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Freedom in Business. Concept and Forms of Manifestation

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ABSTRACT: Liberty is generally regarded as the right of any individual to act according to his own will. This freedom is also transposed in business as the freedom of initiative in which the entrepreneur manifests his legal will according to his interests. The present analysis starts from the role of the principle of freedom in business within the branch of law, in order to identify the normative benchmarks that give it substance and the components of this freedom from an economic and legal perspective, with references to practical elements. The study also addresses the correlation between the values of this freedom and the existence of standard, framework and adhesion contracts that do not exclude the manifestation of the will of the parties in giving content to the business, being protected from any attempt at discrimination or abuse by the authorities. Freedom in business and freedom of contract is analyzed with reference to Romanian and European legislation, but also to specific norms of international trade law, especially regarding the freedom to choose the applicable law.

KEYWORDS: undertake, legal will, competition, usury clause, consensualism

Introduction

As in any branch of law, the principles are meant not only to characterize, to individualize a certain branch of law, but also to provide an impersonal, comprehensive guide for orientation in the respective legal relationships and as premises for solutions, for solutions in the situations in that there is no concrete legal coverage, in this case.

The principles are meant to compromise, to remove, to highlight the lack of substantiation, of reason, the illegitimacy of particular norms, of a way of proceeding, and, in general, the excessive, alienated exercise of regulatory authorities, of control and sanctioning, authorities that are enslaved, taxation of the so-called "regular", "praetorian" law. (e.g.: General Anti-Tax Fraud Directorate, Court of Accounts).

These principles participate in the status of autonomy of business rights. Also, they are true rules of conduct, of orientation, in business when the legal norms are lacunae, incomplete, confused, anachronistic, out of date or are texts adopted considering other historical realities.

General principles that we find in business law are: the principle of freedom in trade; the principle of appearance in commerce; the principle of onerous nature of business; the principle of fair and normal competition; the principle of promoting consumer rights. As is natural, these principles are subordinated to the general principles of law (Boghirnea, Dinică and Dinică 2011, 333-342; Ionescu 2005, 69-71).

The content and normative support

The principle of freedom in business is a composite principle, having a predominantly economic aspect - namely the freedom to undertake - and a predominantly legal aspect - namely the freedom of legal expression.

Legal support and coverage are the concern of the fundamental law - the Constitution and the laws that guarantee and regulate the fundamentals of the market economy, followed by competition laws, company law, trade convention regulations.

The normativity of this principle would not have been created, without the ideological option for the market economy and trade civilization. It is marked by the emblematic declaration of art. 135 para. 1 of the Constitution: "Romania's economy is a market economy,

based on free initiative and competition." This constitutional declaration corresponds to a fundamental and irrevocable obligation in accordance with the European Union treaties.

It should be noted for this correspondence, the provisions of art. 3 paragraph 5 of the Treaty on European Union "In its relations with the rest of the international community, the Union affirms and promotes its values and interests and contributes to the protection of its citizens. It contributes to peace, security, ..., free and fair trade, ..., as well as to the strict observance and development of international law, including respect for the principles of the United Nations Charter". Also, art. 120 of the Treaty on the Functioning of the European Union establishes that "... Member States and the Union act in accordance with the principle of an open market economy, in which competition is free, favoring the efficient allocation of resources, in accordance with the principles established in Article 119."

Freedom to undertake

The freedom of enterprise or initiative, along with the freedom of competition, is the most concentrated matrix and substantial expression of the market economy.

The Romanian Constitution expresses it in art. 135 para. 2 lit. an as being "freedom of trade through the state's obligation to ensure the protection of fair competition, the creation of a favorable framework for the exploitation of all production factors." Upon a careful reading of the text, freedom in trade appears supported and conditioned by the stimulation of fair competition and equal opportunity in trade.

The freedom to undertake or of economic initiative means precisely the absence of any factors, circumstances, elements that are under the control of the authorities in front of the decision of the entrepreneur, the investor, the company and the businessman - to conceive and carry out operations that supply the "open" market, the products and services claimed by it and by consumers.

The constitutional framework is specified in the Competition Law by prohibiting any "actions of central or local public administration bodies, having as their object or having the effect of restricting, preventing or distorting competition...", by limiting the freedom of trade or the autonomy of professional traders to exercise licit and regular trade by establishing discriminatory conditions for their activity.

The Treaty on the Functioning of the European Union (2008) requires member states to establish and guarantee "economic policies in accordance with the principle of an open market economy, in which competition is free" (extract from art. 119). The operation and efficiency of this principle presupposes the absence of constraints, discriminations, inequalities.

Freedom in trade is the freedom to undertake, to conceive, to mobilize funds, to make investments, to establish profitable enterprises, to capitalize on capital, other resources, to exploit the trade fund. It is not reconciled with political constraints, such as those blocking the market economy, the free, normal competition. It is not reconciled either with administrative constraints, such as the restriction of the field of private initiative, with monopolies, quasi-monopolies, pathological bureaucracy, nor with economic limitations, which prohibit access to resources, the presence in the civil circuit of some goods and economic values, currency regime, fiscal regime and customs.

Based on this principle, by art. 44 par. 8 of the Romanian Constitution, "Property acquired lawfully cannot be confiscated. The legal character of the acquisition is presumed", in other words, the interested authority must prove the illegal character and not the targeted enterprise. Freedom in trade also means the governance of the healthy, normal competitive game by the state.

Freedom of legal expression

Freedom of legal expression is the freedom of expression of any person, within the limits of a legal capacity, freedom according to which the subject of law, its bearer, decides unhindered, unconstrained, whether to engage, compare or not in a certain legal relationship: to make a contract or not, to marry or not, to enter into an employment relationship or not and other infinite number of acts that presuppose the manifestation of legal will.

The legal will is that which creates a special bond between two or more persons, covered or controlled by legal norms, norms of conduct whose realization is assisted and guaranteed by the public force.

The freedom of legal expression in business is expressed by the recognized availability of participants in business relations to engage, to set up or not a business, to do it in one form or another, with one instrument or another, to give a concept content exclusively personal to the business: a freedom of business conception, of choosing a partner, a freedom of legal form, of a legal instrument, a freedom of stipulation of the elements and conditions of the business.

a) *Freedom of form*

Unlike civil law, where certain acts and legal operations must take on a solemn, authentic form in order to be valid, in commercial law and business law there is, in principle, no condition for the validity of a certain form of the contract. Even in civil law, this condition is not the rule. The rule is consensualism (what works is consensus, without a special form), but in civil law exceptions have a frequency that seriously affects the principle. Ex.: any mortgage must have the authentic, notarial form, as well as land alienations, wills, subrogation in the rights of the paid creditor consented to by the debtor. There are certain eminently civil operations: the alienation of land, from which a person or business firm cannot dispense. These operations must be done in the authentic form, even if they serve to set up a business, for the location of a factory or dismantling of the company.

This freedom of form is not contradicted by the proliferation of standard contracts, framework contracts and adhesion contracts.

The standard contract is a contract whose clauses are mostly prefabricated by the contract offeror and the business, their purpose being to facilitate the completion of operations, to avoid stipulation gaps and to provide the business with an elaborate legal instrument. The contract also has "free spaces" where the parties introduce particular stipulations, for a specific business. These contracts are justified, but they may represent an abuse, an excess of a dominant position, but they are justified by the particular technicality or complexity of a certain business, by the uniformity and frequency of certain businesses and, in general, they are justified by the desire to facilitate the achievement business and to give it a more coherent, safer legal framework, e.g., the compulsory insurance contract for car civil liability, the bank credit contract.

Rules for using these model contracts:

1) A prefabricated clause is not considered modified if the modification is not perfectly identical in all copies;

2) The added clause, from the free spaces, which contradicts the prefabricated clause, prevails.

Framework contracts are a kind of model contracts, but of legal extraction, with form recommendations resulting from international conventions. They are approved by various normative acts, being contracts for services, services that are of general interest, executed under certain conditions that demand uniformity, e.g., the social insurance contract, the family doctors' contract, tuition contracts, lease contracts, contracts for complex, industrial supplies. The framework contracts were justified by the particular complexity and technicality of the operations.

The adhesion contracts, unlike the first ones, are not only prefabricated, they are the expression of a predominant will of the economic agents who offer the service, the supply, the performance due in essence to the monopoly, as well as the special technicality, the special conditions in which the performance can be performed in general. Ex.: the drinking water supply contract.

We also find these types of contracts in international trade, with international bodies and associations constantly concerned with developing model, framework, standard contract models, contracting guidelines and general contracting conditions. This activity, as a whole, is called standardization. The UN Economic Commission has a special role in this regard, for Europe (Sitaru 2008, 146-147).

b) *The freedom to choose the legal instrument, to design it*

Business partners are free to use a regulated (named) contract or to design an unregulated (unnamed) (Militaru 2015, 43-46; Vâlcu and Didea 2013, 31-42) contract themselves. They can create a hybrid, a composite contract, and in the case of supplementary rules, they can derogate from the legal regulation of a certain contract, leaving it up to the parties to choose the conduct, and if they have not chosen, the provisions of the rule apply. This regulation is a content offer only. In practice, if the partners correctly identify the contract, the legal texts, which regulate the rights and obligations of the parties, they must not be expressly reproduced in the contract, it being sufficient to correctly mention the normative act and the applicable article in the respective issue, or the parties can waive a certain benefit provided in a normative act, if the norm is permissive, for example they can waive liability for hidden defects in the case of a sales contract, the guarantee for eviction.

In business there is a true freedom of technical-legal creation. According to art. 1169 of the Romanian Civil Code (2011). We must specify that in Romanian law the framework regulation in contractual matters is represented by the provisions of art. 1166-1323, art. 1469-1565 of the Civil Code) "The parties are free to conclude any contracts and determine their content, within the limits imposed by law, public order and good morals." It is enough to remember that leasing operations were practiced until 1997, although the regulation was given for the first time by Ordinance 51/1997 (published in Official Gazette no. 224/30 08.1997). In the same situation are franchise operations (Ordinance 52/1997 regarding the legal regime of the franchise), the factoring contract, as a financing technique (factoring as a commercial operation was mentioned in the Government Emergency Ordinance no. 10/1997 regarding the reduction of financial blockage and economic losses, but a complete definition was given by art. 6 paragraph (2) of Law no. 469/2002. Even under these conditions both normative acts were abrogated). Thus, the parties chose an unnamed co-contract, which later became a named one through legislation. The Romanian Civil Code in art. 1168, in the chapter Rules applicable to unnamed contracts establishes that "The provisions of this chapter are applied to contracts not regulated by law, and if they are not sufficient, the special rules regarding the contract with which they are most similar."

c) Freedom to choose the applicable law in international commercial contracts

The identification of the law applicable to a contract is questioned only in international contracts marked by an element of foreignness, an element of such intensity that it can subject that legal relationship to the application of at least two distinct legal systems. *Lex causae* (applicable law) is a *lex voluntatis,* the law resulting from the will of the parties. This freedom of choice is translated into the possibility that in an international operation the partners may stipulate that the applicable law is even a third-party law, which is not the state of headquarters or citizenship/domicile of any of them, such as the law of the country in which concludes the act or the law of the country in which the ascertaining document is drawn up (Dumitrescu 2014, 108-109).

Concluding what we have shown about the freedom of legal expression, we must remember that the principle of freedom in business is limited by the rejection of two types of clauses (Militaru 2013, 170-173):

1) Leonine clauses – when one of the parties' reserves all or most of the benefit without participating in the losses.

2) Usury clauses – clauses by which one of the parties waives any responsibility for non-execution of the contract, thus creating a contractual immunity, i.e., a discretionary position.

It is a principle with constitutional support: art. 135 para. 2, lit. a) from the Constitution obliging the state to ensure "freedom of trade, protection of fair competition, creation of a favorable framework for the exploitation of all production factors." According to this principle, the freedom of economic initiative must be guaranteed by the state, by the public authorities. They have the obligation to stimulate all initiative factors and to provide them with an environment conducive to licit businesses.

Conclusions

Freedom is a very generous term with many meanings, and precisely for that reason, we tried to capture in the present study what characterizes its manifestation in the commercial business field. Whether we are talking about the freedom to undertake, to have private initiative, whether we are discussing the freedom of legal expression, all of these presuppose the manifestation of the will of the parties, an aspect that is valid both in domestic law and in international trade. The parties must show themselves in this sense because the business means innovation, technical and/or legal creation, it means overcoming some temporal or spatial barriers. Trade has an extraordinary expansion, visibly marked by digitization, electronic operations, in the online environment. All this does not reduce the role of the principle of freedom in business, but strengthens it. There is the concern of the states, the international community, the Chambers of Commerce and Industry to ensure, on the one hand, the operation of freedom within the limits of the law and, on the other hand, to promote freedom through their own instruments and to maintain it as a matter of principle.

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