company between partnerships and capital companies, is based on the trust of the associates, whose number is limited and who are responsible only to the extent of the contribution brought to the nominal share capital of the company.

The administrators of the limited liability company may be assigned through the memorandum or chosen by general meeting, among the associates or persons outside the company.

The ethical norms applied to the administrators force them not to take part to certain actions which may create suspicion against them or to injure the interest of the commercial company he manages or of the associates of the collective entity.

The regulation of the competition interdiction is provided by art. 197 par. 2 of the Law of Commercial Companies no. 31/1990, according to which the administrators cannot receive, without the authorization of the meeting of the associates, the administrator mandate in other competitive

companies or having the same activity object, neither to perform the same type of trade or another competitive one on his own or on another natural or legal person, under the punishment of cancellation and liability for damages.

The meeting of the associates may grant to the administrators the permission to compete the limited liability company, as it results from the provision mentioned.

In case of breach of the competition interdiction, under the patrimonial aspect, the company may obtain full compensation of the prejudice incurred, via the action in liability for damages, without disposing of the alternative to substitute in that operation, as this possibility is not provided by law.

The sanction applicable to the administrator committing the competition interdiction act is the cancellation, the legal provision being express. In the regard, the former Supreme Court of Justice decided that it is null the clause from the status by which it is provided the exclusion from the company of the administrator committing competition acts, as the legal sanction is its cancellation. Thus, as no more exclusion clauses may be established, the provisions of the law being binding, the clause formulated in this respect in the contract by the company is hit by the absolute nullity, situation where it cannot be revoked as ground of the action of the plaintiff, more so since the law provides the possibility to revoke from the position of administrator if it is found that the associate with the quality of administrator performs commercial activities of the same nature on his own with another trader.

The competition interdiction in regulating the new Civil Code.

According to art.1.887 of the new Civil Code, the regulations of the Code constitute common right in the matter of the companies, as the law may regulate different types of companies when considering the form, nature or activity object.

When regulating the new Civil Code, the company contract was defined, in art. 1.881, as being the contract by which two or more persons force each other to cooperate to perform an activity and to contribute to it through cash, goods, specific knowledge or provisions contributions, in order to divide the benefits or to use the resulting economy.

The company may be founded with or without legal personality, but, if, according to the will of the associates, the company will have legal personality, this may be constituted only in the form and conditions provided by the special law conferring it legal personality.

Up to the date of obtaining the legal personality, the reports between the associates are governed by the rules applicable to the simple company.

This latter type of company, without legal personality, was introduced by art. 1.888 of the new Civil Code, next to those already known in the Romanian legislation.

The administrators of the simple company may be associated or not associated. If it is not disposed otherwise by contract, the company is administrated by the associates, who have reciprocal mandate to administrate one for the other in the interest of the company.

There are also fields closed through convention to the commercial competition.

In the French legal literature, it was found that the most radical means to stop the performance of certain competition acts is to prevent the installation of another competitor. Unlike the exclusivity clause, under which the producer refuses to treat with other partners, the non-competition clauses are more radical, as through them the person interested is protected against the establishment of another possible competitor.

The non-competition clause in met in al economical activities, like, for example, the interdiction to create a competitive trade background, in case of selling the trade background, or the interdiction to get hired by another competitor, in case of the relationship trader – former employee.

Also, the clause may appear regarding the cession of the customers for the liberal professions, when the transferor undertakes not to return in the perimeter given in a given period.

However, the non-competition clause does not represent a stand-alone contract, but a convention the parties conclude in the context of another legal document.

The non-competition clause concept.

In the Romanian legal literature, it was considered that the explicit non-competition engagement is a contractual obligation assumed by a party, not to fulfill a determined professional activity, at the expense of the other party.

Thus, the non-competition clause is the engagement one contracting party assumes, namely, the debtor of the obligation, not to perform, for a certain amount of time and in a limited geographical area, a determined commercial activity, of the same nature with that performed by the other contracting party, the creditor of the obligation.

To this definition, regarding the non-competition clause from the perspective of the obligation not to perform, limited in field, time and space, **would be added** the necessity of the existence of a legitimate interest meant to be protected through the clause, interest belonging to, of course, the creditor.

The conclusion of such legal document, in the field of production and merchandise circulation, should comply with the principle of free trade, and the validity of the agreement depends on more aspects, like the nature of the clause by which the competition is narrowed, the legal position of the parties, territorial extension, interdiction duration.

Thus, the following obligations were considered incompatible with the normal competitive environment:

a) any direct or indirect non-competition obligation, whose duration is indefinite or exceeds five years; a non-competition obligation which may be tacitly renewed after a five year period will be considered as being assumed for an indefinite period;

however, this limitation of the duration to five years is not applied when the products or the services which are the object of the agreement are sold by the buyer within the spaces owned by the supplier or rented by him to third parties which are not in the group of the buyer, provided that the non-competition obligation would not exceed the duration of using the spaces by the buyer;

b) any direct or indirect obligation determining the buyer, that after the expiry of the agreement, not to manufacture, buy, sell or resell products or services, except when this obligation:

- regards products or services in competition with those which are the object of the agreement,
- is limited to the spaces where the buyer has operated during the agreement,
- is indispensable to protect the know-how transferred by the supplier of the buyer, provided that the duration of such non-competition obligation should not exceed one year from the expiry of the agreement; this obligation with reference to the one year term should not affect the possibility to prohibit the use and revelation of know-how which did not became public, for an indefinite period;

The relevant market includes a product or group of products and the geographical area they are produced and/or sold on. The relevant market of the product includes all products considered by the buyers as being interchangeable or substitutable, due to their characteristics, price and use.

The relevant geographical market includes the area where are located the economic operators involved in the delivery of products included in the market of the product, area in which the competition conditions are homogenous enough and which may be differentiated in neighboring geographical areas due to, especially, some competition conditions substantially different.

These principles are also applied to define the relevant market for services (Competition Council Instructions regarding the definition of the relevant market, in order to establish substantial parts of the market from 26.03.2004 published in the Official Gazette, Part I no. 288 from 01.04.2004).

c) any direct or indirect obligation determining the members of a selective distribution system not to sell the products to certain competitor suppliers.

According to the Regulation from 05.04.2004 regarding the application of art. 5 par. 2 from the Competition Law no. 21/1996, "the non-competition obligation" represents any direct or indirect obligation prohibiting the buyer to produce, buy, sell or resell products or services supplied or provided by the competitor economic operators, considered substitutable or interchangeable with the products or services making the object of the agreement, or any direct or indirect obligation requiring to the buyer to purchase from the supplier or from another economic operator assigned by the supplier more than 80% from its total purchase – summing up so many products or services provided in the contract, as well as interchangeable or substitutable products or services present on the relevant market - calculated based on the values of the purchase made during the previous years.

In the contracts concluded between the parties, the non-competition clause may be expressed or implicit, in the latter case resulting from the interpretation of that contract. In the Romanian law, implicit clauses may be considered those resulting from equity, habit or law, according to art. 970 of the Civil Code, the nature and purpose of the contract, according to art. 981 of the Civil Code and from the principle of good faith.

For the international commercial contracts, the UNIDROIT Principles provide, in art. 5.1.1, that the contractual obligations of the parties may be expressed or implicit.

It was stated that certain non-competition clauses represent restrictions collectively indispensable towards the nature and purpose of the contract, situation in which those clauses would not be regarded as competition restrictive.

The non-competition clauses are most frequently met in the selling contract of a trade background, of renting a space or commercial place, of exclusive concession to distribute merchandise.

Non-competition clause and exclusivity clause.

Usually, the parties provide exclusivity clauses in the distribution contracts, the ones of agent, of exclusive concession, of franchise.

In case of *agent* contract, the exclusivity clause has in view the monopoly given to the agent to negotiate and possibly to conclude commercial contracts in the name and on the account of the *principal*, in a certain field of activity, on a certain territory established by the parties or towards certain customers.

The exclusivity the agent benefits from *may be absolute*, in which case the *principal* cannot perform commercial operations directly or through other *agents* within the exclusivity sphere the *agent* benefits from according to the contract. In such cases, as a general rule, the exclusivity given to the *agent* is accompanied by his obligation to achieve a minimum turnover being also provided sanctions for its breach. These sanctions may consist of removing or restraining the exclusivity, or even the termination of the contract concluded between the parties.

The exclusivity the agent benefits from *may be relative*, in which case through the contract concluded between the parties the principal reserves his right to sell his own products directly in the exclusivity area given to the *agent. The Principal* will be able to sell his products in this area to certain determined clients, or, if this possibility refers to any client, usually will be stipulated his obligation to pay to the agent a commission, depending on the value of the merchandise sold on his territory.

Specifically, it may be **a combination between these two clauses** within the agency contract. As for the agency services it offers, an *agent* is, generally, an independent *economic operator*, an *enterprise in the sense of art. 81 of the Treaty*. Thus, the clauses from an agency contract by which the *principal* transfers to the *agent* exclusive rights regarding certain clients or territories (the

exclusivity clause) or, on the contrary, oblige the agent not to act in the name of other principals (the non-competition clause) should be evaluated in reference to art. 81 par. 1 of the Treaty. The jurisprudence is oriented to this point of view when there are involved cases where an *agent* acts in the name of one or more *principals* or acts partly for a *principal* and partly in his behalf.

In case of **exclusive concession** or **distribution** contracts it may be inserted an **exclusivity clause to the benefit of both parties** or only of the concessionaire or grantor.

The exclusive concession framework agreement sets complex intermediation forms, over a longer period of time, having an *intuitu personae* character and giving birth to a close and constant collaboration between the parties. Thus, the concessionaire assumes the obligation to contribute in promoting the activity of the grantor, and in the context of the collaboration, the grantor assumes a refraining obligation, consisting in excluding any competition act made as damage to the concessionaire. The concessionaire may assume the obligation to refrain from competition acts for a determined period of time after the termination of the contract.

The sale exclusivity is the exclusivity in the favor of the concessionaire and involves the situation in which the grantor undertakes to sale his merchandise, in a determined geographical area, only through the concessionaire.

The buying exclusivity is the exclusivity stipulated only to the benefit of the grantor and involves the situation in which the clause contains the obligation of the concessionaire to supply exclusively with merchandise from the grantor.

The buying exclusivity is total in fewer cases, as in general it is granted to the concessionaire the right to supply from other suppliers as well to the extent of a percentage, established by contract, from his turnover.

The exclusivity clause may be stipulated in the favor of both parties, thus having a bilateral and reciprocal character, situation in which each contracting party will have the quality of creditor of the exclusivity right established in his favor and debtor of the exclusivity obligation established in the favor of the other party.

As for the categorical exemption provided by article 2 of the Regulation no. 2790 / 1999, article 5 let. a) provides that a non-competition obligation tacitly renewable by exceeding a five year period should be considered as concluded for an indefinite period and thus it is not comprised in the maximum 5 year period allowed by the Regulation.

The exclusivity clause may be analyzed as an auxiliary restriction for agreements to create a new company.

The criteria according to which it is appreciated if an exclusivity clause is an auxiliary restriction are the following:

1. the clause should be directly connected to the operation;
2. the clause should be objectively necessary for the performance of the operation;
3. the effects of the clause should be proportioned to the purpose followed.

In this context, the fact that the clause would be necessary to allow the new company to consolidate its market position is not relevant for the classification of this clause as being an auxiliary restriction.

Another analysis criterion is that of proportionality. An exclusivity clause for an initial period of 10 years is excessive taking into account that the new company should consolidate its market position before the end of this period. It cannot be excluded the possibility that an exclusivity clause, although initially designated to strengthen the competitive position of the new company on that market, ultimately to allow that, in a few years, to eliminate the competition on that market.

Non-competition clause in labor law.
The relation between the non-competition clause and fidelity obligation of the employee.
The regulation of the non-competition clause in Labor Code. Non-competition clause.

Prior to the entrance in force of the Labor Code, in the legal doctrine and practice there was a controversy regarding the validity of the non-competition clauses in the individual employment contract.

The admissibility of these clauses was sustained by invoking the necessity to make a reasonable compromise between the principle of free labor and the principles of market economy and fair competition.

In the legal practice it was considered that a non-competition clause contained in the individual employment contract, regarding the period after the termination of the contract, is inadmissible, as it limits a fundamental right of the citizen, namely to work.

It was considered that a clause by which the employee is prohibited to exercise any other professional activity in the period he is employed with an individual employment contract is unconstitutional and unequal as it prejudices the constitutional principle of free labor.

In the current regulation, according to art.38 of the Labor Code the employees cannot give up their rights recognized by law. Any transaction seeking to give up the rights recognized by law of the employees or the limitation of these rights is invalid.

As for the obligations of the employee, he has, among others, the obligation to comply with the provisions contained in the internal rules, in the applicable collective employment contract, as well as the individual employment contract, the fidelity obligation to the employer when executing the work duties, as well as the obligation to keep the work secret.

As it has an *intuitu personae* character, the individual employment contract implies from the employer a special trust in his employee. To this trust should correspond a correlative fidelity obligation of the employee to the employer.

Although the fidelity obligation and the obligation to keep the work secret are provided separately in art. 39 par. 2 of the Labor Code, they are in a report from whole to part, the first including the second.

Also, the fidelity obligation implies a non-competition obligation, even if the latter is not mentioned expressly in art.39 of Labor Code. Thus, the fidelity obligation produces its effects on the whole duration of the employment contract and involves the obligation of the employee not to undertake any action which may damage the interests of the employer, or, the competition acts against him represent such an action.

Among the aspects that may be *negotiated and included in the individual employment contract,* art. 20 par. 2 of the Labor Code lists, as being a specific clause, the non-competition clause.

It is necessary to make the distinction between the legal non-competition obligation, which exists if it is expressly established through legal norms, and the non-competition clause, representing the result of the will of the parties, by which whether it is materialized the legal obligation, or it is extended its existence, or it is established, in the silence of the law, the non-competition, as an obligation of the employee. In the conditions of a functional market economy, during the execution of the individual employment contract, the employee has the obligation not to compete with his employer.

Currently, art.21 of the Labor Code establishes that, *at the termination of the individual employment contract* or during its execution, the parties may negotiate and include in the contract a *non-competition clause* by which the employee is forced that after the termination of the contract not to provide, in his own interest or that of a third person, an activity in competition with that provided at his employer, in exchange of a monthly non-competition allowance which the employer undertakes to pay on the whole non-competition period.

Thus, the legal provision mentioned takes into account the non-competition clause which is producing its effects after the termination of the employment contract.

In the previous drawing, art. 21 of the Labor Code regulates the content of the non-competence clause for the contractual period.

Thus, the non-competition clause forces the employee not to provide, in his own interest or that of a third person, an activity in competition with that provided by his employer or not to provide an activity in the favor of a third person who is in competition with his employer. Also, the clause forces the employer to pay a monthly allowance to the employee.

After the legislative modification occurred in 2005, Labor Code no longer regulates the non-competition clause for the period of executing the individual employment contract, or the obligation of the employer to pay the employee, in this period, an allowance to comply with the non-competition clause.

We consider that, in relation to the relevant legal provisions, as they were modified, currently, for the period of executing the individual employment contract, there is a legal non-competition obligation in the task of the employee. This obligation is a legal obligation, whereas it is a component of the fidelity obligation, which is expressly provided by the law. Thus, the fidelity obligation involves that the employee will not perform any act damaging the interest of the employer, and the competition represents such act. In this situation, the law does not provide anymore the obligation of the employer to pay an allowance to the employee, obligation which is not justified, in discussion being the compliance with a legal obligation.

In this respect, it was considered that the fidelity obligation is incumbent on the employee under the law, by considering the subordination as an essential feature of the employment contract.

As for the admissible duration of the non-competition clause, according to the rule set by art. 22 par. 1 of Labor Code, in the previous drawing, the effects of the non-competition clause were produced only until the termination of the individual employment contract. Its effects could also be produced on a 6 month period after the termination of the contract for the executive positions and of maximum 2 years for management functions only if such period was expressly agreed through the contract.

Currently, art. 22 of Labor Code limits to maximum 2 years the period when the non-competition clause may produce its effects after the termination of the individual employment contract. These provisions are not applicable when the termination of the individual employment contract was produced automatically, except for the cases provided by art. 56 let. d), f), g), h) and j), or has occurred from the initiative of the employer for reasons not related to the employee.

As for the possibility of the provision of non-competition clause for a trial period, in the previous drawing, it was provided that the clause cannot be established for a trial period.

Thus, if the employee and employer provided in the contract concluded a trial period, the non-competition clause may be inserted in the employment contract only after the expiry of the trial period.

Contrary, it was expressed the point of view according to which, within the trial period, it is admissible to provide a non-competition clause in the employment contract, for management positions. We consider founded this latter point of view, also taking into account the fact that the interdiction to set a non-competition clause for the trial period was abrogated by G.E.O. no. 65/2005.

The non-competition clause produces its effects only if in the content of the individual employment contract are provided concretely: the activities prohibited to the employee on the termination of the contract, the monthly non-competition allowance amount, the period for which the non-competition clause produces its effects, third persons for whom it is prohibited to provide activities, the geographical area where the employee may be in real competition with the employer.

The monthly non-competition allowance due to the employee is not a salary, it is negotiated and is at least 50% of the average gross wages of the employee of the last 6 months previous to the termination of the contract or, if the duration of the individual employment contract was less than 6 months, of the monthly average gross wages due to him for the duration of the contract. If the employee is deprived from the benefit of this allowance, the clause has no effects.

The non-competition clause cannot have as effect the absolute prohibition to exercise the profession of the employee or the specialization he owns (art. 23 of Labor Code).

At the referral of the employee or Local Labor Inspectorate, the competent court may reduce the effects of the non-competition clause, case in which this has an abusive character.

In case of breach, by guilt, of the non-competition clause, the employee may be forced to return the allowance and, as appropriate, to damages corresponding to the prejudice he produced to the employer.

Moral damages for the breach of the non-competition clause.

In case of action for unfair competition, the conditions for engaging the tort civil liability are put into question, provided by art. 998 of the Civil Code: the prejudice, illicit act, the existence of a casualty report between the act committed and the prejudice, as well as the guilt of the fact's author. Different from these elements, it is necessary that through that fact to be committed as a competition act, committed between a competition relation, in the respect that the two competitor companies address, mainly, to the same customers, and their activity field is similar. In general, the prejudice consists of removing the customers, with the possibility to reduce the commercial ford, sales and, consequently, the turnover.

If the conditions listed above are fulfilled, having as consequence the engagement of the tort civil liability, Law no. 11/1991 provides expressly the possibility to grant moral damages.

Furthermore, even the contract concluded between the parties provided the possibility to grant moral damages for the breach of the non-competition clause.

Non-competition clause in the agreements to create a new commercial company.

In the memorandum of the newly created company may be inserted a non-competition clause, case in which, in practice, a lot of problems may appear. Firstly, it is necessary to determine if the newly created company may be qualified as a *concentrative joint venture company* or a *cooperation joint venture company*. The joint venture companies are considered to be concentrative even if there is no risk to coordinate the competitive department between the mother enterprises.

The distinction is important because, in the first case, the joint venture economical entity is a legal person constantly fulfilling all the functions of an autonomous economical entity, however without achieving a coordination of the competitive department whether between the founding economic operators, or between it and them, situation in which the operation will be subjected to the rules applicable for economic concentration.

The conditions an association operation should fulfill to constitute an economic concentration in the meaning of art. 10 par. 2 of Law no. 21/1996, are the following:

a. the existence of the mutual control;

b. the structural autonomy of the joint venture company, which exists when, as legal person, the joint venture company constantly fulfils all the functions of an autonomous economical entity, respectively has full functioning;

c. the joint venture company should not have as object or effect the coordination of the competitive department of the mother-companies and/or economic operators.

A joint venture company will not be considered as fully functioning if it takes over only a specific function from the business of the mother-companies, without having access on the market in its own name. This is the case, for example, of the joint venture companies, limited to research-development, production, distribution or sale of the products of the mother companies as sales agents or created in order to participate to a public auction.

When the joint venture company uses the distribution network of one or more of the mother companies acting in this case as agent of the joint venture company, the latter is considered to have full functioning.

In this case, ***the non-competition clause inserted in the memorandum of the new company will have the legal regime of an auxiliary restriction of the economic concentration operation.***

Transfer of rights and obligations resulting from the non-competition clause.

Broadly, by obligation we understand the legal report in whose content is both the active side, namely the debenture right belonging to the creditor, as well as the correlative of this right, the passive side of the report, namely the debt incumbent on the debtor.

Thus, the content of the legal obligation report consists of the right of the creditor to ask the debtor to give, to do or not to do something, under the sanction of constraint by the state in case of willingly non-execution, as well as from the obligation correlative to this right, incumbent on the debtor.

The object of the legal report mentioned may consist of a positive provision, respectively to give, to do something, or in abstinence, namely, not to do something that he may have done without the obligation assumed.

The non-competition obligation is the obligation not to do, its debtor giving up performing a certain economic activity, which, without assuming the obligation, he may have exercised by virtue of the principle of free trade.

The conventional non-competition obligation may have an *intuitu personae* character (for example, the mandate given to a commercial agent), case in which the rights and obligations it involves will not pass to another holder.

Of course, the *intuitu personae* character of the non-competition obligation depend on the nature of the contract concluded between the parties.

Thus, the importance of the personal factor is greater for the administration location of the trade background or for the mandate given to a commercial agent. The rights and obligations are set by considering the personal traits of the contractual partner and will not pass to another holder.

If the personal factor does not have an essential importance, the active or passive transfer may be made.

The debentures and debts may be the object of a *mortis causa* transfer. The transfer of the right of obligation by acts between alive represents a legal operation by which, under the will of the parties or under the law, the active side or passive side of the legal obligation report is transferred from the parties to another person.

Conditions to validate the non-competition clauses.

Mainly, the non-competition clauses included in the commercial contracts should fulfill certain validity conditions.

A non-competition clause is not valid only because the parties have agreed to introduce it in the contract.

Firstly, it is necessary to exist a justified interest of the clause beneficiary, to ensure honesty in using the economical instruments upon which winning and keeping customers depends on. Secondly, through the non-competition clause should not be brought excessive restrictions of the freedom of the party care assuming the obligation not to perform a certain commerce. In this respect, the clause should prohibit only the performance of a trade similar to that performed by the beneficiary, to be limited to a reasonable amount of time and to concern a determined territory.

In the specialty literature, it was shown that the freedom to undertake may be limited by a non-competition clause. The breach of such engagement commends the liability of the author, but also of third parties to this breach.

The non-competition engagement is a clause by which it is prohibited to a person to exercise a trade or an industry for an allowance. However, the practice of the non-competition clauses has developed particularly for certain contracts. We mention in this respect the employment contract, the sale or lease of trade background, franchise contract, shares concession, co-propriety regulation in commercial centers. These clauses bring a limitation in the free creation of a competitor enterprise by a former employee, the assignor of the trade background or franchisor. They are subjected to rigorous

validity conditions. In case of anti-contractual competition, the jurisprudence usually sanctions these situations based on unfair competition, and, particularly, on that of disorganization.

In the field of Labor Law, Law no. 53 / 2003, modified in 2005, introduced an express regulation of the non-competition clause in the individual employment contracts. Its insertion in the contract is at the disposal of the parties, but the production of effects of this clause is conditioned by the compliance with the conditions provided by law.

Until the modification of Labor Code by G.E.O. no. 65/2005, it was questioned the obligation of the employer to make a contra-provision in the favor of the employee, to comply with the non-competition clause, during the individual employment contract.

To validate the non-competition clause of the individual employment contract some **additional conditions** have emerged besides the ones above. Thus, the clause may be included only in the employment contracts of a certain category of employees – specialists, engineers, technicians, who thanks to this training may / could prejudice severely the interests of the employer if they were framed in an enterprise performing a similar activity. Also, the clause will be operated only if the contract ceased as a consequence of the initiative or guilt of the employee, and should be accompanied by a contra-provision, generally consisting of a growth added to the salary. To protect the employee, at his request, the body of labor jurisdiction should have the possibility to reduce the non-competition clause with an excessive character. Of course, as an application of the general rule, the clause should concern a limited period of time (2 – 3 years) as well as a geographically delimited area.

It is noted that these non-competition clauses are subjected to more restrictive conditions than those resulting from the general regime.

Thus, for the employment contracts, the non-competition clauses are especially more dangerous, as the employee often has to accept them, without the possibility to discuss them.

Another particular case is that of affecting the space in use for commercial purposes. In this situation, the non-competition clauses are valid within commercial leases, but the lessor cannot invoke them to deny a partial change of the destination requested by a tenant competing with another.

The appreciation of the validity of a non-competition clause may be much more complex by the possible application of a foreign law, especially when the supplier, in case of an international technology transport, wished to be protected against the competition that may be exercised against him by the buyer.

The protection of the legitimate interest of the clause's beneficiary.

The freedom of commerce cannot be restrained in the benefit of some persons unless they provide a legitimate interest. It was considered that the exigency of the existence of a legitimate interest of the clause's beneficiary allows the assessment of the compliance of the clause with the public order.

In such cases, through the non-competition clause, is pursued the prevention of abnormal or dangerous competition. For example, in case of selling the trade background, this operation would lose all its importance for the buyer if the seller would have the liberty to open a new business place in the immediate vicinity of the background sold. In this case, the buyer has the legitimate interest to be protected against such risk, by inserting a non-competition clause in the sale contract of the commerce background.

This clause should be limited, the buyer not having the right to request from the seller a total inactivity. Such clause cannot be accepted, both fro economic reasons, as well as moral reasons.

The beneficiary of the clause has a legitimate interest to the extent in which the parties are competitors. If in the contract concluded is inserted a non-competition clause, but specifically, the alleged prohibited activity is not in competition with that performed by the beneficiary it cannot be claimed a breach of the non-competition obligation. In a case, the two companies in dispute were performing similar activities, respectively the place of company „L". had the designation of disco,

and „M". was operating a place with live music. „L" formulated an action to prevent „M" to function as disco Friday and Saturday nights. The non-competition clause between the two companies provided that „M" will not function for night events in direct competition with the disco owned by „L". „M" started its business as place with live music, but hidden its intention to use the place as night club Friday and Saturday nights. The judge considered that this fact does not breach the non-competition obligation as the restriction imposed to „M" not to organize discos in a similar stile or addressing to the same group of possible clients like those operated by „L", and, taking into account the proofs from which it resulted differences in the given entertainment style, those involved in the industry in question may identify the difference between the different styles of night clubs situated in the two places.

The court should verify if the restrains brought to the freedom of the debtor are justified by the necessity to protect the enterprise against a possible client blast.

Also, there should be a reasonable proportion between the legitimate interests of the debtor, which must be protected, and the effects of the non-competition obligation.

In labor law, if the former employee breached the non-competition clause by accepting a position in a competitor company, it is considered that the former employer has a protectable interest, which grants him the right to apply the non-competition clause, in the sense of requesting the coverage of the prejudice caused by the breach of the clause. Thus, the non-competition clause is applicable, being a reasonable constraint of the commerce, if the employer has a protectable interest and the restriction is directly connected to that interest.

In order for the protectable interest to be considered enough to obtain the recognition of the non-competition clause validity, the employer should own, within his business, a right characterized by importance and uniqueness, to such extent to guarantee the type of protection a non-competition clause gives.

An employer owns a protectable interest enough to justify the application of a non-competition clause if the position of the employee within the enterprise gives him the possibility to obtain confidential information, access to secret information or the possibility to develop a tight relation with the clients. Also, the protectable interest may result from the fact that the employer invested in his employee, in the respect that he has given professional training, resources and different facilities.

In conclusion, a non-competition clause is justified by the necessity to protect a legitimate interest within that business.

The principle taken into account by the American courts for example, is that the employer cannot apply a post-contractual restriction to his former employee only to eliminate competition, but he must prove the existence of a legitimate interest to be protected.

The legitimate interest of the employer should be maintained in a fair equilibrium with the interest of the employee to practice his profession and, of course, with the public interest.

One of the most important protectable interests of the enterprise is the *"goodwill"*. This notion comprises both the goodwill obtained by the employee as a result of his personal qualities and of the continuous relations with the clients, as well as the goodwill which became associated with the image of the enterprise itself. Toward this double nature of goodwill, the courts were made to decide who belongs this interest to, and namely, the enterprise or its employees. The reasoning in mind was that, if the enterprise had the possibility to protect this interest, the employees should move to great distances and to change their career each time they change work place. Thus, the courts considered that the skills and competences of an employee belong to him and are not a protectable interest of the company.

In case of selling the enterprise, the courts recognized that goodwill represents a protectable interest. Thus, the price paid by a buyer also includes the good will of the enterprise, case in which this has a protectable interest, the value of goodwill being reduced considerably if the seller would start competing with the buyer after the transaction.

Keeping the economic freedom of the debtor of non-competition obligation.

The non-competition clause should not restrain or suppers the freedom of action of the debtor. For this purpose, the non-competition clause should fulfill certain conditions.

Thus, **the interdiction** should be **limited from the point of view of it activity.** It is not allowed to prohibit any economic or professional activity, **but only the activities similar to those exercised by the beneficiary.** In this regard, difficulties may arise when a trade background is sold through which are traded different products, like for example a large store. It this situation it may be considered that the non-competition clause is applied only when exercising a commerce of the same kind, thus being instituted the interdiction to open a large store, or it is applied for each variety of commerce practiced, and namely, the interdiction to sell furniture, food products, etc. If it is considered that, through the clause, it is prohibited to open a large store, than the seller is entitled to resume his activity only in the sector he deems more profitable, thus attracting the afferent customers. If it is considered that through the clause is prohibited the sale of each type of product, it is difficult to appreciate that the clause targets a determined trade.

The interdiction should be limited in time and space.

The non-competition clause is an application of good faith in executing contracts, good faith imposing to both contracting parties.

Thus, the more specialized the trade is, the more the personal relations between the trader and his customers are closer and the duration of the interdiction may be longer. The same principles are applied regarding the territorial extension of the protection. For *endetail* commerce, within which the customers are local, the perimeter where it is prohibited to reestablish the enterprise is smaller, and may even be a city district. Unlike this situation, for the specialized activities, the protection area may be legitimately more extended.

The sanction for a too long duration of the interdiction may be, depending on the circumstances of the case, either the reduction of the non-competition obligation, or the nullity of the clause, or the nullity of the contract containing that clause.

These conditions are necessary and enough. The validity of the clause is not subordinated by the payment to the debtor of the non-competition clause of an amount representing the value of the limitation of his freedom, to which he agreed by contract.

Interpreting non-competition clauses.

The interpretation of commercial clauses involves an ensemble of rules used to determine exact and complete meaning of the content of contractual clauses.

If these clauses are unclear, in the execution process of the contract, the parties are those that may perform the interpretation of the contract. However, this operation will recur to trial or arbitration courts in which case, between the contracting parties, appeared a litigation.

The interpretation of international commercial contracts involves a greater difficulty in comparison to the interpretation of internal contracts, taking into account that the first contain a foreign element which may determine the applicability of more law systems, with different rules to interpret the contract.

The principle that should govern the interpretation of contracts consists in identifying, in the express clauses of the convention, the real will of the contracting parties.

Interpretation rules of contractual clauses in common law.

When the non-competition clauses are obscure or incomplete, their interpretation is made by the trial court, after the rules of the common law.

The interpretation rules of the contractual clauses are set in the Romanian Civil Code by art. 977 – 985, within section III „About the interpretation of conventions", from Chapter 3 „About the

effects of the conventions", Title III, „About Contracts and Conventions". The rules exposed in these articles were taken over and partially modified by the new Civil Code, art.1.266 – 1.269.

Thus, the new Civil Code classifies the interpretation rules of the contracts in four categories, and namely: the interpretation after the contracting will of the parties, the systematic interpretation, the interpretation of questionable clauses and subsidiary interpretation rules.

Within the first category of rules, art. 1.266 of the new Civil Code takes over the content of art.977 of the Civil Code, according to which the interpretation of the contract is made after the common intention (concordant will) of the parties and not after the literal meaning of the terms. Thus, it is established the principle of real will priority of the contracting parties against their declared will.

Par.2 pf art.1.266 of the new Civil Code lists the aspects to be taken into account when establishing the concordant will of the parties. These consist among others, in the purpose of the contract, of the negotiations between the parties, the practices set between them and their behavior after concluding the contract.

The systematic interpretation of the contractual clauses was established by art.982 of the Civil Code, the dispositions taken over in art.1.267 of the new Civil Code. Based on this rule, the contractual clauses are interpreted ones through the others, giving each the meaning resulting from the ensemble of the contract.

According to art.981 of the Civil Code the usual clauses in a contract are implied, although they are not expressly stated. This rule was not provided in the regulation of the new Civil Code, at the section regarding the interpretation of conventions, but to that regarding the effects of the contract, and namely, in art.1.272 par. 2. The same article takes over, in par. 1, the rule currently established by art. 970 par. 2, instituting the principle according to which the contracts force not only to what is expressly provided in them, but to all consequences that the equity, habit or law gives to the obligation, by its nature.

In conclusion, based on this legal disposition, we may consider that, in certain situations, depending on the nature and purpose of the contract concluded between the parties, the non-competition clause is implied.

We consider that, as such clause limits the competitive freedom of the debtor of the obligation, the interpretation of a contract in the sense of the existence of a tacit non-competition clause should be based on legal norms applicable in the field of that contract, like, for example, for the sale-purchase contract, art. 1337 – 1339 of the Civil Code. The new Civil Code establishes, in art.1.269, the subsidiary interpretation rules of the contracts, establishing, by par. 2 of art. 1.269, that, if, after applying the interpretation rules, the contract remains unclear, this is interpreted in the favor of those who is obliged, rule taken over form art.983 of the Civil Code. By applying this legal norm, the non-competition clause will be interpreted in the favor of the debtor of the obligation not to perform a determined economic activity.

The evolution of interpretation mode of the non-competition clauses in legal practice.

If the non-competition clauses inserted in a commercial contract have an unclear or incomplete character, the matter of interpreting these clauses will be in discussion. The determination of the legal content and the meaning of these clauses, will be made, through interpretation, in case of a litigation between the contracting parties, by the trial courts.

In such cases, the appreciation of courts will be in relation, of course, to the actual state retained in this case, so as that the solutions adopted will have value only in this case.

However, from the analysis of the jurisprudence, it results certain general aspects. Two opinions were formed: in the first opinion it was considered that, as it is derogated from the common law regime of the trade freedom, the non-competition clause should be interpreted restrictively. In the other opinion, the interpretation is made after the real will of the contracting parties, based on art.977

of the Civil Code, according to which the interpretation of contracts is made after the common intention of the contracting parties.

Thus, in this interpretation a priority is granted to the real will of the contracting parties through an extensive interpretation, by which, for example, was implied the existence of a default non-competition clause in case of sale or lease of the trade background and in the agency contract.

In this context, it was considered that the sale imposes on the assignor a tacit non-competition obligation, based on which he is prevented from exercising a trade similar to that of the assignee, in his vicinity. The legal basis of this solution is represented by art. 1339 of the Civil code, against the provisions of which the seller cannot avoid in any way the liability for eviction resulting from his own act, any contrary convention being null. Taking into account that this disposition has a public order character, the conclusion is that the useful possession guarantee of the thing sold is evidently disturbed by a fact equivalent with eviction, if the seller regains what he had gave, diverting in the favor of his new enterprise with similar profile, the customer he has sent to the buyer with the trade background. It was considered that such operation would be completely useless and senseless for the buyer, as he losses the whole use this transfer should have ensured. The abusive act of the seller engages his liability against the assignee of the trade background, even if by contract was not provided a competition prohibitive clause.

It was considered that, in these situations, the non-competition clause is implied, under art.1339 of the Civil Code.

Thus, it is admitted the existence of a non-competition tacit and implied clause, resulting from the interpretation of art.1420 pct. 3 of the Civil Code.

The sanctions applicable in case of breach of non-competition clauses.

The breach of non-competition clause by the debtor draws his contractual liability towards the creditor of the clause.

Unlike this, the performance of unfair competition acts draws the tort liability of the author.

As for the contractual competitive restrictions, the matter in question is to set the legality of the conventions excluding the competition between the parties, in a determined field, on a certain territory, regardless of the appreciation of loyalty or infidelity of acts.

If the non-competition clause is considered valid, the matter in question is if, although not prohibited by the law, those contractual clauses constitute, in certain cases, unfair competition acts. The problems are interfering in such measure, that a lot of authors treat together the unfair practices and the legal regime of the prohibited practices, grouping them, not according to the objective followed, but to the nature of the means used.

Difficulties may appear in practice regarding this delimitation, as the debtor of the non-competition obligation, beside the breach of this obligation, will also commit unfair competition acts which bring a prejudice to the creditor of the clause.

Through the unfair competition is usually followed to attract and capture through dishonest means the customers of the injured economic operator, the facts being performed in the limits of the legal competition report and on a certain relevant market.

The legal regime of the two liability forms is different, so that, in the situation exposed, the contractual liability for the breach of the non-competition obligation cannot be extended on unfair competition facts. Also, the tort liability will not be extended on the breach of the non-competition convention in relations with the creditor of the expressed or implicit clause.

Thus, the sanction for the breach of the legal competition interdiction is the tort civil liability, which may be completed with specific sanctions, like the exclusion provided by art 82 and 217 let c) of L 31/1990, and the sanction for the breach of the competition clause is the tort civil liability.

In both forms of liability, the creditor disposes of preventive means, to force the debtor to cease illicit acts, as well as repairing means, to obtain compensation. The creditor may use all remedies for the breach of the contractual non-competition clause, the choice being his.

In conclusion, in case of breach of a valid non-competition clause agreed, the creditor may request to court the protection of the right resulting from that clause. Thus, the creditor may formulate an action for the forced termination of the commercial activity contrary to the non-competition obligation, as well as granting the repairing measures in case of producing a prejudice.

On the other hand, if, through the non-competition clause are breached the national or community rules in the field of competition, besides the private litigations, public law sanctions may occur, applied by the competitor authority or by the trial court.

Conclusions

I consider useful to develop legislation, which should regulate more detailed the legal status of non-compete clauses, under different contracts, in order to avoid some different interpretations.

After comparative analysis of non-compete clause in commercial contracts and employment contracts, the conclusion is that a non-compete clause, to be lawful, must not harm the freedom of the competition or the freedom of the work. For this purpose, the clause can not be limited in time, space and regarding the nature of the exercised activity, and must not be disproportionate to the subject of the contract.

Regarding the labor contracts, I believe it is necessary to supplement the provisions of Labor Code, which regulates the non-competition clause, meaning the introduction of certain additional conditions for the validation of the clause. Thus, because, by applying the non-competition clause, the right to work of the former employee is limited, we consider useful to limit the applicability of the clause to what is necessary to protect the interests of the employer. Therefore, the clause should be included only in the labor contracts of certain categories of employees - specialists, engineers, who, because of their training, can or could seriously prejudice the interests of the employer if they would hire in a competitor company.

Also certain general requirements must be set: objective justification for inserting the clause, in the context of the agreement; the existence of a legitimate interest of non-compete obligation for creditor; precise determination of the extent of the duty in time and space.

Finally, non-compete clause should not result in an unfair restriction on the right of free competition.

Therefore, the non-compete clauses can take different forms, depending on the specific field of application, and their validity depends on the requirements set for the legal domain, applicable to each Legal Report.

An impairment of the regulation has been detected in the contents of this paper, regarding the character of the three months term that the company may act to exclude the shareholder, reclaiming benefits or claiming damages, under Article 82 paragraph 4 of Law No. 31/1990. Thus, the law provides that the right of the company (mentioned in paragraph 3 of Article 82), to exclude the partner or to claim damages, turns off after three months term pass from the day when the company was aware, without having taken any decision in this regard.In the specialized literature have been expressed opinions that the respective term is a decline term and also a special term of prescription. Of the fullfiment of this term the subjective right is extinguished. I've considered that the differences between the expressed views have their origin in the lack of legal prevision rigor, situation in which would be necessary to regulate the legal status of that period.

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