SOME COMMENTS ON REPRESENTATION OF COMERCIAL SOCIETY

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Abstract: *This article analyses the issue of the representation of the commercial company, especially in the case of genuine acts of disposal on the assets of the company, starting from different opinions expressed in the notarial and judicial practice of the form that the empowerment in the case of representation of a company should take. In the present form of Law no. 31/1990, the liability of the company was extended irrespective of the legal form for the legal acts concluded by its representatives.*

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1. The name of a legal representative for administration

Linked to the concept of a legal persons in general and the company in particular, have been formulated in the literature with more opinions.

The way the institution of a legal person is seen in its essence makes the answer to the question of whether individuals through which manifests the legal person have the quality of a trustee, of a legal representative, previously put or of an person whose facts and juridical acts directly to the legal personi.

In an opinion, are regarded as "representatives" of the legal person all who represent opposite thirdii parties. We consider that this definition is too broad, whereas there may be persons representing the entity and yet not have the quality of its representative (for example, a simple representative or an attorney hired to represent a particular process).

In another opinion, through the representative of the legal person, it is meant any person to whom the law or the statutes recognizes faculty to represent the legal person or the manner for a particulariii operation. Although more complex, yet neither this definition does not entirely reflect reality. The notion should not be assimilated representative. Between the representative and the represented there is no identity of positions of the entity and the legal entity.

Mainly, members of the legal person did not represent, but otherwise the question arises when they are gathered in a general overview: their decisions are then the responsibility of the legal personiv.

It is generally attributed the status of "representative"v of the legal person to whom the statute has entrusted the management and control (the administrative board in the case of the autonomous administration, according to Law 15/1990 on the reorganization of the state economic units as autonomous regies and commercial companies; the general meeting of the shareholdersvi, the directorsvii is either acting individually or collectively in a board of directors of the commercial companies governed by Law No 31/1990, the board of directors made up of at least 3 members appointed by the founders at the time of foundation, According to Government Ordinance 26/2000, etc.).

The individuals that make up the body of a legal person are subjects of civil law and appear in double role, namely, as individuals in their own right and as the inner entities of the legal person. These people cannot be called directly responsible, but are called indirectly.
On one hand, the individual that meets the entity's functions are identified with the legal person and on the other hand the legal person stands by that person through injury that has been caused to him.
The legal entity has, in general, two types of principal representatives. On one hand, the general Assembly, where all members are summoned, which has the power to adopt resolutions and express the will of the legal person and, on the other hand, those who manage the legal person, who have the executive power, who run its willpower and bear different names depending on the legal entity (administrators, etc.).
The form of a legal person may consist either of a single person, in which case we are dealing with unipersonal entity, or with more individuals, this hypothesis is called collective and collegial body which represent the vast majority of them.
In conclusion, in our opinion, the body of the legal entity is the person or persons or the internal structure or memorandum of the Association, which will exercise the functions entrusted to them, becoming the will of the legal entity.
The civil code uses the concept of administration entity in art. 209 para.1 and 2 of the Civil Code which provides that legal person shall exercise the rights and fulfil the obligations through its management bodies, from the date of their establishment. Thus, the administration body shall appoint a natural or legal person who, by law, the Act of incorporation or statute, shall be designated to act in relation with third parties, on its own or collectively, in the name and on the account of the legal person.

2. The power to represent the commercial society

In accordance with article 218 of the Civil Code, the juridical acts done by the organs of the administration of the legal person, within the limits of the powers conferred on it, shall be considered to be acts of the legal person itself. In dealings with third parties, the legal person is engaged by the acts of its bodies, even if they exceed the power of representation afforded by The Memorandum of the Association or Status, unless it proves that the third party knew about it at the date of the Act was done.
Under art. 1919 civil code, the general rule is that the company is represented by administrators with the right of representation. Right of representation of a company cannot be awarded by means of a contract of employment, it is a special institution governed by corporate lawviii.
We must, however, make a distinction between the power to represent the company and the power of the company's managementix.
In the structure of any company we can distinguish a *deliberative body*- the general meeting of the shareholders who elect or appoint the *representative body* whose main task is to manage the entity with legal personality. Therefore, the governing body of the legal person is deliberative and the management body is the representative body.
Thus, the associates shall designate individuals who will administer and represent the society through the Memorandum of the Association of the company, therefore, the power of representation exists only if it has been granted to the administrator. The associates shall decide whether the mandate of administrators includes the

power of representation, hypothesis in which they can represent the company in dealings with third personsx or is limited to the internal management of the company. The Power of representation to the administrator must be expressed explicitly in all cases in order to ta With respect to the company, partnerships and Limited Liability Company, the right to represent the company belongs to each administrator, out of stipulation, contrary in the constitutive act, according to art. 75 and 197 paragraph 3 and law no. 31/1990 as amended and supplemented. In the case of these companies, if the articles of incorporation has not been conferred the power of representation of one of the administrators, the presumption that all administrators benefit from the power of representationxi is the one that operates. This presumption shall produce effect by third parties if the formalities are completed.

In the case of the company with limited shares, in accordance with article 143 of Law 31/1990 the right to represent the company in dealings with third parties and in legal proceedings lies with the Administrative Board. If there is no stipulation contrary to the Memorandum, the society is represented through its Chairman.

In conclusion, with the above things said, it results that the administrator enjoys the power of representation in compliance with the law as legal representative of the company, regardless of its form.

The members of the management bodies who legally represent the company benefit of a "general mandate" of representation and can conclude any kind of acts in the name and on behalf of the companyxii.

As the legal representative of the company, the administrator has the right to conclude acts of conservation, acts of administration and disposition under the management of the company. In order to achieve the object of the company's activities, the legislator has moved from corporate of the provisions of the legal acts concluded (conservation, management, provision) and the mode of training of legal acts (real solemn, consensus). We can see that the mandate of the general managers in corporate law encompasses a wider sphere than the mandate from common law, because it includes also documents available.

Thus, authentic instruments of provision in respect of the goods of a company may be made by the legal representatives of the company by virtue of the powers conferred on it by law, the memorandum or decisions of the Association, without the necessity of a special power of Attorney in authentic form for this purpose (70^1 of the law No. 31/1990).

From the analysis of this legal text, it appears that the legislator understood to extend corporate limits of social administrators and give a special character, in the sense that for documents available that have as their object the property of a company, regardless of its form, it is not necessary to have a special power of Attorney and, furthermore, does not require to take the form of an authentic and even in those situations where under the law, the acts of disposition necessarily end in authentic form (e.g. in the case of documents relating to the provision of property).

This opinion was enshrined and relatively recent in court practice, thus putting an end to the controversy of the doctrine, by Decision No. 731/05.03.2015 of the High Court of Cassation and Justice- Civil Section II. Thus, where the conclusion of a contract of mortgage the company was represented only by one of the Admins, this representation is in compliance with the provisions of law No. 31/1990 and the Memorandum Act, we cannot talk about the lack of consent to the conclusion of the Act, the fact that the other administrator hasn't agreed on the validity of the Act concluded between the company-which was legally represented- and a third person.

The extent of the powers of the person legally representing the company differ according to the type of management.
The Memorandum of the Association may contain two forms of Administration:
- **Simple**, that implies that provision (disposal or encumbering real warranty) are allowed to the administrator who manages assets whenever they are necessary for the proper management of the universality; in other cases it is required the prior authorization of members
- **Full** – that implies that the administrator can do any of the acts of disposal for valuable consideration or encumbering real rights, without any declaration of a general meeting of members. Cannot conclude, however, acts with a free title, such as donations of goods or bailment contracts only on the basis of the General Assembly of members' decision.

3. Transmission of the representative power

Under art. 71 para. 1 of the law of companies and the Civil Code art. 2023, the administrator is able to convey the power of representation to another person only if that possibility was expressly granted by the Memorandum or by the decision of the general meeting of shareholders. Otherwise it is required to represent the company in all documents that will be done. Assuming that he is granted the right of substitution, the administrator may exercise it by giving it to another person with a special mandate.
This legal text does not represent anything other than applying the General principles of mandate and justification is found in the right to represent the companyxiii.
Substitution with another person through a special mandate must be done carefully, however, for certain acts.
In general, the administrator may do any act in the interest of the administration of the company. In terms of provision of a certain gravity, law No. 31/1990 includes some specific provisions, which are different depending on the form of that company. Acts of acquisition by the company of certain goods from a founder or shareholder are subject to the conditions provided for in article 44 of the Act 1st index.
The legal documents for the acquisition of the company, concluded within a maximum period of 2 years from the date of establishment or of authorization from the start of activity of the company in return for a lump sum or other equivalent value representing at least one tenth of the issued share capital are also kept in mind. Such legal deeds must be subject to prior approval of the extraordinary General Assembly of shareholders, listed in the Trade Register and published in the Official Gazette and in a newspaper with wide spread. The goods are object of judicial acts and shall be subject to surveys.
The administrator will be able to dispose of their own behalf respectively acquire goods to or for the society, having a value of more than 10% of the value of the net assets of the company only after obtaining the approval of the extraordinary General Assembly.
Under art. 153[22] The Board of Directors, namely the Directorate will be able to conclude legal acts in the name and on behalf of the company, to acquire the property for it or dispose or rent, exchange or put as warranty, all that constitute goods contained in the heritage society, the value of which exceeds one half of the book value of the assets of the company at the date of conclusion of the legal act, only with the approval of the general meeting of shareholders given in article. 115.

The approval of the General Assembly is required for each legal act in part as to the mandate of the common law. This legal prohibition applies in the case of public limited companies.
Finally, in the case of companies, if the administration bodies only represent a legal entity, the conclusion is that a legal act for which the law requires authentic form ad validitatem (e.g. a contract of mortgage of the real estate), legal representatives do not need a special power of Attorney, given in authentic form, in order to create the documents in relation to the real estate.

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Notes

I. See I. Christian, *Theory of legal entity*, Editura Academy, Bucharest, 1964, p. 258.

II. See D., Mazeaud, *Responsabilité civile et précaution*, in Responsabilité Civile Et Assurances 6 bis, 2001, 611.

III. On this issue, see J.C. Groslière, Les responsabilités encourues par les organes des sociétés de commerce, Annales. Droit Toulouse, 1971, p. 1552. This author considers also representatives of legal persons and delegations; in this case, Dijon, 3 avr. 1981, Lettre de la Distribution, n. 9 of 1981 decided that the President-general manager of a limited-liability company is an entity while marketing director is the onre of the society.

IV. see J.C. Groslière, *op. cit.*, p. 152 et Com., 1 févr. 1994, JCP, 1995.II.22432, note D. Gibirila.

V. In Switzerland has been considered by courts in different situations, as organs: the individual wills appear directly through the corporate, though does not manifest itself towards third parties, gives guidance to persons with the right of signature; the individual named in the statute, not subordinated to the entity, which is the only legal entity through which can manifest apart;

an individual participating in the internal training of the will of the legal person and expressing this will direct his actions; the individual named in the statute and to which organ, as administrator of the legal person assigned the functions of an organ; natural person in the hand levers that put into motion the whole enterprise; the administrator, the responsible person participating in the formation of the will of the legal person and representing it by third persons, etc.; see r. Steinbrüchel, Hiljsperson und Organ (Organ and assistants), Zürich, 1947, p. 35-38, quoted after Christian I., *op. cit.*, p. 260.

VI. General meeting of the Associates was defined as a body in which associations, concerned shareholders, express their individual will as a collective will, other than the totality of the will of individuals who compose it, namely the will of society as a legal entity; see R. P. Lee, Right, Light companies, 2000, p. 113.

VII. As regards the nature of the relationship between administrators and society, see Freddy Gârbaci, the action in liability against the directors of companies, the New Romanian magazine nr. 5/2003, p. 156-172.

VIII. In this sense it has been decided the judicial practice-to see High Court of Cassation and Justice-Decision No. 150/C/2015-A of 20.05.2015.

IX. I. Georgescu, *Romanian trade law*, vol. II, companies, Junimea Publishing House, Bucharest, 1946, p. 109, E. Munteanu, *The legal status of company managers*, All Beck Publishing House, 2000, p. 106.

X. The power of representation implies the right of representation of the company by the administrator to whom it was awarded.

XI. St. Cărpenaru, *Treatise on commercial law*, Universul Juridic, 2012, p. 217.

XII. S. Bodu*, Limitations and conflicts of interest in the appointment and mandate of administrator of a company,* published on www.juridice.ro.

XIII. M.Șcheaua, *The Law of commercial societies 31/1990 comments and amendments,* Editura All Beck, 2000, p.160.