

THE NATURE OF LEGAL REPORT BETWEEN THE ADMINISTRATOR AND THE TRADING COMPANY

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Abstract:

The present study proposes to decelerate the legal nature of the reports born between administrator and the company in the conditions of actual legal regulations but also in the context of the empowerment given to the administrator through the constitutive document.

Key words: company, administrator, legal report

As it is known in the internal law the foundation and organization of the trading companies is regulated by the law no. 31/1990³⁸⁹ as common right in trading companies domain, containing general regulations applicable to all trading companies but also special regulations applicable only to one of the five types of trading companies: general partnership company, limited company, joint stock company, joint stock limited company and limited liability company.

Regarding trading companies' operation, the law no. 31/1990 comprises both general specifications applicable to every company and conditions specific to every legal form of trading company and have as object aspects referring to the legal form of the goods brought as contribution in the company, partners' rights to dividends, company's personnel and so on.

The company's personnel benefit of an express and detailed regulation having the mission to state on legal plan the legal person's intention, company's intention.

The social intention is formed within the deliberation committee constituted by the Associates' General Assembly, respectively Shareholders' General Assembly. This intention is put into practice through an execution, administration committee that is represented by administrators. And not at least we identify as part of the company also the censors that ensure the administration control done by the administrators in the name of the company.³⁹⁰

The actual study has as an object the study of the legal social relation form born between the administrator and the company as whose administrator is.

In the first place, the question that arises towards the nature of the legal report is to know to whose rules this social relation becomes incident tot. Is this legal report a commercial, a civil or a labour right one?

The importance of the distinction resides especially from different rules contained by the three branches of private law, concerning the birth of legal report, the proof of rights and obligations and the special rules concerning to the development of the reports.

In order to reach a judicious conclusion we will analyze all the three assumptions mentioned above.

In our analyse we need to start from the premise given by the regulations of the art. 72 from the law no. 31/1990 due whom the administrators' obligations and responsibilities are regulated by the aspects referring to the mandate. These reports specific to the mandate contract can be identified in civil, commercial or even individual labour contract domain.

Concerning the civil nature of the reports between the administrator and the company, firstly we can notice that we are in the presence of some contractual reports in which on one

³⁸⁹ Republished in the Official Gazzete, no 1066 from 17.11. 2004.

³⁹⁰ St.Cârpenaru, Romanian trading law, the 5th Edition, All Beck Publishor, page 208.

hand we have a trading company and in the other hand we have the administrator who can be either a legal person or a natural person.

However we will notice that according to art. 4 from Trading Code, there are presumed as being trading acts, all the contracts and obligations belonging to a tradesman. The legal content of this article, that reflects simultaneously the subjective conception referring to the existence of trade processes, settles in a way this problem establishing a simple presumption that these reports are not civil ones. In these terms, the problem of establishing the civil nature of this legal report it is not longer taken into consideration when the administrator is a legal person.

Secondly, the answer to the question, if this legal report is a civil one or not when the administrator is a legal person, is settled by the conditions of art. 56 Trading Code according to which if an act is a trading one but only for one of the parties, all the contracting parties are submitted to the trading law, except of articles referring to traders and of the cases when the law disposes differently.

Thence even if in the legal report between the administrator and the trading company, the administrator is a natural person, this legal report will not be of civil nature and will not be thereby submitted to civil law.

In the doctrine has been also stated that taking into account the complexity of the administrator's job marked by the requirements of public order, it has being sustained that the idea of the mandate is absorbed by the larger idea of representing, with the consequence that the report between the administrator and the company wouldn't be a simple mandate, but a mandate with a legal content, similar to the custodian one.³⁹¹

Even the condition of legal report in the case of labour law between the administrator and the company was not characterized by lack of supporters.

Therefore, starting from the idea that the administrator, natural person, is developing a permanent activity designated for the company we can sustain that we are in the case of a labour legal report.

To this idea was objected in the first place that the administrator's job description is given by the legal acts and not by material acts as it happens in the labour contracts' case.

On the other hand we appreciate that the relation of subordination between the employer and the employee is not that characterized in the relation between the administrator and the company as within the labour legal reports. Therefore, even though the administrator role, as an executive organ, is to put in force the partners' decisions taken within the general assembly with the abidance of statutory and legal conditions, yet he has accordingly to articles of law no. 31/1990 certain independence in accomplishing his attributions.

Thereby, according to art. 70 he can execute all the administrative and representation operations in order to fulfil the company's goal, thus allowing him to a fulfil conservation, administrative actions, and even activities regarding company's management. However, legal administration or disposal acts referring to goods incorporated in a value that exceeds half of the book value of the company's assets at the closing date of the legal act must comprised also the associations' general assembly agreement.

What happens if the administrator's activity does not involve only the development of legal acts, but also the development of material acts in the company's benefit? Has he the obligation of signing an individual labour contract with the company?

We appreciate that the administrator, as an individual person, is entitled to perform in the best interest of the company any necessary action in order to achieve the object of activity, without

³⁹¹ D.D.Gerota, Course of trading company, pages 85-86; E. Munteanu, Some aspects regarding legal statute of trading companys's administrators in „Trading company magazine” no. 4/1997, pages 76-82.

having to sign an individual labour contract, including short-term activities necessary due to the lack of personnel.

To interpret in other way the dispositions concerning labour contract would lead to an excessive formalism, as it requests that even the company's leader to have an individual labour contract, even if he is appointed by the associates to perform administration activities for the company.

Or, under the conditions that the law does not stipulate, by administration activities we understand any behaviour that gives value to a patrimony or good, by respecting the principle of company's specific and legal capacity, meaning respecting the limits stipulated in the constitutive document.

In other words, the administrator will be able to elaborate himself the trading documents of the trading company, having a management position and also the right to represent it based on the Mandate contract issued by General Assembly.

The administrator does not need individual labour contract in order to justify his activity within his own trading company, because he is, first of all, the delegate of the associates and he represents the company regarding performing its object f activity.

It is immanent that in administrator's commercial activity to intervene situations that require administrator's prompt intervention, especially because he has a responsibility towards the associates.

Constitutional principles of economic and commerce freedom support the same theory, as long as no normative disposition forbids performing an economic activity by the very administrator himself without individual labour contract, as long as he acts according to a Mandate contract, being delegated by Associate's General Assembly.

As a result, the company could never be the active subject of the contravention stipulated by art. 276 al. 1, letter e from Labour Code and neither the active subject of the offence stipulated by art. 10 al 3 from Law 130/1999 regarding protection measures for persons with labour contract.

Of course, as there is no law to oblige the administrator to have an individual labour contract within the company whose administrator is, the same, if parties agree, they have the liberty to sign between themselves an individual labour contract, except shared profit companies where, according to art. 137, art. 1, al 3 from law 13/1990, signing such a contract is forbidden.

Even in the case that an individual labour contract is signed, the mandate's will to revoke the mandate given to the administrator is not obeyed to the restrictive rules stipulated by labour legislation, because in case of administrator's ademption by general assembly are available the dispositions of art. 56 letter h from Labour Code, that stipulate the termination of the contract as a result of withdrawal of the necessary approvals by competent organisms.

Commercial character of legal report between administrator and a trading company is fully shown by the majority of authors through relating to commercial code.³⁹²

As sustained in this thesis there are registered the stipulations of art. 4 and 56 from Commercial code which, establishing the commercial presumption of all deeds of a tradesman, on the other side it proclaims the commercial character of legal reports between a tradesman and non-tradesman.

Thus, the administrator's obligations are, first of all, contractual, arising from the mandate given by the associates and which finalizes in the stipulations of Constitutive

³⁹² Claudia Roşu, *Legal nature of legal reports between administrator and a trading company* in „Commercial Law Magazine” no. 4/2001, pg. 80; S. David, F. Baias, *Civil liability of a trading company's administrator* in Law Magazine no. 8/1992, pg. 13.

Document or in the decisions of Associates' General Assembly taken within legal conditions of quorum and deliberation. In this way, the Mandate report does not include only the possibility that mandating names the attorney and fixes the limitations of its mandate, but also the possibility for its revocation under the conditions that element very specific for a Mandate contract, both civil and commercial, *intuitu personae*, is lost.

The content of administrator's attributions is not exclusively given by the social volition expressed through Associates' General Assembly decisions. Therefore, taking into account public interest of legal stipulation of the trading companies, some of the administrator's obligations are stipulated by law. It is the case of the stipulations of art. 72 from Law 31/1990, according to which the administrator's liabilities are stipulated by the special disposals from commercial companies' legislation.

This is the reason for which it was affirmed in doctrine that this double contractual and legal nature of the content of administrator's liabilities defines the position of administrator, but at the same time it also differentiates it from other legal positions.³⁹³

In conclusion, taking into consideration the legal stipulations, one can affirm that the legal report between the administrator and its company is one of commercial nature, having the legal roots in the existence of a Commercial Mandate Contract. Even if there is nothing to deter this commercial report from being grafted on the idea of an individual labour contract, this does not mean that the rules concerning the mandate do not apply to this legal report, as these rules are reflected in labour legislation as well, as shown previously.

³⁹³ St. Cărpenaru, op.cit., pg. 226.