Annals of the University of Oradea,Fascicle: Ecotoxicology,Animal Husbandry and Food Science and Technology, Vol. XVI/A 2017

Analele Universitatii din Oradea, Fascicula: Ecotoxicologie, Zootehnie si Tehnologii de Industrie Alimentara, Vol. XVI/A 2017

THE CONTRACT - ESSENTIAL LEGAL INSTRUMENT IN CARRYING OUT COMMERCIAL ACTIVITY PART I

Chebeleu Ioana Camelia*, Chebeleu Mircea*

*University of Oradea, Faculty of Environmental Protection, 26 Gen. Magheru St., 410048, Oradea, Romania, e-mail: chebeleuioanacamelia@yahoo.com

Abstract

Both due to the development, progress and evolution of human society in general, and due to the necessity to achieve transactions as soon as possible, the contract is the most appropriate instrument, used by both individuals and the legal entities in order to assume bonds and acquire rights. Business environment is "addicted" to this legal instrument in order to function legally and at full capacity.

INTRODUCTION

The contract represents the most important part in commercial transactions because it implies the embedding in a single frame of several basic elements which have as purpose its signing. These basic elements are researching and studying the market, promoting products and services, negotiating closing conditions and carrying out the contract.

MATERIAL AND METHOD

Materials used in drafting this work are composed of specialized books such as specialized courses, treatises, monographies. Methods used are legal, namely formal method, comparative method, sociological method, the logic method and analytical methods, which have affected systematic analysis of information extracted from the studied sources in order to develop views and conclusions.

RESULTS AND DISCUSSION

Beginning from the history of contract, its first form appeared in the ancient Rome as a loan form that was achieved through an operation called *nexum*, which was designed as a kind of *mancipatio* .This *mancipatio* in the Roman law was a formal and solemn verbal contract through which was transmitted the property of things or goods - *res mancipi*. These things or goods were: rustic and urban estates, slaves, animals used in agricultural

work and in transporting the goods.It was one of the most important institutions and also long lasting that Romans had. Roman jurist Gayo was the one who managed to recover and restore a big part of this institution in his paper *Institutas*. Mancipatio character is archaic, this being one the factors that favored different theories explaining this institution. Some of these theories refer to primitive agriculture or a first domain concept with a sovereign power or a unilateral act of the acquisition.This institution was preserved for a long time; even in the *Theodosian Code* is mentioned about this institution in the year 355. From that date *mancipatio* begins to decline, until Emperor Justinian has removed it all through the compilation of laws known as *Corpus iurisCivilis.*

Alongside *nexum,* was also met in this age another two operation called *sposio* and *stipulation*. *Sposio* was a commitment made under oath and performed in front of divinity in solemn forms and words, commitment which wouldn't convert the one who borrowed to creditor, but the person who borrowed money (called *fides*) and vows, was committed in front of divinity and if he had violated the commitments he would have committed a religious crime. *Stipulatio* was different from *sposio* because it no longer had a religious character and the presence of both sides when were pronounced the solemn words was necessary.[1]

Contract's theory has developed on the basis of existing institutions prior to the adoption of the new legislation, such as the institution of the preliminary contract, public contracts, adhesion, in favor of a third party, option, and implementation of some constructions, taken from the international law, such as the promise of contract, the obligation to contract, the emergence of obligations following the contract's conclusion negotiations, new varieties of special contracts. Legislation and contemporary doctrine based on the ideas, principles and norms of Continental Law system identifies two qualification criteria of the contract, namely: willing consent and legal order. The last is appreciated as a subjective targeting of willing consents, and is entirely committed to parts discretion to produce legal effect. Based on these uniform qualification criteria of contracts, contractual agreements become binding between the parties, independent of other objective factors, such as the form that understanding takes, or actual transmission of the good/claim in its basis, or especially, recognition by the legislator of the case as the content of the contract, sanctioned by positive law. Otherwise speaking, the construction of the contract is based on the principles of mutual consent, perception based on moral rules to keep the promise, to be of good faith, to respect the

[1] V. Patulea, G. Stancu, *Dreptul contractelor*, Ed. C.H.Beck, Bucuresti, 2008, p. 20

interests of the other one. In German literature can be found the opinion that the contract is an agreement between partners to regulate the legal relations, or a willing consent between two or more persons in order to reach a legal result. This notion isn't found in a encoded act of the German state,that is why it receives a theoretical development in doctrine.[2]

The contract is an agreement between two or more persons, whether natural or legal, from which results certain rights and obligations; is a convention or a written agreement whereby two or more parties engage mutually to something.

At the base of contract's concluding stays the willing consent that aims to reconcile divergent interests of the parties and to achieve the common purpose targeted by these.[3]

The necessary elements that must be established to determine the formation of a contract are offer, acceptance, the consideration, mutual obligation; competence and ability, and in certain circumstances, a written instrument.[4]

Starting from the the regulations of the Civil Code, the contract is a source of obligations, the willing consent between two or more persons with the intention to establish, modify or extinguish a legal relationship.[5]

The essence of the contract is the willing consent between the parties, because no contract can be formed as long asthe wills that compete at its creation have not agreed.[6]

The contract represents the main source of commercial obligations because it is the main instrument through which is realised the movement of goods from producers to consumers.[7]

CONCLUSIONS

As the main source of obligations, the contract represents the most important tool used by individuals and companies in order to birth the legal relationships that have as purpose acquiring rights and assuming

[2] Shchennikova LV *Despre dreptul tratatelor, perspectivele sale și construirea unui contract civil.* / Zakonodatelstvo №5, 2003, p.19-20; Beklenischeva IV *Contract civil: tradiția clasică și tendințele moderne:* M, 2006, p.58; https://dreptprivat.wordpress.com/2012/03/06/reflectii-asupra-teoriei-contractului-civil/ accesat la data de 09.04.2017

[3] Bacter R. V., *Tehnici de negociere si contracte*, Ed. Universitatii, Oradea, 2015, p. 130

[4] https://contracts.uslegal.com/elements-of-a-contract/ accesat la data de 04.09.2017

[5] art. 1165, art. 1166 C. civ.

[6] C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, *Tratat de drept civil roman*, Vol. II, Ed All, Bucuresti, 1998, p. 484; Madalina Afrasinei, Mona-Lisa Belu-Magdo, Alexandru Bleoanca, *Noul cod civil: comentarii, doctrina, jurisprudenta*, Vol. II, Ed. Hamangiu, Bucuresti, 2012, p.392-393

[7] I. Schiau, *Drept comercial*, Ed. Hamangiu, Bucuresti, 2009, p. 370

obligations. The contract experienced a fulminant evolution in time due to the development of society, its rebirth through industrial revolution, economic, technological, commercial, including informational.We can even speak about a globalization of legal relations emerged as a necessity in order to extend the circulation of goods and persons, which determined in the evolution of time, the appearance of a series of types of contracts that have as purpose easing the finding of business partners, speed of goods circulation, and why not, finally achieving profit pertaining to the essence of the activity in commerce domain worldwide. The present work treats broadly the contract's institution, from ancient times until today, following that in the II and III part to be debated elements of contracts, conditions of their concluding, contract types and their importance in the development of commercial activity.

REFERENCES

1. Afrasinei Madalina, Belu-Magdo Mona-Lisa, Bleoanca Alexandru, *Noul cod civil: comentarii, doctrina, jurisprudenta*, Vol. II, Ed. Hamangiu, Bucuresti, 2012
2. Bacter Ramona Vasilica, *Tehnici de negociere si contracte*, Ed. Universitatii, Oradea, 2015
3. Beklenischeva IV *Contract civil: tradiția clasică și tendințele moderne: M*, 2006
4. Codul Civil –
5. Hamangiu C., Rosetti-Balanescu I., Baicoianu Al., *Tratat de drept civil roman*, Vol. II, Ed All, Bucuresti, 1998
6. Patulea Vasile, Gheorghe Stancu, *Dreptul contractelor*, Ed. C.H.Beck, Bucharest, 2008
7. Schiau Ioan, *Drept comercial*, Ed. Hamangiu, Bucuresti, 2009
8. Shchennikova LV *Despre dreptul tratatelor, perspectivele sale și construirea unui contract civil,* Zakonodatelstvo №5, 2003
9. https://contracts.uslegal.com/elements-of-a-contract/ - accesat la data de 04.09.2017
10. https://dreptprivat.wordpress.com/2012/03/06/reflectii-asupra-teoriei-contractului-civil/ - accesat la data de 09.04.2017