ROMANIAN COMMERCIAL COMPANIES IN INTERNATIONAL BUSINESS AND LITIGATION

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Summary: In this article I'm referring to commercial companies from Romania which have to face out the international competition and litigation. These companies need to adapt to the new demands of the international market and integrate in the European Union, a community which becomes larger.Firstly, I present in chapter 1 the notion of the commercial company, in chapter 2 I treat the notion of litigation and the procedure of solving it and in chapter 3 a particular case is being presented related to the subject of Court of Arbitration and commercial companies.

Keywords: company, commercial, litigation, arbitration.

Introduction

The 1st of January 2007 is a historical moment for Romania, because it is the date when our country became a member of the European Union.

Starting with this date we assist to a complex process for Romania, the European integration, a process that submits the commercial companies from Romania to a harsh test in the contemporary European geo-political and economical context and in the context of the intensification of the international business.

Can the Romanian commercial companies manage the competition, the integration and the litigation? There is an adequate political and economical context that allows the development of the Romanian commercial companies or they must adjust to the new demands of the market?

Chapter 1

In the first place we need to define the notion of commercial company. So what is a commercial company?

According to the dispositions of the Romanian Civil Code the company is a contract by which two or more persons agree to put something in common with the purpose to share the profit that may derive from it. The company has to have a lawful object that has to be made for the common benefit of the parties (art.1491 and art.1492).

Any commercial company has its own judicial personality, it represents a contract, as well as a subject of autonomous law, and in the same time it has a lucrative purpose, because it wants to have material benefits, and benefits of another nature.[187]

The notion of commercial company is used in the legislations of the states in which the commercial law has an independent existence. The appreciation of the commercial character of a company is made after two criteria. In connection to the admitted solution one can use the criterion of the social object or the criterion of the way of establishing.

The first criterion, that of the social object, was consacrated by the French Commercial Code from 1807. The social object is a classical criterion, and it is an objective one. A company is commercial if it has been established with the purpose of making acts of commerce, acts that are stipulated as such in the Commercial Code.[188]

The criterion of the form of establishing is adopted by the French Law nr.537 from July, 24th, 1966 on commercial companies. This criterion is a modern and a formal one. A company is commercial if it was

[187] C.Hamangiu, I.Rosetti-Balanescu,Al.Baicoianu, Tratat de drept civil roman, vol II, Ed.Nationala,Bucuresti,1929,p.994 si urm; Fr. Deak, Tratat de drept civil.Contracte speciale,Ed Actami, Bucuresti, 1996, p.356 si urm.

[188] A se vedea art.1.alin.(1) al Legii romane din 1990 privind societatile comerciale si art.3.C.com.rom.

established under the form of a company in common name, company with a limited responsibility or as an anonymous company with stock.[189]

So a commercial company that was made in a legal manner, with the fulfillment of all the established conditions of content and form, gets a judicial personality. From that moment on, the commercial company has its own name that is mentioned on the social firm, the name of the company permits the individualisation of the social activity, a social environement, a nationality and partrimony. The company can participate in its own name in the commercial circuite, it has the capacity to stand in court and it has its own patrimonial responsibility.[190]

The commercial company has its own domicile that becomes its social headquarters.

The establishing of the comapny's headquarter has important consequences. In connection to the social headquarters one appreciates: the nationality of the commercial company, the place where the the procedure documents are communicated, the abilitated court to judge the litigation in which the company is a part of, the place where some publicity measures are taken, the place where the company can be executed.

In the Romanian law, in order to determin the nationality of a commercial company, we use the criterion of the social headquarters. Thus a company that has its headquarters in Romania has the Romanian nationality, is subjected to the Romanian laws, this criterion is applied also to the companies that have foreign participation[191].

The commercial company has its own nationality, that is distinct from the one of its members. The notion of nationality expresses the affiliation of the comapny to a certain state and law system (art. 237 from the Commercial Code). The affiliation of the company can be determined after several criteria: the criterion of the social headquarter, the criterion of the registration, the criterion of the place where the main exploatation is located, and the criterion of control.

The commercial company has its own patrimony, that is distinct from the one of its associates and in the same time it has an autonomous character that is very important (I. Macovei, 2006, p.107).

Once we have clarified the notion of commercial company, we have to think to other aspects: the competition, the integration in the European Union of the Romanian commercial companies, their place in the international business.

I consider that today there is a number of commercial companies that are ready to face the competition, but unfortunately, the number of the comapnies that are not prepared to face the competition and the international business is pretty big. What must be done in this direction? What is the solution? Can these companies be integrated in the economy of the European Union?

My opinion is that in this situation the attitude of the people in charge, of the political class should change, in the sense they should reduce taxes and that the local investors should have some advantages, thus we can reach a durable development/ growth of the Romanian economy and the possibility that the Romanian commercial companies can extend to a international level. Besides this, the commercial companies have to adapt to the new demands of the market, in order to reach a positive outcome.

This adaptation can be done through a good management and marketing and through the total implication of the employees, through investitions in equipment and in the latest machines.

Unfortunately, this reduction of taxes will not be done any time soon, because lately I noticed that few Romanians fight for the rights they have through the Constitution.

In this conditions, Romanian commercial companies will not be able to develop and integrate in the European Union. It is desirable to be better aware of the important of the Romanian commercial companies.

Chapter 2

In the international economical context one can have litigations that are solved by the Romanian Court of Commercial Arbitration, these litigations being between Romanian commercial companies and the ones

[189] I.Macovei, Institutii in dreptul comertului international, Ed. Junimea, Iasi, 1987, p.102
[190] Pentru detalii, I.Macovei, Dreptul comertului interabtional, vol I, Ed.C.H.Beck, Bucuresti 2006, p.105 si urm.
[191] Art.1 align.(2) si art.280 din Legea 31/1990

from other states. After resolving these litigations, the Romanian commercial companies can win or the exact opposite can happen. This depends only on the judges from the Court of Arbitration.

There is a set of Rules of arbitrary procedure that were emitted based on art.5 j, art.11 and art 13 from the Order in Council nr.134/1990 regarding the Chambers of Commerce from Romania and that were aproved by the College of the Court of Arbitration through the Decision nr.3 from the 10th of September 1999, that came into effect at the 1st of January 2000. the modification and completation of these Rules was made through the Decision nr.1 from 30th June 2004 that came into effect at the 1st of September 2004.

Next I will present a part of the rules of arbitrary procedure that were modified and completed through Decision nr.1 from the 30th of June 2004.

Thus, according to art.(1) align(2) the organization of the arbitration "is made through the Court of Commercial Arbitration that functions besides the Chamber of Commerce and Industry of Romania, that is still called the Court of Arbitration....".

Continuing art.(2),align (1),(2) and (3) stipulates the next aspects: "The Court of Arbitration organises and manages solutions on the way of arbitration, of some internal or international commercial litigations, if parties have concluded in this sense a written arbitrarial convention.In the meaning of these Rules, commercial litigation is any litigation that derives from a commercial contract, including his conclusion, execution or abrogation, and like any other commercial judicial reports." "Commercial litigation is internal when the results from a contract or from other commercial judicial reports that interests international commerce."

Chapter 2, article 10, align.(1) stipulates : "The arbitrarial convention is made in writing, under the nullity sanction.This act of arbitration can be realised of any arbiter that is a physical person, Romanian citizen or foreigner, who has complete capacity of exercise of rights, enjoys of an untouched reputation and has a high qualification and experience in the commercial law domain and international commercial relations".(art.17,align(1))

Parties can establish if the litigation can be judged by one, two or more arbiters. In the situation that parties haven't established the number of arbiters, the litigation will be judged by three arbiters each one of them named by each side and the third superarbiter chosen by the two arbiters.(art.19)

But there also exists a situation stipulated in article 19 in which if there are more claimants or more defendands, parties that have common interests will name only one arbiter.Only in case of a misunderstanding the arbiter will be appointed by the president of Court of Arbitration.

Another important aspect that needs to be taken into account is that the arbiters have to be impartial and independent.(article 20)

Concerning the notification of Court of Arbitration this is made by the claimant through an written petition, named arbitration petition or arbitrarial action.(article 30)

The arbitral procedure ends by sentencing the arbitral decision named arbitral sentence with a decisive role.(article 56, align.1)

Rules must be respected once parties have committed, so that at the end to come up to an advantageous result for a part and less for the other part.

Chapter 3

Next I will present a particular case bounded to the subject of Court of Arbitration and commercial companies.

It's about the conclusion from the 9th of October 2001 from the International Commercial Court of Arbitration from the Chamber and Industry of Romania.In this sense is taken into discussion the exception of prematurity, the lack of making directly conciliation procedure stipulated in article 7201 Civil procedure code.(www.avocatura.com)

The section form 30th of January 2002, the arbitration court with superarbiter: Ion Bacanu and arbiters: Stanciu Carpenaru, Victor Babiuc si Daniela Pop. On the role it is the sentence about the exception of prematurity of arbitral action registered under the number M 11966 from 4.10.2001, action formulated by SC.TH.SA, in attribute of claimant against SC.SDC.SA in (the capacity) attribute of defendant. In the session of arbitration from.15.01.2002, according to those registered in the conclusion of that day, the defendant raised the exception of prematurity of the arbitral action. The plaintiff requested the rejection of

the exception as unfounded. The arbitral court putt off the sentence about this exception succesive at 22.01.2002, at 28.01.2002 and then for the date of 30.01.2002, when the sentence was pronounced in the presence of the three members in person with unanimity of votes, at the residence of the Arbitration Court. The Arbitral Court puts in discussion the exception of prematurity of the arbitral action. Through the contestation registered under the number 126 form 10.01.2002 and the oral conclusions raised in the session of arbitration from 15.01.2002, the defendant raised this exception with the motivation that the plaintiff infringed the imperative stipulations of article 7201 of civil procedure code. According to this text in actions in law and petitions in commercial matter evaluated with money, before introducing the petition of summoning, the plaintiff will try to resolve the litigation through direct conciliation with the other part.(align. 1)

In this intent, the plaintiff will convene the adversary part, communicating to him in writting his claims and their legal base, and all the acts that can be proven.(article 7201,align.2) The convocation date for conciliation will not be established earlier than 15 days from the date of receiving the communicated acts.(align.3) The result of conciliation will be committed in an written act with the indication of each other pretences regarding the object of litigation and the point of view of each part.(align.4)

The written act about the conciliation result, or in case the acuused couldn't come to convocation the proof that from the date of receiving the convocation have passed 30 days, will be annexed to the petition of summoning.(align.5)

The defendant sustains that the plaintiff did not respect the minimum of 15 days, between the date of receiving the convocation by the defendant and the date of convocation, fixing a term of only 5 days and at the same time the plaintiff did not show in the convocation the hour to where the defendant was called for conciliation.(www.avocatura.com)

The plaintiff, through oral conclusions from the arbitrarium session from 15.01.2002 and through written conclusions, demanded for the exception to be repelled as unfounded, in principal, with the motivation that the procedure of direct conciliation stipulated by article 7201 civil procedure code is not obligatory in the arbitral procedure and in addition the defendant hadn't made the proof that by this prematur action could have suffered a damage that could not be removed only by the annulment of the arbitration petition, regarding that article 7201 does not stipulates in express way the nullity sanction, so it's about a virtual nullity regulated by article 105, align.2 civil procedure code. Examining the claims of both sides and the proof from the file, the arbitral court will establish that the attached lawsuit in xerox copy, the convocation for the purpose of trying to settle in a good way differences related to the execution of selling-buying contract number 20 B from 23.04.2001, convocation made through notification number 823 from 9.07.2001, transmitted through a judiciary executor, whereby the defendant is convocated at the indicated place in the convocation, in term of 5 days from the receiving oh this. In convocation are showed the issues that will be discussed and the precise day and hour when will display the meeting, it this sense the defendant wiill be asked through fax. At the end of convocation will be specified that in case the discordant issues won't be solved amiably, the plaintiff will address to arbitration according to article 8 from contract number 20B from 23.04.2001, made by the parties. Corresponding to arbitration clause from article 8, any litigant situation will be solved amiably between the two parts of the contract the decision being final and executory and in extraordinary way the Committee of Arbitration from the Commercial Chamber of Romania will solve the situation.(www.avocatura.com)

The Arbitral Court, verifying her own competence, holds back that this arbitration clause is available according to artcle 969 civil code, artcile 340 and next procedure civil code and article 2 and next from the Porcedures Rules of Court of Arbitration.

Consequently, the Arbitral Court is competent in solving this litigation including the exception of prematurity.

After a lot of discussions, the Arbitral Court consideres that the two legal dispositions from article 341 align.2 procedure Civil Code which stipulates that parties establish the procedure of eventual preliminary conciliation and article 7201 procedure civil code referring to direct conciliation has a character of special stipulation, derogatory from common law of civil pocess and, consequently of strict interpretation.Even if they have common aspects and follows the same finality, they strictly apply in disputed claims office for which they have been edictated, the first one in arbitral litigation and the second one in judicial commercial process.

In conclusion, the Arbitral Court consideres that the stipulations of article 7201 from procedure civil code cannot be applied in this litigation, so that the exception of prematurity will be rejected as unfounded.

Conclusion

Finally I consider that commercial companies from Romania have real opportunities to develop in international business and integrate in the European Union and this will happen only if the Romanian state will take measures and make everything that is possible regarding legislation and taxes.

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