The Sources of Corporate Law

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Abstract

Business law is that branch of private law which includes the unitary set of legal norms which regulate the patrimonial and non-patrimonial social relations in the business sphere, concluded between persons in a position of equality before the law.

The object of business law is both the legal norms which regulate commercial activity and the legal norms applicable to traders.

***Source of law** is the generating form by which the right is carried out according to the mandatory legal norms. The legal norms which act upon businesses are expressed, first of all, by written laws and then by practice (customs of the traders).*

Key words: corporate law, sources, norms, principles, jurisprudence
J.E.L. classification: K2

1. Introduction

In a broad sense, the sources of law represent socio-economic conditions that determined the appearance of certain legal norms, depending on the type of society existing in a given historical period. This term answers to our questions of why, where, when, how and for what reasons that legal norm appeared. These sources are called normative sources.

According to art. 1 para. (1) from the Civil code, the law, the practices and general principles of law are the sources of civil law. For the first time, in civil law the quality of being a source of law of practices and general principles of (civil) law are expressly named. As most of the specific norms of corporate law come from private law, governed as a common law by civil law, we consider that the above enumeration is applicable to our matter as well.

Besides normative sources, certain interpretative sources of law are also recognized, with an important role in interpreting normative acts. These are the doctrine and the judicial practice.

In a narrow sense, the sources of corporate law are forms of expression of the norms specific to this branch.

2. Theoretical background

The theoretical concepts presented in this paper deal with the general regulatory framework of business law, namely: The Constitution, the Civil Code, special commercial laws, commercial practices, principles of law, doctrine and the judicial precedent.

3. Research methodology

The purpose of this analysis consists in presenting the novelties to the regulation of the business law legal relations generated by adopting the New Romanian Civil Code dealing with the relations between the traders and the other business partners.

The analytical research method was used while analyzing normative acts as well as opinions of various authors. The following interpretation methods of such rules of law were used: the systematic interpretation method and the teleological interpretation method.

4. The normative sources of corporate law are the following :

A. The law

Originating from the Parliament, it has a superior legal force to the other sources of law, which are subordinate to it and must not violate it. Parliament adopts constitutional laws, organic laws and special laws.

a) The Constitution of Romania, as the fundamental law of the country, regulates the principles of economic activity organization.

According to art. 135 of the Constitution, Romania's economy is a market economy, based on free initiative and competition. The state must ensure the freedom of trade, the protection of fair competition and the creation of a favorable framework for the exploitation of all production factors. (Costin *et al*, 2020, p.127)

b) Organic laws regulate a specific and limited series of domains and are adopted with the vote of the majority of the members on the lists of each House of Parliament. Sometimes, organic laws are presented as a set of legal norms, systematically organized, bearing the name of codes (examples of organic laws - sources of civil law: the Civil Code, the Civil Procedure Code – regarding the evidence from civil cases).

The organic law which has a special interest in corporate law is the Civil Code, regulating the patrimonial and non-patrimonial relations between persons, as subjects of civil law.

As stipulated by art. 3 Civil Code, its provisions also apply to the relations between professionals, as well as to the relations between professionals and any other civil law matters.

Among the legal institutions of commercial reference included in the New Civil Code, the following stand out: the professionals and the enterprise (art. 3), the joint venture (art. 1949 - 1954), the commission contract (art. 2043 - 2053), the consignment contract (art. 2054 - 2063), the forwarding agreement (art. 2064 - 2071), the finder's fee agreement (art. 2096 - 2102), the current account agreement (art. 2171 - 2183), letters of guarantee (art. 2321 - 2322), securities (art. 2647 - 2658).

According to art. 5 Civil Code, in the regulated matters, the norms of the European Union law take precedence in being applied, regardless of the quality or the status of the parties.

The special nature of business law relations compared to civil legal relations is indisputable, and this aspect remains constant, regardless of their normative source. The New Civil Code brings extra efficiency to business law relations, structurally reforms the legal order of private law, uniting in a single regulation the branches of civil law, commercial and business law, private international law (Bratis, 2012, pp.34-52).

In addition, the New Romanian Civil Code regulates legal institutions which directly concern the field of business, such as: the administration of another's assets, the nullity of legal entities, periodic property, unilateral juridical act, assignment of debt, joint insurance, escrow.

c) Special laws are organic laws that take into account certain aspects of the commercial activity. For example, we mention Law no. 31/1990 on companies, as subsequently amended and completed, Law no. 26/1990 on the trade register, as subsequently amended and completed, Law no. 82/1991 on accounting, Law no. 85/2006 on insolvency, Law no. 58/1934 on the bill of exchange and the promissory note, Law no. 59/1934 on the check.

d) Government Decisions, Government Ordinances and Government Emergency Ordinances. The government adopts decisions and ordinances. The decisions are issued for the organization of the implementation of the laws, and the ordinances are issued under a special law of empowerment from the Parliament, within the limits and under the conditions stipulated by it. The enabling law establishes the domain (only domains that are not subjects of organic laws) and the date by which the ordinances can be issued.

e) Normative acts issued by the central and local public administration (orders of the ministers, decisions of the Local Council, provisions of the mayor, orders of the prefect) are sources of corporate law insofar as they contain provisions of corporate law.

f) International regulations (international conventions and treaties to which Romania is a party) constitute sources of corporate law insofar as they contain provisions of corporate law and are applied in our country based on the ratification law issued by the Parliament (Bobei, 2020, pp.56-57).

g) Normative acts of the European Union: regulations, directives, decisions.

The regulation produces effects directly on the territory of the EU Member States, without the need to be transposed into the national legislation of the respective state.

The Directive does not produce direct effects, but it must be transposed into the national legislation of the Member States, within the term indicated in its body.

The decisions are applied directly and in full, similar to the regulations, being able to target a certain Member State or even a certain natural or legal person.

As a novelty compared to the old regulation, in art. 4 and art. 5 the Civil Code expressly establishes that European Union law and international human rights treaties take precedence in being applied.

Thus, in the matters regulated by the new Civil Code, the norms of the European Union law take precedence in being applied, regardless of the quality or the status of the parties, and the provisions regarding the rights and liberties of the people shall be interpreted and applied in accordance with the Constitution, the Universal Declaration of Human Rights, the pacts and other treaties to which Romania is a party, and if there are contradictions between the pacts and treaties regarding the fundamental human rights to which Romania is a party and the new Civil Code, the international regulations take precedence, unless the new Civil Code contains more favorable provisions.

B. Practices

Practice is a long-standing use that has a certain degree of seniority, repeatability or stability applied to an indefinite number of traders.

Practice, within the meaning of the Civil Code, is understood to be the custom and professional practice [art. 1 para. (6) Civil Code].

The norm (custom) is a rule of conduct born out of social practice, used for a long time and adopted as a mandatory legal norm.

Professional practices are established rules of conduct in the practice of a certain profession, which are applied as if they were legal norms.

In the Romanian legal system until the entry into force of the current Civil Code, the practices did not constitute formal sources of law and they did not have a normative, regulatory character. The situation has changed, art. 1 Civil Code expressly listing practice among the sources of civil law. (Căzănel, 2015, p.23)

Otherwise, in business relations, commercial practices are increasingly present, either in the form of standardized contracts or clauses, such as "general business conditions" or in the form of "best practice" rules.

The incidence of practices as sources of law is limited, however. Practice application is subject to restrictions. Thus, in matters regulated by law, practices apply only when the law expressly refers to them. Only if the law does not stipulate otherwise the practice shall apply.

Naturally, only practices in accordance with public order and good manners are recognized as sources of law.

The burden of proof of existence, but also of the content of the practices rests with the interested party, who invoked the practice. In order to facilitate the burden of proof, a legal presumption regarding the existence of the practices published in collections elaborated by the authorized entities or bodies is established. The presumption is relative and may be overturned by opposite proof.

C. General principles of law

The principles of law are enshrined as a distinct source of law by the provisions of art. 1 Civil Code. In the cases not provided by law the practices apply, and in their absence, the legal provisions on similar situations, and when there are no such provisions, the general principles of civil law.

For the first time, practices and general principles of (civil) law are expressly named as sources of law in civil law.

For the legal relations that are established in the field of corporate law, a great importance is represented by the principles resulting from the norms applicable to the relations in which the professionals of the commercial activity participate.

The principles of corporate law come from the doctrine which addresses the principles of commercial law and are as follows:

- in business, legal acts are acts with onerous titles;
- in commerce, money is always fruitful;
- in business legal documents, in case of doubt, the rule favoring the movement of goods is applied;
- contracting in favor of the third is commonplace.

On the other hand, **the interpretative sources of corporate law** are the following :

A. Doctrine

Doctrine is not generally accepted as a source of law, but it is an important instrument for interpreting and applying normative acts regarding business activity.

The new legislation was also founded by the legislature's taking over some doctrinal solutions (Terré, Simler and Lequette, 2005, p.150).

B. Jurisprudence

The judicial precedent (jurisprudence) may also sometimes be a source of law regarding certain legal relationships. The decisions of certain courts, under certain conditions, may have the value of a source of law, but an interpretative source, similar to practices, rather than a normative one (Jurcă, C. *et al*, 2007, pp.7-8)

This is the case of the decisions reached by the European courts in solving prejudicial issues. If, in the application of the provisions of European law - including those of companies - the national courts have doubts about the applicability or the meaning of some provisions of the European normative acts, the national judge has the obligation to notify the European court on a prejudicial question so as to interpret the respective European norm. The solution given by the European judge in solving the prejudicial question has a binding value both for the national courts of the state which has notified the European court and for the other Member States, even if contrary to national law.

The decisions of the European Court of Justice which do not concern prejudicial issues are also binding.

The decisions of the European Court of Human Rights (ECHR) are also binding. Insofar as they refer to matters which are subject to corporate law, ECHR can also make decisions in this area, being sources of law.

Of the decisions reached by the national courts, the value of source of law is only recognized for the decisions of the High Court of Cassation and Justice given in judging appeals in the interest of the law and in solving the questions of prior law, as well as the decisions of the Constitutional Court given in solving the exceptions of unconstitutionality regarding provisions of laws and ordinances.

Thus, the solutions reached by the High Court of Cassation and Justice in the appeals in the interest of the law are binding for courts from the date of their publication in the Official Journal of Romania. In order to ensure the unitary interpretation and application of the law by the courts, the High Court of Cassation and Justice shall rule on the legal issues that have been solved differently by the courts, through decisions, via a procedure regulated by the provisions of art. 514-518 Civil Procedure Code.

Furthermore, when in the course of a trial, a full court invested with the solution of the case in the court of last resort, finding that a question of law, the solution of which is needed for the settlement on the merits of the respective case, is new and the High Court of Cassation and Justice has not ruled on it and is not the subject of an appeal in the interest of the law pending solution, it shall be able to request the High Court of Cassation and Justice to come to a principle resolution to the question of law referred to it. The clarification of questions of law is mandatory for the court that requested the clarification from the date of the decision's announcement, and for the other courts, from the date of the publication of the decision in the Official Journal of Romania. This procedure is regulated by the provisions of art. 519-521 Civil Procedure Code.

The Constitutional Court, when admitting an exception of unconstitutionality, reaches a decision that has *erga omnes* effects, the legal disposition declared as unconstitutional no longer being applicable either in the process in which it was invoked or in other identical or similar situations (Nemeş and Fierbinteanu, 2020, pp.34-36).

5. Conclusions

The New Romanian Civil Code establishes a certain order of the application of the norms which constitute sources of law, an order from which it cannot derogate.

The law in the broad sense shall be applied first. Within the category of laws, in case of a conflict between the norms of domestic law and European Union law, the norms of European Union law shall take precedence in being applied, regardless of the quality or the status of the parties (TFEU, directives, regulations, etc.). Also, international treaties on human rights, less common in corporate law, shall take precedence in being applied.

Laws derogating from a general provision that restrict the exercise of civil rights or stipulate civil sanctions apply only in the specific and limited cases provided by law.

If the law does not stipulate anything, the practices shall apply, and in their absence, the legal provisions on similar situations, and when there are no such provisions, the general principles of law. If a certain matter is regulated by law, practices are not in principle directly applicable insofar as there is an express provision of the law governing the matter. If the reference to practices is made by an express provision of the contract, the provision applies even if there is also a legal but supplementary provision. If the matter is not regulated by law, practices become applicable, being a subsidiary source.

Thus, the New Romanian Civil Code represents an innovative and original legislative creation, but also a normative capitalization of the national and European jurisprudence, as well as of the guidelines of the scientific research performed by the most reputable Romanian jurists.

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