THE CONTRACTS AS VIEWED BY THE CIVIL CODE

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Abstract
The law no.287/2009 regarding the Civil Code, the law no.71/2011 for applying the Civil Code and the G.E.O no.79/2011 for modifying and completing the law no.71/2011 all conduct to the terminological leveling in the contracts field, assigning them the name of civil contracts or just contracts. The same regulatory documents, appertaining in terminis to the economic/commercial/ remunerative oriented activity, acknowledge the distinguishing characteristic of the merchant-proffesional, of the commercial enterprise and therefore of the contracts regarding the economic activity. The Civil Code becomes the frame-law in the contracts field and attempts to compile an inventory of the contracts defined by the law, inventory in which the prevailing role is held by the contracts specifically related to the commercial activity. The intent of this study and its goals are to prove that, in spite of the terminological offensive - expression of the homogeneous regulation of the Private Law, the Civil Code not only does not eliminate the Commercial Law as a sefl-contained filiation of the Private Law, but assimilates it and allows to be contaminated by it. This happens because the Commercial Law sprung from a reality - the commercial activity - and it will perish alongside this reality, which is never going to happen. Today, more than allways, the Commercial Law has become the foundation of the Civil Law in regard to obligations and this study intents to prove this.

Keywords: *contracts, Commercial Law, merchant-proffesional, commercial enterprise, the contract as a source of obligations*

INTRODUCTION

1. Terminological unity . In line with the recently adopted system intended for the unity of the private law regulations and noting certain "regrettable" omissions of the legal terminology, the Romanian lawmaker passes the following corrections in Act No. 71/2011 - art. 8 para.2 :

In all current laws, the terms "commercial acts" and "commercial deeds" respectively are replaced by the term "production, commerce or service provision activities".

Unfortunately, we witness a lawmaker's increased "vigilance", who, at the time prior to the effectiveness of the New Civil Code, discovers and "remedies" other faulty terminological "discrepancies", deciding on the following:

Art. VII of the Government's Emergency Ordinance No. 79/2011 for the regulation of certain measures necessary (our underline) for the effectiveness of Act No. 287/2009 on the Civil Code:

On the effectiveness of Act No. 287/2009 on the Civil Code, republished, the term "commercial contract" or "commercial contracts" is replaced by the term "civil contract" or, as the case may be, "civil contracts", whereas the term "contracts or commercial acts" is replaced by the term "contracts".

The lawmaker's "rigor" is exemplary. It has determined some doctrine specialists speak of a "cleansing of the legal vocabulary" and an "excommunication" of the commerce- and commercial law-related concepts[1].

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[1] Turcu, Ion – "Noul Cod civil. Pe cine incomodează existența dreptului comercial?"/"The New Civil Code. Who Is Bothered by Commercial Law?" – www.juridice.ro.

We have called it terminological offensive and our opinion is, nonetheless, that the undertaking lacks efficiency as the legal area and legal institutions it is based on do not disappear by way of a mere "reform" of the legal language.

Back to our topic, we notice that, *de lege lata* (the law as it exists), one cannot speak but about civil contracts and/or contracts. Given the aforementioned arguments and those we are about to elaborate hereunder, we believe there are still commercial contracts or, to be strictly compliant with the provisions of art. VII of the Government's Emergency Ordinance No. 79/2011, there are contracts on the commercial activity.

1. The topic of this article is contracts. The study aims at highlighting the New Civil Code vision on contracts.

2. The importance of the article consists of its novelty as it is, to the best knowledge of its author, the first to approach the topic of the New Civil Code on contracts.

Its pursued goals are as follows:

- present an overview of the New Civil Code on contracts, underlining that this vision is intended to ensure the regulatory unity of the private law;
- highlight the fact that the New Civil Code is based on a coherent structural vision with novel elements as compared to the former regulatory system, that fill certain gaps and consecrate, from a legislative point of view, a series of doctrine and jurisprudence solutions in the area of contracts;
- expose the drawbacks of this vision, the failures of the monist conception in the area of contracts;
- underline the specificity of commercial activity contracts, highlight the comprehensiveness of the special legislation that is the core matter of these contracts, a legislation that preponderantly lies outside the code and that alleviates the all-comprehensive ambition of the New Civil Code of being the framework law on contracts.

3. The means to reach these objectives mainly resides in the critical analysis and systemic interpretation of the provisions of the New Civil Code, as well as those of the relevant special laws on contracts. Equally, the relevant doctrine on the matter, both consecrated ad recent one, will be considered. Also, it will be taken into account that no references to the internal jurisprudence will be possible, given the recent effectiveness of the New Civil Code.

4. To the best knowledge of the author, there are no studies that cover the entire area this article refers to. There are specialized works (articles, volumes) dealing with this issue in a fragmented manner: specificity of contractual obligations, of obligations undertaken by professionals, autonomy of commercial law, existence of a real law on professional contracts.

CONTENT

A. CONTRACTS IN THE NEW CIVIL CODE

2. The contract as a source of obligations

In line with art. 1164 of the New Civil Code, the obligation is a rightful connection by virtue of which the obligor has to perform for the obligee, and the latter is entitled to the owed performance.

The above-mentioned article means real progress as compared to the former Civil Code, which did not provide a definition for the term "obligation", such definition being imposed by the doctrine and consolidated by jurisprudence.

Art. 1165 of the New Civil Code lists the sources of obligations: contract, unilateral document, business administration, enrichment without just cause, non-owed payment, illicit deed, as well as any other document or deed that the law relates the birth of an obligation to.

This regulation performs a systematization of the sources of obligations, not far from those already consecrated by the doctrine under the former regulation: the legal document, legal and illegal deed. Moreover, art. 1165 of the New Civil Code refers to "other" documents and deeds that the law relates the birth of an obligation to. A normal question is raised in relation to these "other" documents and deeds that the law could set forth at a given time as sources of obligations. Why are these expressly laid down and what are the arguments based on which they cannot be a sub-category of those referred to in the article body? At the time of this present analysis, we could not find a satisfactory answer to these questions.

For lack of any textual arguments, this reference appears to be superfluous; however, we will wait for it to pass the test of time.

Back to our discussion on the contract, mention must be made of the lawmaker's firm option in favour of the term "contract" detrimental to the term "convention". On a legislative level, there is a distinction between the two notions in the French law (art. 1101 of the French Civil Code), however, in the Romanian law, despite the opinions on the doctrine, there is no such legislative distinction, the terms being actually synonymous.[2]

Art. 1166 of the New Civil Code defines the contract as an agreement based on the free will of two or more parties to it with the intention to establish, change or cease a legal relation. The definition is approximately similar to that in the former art. 942 of the Civil Code, with the addition of the intention to change an existing legal relation.

Mention must be made about the relation between the contract and the civil legal document. The latter is an institution defined as a manifestation of the will of one or more persons, done for the purpose of establishing, changing, transmitting or ceasing rights and obligations. In this context, the legal document, where the emphasis is placed on the volitional and intentional aspect (unlike the legal deed) is the gender, whereas the contract is the species. Hence, any contract (uni-, bi- or multi-lateral) is a legal document, but not all legal documents are contracts. Given this aspect, one should notice that the New Civil Code consecrates the institution of the unilateral legal document and determines its legal regime in Book V, Title II, Chapter II.

3. The Civil Code as the framework law of contracts

Art. 1167 of the New Civil Code stipulates, in para. 1, that all contracts shall comply with the general rules and regulations in Chapter I, Title II, Book V; however, para. 2 of the same article stipulates the derogation regime applicable to certain contracts of the Code or in special laws.

Hence, this article establishes the vocation of the New Civil Code as a framework law of contracts.

It also establishes, together with art. 1168, three applicability principles concerning all contracts:

1. all contracts shall comply with the general rules and regulations in this chapter;

2. certain contracts (special ones, in our opinions) shall be applied particular rules and regulations laid down in the New Civil Code and special laws;

3. contracts that are not regulated by law (traditionally known as "non-regulated contracts") shall be applied the provisions of this chapter and, if these provisions are not sufficient, the special rules (our mention: in the Code or special laws) concerning the contract that the non-regulated contracts are mostly similar to.

This latter assumption is, in our opinion, a typical case of *analogia legis*.

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[2] Adam, Ioan – *Drept civil. Obligațiile. Contractul/Civil Law. The Obligations. The Contract*, (C. H. Beck Publishing House, Bucharest, 2011) , 6-7.

As far as contract classification is concerned, we note that art. 1171 – 1177 of the New Civil Code propose various contract categories, however, as concerns the above-mentioned matter, , i.e. the vocation of the New Civil Code of representing common law, it necessary to make a conceptual determination of the special contract institution and that of "non-regulated contracts" (particularly known as "non-regulated contracts").

3.1 Special contracts

The doctrine is unanimous[3] in acknowledging the "bridging" role that special contracts play between the general theory of obligations (that determines the abstract civil contract unconnected to reality) and the individual civil contract as an agreement of free will between certain parties, with a specified content.

Equally, as resulting from art. 1167 para. 2 of the New Civil Code, special contracts are applied the special legal rules stated for each special contract type, which rules are laid down in the Code or special laws. This provision stands for the accurate application of the *specialia generalibus derogant* legal principle.

As a matter of correlation, in considering the vocation of the common law New Civil Code in the area of contracts, we should emphasize that this regulation will apply whenever there is no specific regulation of special contracts and validity, interpretation and performance of special contracts respectively.

The category of special contracts stands for, just as the entire area of commercial law, some sort of "laboratory" where legal regulations and principles and legal institutions are applied, forged and perfected. This "laboratory" that is connected to the economic and social reality to the highest of levels gives rise to novel legal constructions and techniques most often materialized in contracts failing to comply with traditional patterns, that are innovative and push the boundaries of the legal sphere.

To the extent the solutions resulting from this alchemy are validated in practice, they become popular and represent a premise for reflection that can become materialized in legislative terms and often influence various areas of activity.

In that respect, it has been fairly underlined, we believe, that "a tendency in the contemporary law is noted, that of elaborating *transversal* rules that apply to special contract categories (our underline), in particular goods and services provision contracts"[4]. In that respect, "the common consumer protection or free competition concerns..."[5] were mentioned.

3.2 Regulated and non-regulated contracts

As far as non-regulated contracts are concerned, that are designated by the lawmaker in art. 1168 of the New Civil Code as "contracts not regulated by law", one can note that the New Civil Code limits itself to mentioning them without defining them, thus persisting in the tradition of the former Civil Code and failing to take up the example of art. 1107 of the French Civil Code.

It has been stated[6] that this category of "non-regulated contracts was eventually consecrated in Justinian's time, opening a new specific action – *prescriptio verbis*. They were divided in four categories: *do ut des, do ut facias, facio ut des, facio ut facias".*

As these contracts, though regulated by the parties, stay non-regulated in relation to the legal categories, they were considered actual legal fictions.[7]

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[3] Cărpenaru, Stanciu- introduction *to Contracte civile şi comerciale – cu modificări aduse de Codul civil 2009/Civil and Commercial Contracts – As Amended by the 2009 Civil Code*, done with Stănciulescu, Liviu and Nemeş, Vasile, (Hamangiu Publishing House, Bucharest, 2009) , 1 and Moțiu, Florin – *Contractele speciale în Noul Cod civil/Special Contracts in the New Civil Code*, II edition, (Universul Juridic Publishing House, Bucharest, 2011) , 17.

[4] Moțiu, Florin – quoted work, 18.

[5] ditto.

[6] Deleanu, Ion – *Ficțiunile juridice/Legal Fictions*, (All Beck Publishing House, Bucharest, 2005) , 66.

Most contracts falling under this category are typical of the commercial activity, being determined by the countless facets of such activity, as well as the parties' intention to build conventional instruments characterized by a certain level of diversity and flexibility, in order to respond to the most complex of requirements.

The existence of non-regulated contracts is not excluded from the legal relations between non-professional natural individuals either; however, their numbers are visibly lower, given, on the one hand, the overall low percentage of contracts entered into as to these legal matters and, on the other hand, the aim concerning the civil circuit security these are involved in, materialized in resorting to legislatively consecrated forms they can enter into.

Regulated contracts are those whose content is laid down in the provisions of the Civil Code and/or other special laws. The main special contracts are sale and purchase as an instrument for economic exchange, mandate, lease (or sale of use) and general contractor agreement as an instrument of service provision.

Regulated contracts are the lawmaker's exclusive attribute as their creation is not possible by the parties' agreement based on their will. The parties only have the possibility to enter into individualized special contracts, adapted to their needs, which contracts are, however, subject to the special rules in the Code and/or special laws, and, as to their general conditions – they are subject to the general conditions in the Code.

Non-regulated contracts are those beyond legal regulation, though, in terms of the legal conditions, they are legally executed. This is the reason why they have been classified to fall under the category of legal fictions: they are legal documents that meet the validity-related legal conditions, comply with public order and mores, but which the law does not "know" and regulate, however, having no reason to challenge them.

The content of these non-regulated contracts is the parties' exclusive attribute, an expression of the principle of freedom to contract, and serves their actual needs. A recent example in the commercial law is the reservation contract or, in the real estate field, the construction contract, the latter being a *mixtum compositum* between the general contractor agreement and the bilateral promise of sale and purchase.

The issue that non-regulated contracts raise is related to the applicable legal regime. However, the problem that an authority summoned to settle a dispute based on such a contract faces is, above all, an issue concerning contract qualification.

This involves an analysis of the contract content, the parties' converging/common/real will and then the contract qualification. In other words, in order to determine whether it is a non-regulated contract or not, one needs to interpret the contract and determine the unquestionable difference between them and between special or regulated contracts.

Often this is rendered difficult by the name the parties give to their contract, a name which could point to its classification in this or that category of regulated contracts or that, on the contrary, could create a first similarity (identity) with a regulated contract, contradicted, on a more careful analysis, by the *sui-generis* non-regulated content of the contract.

Nonetheless, the person interpreting the contract should not leave out the application of the interpretation rules laid down in art. 1266-1269 of the New Civil Code.

Once a contract classification in the non-regulated category is done, the applicable legal regime is the one laid down in art. 1168 of the Code: the rules first to be applied are the general rules on contracts, the rules laid down in Book V, Title I, Chapter I, and, should these not be sufficient, the special rules applicable to the contract the non-regulated contract resembles the most.

[7] ditto.

4. Contract categories established by the New Civil Code

Section 2 of Chapter I, Title II, Book V, deals with "various contract categories" with no enunciation by the lawmakers of the criteria they consider when elaborating such taxonomy.

One should note that the Code does not provide a classification that exhausts the criteria that it was constantly based on, and, from this perspective, it is not that distinct from the former provisions of art. 943-947 of the Civil Code.[8]

Art. 1171 differentiates, by content, between synallagmatic and unilateral contracts.

A contract is synallagmatic when it includes mutual and independent obligations, and is unilateral unless it does so, even if its performance involves obligations resting upon both parties.

The ambiguous wording of the legal text results in the conclusion that a contract is synallagmatic whenever it gives rise to mutual and independent obligations, both parties concomitantly having the capacity of obligee for the other party's obligation(s) and obligor to its own obligation(s).

An interesting emphasis was placed in the doctrine in connection with the synallagmatic contract, asserting that this is a redundant construction, given the etymology of the term "synallagmatic" – from "synalagme", meaning *contract* in Greek. [9]

Art. 1172 differentiates, by the purpose pursued by the parties, between onerous contracts and gratuitous contracts.

A contract is onerous if both parties aim at getting some advantage in exchange for the undertaken obligation.

On the contrary a contract is gratuitous if a party aims at providing a *benefit* (our italics) to the other party, without getting any advantage in exchange.

We estimate that, whereas the lawmaker does not made any legal differentiation between "benefit" and "advantage", the use of the two terms, that are within the same semantic sphere, is not inspired and leaves room for speculation. We believe that the lawmaker had the possibility to choose either of the two terms and use it exclusively in order to escape all ambiguity.

Art.1173 differentiates, by the certainty or uncertainty of provision extent at the time of contract execution, between commutative contracts and random contracts.

A contract is commutative if, at the time it is entered into, the existence of the parties' rights and obligations is certain, and the consideration is determined or determinable.

A contract is random if, by its nature or the parties' will, it gives at least one party the chance of a benefit and simultaneously exposes it to a loss, which gain or loss are dependant on a future uncertain event.

Art.1174 differentiates, by the manner of formation, among consensual, solemn and real contracts.

A contract is consensual if it is formed by the mere parties' will.

A contract is solemn if its validity is subject to fulfilling certain formalities laid down by law.

Finally, a contract is real contract if the remission of the assets is necessary for its validity.

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[8] A classification of contracts can be found in, *exempli gratia,* Stătescu , Constantin and Bîrsan , Corneliu – *Drept civil. Teoria generală a obligațiilor/Civil Law. General Theory of Obligations* , IX edition,(Hamangiu Publishing House, Bucharest, 2008) , 22-37.

On categories of contracts not included in the New Civil Code, see Turcu , Ion – *Vânzarea în Noul Cod civil/Sale in the New Civil Code*, (C.H. Beck Publishing House, Bucharest, 2011) , 78-84.

[9] Piperea, Gheorghe – "Concepția monistă a Noului Cod civil , între intenție și realitate sau Despre Noul Cod (civil) comercial"/"The Monist Vision of the New Civil Code, between Intention and Reality or On the New Commercial (Civil) Code in *Noile Coduri ale României – Studii și cercetări juridice/The New Codes of Romania - Legal Studies and Research*, (Universul Juridic Publishing House, Bucharest, 2011) , 36.

In the case of solemn and real contracts, the form prescribed by the law, and the provision of the asset respectively, are prerequisites for contract validity; failure to comply with the same results in absolute nullity.

However, mention must be made of the fact that, by art. 1260 of the Code, a solution is legislatively consecrated that long ago found its settlement in the doctrine and that was applied as a matter of jurisprudence. This article introduces the institution of *conversion of the null contract* and stipulates in para. 1 that an absolutely null contract shall still have the effects of the legal document the legal content and form requirements are fulfilled for.

The second paragraph of the same article includes however an alleviation of the conversion process, providing prevalence to the parties' contrary will.

Thus, it is stipulated that the provisions of para. 1 shall not apply if the intension to exclude the conversion application is stipulated in the contract affected by nullity or unquestionably results from the purposes pursued by the parties on contract execution.

Art.1175 defines the adhesion contract and comes to cover, from a legislative perspective, a doctrine and jurisprudence creation resulting from a reality where such contract type has become very common.

A contract is an adhesion contract if its core clauses are imposed or elaborated by, for or following the instructions of either party whereas the other party is left with the sole possibility of accepting them as such on a "take it or leave it" basis.

As far as this contract type is concerned, the free will of either party, usually the one in an inferior financial or economic position is limited to *adhering or not adhering to* a contract with predefined clauses that it does not have a possibility to negotiate.

Art.1176 defines the framework contract as an agreement which the parties agree to negotiate, enter into or maintain contractual relations whose core elements are determined by.

It is worth noting that this contract type stipulates only the core elements of the contractual relations and that the means to implement the framework contract (in particular, term, volume of performance and, if applicable, price thereof) is indicated by subsequent conventions.

One should note that this contract type has been taken up in the domestic legislation following the pattern of framework contracts commonly used in international law, in complex and long-term operations, such as double-entry records, international economic cooperation, complex exports.

The doctrine[10] underlines the following:

"Framework contracts are of a nature similar to predefined clauses compared to subsequent special classes, i.e. the latter relate to the former, framework contracts containing coordination and harmonization clauses of the subsequent clauses with a view to reaching their joint economic goal.

Secondly, framework contracts contain clauses whose subject matter is an ***in contrahendo*** obligation, i.e. the contracting parties' obligation to enter into the mentioned special contracts, unlike the latter whose subject matter are an obligation to give, do or not do, as the case may be."

Finally, **art.1177** deals with the contract entered into with consumers, but it limits itself to mentioning it, without defining it, with a referral to the special legislation outside the Code and only as a supplementation of the Code provisions.

5. Freedom to contract and good faith as fundamental principles of contract execution and performance

We have reviewed the principles that, in our opinion, govern civil law and contracts.

[10] Sitaru , Dragoş-Alexandru – *Dreptul comerţului internaţional. Tratat. Partea generală/International Commerce Law. Treatise. General* , (Universul Juridic Publishing House, Bucharest, 2008) , 439.

The principle of freedom to contract has been included among the principles governing contracts, and the principle of good faith was included among the general principles of civil law.

If we are to resume the discussion on these two principles, we do it to highlight the fact that they are distinctly evoked by the Romanian lawmaker in the area of contracts, in Section 1 – General Provisions, which leads us to the conclusion that they are considered of utter importance in said area.

Art. 1169 of the Code enunciates the freedom to contract principle, its content and limitations of its application. This principle will be the subject matter of subsequent elaboration.

In reality, Art. 1170 of the Code establishes the good faith obligation that rests upon the parties in the pre-contract stage, on contract execution and performance, stating the prohibition to stipulate any clause that could remove or limit said obligation.

One can thus note the legislative evolution from the presumed good faith, express in *bona fides praesumitur*, to the good faith that the lawmaker imposes to the participants in the civil circuit.

It is easily noticed that the lawmaker limits himself/herself to evoking good faith, without defining it, though the issue of the concept identity has been the object of doctrine concerns. In that respect, the works of the Henri Capitant Association are worth mentioning, that focused on good faith and took place in Paris in 1992 and 1994.

To summarize, without any claim of providing a definition herein, it has been shown that good faith, regarded as a general clause, involves a psychological and intellective notion, i.e. that it represents unawareness of a fact or circumstance, the erroneous conviction that a subject has taken up.[11]

The same author has shown that good faith is a purely moral concept, a rule of conduct in line with loyalty and honesty.[12]

The role of good faith has been summarized as follows: a rule of conduct in contract formation, corrective in contract performance and complementary in identifying the obligations undertaken by the parties (e.g.: obligation to inform).[13]

We believe that, in establishing such an obligation, which is salutary nonetheless, the Romanian lawmaker of 2009-2011, should not have relied, in an area as technical as that of contracts, on such a hard-to-define construction that anyone is convinced of knowing, yet that each interprets at will.

It would have been auspicious if, and our belief is that it will be established as such, at least in the area of contracts, good faith had been adjoined by, at least, merchants' equity and honest and practices.

B. CONTRACTS CONCERNING COMMERCIAL ACTIVITIES

1. Terminology rationale

We stated in the abstract our firm belief that commercial law should stand as an independent branch of private law, even in light of the abrogation of the 1887 Commercial Code and the lawmaking unity via the New Civil Code.

We support the idea that this branch of the law includes the totality of laws concerning the legal regime of professional merchants and commercial companies, as well as legal documents that professional merchants enter into within their commercial activity.

We equally support the idea that the legal documents that the professional merchants enter into are commercial legal documents, and the overwhelming percentage in their economy is represented contracts.

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[11] Alpa, Guido – *Diritto giurisprudenziale* , excerpt – www.altalex.com.
[12] ditto.
[13] ditto.

We would unhesitatingly continue to use the term "commercial contracts" should there not be a prohibition placed by art. VII of the Government's Emergency Ordinance No. 79/2011, that abolishes it *in terminis*, replacing it with term of "civil contracts" or, simply, "contracts".

However, as the commercial area further preserves its identity, focused on commercial activity, in considering the connection between the contracts entered into by professional merchants and the commercial activity within which it is concluded, we believe that this contract category has a special name and status and such contracts may be named, with maximum legal accuracy and in compliance with the lawmaker's terminological prescriptions, **commercial activity contracts**.

2. Criteria for differentiating commercial activity contracts

The problem that needs to be solved mainly in relation to these contracts is that of the criteria of differentiation from other civil contracts.

We estimate that, on characterizing the commercial nature of a contract, the following requirements must be simultaneously met:

a . the contract should be entered into professional merchants or at least one contracting party should be a professional merchant;

b . the contract should be entered into in connection with the operation of a commercial undertaking, and the performance of an economic activity respectively;

c . the contract should be onerous in nature, and pursue the goal of providing an advantage (profit) to the contracting professional merchant.

Hence, in an attempt to outline a *definition*, we state that a commercial activity contract is a contract entered into two or more parties, among which at least one is a professional merchant, that concerns one or several operations connected to the commercial activity and by which the professional merchant aims at obtaining profit.

3. Peculiarities of the legal regime of commercial activity contracts

The general rules are those laid down in art. 1166-1168 of the New Civil Code.

A close analysis of the area of obligations requires, however, revealing a series of peculiarities that the New Civil Code still preserves as concerns legal relations among professionals.

Similarly, peculiarities of commercial legal relations can be identified, extended in the New Civil Code and the legal relations among non-professionals.

3.1 Rules borrowed from commercial law and extended throughout the civil law

3.1.1 Formation of distance contracts, contracts between remote parties or *inter absentes* contracts

The mechanism was consecrated by the former 1887 Romanian Commercial Code in art. 35-39 and became popular because "in the relations among merchants, the variety of concluded contracts and the requirements for business rapidity most often require the conclusion of contracts between parties that are located in various places and communication between them is done by correspondence (...)" [14]

As constantly underlined in the doctrine[15], though the former Commercial Code mentions conclusion of contracts "between remote parties", in reality, what is of interest is not the distance separating the contracting parties, but the non-concomitance of the manifestations of their will, the interval of time when the agreement by will is done.

[14] Cărpenaru, Stanciu – *Tratat de drept comercial român/Romanian Commercial Law Treatise*, II edition (Universul Juridic Publishing House , Bucharest , 2011) , 466.

[15] ditto.

It is noted that the New Civil Code takes up this mechanism of the former Commercial Code in art. 1182-1203 and extends it to all contracts, regardless of the capacity of the contracting parties, thus acknowledging that it has proved viable in time and confirmed in practice.

The New Civil Code consecrates, in art. 1186 para. 1, the theory of acceptance, which implies that a contract is entered into at the time and place where the acceptance reaches the offerer even if he is not aware of the acceptance due to reasons that are not imputable to him.

Justly, it was noticed in the doctrine[16] that the Enforcement Act No. 71/2011 establishes in art. 106 that the provisions of art. 1186 para. 1 of the New Civil Code do not apply to contracts if the offer to contract was sent before the effectiveness of the Civil Code. This is how the incidence of the *tempus regit actum* principle is acknowledged.

It is worth noticing that para. 2 of art. 1186 extends, throughout the civil contracts area, the application of the former art. 36 of the Commercial Code, known in the doctrine as a legal basis of the "simplified contract", and "order followed by immediate implementation" respectively.

Art. 36 of the Commercial Code stipulates that, when the party making the proposal requests the immediate implementation of the contract and a previous acceptance response is not requested or necessary, given the nature of the contract, then the contract was perfect as soon as the other party started its implementation.

Art. 1186 para. 2 of the New Civil Code refers to performing a "conclusive document or deed" and its meaning of offer acceptance, regardless whether the offerer becomes aware of it or not, the acceptance significance being determined based on: the content of the offer (here it is worth noting the perfect resemblance to art. 36 of the Commercial Code); the practices consolidated between the parties; general practices; nature of the business (identical to art. 36 of the Commercial Code).

3.1.2 Determination of the place for obligation fulfillment

This is the subject matter of art. 1494 of the New Civil Code that extends the provision of art. 59 of the Commercial Code to the entire area of contracts, previously applied only to commercial obligations.

Thus, the determination of the place where the payment will be made will comply with the terms and conditions of art. 1494 of the New Civil Code only if the parties do not have an express provision at hand in that respect or if the payment place cannot be agreed due to the nature of the performance as per the contract, practices between parties or general practices.

We estimate that the assumption in the text concerning "under the contract" is redundant, being covered by the initial assumption "unless stipulated otherwise".

The following seems to us a more accurate wording: "whenever the parties have not agreed otherwise as in the following provisions, as well as if the payment place cannot be agreed due to the nature of the performance as per the contract, practices between parties or general practices, the obligations shall be performed as follows ...."

It should be noted that the Romanian lawmaker determines the place of contract performance (i.e. payment place) depending on the nature of the obligation. For obligations consisting of sums of money, the lawmaker establishes the portability principle, the payment place being the obligee's domicile or headquarters as of the date the contract is entered into.

For obligations consisting in delivery of a defined individual thing, the payment place is that where the thing is located as of the date the contract is entered into.

[16] Popa, Cornel; Frangeti, Ruxandra – "Reguli specifice aplicabile raporturilor între profesionişti conform Noului Cod civil"/"Specific Rules Applicable to Relations between Professionals under the New Civil Code" - www.noulcodcivil.ro.

For the remaining obligations, the payment place is defined according to the principle of the obligee's capacity to approach the obligor at the obligee's headquarters, it being the obligor's domicile or headquarters as of the date the contract is entered into.

As a matter of novelty, the second paragraph of art. 1494 of the Code identifies the solution of a problem that, in practice, could result in additional costs and could burden the obligor of the payment obligation. This is the case where any party changes, after contract conclusion, its domicile or headquarters designated as place where the payment will be made. The above-mentioned legal provision establishes an equity criterion, i.e. obliges the parties responsible for such a change to incur the additional expenses caused by performance at the new location.

3.1.3 Regime of interests in case of pecuniary obligations

Art. 1535 of the New Civil Code extended to the civil matter the principle established by art. 43 of the former Commercial Code, i.e. the legal accrual of interests as of the due date in the case of exigible pecuniary obligations. The article characterizes the interest as deferred interest, stipulates that its level may be agreed by the parties, and, unless they do so, the interest shall be the one that is stipulated by law and exempts the obligee from any prejudice.

Moreover, as a matter of novelty, para. 1, final thesis, art. 1535 of the Code prohibits the obligee to prove that the prejudice incurred by the obligee by late payment would be lower than the one resulting from the calculation of conventional or legal interest.

It is worth noting a new provision in para. 2 of art. 1535 :

If, before the due date, the debtor owed interests higher than the legal interest, the deferred damages are owed at the level applicable before the due date.

We believe the provision to be useless, falling under the assumption laid down in para. 1 of the same article, in case the parties agreed on the interest level in the contract respectively. The only utility of the text is that of interpreting it as a possibility provided to the parties to set forth deferred interests whose value is higher than that of legal interest.

With regard to the elaboration of the above-mentioned legal provisions, one may consider they govern both the legal relations that professionals are parties of, and those that non-professional are involved in.

It should be noted that, in correlation to the provisions of art. 1535 of the New Civil Code, the Government's Ordinance No. 9/2000 was amended by the Government's Ordinance No. 13/2011 on the legal remuneration and penalty interest for pecuniary obligations, as well as for the regulation of financial and fiscal measures in the banking field.

3.1.4 Interest capitalization or anatocism

This is applicable to all contractual relations as the provisions of art. 1489 para. 2 of the New Civil Code make no distinction depending on the capacity of the participants in these relations.

This article shall be supplemented by the provisions of the Government's Ordinance No. 13/2011 that, as shown previously, amend the Government's Ordinance No. 9/2000 on the level of the legal interest on pecuniary obligations.

3.1.5 Solidarity of joint obligors

With regard to this rule, derived from the former art. 42 of the 1887 Commercial Code, the doctrine opinions differ. Some authors believe this rule is maintained only for obligations contracted while performing the activity of an undertaking.[17]

On the contrary, other authors[18], whose opinion we agree with, believe that the provisions of art. 1446 in the New Civil Code, though they set forth *in terminis* the solidarity between the joint

[17] Popa, Cornel; Frangeti, Ruxandra – quoted article.

obligors of an obligation contracted during the activity of an undertaking, should be extended to non-professionals as well by virtue of the principle provisions of art. 3 para. 1 and 3 of the Code that stipulates "the general unity of application of the Civil Code".

It has been argued, in a just manner nonetheless, we believe, that this vision should concern the entire legal relation as "the differentiated application, for each part of the rules, is not even possible as long as the purpose was the unity of the private law"[19]. The presumed solidarity of joint obligors should extend to non-professionals as well in compliance with art. 3 para. 3 of the New Civil Code.

Anyway, the area of application of the presumed solidarity is much enhanced as compared to art. 42 of the Commercial Code, even if the professionals' category extent that exceeds that of merchants should be considered.

3.1.6 Cumulated penalty and direct, precise and unchanged performance of obligations

This is a novel rule added by art. 1539 of the New Civil Code and, though it is not a creation of the commercial law, it should be firstly signaled in considering its novelty in the area of contractual obligations, as well as in considering that it is a rule applicable to all contractual obligations that both professionals and non-professionals participate in.

3.2 Rules typical of the legal relations between merchants, that are taken up from the New Civil Code

3.2.1 Grace period

Art. 44 of the former Romanian Commercial Code stipulates that, as to commercial obligations, the judge cannot grant an obligor the grace period laid down in art. 1021 in the former Civil Code.

This prohibition was rigorously maintained until the abrogation of the Commercial Code, with the only derogation provided by the Government's Ordinance No. 5/2001 and the Government's Emergency Ordinance No. 119/2007.

Thus, art. 6 para. 2 and 3 of the Government's Ordinance No. 5/2001 on the procedure of demand for payment and art. 10 para. 1 and 3 of the Government's Emergency Ordinance No. 119/2007 on the steps for fighting the late performance of payment obligations resulting from commercial contracts, stipulate that the judge, finding the request grounded, will issue the ordinance of demand for payment, and payment ordinance respectively, which will indicate the payment due date.

However, we estimate that these two legislative instruments did not influence the rule laid down in art. 44 of the former Commercial Code as they were stated for two special procedures, which were brief, where the investigation of the receivables right was exclusively done based on written documents.

In common law litigations, where decisions were made that enjoyed the *res judicata* (matter judged) status, the provisions of art. 44 of the Commercial Code were fully incident, that prohibited grace periods, and the application of such rules was confirmed even in the trial-related matter, art. 720_8 of the Civil Procedure Code expressly consecrating the enforceability of court decisions made in the first instance in commercial cases.

[18] Săuleanu, Lucian – "Specificul obligațiilor asumate de profesioniști în contextul dispozițiilor Noului Cod civil" – „Specificity of Obligations Undertaken by Professionals under the New Civil Code" - www.juridice.ro.

[19] ditto.

3.2.2 Prohibition of dispute and obligation extinction by the obligor before an obligation assignee

The rule laid down in art. 45 of the former Romanian Commercial Code concerning the prohibition of dispute and obligation extinction by the obligor in the assignment of a right deriving from a commercial deed, which rule characterized the area of commercial obligations, is no longer found in the New Civil Code.

3.3 Rules typical of the legal relations among merchants, applicable in contractual relations among professionals only

3.3.1 Determination of the price among professionals

Art. 1233 of the New Civil Code stipulates that, when a contract entered into among professionals (our underline) does not define the price or does not indicate a means to define the same, it is presumed that the parties considered the common price in the field for the same provisions under comparable circumstances or, for lack of such a price, a reasonable price.

This article is remindful of art. 40 and art. 61 of the former Commercial Code that, in similar circumstances, referred to the "real price" or "current price", agreed on the basis of the stock market level or the relevant lists of prices where the contract was entered into.

However, the current regulation no longer takes up the parties' possibility provided by art. 61 para. 2 of the former Commercial Code, i.e. determination of the price by a third party (arbitrator) designated by the parties either by contract or after contract execution and seems to have submitted the determination of the price not agreed by the parties by contract to the court or arbitration tribunal.

4. Commercial activity contracts set forth in the New Civil Code

An overview of Title IX, Book V, the New Civil Code, finds that it considers a high number of special contracts, serving as an actual list thereof. Our intention is not that of providing an interpretation of these contracts, but an analysis of their structure and the significance of said structure.

Two conclusions emerge, *prima facie,* in connection with this title on special contracts:

The first conclusion: despite the outstanding number of special "regulated" contracts that it refers to, Title IX does not claim to be exhaustive as it concerns "various" special contracts.

Relating the name of this Title of Book V to the provisions of art. 1167 para. 2 of the Code, the conclusion is that, *de lege lata*, there are two systems that regulate the special contracts: the New Civil Code and special laws.

The second conclusion: given the non-comprehensive inventory of the special contracts regulated by the New Civil Code, the most overwhelming part is covered by contracts that are traditionally considered commercial contracts, that we designate, due to legislative limitation reasons, commercial activity contracts.

Thus, out of a total of 20 special contracts (guarantees excluded) laid down in the Code, at least 15 essentially concern commercial activities whereas only 4 are civil in nature: loans among non-professionals, life annuities, maintenance, games and gambling as activities unauthorized by the competent authorities.

The remaining special contracts either essentially concern commercial activities (supply, contracting, transport, shipping, consignment etc.), or are traditionally very common in the area of commercial activity (sale and purchase, exchange, lease, company etc.).

Given the circumstances, even without considering the special contractual legislation outside the Code, that is almost exclusively related to commercial activity, we can speak of a real "commercialization" of civil law, a contamination thereof, that not only fails to justify the existence

of commercial civil law as a species of civil law[20], but, on the contrary, it reverses the gender-species relation between commercial law and civil law.

Once again, we deal with the terminological constraints imposed by Law No. 71/2011 and the Government's Emergency Ordinance No. 79/2011 as concerns the terms "commerce", "merchant" and "commercial" and we limit ourselves to stating that such strong penetration of civil law by the commercial law, and the extension of the application sphere of such a great number of commercial law institutions to all types of legal relations (thus involving non-professionals) stands, in fact, for the victory of commercial law.

5. Commercial activity contracts that are not laid down in the New Civil Code, set forth in special laws

We have previously presented an inventory of the major special contracts/and areas of commercial law where such contracts regulated by special laws are entered into.

We added here transports that, in doctrine, are even the object of a legal sub-category – law of transports, maritime commerce – still under the incidence of the non-abrogated part of the 1887 Commercial Code, financial derivatives (with *futures*, *options*, *forward* contracts) etc.

The legal regime of these special contracts, just as in the case of those set forth by the New Civil Code, is that stipulated by art.1167 para.2 of the Code: these contracts are subject to the special legislation that consecrates them.

These legal provisions are meant to clarify a dilemma raised in relation to special contracts not laid down in the New Civil Code: what is their fate? Not being in the Code equals failure to exist?

Based on the very title of Section II, Title II, Book V, the New Civil Code – Miscellaneous (our underline) contract categories – and also considering the provisions of art.1167 para.2 of the Code, results in the idea that failure to include a multitude of mostly commercial special contracts in the Code does not deny their existence, on the contrary, it acknowledges it, determines they are subject to the legislative instruments that consecrate them and, thus, confirms the incapacity of the Code itself to create a complete inventory thereof, hence the failure of the tendency to integrate and the much praised unitary regulatory system.

6. Several final reflections on commercial activity contracts

These contracts, being specially laid down in the New Civil Code and the special commercial laws, are *special* or *regulated* contracts.

With reference to them, an author [21] justly signaled that "they are creators of the common law; the latter is not rigid, it grows every day based on doctrine and jurisprudence, as well as some special regulations for certain contracts, that are later generalized by contractual practices as well, that become abstract. Thus, certain principles (the principle of consensus), certain techniques (contract for a third party's benefit, subcontracting) or certain concepts (the creating drive of appearance in law, abuse of law, good faith, obligation to inform) are generalized."

We find a simple, but essential mention necessary: the contracts that set the tone and stimulate the evolution of common law concern the commercial activity.

In reflecting on the ample nature of this area and the vast and extremely technical set of issues it gives rise to, an idea was proposed, i.e. configuring a new branch of civil law, namely the law of professional contracts.[22] It remains to be seen whether such vision passes the test of time, gathered

[20] Piperea, Gh. – homonymous article **Curierul judiciar** issue 7-8/2011.

[21] Moțiu , Florin – quoted work, 17.

[22] Piperea ; Gheorghe – *Introducere în Dreptul contractelor profesionale/Introduction to the Professional Contracts Law*, (C.H. Beck Publishing House , Bucharest , 2011).

around the new concept of "professional" and the variety of contracts that "operating an undertaking" involves.

Conclusions

1. The article follows two major directions:

a. The vision of the New Civil Code on contracts, with focus on the following:

- the contract as a source of obligations;
- the New Civil Code as a framework law in the area of contracts;
- regulated and non-regulated contracts and their legal regime;
- categories of contracts laid down in the New Civil Code;
- the freedom to contract and good faith as fundamental principles of contract execution and performance.

b. Commercial activity contracts with focus on:

- criteria for differentiating these contracts from other contracts;
- definition of commercial activity contracts;
- peculiarities of the legal regime of these contracts;
- commercial activity contracts laid down by the New Civil Code;
- commercial activity contracts not stipulated by the New Civil Code, but regulated by special laws;
- place and importance of this contract type within the overall area of civil contracts.

The core result of this undertaking is outlining the vision of the New Civil Code on contracts, its pros and cons, as well as focusing on the specificity of commercial activity contracts and the influence they exert on all civil contracts.

2. The estimated impact will be:

- on legal professionals to whom it will provide a general overview on the New Civil Code vision, benefits and drawbacks thereof;
- on decision-makers that will consider potential future remedies on a legislative level;
- last, but not least, legal theoreticians who will find in this article reasons to debate the justness and timeliness of the Romanian lawmaker's option for the private law regulatory unity system.

3. The author's belief is that future research in the analyzed area will concern the vocation of the New Civil Code as a framework matter on contracts, the determination of the specificity of commercial activity contracts, making a list of such contracts (stipulated in the New Civil Code and special laws), as well as the determination of their compatibility with the New Civil Law regime.

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