BUSINESS MANAGEMENT – A CIVIL LAWCLASSICAL INSITUTION

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Abstract: Business management represents that certain illicit fact by which a person called a gerent who commits, by his own will and without any legal mandate, certain judicial or material acts, necessary and useful to another person called a gerate.
Known from Roman law as "negotium gestio" this institution allows for a judicial relation which had a winding evolution in Romanian law, both in regard to its background and legal nature, as it was considered a quasi contract in the opinion of the 1864 lawmaker; as a result of evolution caused by the doctrine opinion and the solutions provided by legal practice, the new Civil Code defined it as a "voluntary and unilateral" licit legal act.
Since the antiquity, business management was based on the principles of selflessness, as it was not supposed to cause inequitable situations between the subjects of law, thus ensuring an optimal balance between "charity" and "profit" by the use of legal means provided by "negotium gestio".

Key words: ***business management, legal fact, legal act, contract, civil obligations***

Business management also known as "negotiorum gestio"[1] raised quite a few controversy in specialty doctrine regarding its qualification of quasi contract in the classical age of Roman law, a solution which was later adopted by the 1864 Civil Code until the new opinion phrased by the new Civil Code, according to which "managing other people's interest" is a legal and voluntary licit fact[2].

The institution of business management appeared as a result of the innovative spirit of the Romanian people who, for reason of practical necessity, attempted to provide a legal regulation for some actions which required legal effects; they also tried to order the conduct of the subjects of law.

When Rome becomes an "universal state" spreading across three continents, a certain increase in commercial relations occurs by creating a new dynamic economy; this new economy proves to be a challenge for the lawmaker and especially for the praetor, the main legal actor, who was called upon to correct or modify the rigid regulations of "ius civilae" by adjusting them to the new practical realities.

It was rightfully shown that every time a person committed a legal act in the interest of a person, without specific consent from that person, he was actually performing "business management", an institution similar, but different from the contract of mandate.

It is a known fact that the relations which governed the Roman patriarchal family, socio - legal relations from the old ages, were a factor which helped configure law, by creating new institutions with novelty elements such as selflessness and social solidarity, specific to „antiguum consortium" [3] and „quiritar property".

[1] Cf. C. Tomulescu, Romanian private law manual, Invătămantului Publishing House, Bucharest, 1956, p.754

[2] Cf. I. Adam, Civil law, Obligations, Legal fact, C.H. Beck Publishing House, Bucharest 2013, p.13 and following

[3] Cf.VI. Hanga, Romanian private law, Didactica si pedagogica Publishing House, Bucharest, 1971, p.128

The interference of a person without consent from the person on behalf of which he acted, thus in the lack of any contract of mandate, was regulated by praetor edict, the main judicial magistrate, called upon to legally valorize new legal institutions which covered the interests of Roman citizens.

Thus, the occurrence of someone who was preoccupied with another person's business without mandate „ si sine mandato quisque alinies negatiis gerendis se obtulerit" becomes a quasi contract according to the Roman lawmaker, a legal institution which became identical to that of contract as a main source of obligations.

This gave rise to a new procedural form by which the praetor interfered by indirectly mediating in the passing of civil law which will be applied to Roman citizens as the development of economical life and commercial activity required that a merchant must be a person with multiple commercial relations in several places considering the rather large area of these operations; thus it was common knowledge that certain situations might arise, in which a person's interest could have been affected by the fact that this person was not present at that certain place in time where his goods should have been preserved and managed.

Thus, the timely and useful intervention of another person without mandate was beneficial, by preventing a prejudice or by limiting the effects of a prejudice which has already occurred.

It was noted that this was not an act of philanthropy, but an equitable act of human solidarity, caused by real selflessness.

As selflessness is a virtue, it must be legally protected, and the gesture of the gerent is not a mere benevolent act which can't be legally protected; thus, a new legal institution arose.

A new postulate was respected; one that defines the essence of Roman law, based on legal and moral principles, in which both were combined and equity was the supreme value. Celsus said that „ius est ars aequi et bani".

From the very beginning, we notice that the Romans have regulated the institution of "negotiorum gestio" from the time of imperial law in the post-classical age, thus considering the technical meaning of the act of management, namely the temporary management of the goods of the gerate by the gerent without consent from the former.

Thus, the regulated phrasing is frequently used "a person interferes in the business of another person without consent from the owner" as a defining element of "negotiorum gestio".

Starting from the quadripartite classification of obligations, Romanian doctrine identifies quasi contract as an act which creates rights and obligations for both the gerent and the gerate although they had no legal relation or contract concluded between them or any other element meant to ensure business management with the mandate contract, since there are "similarities" between the two, as stated in specialty doctrine.

Considering the opinions of Roman law advisers regarding quasi contracts, French legal literature described this legal institution as the spontaneous act of a person which results in an advantage for a third party and a demise of the patrimony of the agent, which entitles him to compensation from the third party.[4] In this context, compensations can be qualified as an obligation to reimburse or repair the prejudice in case one of the parties fails to respect its

[4] M. Douchy, La notion de qvasi-contract en driot positif francois, Economica Publishing House, Paris, 1997

commitment, thus it is known as a "quasi contract" or another type of contract which fictionally connects the person who is enriched with the person who is impoverished[5].

In case of business management, we are discussing a person who, by its own will, interferes with the patrimonial interests of an absent person, by managing his business without special mandate and without knowledge of the person whose business is administered much less without consent to the actions of the gerent[6]. Thus, it is correctly stated that business management is not legally compatible[7] as a quasi contract as there is no agreement between the will of the gerent and the will of the gerat.

The concept of equity led to the stating of the principle regarding reimbursement, an element meant to create a background for quasi contract, a document, which, in the opinion of the lawmaker of the new Civil Code, is a thing of the past.

Business management allowed for conceptual dispute in regard to the different orientation of the continental and Anglo-Saxon systems of law, where the classical institution of "negotiorum gestio" was differently interpreted, as it was based on Germen, French or Italian systems of law, which sanctioned both the obligations of the gerent and the gerate; the Anglo-Saxon system of law even regulated that the legal act performed for another person was a voluntary act with no legal effects, no right to compensation.

However, we must mention that the interference of a person in another person's business must be made in good faith; it must not be performed abusively or with the interest of securing certain patrimonial advantages. Thus, it was stated that "business management must start from a feeling of affection and friendship, thus making it essentially free"[8].

In the Romanian legal system, business management was regulated in articles 987-991 of the 1864 Civil Code and in article 1330-1340 of the new Civil Code.

By embracing a modern vision, the lawmaker of the new Civil Code provides this institution with an independent qualification, by defining its legal nature and considering it as a source of civil obligations. The French Civil Code regulates this institution in articles 1372-1375 by showing that there is business management every time a person performs an act in the interest of another person without receiving a specific task from that person[9].

According to article 1330 first alignment, the new Civil Code mentions the following: "There is business management when a person, named a gerent, without having a specific task, voluntarily and usefully administers the business of another person called a gerate, who doesn't know the existence of the business management or knows it but is not able to point out an agent or provide for his business in any other way."

Starting from this legal provision, we feel that the closest definition in specialty doctrine is that according to which business management is a legal, licit and voluntary fact, by

[5] E. Terrier, La fiction au secours de quasi contracts au l'achevement d'un debut juridique, Droit, Paris, 2004

[6] I. Adam op.cit. p.9

[7] C.Stătescu, C. Bârsan, Civil law treaty. The general thory of obligations, The Academy Publishing House, Social Republic of Romania, Bucharest, p.118

[8] D. Alexandresco, A theoretical and practical explanation of Romanain civil law as opposed to ol laws, Volume V, National Publishing House, Iaşi 1898, p.312

[9] A. Benabent, Droit civil, Les obligation, Montchrestein, Paris 2001, p.293

which a person, called a gerent, performs necessary and useful material acts regarding the patrimony of another person, called a gerate, without intent or knowledge from the owner, resulting in the need of the gerate to reimburse the gerent with the expenses caused by his management[10].

The lawmaker of the new Civil Code agrees with the thesis according to which business management exceeds the institution of quasi contract origin, by considering that it is a legal, licit, voluntary and unilateral act which generates obligation.

However, it is not any less important that the lawmaker valorized the historical tradition of this institution, especially in regard to the objective background which generated the current legal regulation and the idea of selflessness and equity, as the person who performed certain actions in the interest of another person must be compensated for his expenses.

Thus, it is appreciated that it is a moral gesture with legal meaning by which an impoverished person suffers damage in order to prove solidarity, not to get rich by receiving compensation.

A certain advantage was created for the gerate by the intervention of the gerent, which was naturally entitled to be compensated for his expenses.

At the beginning, the object of business management was somewhat limited to preservation and administration acts performed for an absent person; currently, the area of business management comprises all situations in which a person performs an act in the interest of another person[11].

However, these acts must not exceed the domain which defines the preservation or administration act even if the intervention is achieved by a series of actions which comprise acts of disposition regarding a certain „ut singuli" good, but the entire patrimony of the gerate; thus, the act will be qualified as an act of administration by considering its purpose. We can also mention that selling goods which are perishable are also acts of administration considering their purpose.

Some courts of law provided similar solutions and appreciated that the nature of the act in regard to the entire patrimony of the gerate and by considering all the facts that enabled the gerent to perform the business management.

As a rule, the acts of administering another person's interests can't exceed lato sensu the area of preservation of administration acts.

It was correctly shown that, in order to compensate the person who intervenes on behalf of another person, he will have to act like a real business manager. By this specific characteristic, business management is different from other licit legal facts. Thus, the unilateral act of the gerate created that certain legal report based on which new rights and obligations will arise for both the gerate and the gerent.

As a consequence, the person who interferes in another person's business in order to achieve a personal interest does not perform an act specific to business management as regulated by article 1330 second alignment of the new Civil Code, which mentions: the

[10] I. Adam, Op.cit., p.17

[11] Ibidem

person, who without knowledge, works in the interest of another person, is not held by his obligations, according to the law of the gerent. He is entitled to compensation according to the rules of unjustified enrichment.

By analyzing this, we can identify the stability elements which defined the traditional institution of negotiorum gestio as follows:

- an element of fact, meaning an act of management
- an international element, which can be identified in regard to the gerate and a negative element resulting in the acknowledging the intervention of the gerent by the gerate[12].

The intervention of the gerent is not limited to legal acts he concludes, but comprises any material act performed in the interest of the gerate, as long as it is of patrimonial character.

As for the legal acts, the lawmaker of the new Civil Code states „expresis verbis" that business management must by useful to the gerate, by avoiding damage to the patrimony of the gerate[13].

By concluding legal acts, the gerent must have capacity to conclude a contract, while the gerate can lack exercise capacity.

As a consequence, the responsibility of managing another person's interest can be engaged only by people with full exercise capacity[14].

The subjective attitude of the parties distinguishes the act of managing another person's interest from other legal facts as sources of obligations. The ensemble of material acts and facts which must be performed with the intent of managing another person's interest must be performed without consent and special authorization from the gerate. Also, these acts must be performed in order to force the gerate to compensate the gerent's expenses and are not considered to be a liberty (see article 1330 third alignment).

If the gerate had knowledge about the intervention of the gerent in his business[15], thus reaching an agreement between the will of the gerate and the will of the gerent, we would be in the presence of a mandate contract.

„Negotiorum gestio" results in obligations for both parties. The obligations of the gerent are as follows:

- the obligation regulated by articles 987-988 of the 1864 Civil Code and article 1332 of the new Civil Code to continue the business until the gerate will have the necessary means to manage it
- the obligation to manager the goods of the gerate like a good faith owner (see article 989 of the 1864 Civil Code and article 1334 of the new Civil Code)
- the obligation to be responsible to the gerate for all performed operations so he can in concreto appreciate if they are useful. Article 1335 of the new Civil

[12] C. Tomulescu, Op.cit., p.755

[13] I. Adam, op.cit., p.24

[14] Ibidem

[15] R. Sanilevici, The general theory of obligations, Iasi University, 1976, p.214

Code states: "When the management stops, the gerent must be responsible to the gerate and return all goods used in managing the business"

- the obligation to return to the gerate all goods acquired while managing the business (see article 1335 of the new Civil Code)
- the obligation of the gerent is sanctioned by „actio negotiorum gestorum directe" provided for dominus rei gestae (the gerate)[16].

In his turn, the gerate will have some obligations in regard to other gerent consisting of: the obligation to reimburse the gerent for all necessary and useful expenses resulted from the business management even if the desired result was not achieved, according to article 1337 alignment 1 of the new Civil Code

- the obligation to reimburse the gerent „for the prejudice caused to the gerent without any of his fault, during business management" (article 1337 alignment 1 of the new Civil Code)
- the obligation of the gerent to perform all necessary and useful acts as concluded by the gerate (article 1337 second alignment of the new Civil Code)
- the obligation to return to the gerent the value of the unnecessary expenses provided he proves that those expenses were made strictly to the advantage of the gerent"" (article 13379 new Civil Code)
- the obligations of the gerate were sanctioned by actio negotiorum contrario[17]

From the above stated facts, we can notice the influence of Roman law, exemplified by

„negotiorum gestio" over the systems of law from the family of continental law, in regard to the source of obligation and the institution analyzed in order to identify the legal means provided to the parties for them to capitalize on their subjective rights resulting from legal civil law relations.

Nowadays both legal practice and specialty doctrine identified new forms of manifestation of the institution of business management in the diversified social relations regulated by civil law, namely article 1330-1340 of the new Civil Code; this entitles us to state that „negotiorum gestio" is a permanent and classical institution of civil law. Randomly, we provide examples from the activity of an attorney at law whose mission is not limited to accurately execute an mandate according to the law[18] but he can also conclude, by his own will, certain operations like disloyal facts which will benefit his client based on „negotiorum gestio".

Thus, in a state of law, these activities prove that business management is significant to justice as it protects the rights and liberties of the citizens, as the attorney at law is the adviser of his client sometimes even without his authorization and knowledge.

Similarly, it was shown that the stock broker who performs his activity in a stock market company and undergoes certain operations for his clients, while they are unaware of

[16] P.F. Girard, Manuel elementaire de droit romain, Paris, 1929, p.121

[17] Ibidem

[18] E. Poenaru, C. Murzea, Liberal judicial professions, Hamangiu Publishing House, Bucharest 2009, p.109

these actions, they will be held responsible for their actions. Their obligations results from business management and not a mandate contract[19].

A frequent situation in practice is when a renter, by own will and at his own expense, repairs a house which belongs to the owner, without the owner's knowledge.

If the renter's expenses are necessary and useful, he is entitled to compensation as a result of business management and not based on the lease contract concluded between the renter and the owner.

The practical utility of „negotiorum gestio" is obvious as it provides a legal tool by which a person intervenes in the business of another person, without knowledge and mandate from that person, but providing an advantage which will result in compensation of expenses based on the licit and voluntary fact of business management.

The importance of business management is all the more obvious as specialty doctrine correctly claims that the gerent's intervention can be useful not only to the gerate, but also to society, if it preserves and protects common goods endangered by the lack of care manifested by the owner.[20].

Business management is one of the licit voluntary legal acts which generate obligations in favor of another person, without mandate from that person; these rights and obligations are useful to him and generate the right of the person who intervened to be compensated.

A classical institution of civil law, known from the classical age of Roman law „negotiorum gestio" was provided with a new regulation in article 1330-1340 of the new Civil Code, a regulation which valorizes both the legal texts or articles 987-991 of the 1864 Civil Code and the opinions of judicial practice and civil judicial doctrine, thus providing the subjects of law with new means to capitalize on their subjective civil rights and the correlative obligations which result from business management.

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[20] I. Adam, op.cit. p.20

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