USAGES – THE LEGAL REGIME IN NEW CIVIL CODE

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Abstract
In the broad sense, the concept of law is represented by totality of acts that are elaborated by competent state authorities and their purpose is legislating. There are juridical situations are outside the scope of regulation of legal norms and they are stipulated by the New Civil Code, namely the usages: which are defined, in the broad sense, as rules of conduct for a long time, born of social practice. If the law sanctioned any usage, by a rule of reference, giving them, as such obligatory legal power, they are sources of law and the legislator has provided, as is source of civil law, only usages which are in conformity to public order and morality. This problem there was no in the case of legal rules because, they themselves are created with the purpose of to generate the public order and morality. In the situations not covered by law, the usages have a greater force than that of the legal dispositions regarding similar situations, so the broad interpretation of the rules of civil law is made, in the cases which are not covered by the law, only if such an interpretation is not contrary to the usages. An analysis and understanding of the juridical status of usages representing: the customs and the local habits which is accepted by the members of that community as well as the professional uses, as rules of development of professional activities, may result in to perceive the legal force of their but also to reduce, on as much as possible, some potentials confusions of interpretation and application of the law.

Keywords: *legal rules, usages, public order, sources of civil law, legal regime.*

Introduction

Harmonization of the national legislation with European Union legislation is a continuous process and is aimed at ensuring compatibility of national rules with the European Union legal system, by modifying or completing national normative legal acts in accordance with the European norms, in this manner the European legal rules they become component part of national law.

The New Civil Code is the result of significant and profound transformation of Romanian society, in the context of development of the current European realities. In its content it is aimed the protection some the new social values: morals, cultural, scientific and economics and the legal norm of civil law have as its task, in equal measure, to exigencies which resulting from the commitments assumed by Romania as a member state of the European Union. This New civil Code, in its entirety, promotes the monistic conception of regulatory of private law relations in a single legal norm, systematizing and incorporating, in a single legal norm, all regulations relating to persons, family relations and commercial relations as well as international private law provisions, what they did, up to this moment, the subject of a separate legislation. The provisions of this fundamental legal norm of private law contains principles from new and modern regulation, which exists and in other legislations – rules of substantive law – rules and principles that can resist in time and also aspects related to the dynamics of social life, of existing realities and ever changing.

The sources of law that are enshrined in the The New Civil Code, art. 1, par. (1): "Are sources of civil law usages and general principles of law", regulates, for the first time, usages as the source of law. It is noteworthy that usages are not primary sources of law but, secondary sources in the sense that, only in the absence of legal rules, usages along with the principles of law are be taken as a source of law – par. (2). Same article, in par. (5), also provides that, „Interested party, must prove the existence and content of usage. Usages published in collections elaborated by entities or authorized

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bodies in this field is presumed to exist, until proven otherwise." Thus, usages, after the law, can be invoked and called upon to contribute to solving of a state of facts through solving a problem of law.

Paragraph (6), provides that, the „The purposes of this code usage, is the habit (customary law) and professional usages." The risk of this situation consists in that, at this moment, does not exist collections of usages and simple habit, the social behavior that is generated for a short time, to be mistaken for a custom, which represents a legal habit, for the long time and with a high repeatability and stability in time. The New civil Code[1], shaded a bit the rules that are applicable with usages, such as the example provided in article 1272 through which to be provide that a contract obliges not only at what you expressly provides, as well as to all the consequences which the law, custom or equity, to give them to the obligation, after its nature.

Codification of usages, as source of law, can give to litigants the possibility to supplement the arguments in to introduce request for judgment to the court, with the impression that the law gives him more than up to now and, the number of civil legal disputes to be higher. But, the legal regime of usages can be and the primary source of law when there are no legal rules in a particular case, the legislator is the one who give legal effect to usages in this sense.

Content

As a rule, the usages are the unwritten secondary formal sources[2] of the civil law and apply only in the absence of legal texts – the written sources of law, to regulate a specific legal situation. In the situation when exists and the law and the usages in a particular cause of resolved, then will be apply the law and if the text of the law makes reference to the usages, only then usages they become exclusively applicable. Because, the usages are the unwritten sources, they may be the subject of collections elaborated by the authorized institutions or by the entities in a particular geographic area. According to the New civil Code requirements that are necessary for the usages to become sources of civil law, are those that shall conform with public order but and with good morals[3] just like the legal rules.

The interested party in invocation of usages, need to prove their existence having the right to use any mode of prove. The means of administration or of prove of usages, could be: knowledge of usages by the courts, questioning of the involved parties in the cause of resolved, hearing of the witnesses, the expertise.

The legal rules and the usages, established rules of behavior but, the usages have a more limited scope than of the law, on one hand, because usages are concerned of a more restricted field of social relationships, and on the other hand, because just laws limited field of action of usages.

In cases where, a legal rule has its origin in a spontaneous situation, when its occurrence is not linked to a specialized official institution, but clearly originates from the social group, when the legal rule comes from a general and prolonged practice, from a constant habit, which is based on consent of the whole social group, which a considered as complying with the law, the custom or the juridical object is born.[4]

The custom, the oldest source of law, named in the past, *the earth habit*, because was born by repeating of a legal ideas by members of a community, in a significant number of successive individual cases, by creating some precedents[5] that were aimed, meeting the needs of the members and without causing an personal or collective injury.[6]

[1] G.Beleiu, *Romanian Civil Law. Introduction to civil law. Subjects of civil law*, eleventh edition, revised and enlarged by M.Nicolae and P.Trusca, (Bucharest: Legal Universe, 2007), 45-46.

[2] N.Popa, *General Theory of Law*, (Bucharest: All Beck, 2005), 168.

[3] C.Munteanu, O.Ungureanu, *Civil Law. General Part*, (Sibiu: University „Lucian Blaga" of Sibiu, 2011), 32.

[4] M.Djuvara, *General theory of law*, (Bucharest: Library Socec@Co.SA, 1930), 423.

[5] *Idem*, p.425.

[6] M.G. Losano, *Majors legal systems*, (Bucharest: All Beck, 2005), 287.

Thus, in order for a particular rule of habit to become customary, it must fulfill the following requirements: to have an uniform character, to be applied over and over again, to have a certain duration. The simple customs is not than a factual element, if they are not recognized to be a real law which can be claimed as a law accompanied by sanctions.

First, the custom, is based on concrete cases that preceded the so called precedents. Such cases have had to be consecrated, namely to be recognize the legal value, just as it it recognize the legal value of a law. In each of these concrete cases, the juridical rationality analyzes complex of juridical relationship which it compose and find that some repeats. In this way, is constitutes a general notion by identifying what is common in some concrete cases this is form, the general rule thus consecrated by the custom.

The customs represent a practice such entrenched so, people consider that by they exerts himself a positive law. In cases where, the custom is not consecrated by the courts but, is finds from repeated actions of public law institutions, the custom constitutes the usages.

Classification of the usages is done according to several criteria but, the most important are: the criterion of the scope into space of usages and the criterion of juridical force.

Classification, according to criterion of juridical force is most important because, the juridical force constitutes the defining element of their. According to this criterion, the usages can be:

- the normative usages (the legal usages, the usages of law), also called customs, in the doctrine of private and public international law;
- the conventional usages, also called interpretatives[7], completives or of fact, that have the value of contract rules.

Normative usages

The normative usages have the first two juridical characters common for all usages, with some particularities of interpretation, but have, as specific element, the character of a source of law. The normative usage (the custom) includes two essential elements[8]:

- an objective element, represented by the behavior which must be followed as a result of the existence of a particular social practices. This objective part of the normative usages – of the custom – is expressed by the formula: *longa, inveterate, diuturna consuetude* – old, continue, evident practice;
- a subjective element, the psychological element, consists in convincing subjects of law that the rule which is prescribed by that usual law (the custom) is obligatory and constitutes the law[9] to be respected (*opinio juris sive necesiitatis*), *opinio,* is belief that the behavior in question is juridical and *necesiitatis* assuming an obligation that derives from an alleged preexisting legal norm, already established.

The existence of the general belief of juridical obligation[10] is a necessary condition, but not sufficient, so that a usage to acquire the character of the legal rules. It is necessary to be fulfilled and a legal requirement, namely that the system of law which constitutes *lex causae,* in this case to recognize the normative force of these usages in sense of the New civil Code art.1, paragraph (2) „In cases not provided for by the law is applied usages and in their absence, the legal provisions regarding to the similar situations, and when there are no such provisions, the general principles of law”, in conjunction with para. (3), „In the matters governed by law, the usages shall apply only to the extent that the law refers as expressly to these.” The juridical role of normative usages is to determine the rights and obligations of parties, just like the law.

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[7] *Legal Dictionary of Foreign Trade*, (Bucharest: Scientific and Encyclopedic 1986), 307.
[8] B.Oglinda, *The business law*, (Bucharest: Legal Universe, 2012), 51.
[9] M. Djuvara, *op.cit.*, 423.
[10] G.Del Vecchio, *Lessons of legal philosophy*, trans.I.C. Dragan, (Bucharest: Europa Nova), 226-228.

According to the New civil Code, this role to may manifest in any of the following ways: to regulate relations of law yet unforeseen of law (*consuetudo praeter legem*) of to interpret or supplement the provisions of the law (*consuetudo secundum legem*).

In relation with the contract, considering that the source of authority of normative usages is not the will of the parties, the usages of which reference is made is impose contracting parties, even if were not accepted by they and even if they are not have known. The parties may however, to remove application of normative usages, either by their express will or by only tacitly, through the fact that stipulate in the contract clauses that are contrary to usages.

Some examples from the New Civil Code where the usages are invoked as a source of the law

In the New civil Code, the role of usages in forming of the contract is given by the section what provides the rules for consent, art. 1186, which, with regard to moment and place of conclusion of contract, provided that: paragraph (2) „Also, contract is considered concluded, when the addressee of the offer committeth an act or a conclusively fact, without notice to the offeror, if pursuant to offer, of the practices established between the parties, of the usages or according to nature of the business, the acceptance can be done in this way.

In this way, the legislator establishes an alternative time in which, according to some previous practices that have been settled between the parties or of some other usages exists between these, the acceptance of the contract can be done and in this way.

Another the legal regime of usages is given of art. 1189, with regard to, "The proposal addressed to some determined persons", through which a proposal of to contract is done, usually, to determined persons. There are however, offers which are made and to indeterminate persons – the goods with displayed prices, that are exhibited in the windows of shops. In this sense, the legislator establishes that, in the principle, a such proposal addressed to some undetermined persons, cannot be qualified as an offer but, depending on circumstances, *the request for the offer* or *the intention of negotiating*. Paragraph (2), establishes however that, propose to these undetermined persons have value of offer if „this is apparent from the law, from the usages or in there is no doubt, from the circumstances."

In case of the irrevocable offer, provided by art. 1191, the legislator invokes usages but and practices established between the parties, through paragraph (1), „The offer is irrevocable as soon as its author commits itself to maintain a certain period. The offer is also irrevocable when it can be considered thus under the agreement of the parties, of the practices established between these, of the negotiations, of the content of offer or of the usages.

The offer shall be considered acceptable under the conditions provided in art. 1196, through „silence or inaction of recipient of the offer" in these conditions in which result from provisions of law, from the simple will of the parties but, also and in the conditions in that results from „the practices established between they, from usages or from other circumstances."

Regarding another essential element of the contract, *the consent*, art. 1240, concerning „Forms of consent" provides that, the will may be expressed, verbally or in writing but also and suitable, of practices established between the parties or „of usages, leaves no doubt about the intention to produce corresponding legal effects."

For the purpose of distinguishing of an unmistakable intention of producing specific legal effects of the initial contract, the New Civil Code provides a series of factors of reference: the law, convention of parties, practices established between these, the usages. Listing of these factors of reference, suggest prioritizing, the first priority situating himself the law but, only in absence of the law, the others sources of law.

Article 1272 regarding, „The legal ways to complete of content of the contract", paragraph (1), a first legal way to complete the contract consists in references to practices established between

the parties, the usages, the law or the equity, representing the factors of reference with the various degrees and increasing of generality or objectivity.

- in the first place, are situated the practices established between the parties, representing the particular factor or subjective factor of reference, in order to complete the contract, specific of the parties from the contract, used in their partnership relations;
- secondly, is situated the usages, which represents a factor of reference with a first degree of generality or of objectivity, according to the field of activity in which it activates the parties.

Article 1494, the New civil Code, mentions the following ways for determining of the place of payment which dispose, among other things and that, in the absence of express clause, the place of payment shall be determined in accordance with practices established between parties or of usages to which they have acceded.

Article 1495, the New civil Code, establishes the general provisions pointing methods for determining the date of payment and, in their absence, the suppletive rule of immediate chargeability of obligations. In this sense, the payment must be made at the time when the obligation has matured, that has become exigible.[11] According to para. (1), the chargeability of obligation or the date of payment is, first, established between the parties by indicating of a execution time. In the absence of express clause, the date of payment may result from the interpretation of the contract, and if nor this modality not its proves, to be useful will resort to the practices established between parties, respectively to the usages.

Article 1667, provides measures for „The costs of teaching”, in the sense that „In the absence of usages or of contrary stipulation, if the good must be transported from one place to another, the seller has to take care of shipping by the expense of buyer. The seller is released when teaching the goods to the carrier or to the shipper. Cost of transport are the responsibility of the buyer.” So, in this article, the usages have the juridical regime of the principal source of the law because, the New civil Code refers explicitly to the usages.

In any contract of sale, the problem is of establishing ways of delivery, the transfer of risks and of distribution between the seller and the buyer of expenditure related of transport of goods (the expenses of the insurance of goods, the value of transportation, etc.).

Is difficult to resolve these formalities every time by inserting in the contract, of the detailed clauses, containing the regulation of all these issues. Therefore, the practice, devised a method to shorten the way up to end of the contract, by resorting to commercial terms what condenses in a form more possible simplified, the most usual situations.

The commercial usages have been originally, own of the maritime sales[12] and their meanings was different depending of the place, of the port (of sea or of river), or of the country. This fact created difficulties in terms of their knowledge of the parties, who did not know exactly extent of their obligations, since the usages knew the varied acceptances depending on port in which were applied. For example, a sale FOB, involves in a port the obligation of the seller to load the goods on board of the ship, while in another port, it was necessary only to bring the goods to the quay, near the ship. Often these differences were uncomfortable and were sources of disagreement between the parties, being extremely difficult to determine, which was the original intention of the parties.

In order to remove these inconveniences, International Chamber of Commerce from Paris, beginning with 1920 year, had the initiative and has undertaken codification of most commonly used commercial terms. The first coding was made in 1936, was revised in 1953, completed in 1967, 1976, 1980 and 1990. The latest version dating from 1999 being published in 2000 under the title of *Incoterms 2000*.

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[11] C.Statescu, C.Birsan, *Civil Law. The general theory of obligations*, (Bucharest: Hamangiu, 2008), 315.

[12] G. Buta, *New Civil Code and unity of private law*, in the volume of the New civil Code. Comments, Third Edition, revised and enlarged, (Bucharest: Legal Universe, 2011), 65.

Incoterms[13], contain a preamble, showing that the provisions of these rules does not impose to the will of the parties (so, they have not binding), the partners having the freedom to insert in the contents of the special contract, the adopted provisions. The two parties may refer to Incoterms as the basis of their contract but, may provide under the contract, the certain changes or additions depending on nature of the goods. Applying of Incoterms is optional is dependent on the will of the parties.

Adoption, by the parties, of the conditions of delivery, regulated by these usages not requires other formalities or other specifications than the simple registration in the contract of the international sales of the chosen clause, followed by the shortened name of the rule as: FOB[14] - Incoterms 2000; C.I.F.[15] - Incoterms 2000; F.A.S.[16] - Incoterms 1990.

Conventional usages

The conventional usages, have to their turn, the first two basic elements of all usages and constitutes a source of law in the conditions in which fulfill those conditions of repeatability and some older between the business partners.[17]

The legal force of the conventional usages is that of a contractual clause. The pursuant of authority of these usages is the agreement of the will. Applying of these usages shall be placed on the area of the freedom principle of the will of the parties.

The agreement on the application of the conventional usages may be, express or tacit:

- the most frequent situation is that of the express agreement of the parties, expressed by clause of reference provided in the contract. But, there are fewer cases in which by the contractual clause, the parties send to *the current usages* in this field of business. The sending is done, usually, to codified usages, either by neutral organisms or by the one of the parties, through the general conditions, the model contracts, the framework contracts, etc. In these cases, the usages fixed thus, are received contractually, with role of completing the content of contract;
- the usages can be incorporated contractually, applying as a contractual clause, and through tacit or implied will of the parties.

In some cases, the tacit character of manifestation of the will be deducted from some indices, which can be intrinsic or extrinsic of the contract. It is, in this case, of acts or of facts outside of the contract, for example, the reference to an usage in the framework of an additional act, from which is be concluded that the parties wished to implement the usages and to the principal contract. In other cases, the usages that fulfill some conditions are considerate, by the law, as being applicable tacitly in the contract, even in the absence of some indication of will of the parties.[18] The role of conventional usages is to determine specifically the rights and the obligations of the parties.

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[13] *INCOTERMS* is an acronym for *IN*ternational *CO*mmercial *TERMS* which means *Terms of International Trade.*

[14] *Incoterms 2010, ICC publication 715 – Free On Board* (named port of shipment) – The seller must load the goods on board the vessel nominated by the buyer. Cost and risk are divided when the goods are actually on board of the vessel. The seller must clear the goods for export. The term is applicable for maritime and inland waterway transport only but NOT for multimodal sea transport in containers. The buyer must instruct the seller the details of the vessel and the port where the goods are to be loaded, and there is no reference to, or provision for, the use of a carrier or forwarder. This term has been greatly misused over the last three decades ever since Incoterms 1980 explained that FCA should be used for container shipments.

[15] *Incoterms 2010, ICC publication 715 – Cost, Insurance and Freight* (named port of destination). Exactly the same as CFR except that the seller must in addition procure and pay for the insurance. Maritime transport only.

[16] *Free Alongside Ship* (named port of shipment) The seller must place the goods alongside the ship at the named port. The seller must clear the goods for export. Suitable only for maritime transport but NOT for multimodal sea transport in containers. This term is typically used for heavy-lift or bulk cargo.

[17] D.Mazilu, *International Trade Law, General Part*, Ed. Lumina Lex, Bucharest, 1999, p.133-143.

[18] *The Vienna Convention* of 1980, Article 9, paragraph 2.

Assimilation of the conventional usages, in terms of their legal force, with the contractual clauses, arises a problem to the report of this usages with the law respectively with the contracts. In this respect, it is evident that the parties may exclude application of the conventional usages by their express or tacit will. This solution is explained by the fact that the role of the usages is to interpret and to complete the agreement of the will between the parties.

Professional usages

„The professional usages, are those rules which governing relations between the members of a profession or, where appropriate, between the members and the customers, during exercise of the profession.”[19] The professional usages have been introduced, as the sources of civil law, because the New civil Code „it applies to the relationship between the professionals, as well as relations between they and any other issues of the civil law.” The professionals are defined as „... all those who operating a company.”[20]

Nor the New civil Code, nor the law of its implementing, does not contain a synthetic definition of the professional or the explicit criteria of establishing or of identification of this in relation of other participants to the civil legal relations. From the systematization and the spirit of law resulting, however that, the professional is defined by reference to the activities of operating of a company. The law of implementing of the New civil Code, no. 71/2011, art. 8, lists more categories of the professionals, including on *the trader* who is renamed by art. 6 of same law in *the professional*.

The professionals are usually[21]:

- *the physical persons,* such as: the traders, the authorized physical persons, the family or the individual entrepreneurs and the persons who exercise the liberal or the regulated professions;
- *the legal entities,* such as: the commercial companies, the cooperative organizations, the autonomes regies, the civil societies with legal personality, the groups of economic interests;
- *the public institutions,* who operates a company can be the professionals for the purposes of the New civil Code, regardless of whether obtain or not, the profit.[22] This category includes: the hospitals, the universities, the authorities of regulatory of supervision and of control;
- the holders of a company may be, however, even the entities without legal personality such as the simple societies, the civil societies without legal personality, governed by the special laws (the funds of pensions, the investment funds, the law firms, the notaries, the legal executors or the practitioners of insolvency) and the groups of companies because they too operates a company, and the operation of company can be an exercise of one or of more persons, united or in the associations with legal personality, or in yhe collectivities or the entities without legal personality.

If, the law does not provide, shall apply the usages (the habit or the custom and the professional usage). In their category, the professional usages are priority, especially since they are usually „coded” ie, united in the collections elaborated of the ability organizations, the reason for which they are presumed to exist, while the customs must proved by the party who them invokes.

Conclusions

In conclusion, moment of formation of a usage is found even in the agreement of the will of partners who have imagined that solution. Retrieving of this solution and of other partners and its observance by them in conducting of the legal relationship resulted to formation in time of a practice

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[19] G.Boroi and C.A.Adreescu, *Course of civil law. General part - according to the New civil Code*, (Bucharest: Hamangiu, 2011), 8.

[20] Art. 3, *The New civil Code*.

[21] C.Florescu, *Romanian Pandectes nr.10/2011, Concepts and trends in relation with the company law*, (Bucharest: Wolters Kluwer, 2011).

[22] S.D.Carpenaru, *Commercial law under the conditions of the New Civil Code*, in the Judicial Courier nr.10/2010, (Bucharest, Judicial Courier, 2010), 543-546.

in this sense and the constancy with which that practice was followed by the participants from the locality or the geographical area where it was formed had as a result transformation of the initial solution in the rule of conduct which by compliance and enforcement repeated in the practice came into consciousness of the traders and has become by virtue of the tradition of the respect for all participants to the trade. By their character of generality and of impersonality, the usages approaches of the legal norm but in contrast to this which is generated and ensured by the state, the usages are the realization of the participants themselves to the specific legal relations. The usages, representing the most direct expression of the activity of the participants in the national and the international business, have a great capacity to adapt to the new circumstances arising in the different areas of the business, their role is just that, of to complete the eventually legislative and contractual gaps.

Identification, inventorying and codification of the usages, will be a challenge for all business partners but also and for the adepts of the science of the law, fair in order to the equitable realization of a justice of high quality, capable of to defend the legal order, the part of the social order.

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