Conceptualizarea şi tipologia contractelor comerciale în relaţiile de afaceri

Conceptualization and typology of commercial contracts in business relations

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Abstract

The commercial contract is the main legal instrument through which domestic and international trade is performed. At first sight, the commercial contract appears to be an ordinary contract, similar to those regulated by civil law.

A closer look at the conceptuality of the commercial contract shows that it presents itself as a different legal institution through its specific features compared to the civil contract.

This is thanks to the phenomenon that entrepreneurs have intuitively initiated the separation of civil contracts into two broad categories: civil contracts and special commercial contracts (contracts intended for entrepreneurial activity), actions based on a well-defined goal: gaining profit in business relationships through commercial contracts.

The commercial contract benefits from its own regulations and bears the impact of civil law rules to the extent that commercial law is insufficient to fully clarify the aspects that the reality of life highlights in relation to these special contracts.

Therefore, under the pressure of current needs, practitioners develop new models of contracts that jurisprudence enshrines, after first subjecting them to a severe theoretical examination.

Keywords: *Concept; typology; commercial contracts; groups of commercial contracts; entrepreneurial activity.*

Rezumat

Contractul comercial este principalul instrument juridic prin care se desfăşoară comerţul intern şi internaţional. La prima vedere, contractul comercial pare a fi un contract obişnuit, asemănător celor reglementate de legea civila.

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O privire mai atentă asupra conceptualităţii contractului comercial arată că acesta se prezintă ca o instituţie juridică diferită prin trăsăturile sale specifice faţă de contractul civil.

Acest factor este datorat situaţiei că, antreprenorii au iniţiat intuitiv separarea contractelor civile în două mari categorii: contracte civile şi contracte comerciale speciale (contracte destinate activităţii de întreprinzător), acţiuni bazate pe un scop bine determinat: realizarea de profit în relaţiile de afaceri prin intermediul contractelor comerciale.

Contractul comercial beneficiază de reglementări proprii şi suportă impactul regulilor de drept civil în măsura în care dreptul comercial este insuficient pentru a clarifica pe deplin aspectele pe care realitatea vieţii le evidenţiază în legătură cu aceste contracte speciale.

Prin urmare, sub presiunea nevoilor actuale, practicienii dezvoltă noi modele de contracte pe care jurisprudenţa le consacră, după ce le-au supus mai întâi unui sever examen teoretic.

Cuvinte-cheie: *Concept, tipologie, contracte comerciale, grupuri de contracte comerciale, activitate antreprenorială.*

1. Introduction

The principle of contractual freedom allows participants in the civil circuit to conclude a wide variety of civil, commercial contracts and the ones related to other branches of law.

Some *commercial contracts* are expressly provided by civil legislation, but the diversification of economic and social life leads to the emergence of new legal forms, which are not specifically regulated.

The Civil Code expressly regulates some of them, such as: the sale, the mandate, the commission and even some new types of contracts, such as the current bank account, the insurance contract or of non-traditional origin, such as the franchise contract, the leasing contract and so on.

However, there is a variety of commercial contracts the regulation of which is not found in the Civil Code, but is presented instead in other legislative acts (for example the concession contract) and, above all, a series of contracts that we do not find regulated in any legislative act (know-how transfer contracts, engineering consulting contracts etc.).

Therefore, the classification offers the possibility to determine the characteristic features of the different categories of commercial contracts in order to facilitate the process of their qualification and the correct application of the legal norms.

Classifying commercial contracts means *grouping them into different categories in order to orient ourselves in the multitude of contracts that surround us, to recognize them, to distinguish them more easily in the case of their implementation in practice.*

2. Related works

In this context, we affirm that the problem of the classification of commercial contracts is of a particular interest from both theoretical and practical points of view.

The classification of contracts offers the possibility to determine the characteristic features of different categories of contracts in order to facilitate the process of their qualification and the correct application of the legal rules.

There are several criteria for classifying contracts. The criteria elaborated by the doctrine are added to those expressly presented in the civil legislation.

Some of the main classification criteria are listed below:

– the content;
– conclusion of a contract;
– the purpose pursued by the parties;
– regulation in civil legislation;
– the effects produced;
– the execution method;
– correlation between contracts etc.

From the beginning, starting to study commercial contracts, we encountered both their *unity* and their *diversity*:

– *the unity of contracts* results from their common features, i.e. all contracts consist of voluntary agreements of the contracting parties and, to be valid, all must meet the structural elements of contracts and not exceed the limits of contractual freedom;

– *the diversity of contracts* results from their multitude and from the various classifications to which they may be subject.

Basically, contracts can be unlimited and varied. The parties can conclude not only contracts regulated by legislation, but also others, unregulated, as well as different combinations of contracts.

Therefore, *enumerating the variety of contracts is impossible*. This also explains why legal contracts and only a part of the unregulated ones are researched in specialized works, being more frequent and better defined in contract doctrine.

However, *it is possible to classify contracts*, which is traditionally done by law, jurisprudence and juridical doctrine[1].

The classifications that we present below involve *the prior delimitation of contracts*, at the level of legal system, *in civil law contracts and commercial contracts.*

As for the *criteria for classifying contracts*, they consist of regulation, the role of will and conclusion, the requirements of substance and form, the purpose and effects of contracts.

The classifications reduce to *a generic juridical language* the endless variety of contracts, highlight the similarities between them and are of obvious guidance in determining the legal regime applicable to each category of contracts separately.

[1] M.N. Costin, *Commercial law treaty. General theory of obligations*. Vol. I, Târgu Mureş, 1993, p. 78.

The existence of different criteria by classification and consequently different classifications make one and the same contract susceptible to inclusion in all or almost all contract classifications.

For example, the contract of sale is a contract called synalagmatic, with onerous title, main and, as a rule, consensual, negotiable and of instant execution, and by exception – solemn, of adhesion or imposed and of successive execution.

Therefore, *the classifications of contracts are not mutually exclusive*, i.e. the inclusion of one contract in one of the classifications does not exclude its inclusion from another or other classifications, but they combine in order to qualify, characterize and interpret the various contracts.

Regarding the *legal basis for the classification of contracts*, a triple distinction can be made:

1) *classifications expressly provided by the Civil Code*, namely:

– bilateral and unilateral contracts;

– onerous and with free title;

– and the onerous ones in commutative and random.

2) *classifications resulting implicitly from the provisions of the Civil Code*:

– named and unnamed contracts;

– consensual and non-consensual;

– of instant and of successive execution;

– main and accessories;

– simple and complex.

3) *classifications resulting from the corroboration of the provisions of the Civil Code with the provisions of some subsequent civil normative acts:*

– negotiable contracts;

– adhesion contracts;

– imposed contracts[2].

For example, in the specialized scientific literature we find the analysis of a multitude of varieties of the commercial contract, a fact that generates difficulties in identifying specific classifications of these contracts.

In the opinion of the scientist S.S. Zancovschi, *the classification of contractual (commercial) obligations represents a difficulty. So far no one has been able to propose a general classification that easily and logically fits all obligations.* Apparently this fact is impossible, because the contracts are brought to life by applying them in practice without analyzing them if they will fit or not in the series of classifications formulated by the theory of law[3].

Certain types of commercial contracts were highlighted by outstanding civilian scientists as early as the late 19th and early 20th centuries.

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[2] *Ibidem*, p. 79.

[3] S.S. Zankovsky. *Entrepreneurial contracts*, Wolters Kluver, Moscow, 2015, p. 96.

In particular, the Russian scientist P.P. Ţitovici attributed to the so-called *entrepreneur* (commercial) *contracts* the transactions:

– sale-purchase;

– with premiums, rewards (*premium deal*);

– the publishing contract;

– the transport and baggage contract;

– personal insurance (capital and income)[4].

Professor G.F. Sersenevici, in turn, classifies transactions according to the following types:

– regarding intermediation in the movement of goods;

– in the circulation of funds, in the circulation of labor;

– in facilitating intermediation[5].

Scientific research into the classification of *entrepreneurial* (commercial) *contracts* has also been carried out by modern scientists.

According to the opinion of legal scientist B.I. Puginsky, there are the following types of contracts in commercial law:

– performance contracts;

– brokerage contracts;

– contracts that facilitate trade;

– organizational contracts[6].

3. Discussion and materials

Another classification of the commercial contract is also identified in the doctrine:

1) Depending on the composition of the subjects, we can distinguish contracts in which all parties are professionals (entrepreneurs) or only one party is professional:

a) a party to the transaction is an entrepreneur (retail contract, rental agreement, loan agreement, energy supply contract etc.);

b) is concluded exclusively between entrepreneurs (contracts for the supply of goods for entrepreneurial purposes, financial leasing (leasing), deposit contract, risk insurance for entrepreneurs etc.

2) Depending on the result of the contract, which the parties would like to achieve:

a) contracts for the transfer of the property in possession (lease agreement, rental agreement etc.);

b) contract regarding the transfer of ownership of goods, economic management or operational management (the contract regarding the supply of goods, the contract for the sale of an enterprise etc.);

c) contract regarding the performance of works (works contracts etc.);

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[4] P.P. Tsitovich. *Essay on the basic concepts of commercial law*, Kyiv, I.N. Kushnereva and Co., 1886, p. 217.

[5] G.F. Shershenevich, *Textbook of Commercial Law (after 1914 ed.)*, Spark Firm, Moscow, 1994, p. 50.

[6] B.I. Puginsky, *Supply contract and implementation plan*, Legal Literature, Moscow 1975, p. 143.

d) service contract for pecuniary interest;

3) Depending on when rights and obligations arise, contracts are classified into:

a) consensual;

b) real;

4) Depending on the fact whether or not the contracts are regulated (named) in the Civil Code:

a) named contract;

b) unnamed contract[7].

At the same time, it should be noted that a whole system of commercial contracts has been developed in civil law, taking into account the peculiarities of certain types of economic relations[8].

1) *contracts of relization* for the transfer of property for consideration (supply contracts, exchange contracts, loan agreements etc.);

2) *property transfer contracts* (lease contract, rental agreement, leasing etc.);

3) *service contracts* (consultancy contracts, advertising contracts, legal contracts, insurance agreements, transportation contracts, storage contracts etc.) This group of contracts includes *brokerage contracts* (commission contracts, concession agreements, commercial agency contracts) and *representation contracts* (commercial representation agreements);

4) *works contracts* (design, construction contracts, marketing agreements, evaluation, audit contracts etc.);

5) *contracts regarding joint actions or activities* (consortium agreements, holding agreements, financial-industrial group contracts etc.);

6) *financial contracts* (bank contracts, deposit agreements, credit, loan agreements, factoring contracts);

7*) contracts for the transfer of rights over intellectual property objects* (copyright lycense agreements, commercial concession agreements, leasing contracts);

8*) exclusive rights transfer contracts* (distribution).

9) *basic insurance contracts* (pledge agreements, mortgage contracts, deposit agreements, guarantee and bank guarantee, property insurance).

Finally, we note that in the business world, in general, commercial contracts are onerous and synalagmatic, so that the usual juridical classifications can be much simplified.

This is because, with the exception of the guarantee, in this field there are no free contracts.

In business, contracts are only for consideration, as businessmen aim to achieve *benefits* (profit); therefore, the contract can be profitable for both contracting parties.

These contracts, called synalagmatic (because each of the partners untertakes to the other), do not remain indefinitely in this state.

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[7] A.S. Pelikh, A.A. Chumakov, *Organization of entrepreneurial activity*, Moscow, March, 2014, p. 128.

[8] A.N. Tolkachev, *Commercial Law: Textbook*, RIOR, Moscow, 2009, p. 75-76.

When one of the services is performed, the contract will only bind the debtor and, therefore, it will cease to be synalagmatic, it will become unilateral (the unilateral the contract will bind only one of the parties).

As, for example, the accepted promise of a loan with interest is a synalagmatic contract, but once this loan is received it is no longer a promise of a loan, but a loan, and will not generate an obligation except on account of the lender; it becomes a unilateral contract.

Contracts that were or are synalagmatic create a close link between the two benefits that constitute the juridical cause of one in relation to the other.

When one of the performances is not fulfilled, the other party can refuse to perform his one and can ask for the contract termination.

A category of commercial contracts, which has become classic in contemporary law, is constituted by random contracts, i.e. those contracts at the conclusion of which the existence or the exact extent of the patrimonial advantages that will result for parties is not known, because parties agreed to oblige themselves toward each other according to a future and uncertain event.

Such contracts involve for each party a chance of winning or a risk of loss. The stock market game is a random contract, the insurance – too.

4. Typology of commercial contracts

Regarding the classification of commercial contracts, we generally distinguish the following groups of contracts[9] (agreements):

a) **the sales contract** (the most important contract both in terms of domestic trade and international trade);

b) **brokerage contracts**

– commercial mandate contract;

– professional commission contract;

– commercial agency contract;

– the commercial consignment contract

c) concession contracts

– the exclusive concession contract;

– the franchising contract.

d) **technology transfer agreements**

– know-how transfer contracts;

– consultancy and engineering contracts;

e) **financing contracts for commercial operations**

– the factoring agreement;

– the leasing contract[10].

f**) commercial and banking contracts**

[9] Al. Cuznetov. *Classification of commercial contracts*. Materials of the National Scientific Conference with international. participation: Integration through research and innovation, 01-02 October 2019, CEP USM, Chisinau, 2020, Vol.1, p. 229-232.

[10] C. Bîrsan, *Civil law. General theory of obligations*, All, Bucharest, 1993.

– bank deposit agreement;
– current account contract;
– the credit agreement.

5. Conclusion

The juridical-practical importance of commercial contracts classification lies also in the fact that the establishment of the essential features of a commercial contract makes possible its juridical framing.

Thus, the classification procedure represents a step in the qualification of commercial contracts, which means the identification of their juridical regime.

6. Conclusions

Hence, commercial contracts are an institution of business law and study the set of legal rules applicable to legal relations arising from legal acts, facts and operations considered by law as acts of trade, contracts and obligations of traders, if not of a civil nature, and the legal relationships in which traders (entrepreneurs) participate.

Finally, we note that the identification of the regime applicable to some categories of commercial contracts by classification, is strictly conditioned by several grouping criteria, depending on the theoretical or practical approach to the problem, we distinguish traditional, recent, legal and doctrinal classifications.