The Management of Business in the New Civil Code

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Abstract: One of the most important lawful legal actions generating obligations is represented by the management of business. In Roman law, this institution was called negotium gestio and it was entailing mutual actions between its parties. For example, if a person dealt with another person’s business, in the absence thereof, there were born reciprocal actions between them: the person whose businesses were administered (principal or dominus negotii) had direct action, and the person who administered them (gestor) had the contrary action. However, the new provisions of civil substantive law from our country consecrate to this civil legal action a much more modern and judicious regulation. It is noteworthy, in particular, that the contemporary civil legislator tried to determine its specific conditions, consecrating, in this respect, several provisions incident to the parties and to their actions. However, the effects of business management present a particular interest in the light of the parties' obligations; equally, we are going to identify a special component of this institution known as the management ratification by the principal. Through the management ratification by the principal, the legislator has compared the management of business with the mandate.

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1. Preliminaries on the management of business in the new Civil Code [1]

The management of business (negotiorum gestio) takes place when a person (gestor), without being required or by virtue of a (legal or judicial) mandate, voluntarily and timely conducts another person’s business (principal), who does not know about the existence of these facts or who, knowing about them, is unable to appoint a trustee or to take care of his/her business in a different way [art. 1330, para. (1), NCC]. For example, a person performs certain urgent repairs to the neighbor’s building and the neighbor is not present; or someone pays for his/her friend’s funeral expenses, without knowing the heirs.

The management of business can be defined as the voluntary performance by a person (gestor) of certain necessary administration or disposition material or legal acts, provided that they are appropriate, necessary and useful to another person (principal).

From this perspective, we continue the presentation of our study by revealing some theoretical aspects that highlight, on the one hand, the good regulation of the business management institution in the current system of substantive law and, on the other hand, its social importance.

2. Specific conditions of the management of business

From this definition, we trigger the following specific conditions of business management:

A) Conditions specific to the parties to the management of business. Within the legal fact of business management, there are always two parties, namely: the gestor (a) and the principal (b).
(a). The business gestor should meet the following conditions:
- He/she should enjoy the civil status regulated by the civil provisions of substantive law (and he/she can be either a natural or a legal person). This condition can be relative and it applies only if the gestor concludes legal documents. As we can notice in the following lines, the gestor can also conclude certain material acts, in which case, in our view, the gestor's civil status would not be mandatory;
- His/her intervention should be voluntary and spontaneous, i.e., it should occur without a pre-existing obligation that results from a contract (or mandate) or by virtue of a legal provision (for example, guardianship, under art. 112, NCC), or by a court decision (for instance, the court decision that mandates one spouse to represent the other; art. 315, NCC);
- He/she should have the intention to manage another person's affairs. If he/she acts in his/her own interest, but, in reality, he/she unintentionally does a service to a third party (for example, he/she repairs a building believing that he/she is the heir of that asset, but the heir certificate is canceled), we cannot talk about the existence of business management but about the unjust enrichment of that third party;
- According to the foreign doctrine, the management of business requires an act of altruism by the gestor [2];
- In case of death, the gestor’s (legal or testamentary) heirs who know about the management are obliged to continue the business started by the gestor, under the same conditions (art. 1333, NCC);

(b). The principal. Regarding the principal, there is no requirement in terms of his/her status. In addition, he/she should not express any agreement because, otherwise, we are in the presence of a genuine mandate. Equally, he/she should not express his/her opposition to the gestor. If the principal opposes the management started or continued by a gestor, and the latter ignores the opposition shown by the former, his/her future actions will be treated as civil offenses, so that the gestor could be liable for damages even in the case of the slightest fault [art. 1338, par. (3) of the NCC].

B) Conditions specific to the acts of management. The lawful legal act of business management is complex and, apart from the determined parties, there should be ascertained the existence of specific acts (in the sense of actions), which, as we have already noted, in some cases, would lead to the confusion with another legal act called unjust enrichment. The acts performed by the gestor are expressly regulated in art. 1336 of the NCC; however, the text refers to his/her actions towards third parties. In general, the actions specific to the management of business have a patrimonial nature, but we also encounter cases where they are of non-patrimonial nature (for instance, the gestor voluntarily saves the principal from a traffic accident and suffers, in his/her turn, some injuries etc.). Therefore, in the following lines, we reveal the most important conditions that the acts performed by the gestor should meet. For a better understanding of the concept, we should distinguish between: acts performed by the gestor for the principal (a) and acts performed by the gestor for third parties (b).

a. Acts performed by the gestor for the principal. The analysis of the conditions and forms of certain acts performed by gestor for the principal triggers a very broad debate but we will try to summarize this topic in order to precisely provide answers on the business management mechanism. Whatever the type of the act performed by the gestor, it should be performed in cumulative compliance with the following essential features: voluntary, opportune, necessary and useful to the principal.

The act is voluntary when it is not under an obligation; it is seen as opportune upon its performance and not upon its outcome (for example, a neighboring building in danger of demolition is performed consolidation works on the principal’s behalf but, after a period, it is destroyed due to a fire). Moreover, the acts performed by the gestor may be necessary or useful, and paragraph (1) of art.1337 of the NCC provides for the principal’s liability to return them to the gestor, even if the management result was not achieved [3].

Therefore, considering the definition given to the management of business, we should note that the acts performed by the gestor may be: material, legal, of management or even of disposal.

- The material acts performed by the gestor may be different and represented through various actions, such as repairing a pipeline; repairing the wall of a neighboring building in danger of demolition; unloading of goods; performance of works etc;
The legal acts executed by the gestor may be rare but have a special importance. Among these acts we mention: concluding a contract with a contractor who undertakes to repair a building belonging to the principal; payment of debts; calling a veterinarian and paying him/her for the care of animals that belong to the principal etc;

- The management acts performed by the gestor are useful legal acts aiming at valorizing some of the principal’s goods to their true value and according to their usual nature or destination. Such acts may relate to: the collection of fruit; renting or leasing property, etc;

- The acts of disposal that may be performed by the gestor are very rare because it is inadmissible for the gestor to conclude legal documents on behalf of a person without the latter to be represented. In practice, these acts are fairly isolated and several doctrinal views, by exception, assimilate them to the acts of conservation and management. Therefore, the only situation where the gestor may perform such acts is the sale of perishable food;

b. Acts performed by the gestor for third parties. Regarding the act performed by the gestor for third parties, art. 1336 of the NCC highlights two situations: when the gestor acts in his/her own name and when the gestor acts on the principal’s behalf. From this perspective, paragraph (1) of the said norm establishes that the gestor acting in his/her own name is bound towards the third parties wherewith he/she contracted and recognizes their right to seek, at anytime, a regal remedy against the principal. However, this provision reveals, quite clearly, that the principal's obligation mentioned in the act would not be validly entailed unless he/she had the civil status recognized by law. The above mentioned provision does not refer to the type of the acts that he/she can perform but, in our opinion, the acts in question are those that would contain an obligation of the principal.

Furthermore, para. (2) of the article subject to our discussion reveals the situation where the gestor acts on the principal’s behalf. In this situation, the gestor is not bound to the third parties wherewith he/she concluded the contract unless the principal is bound towards them. It is noteworthy that the final sentence of the previous paragraph illustrates that the acts performed by the gestor, directly, on the principal’s behalf, directly create an obligation on the latter and a right in favor of the third parties, if the management is necessary or useful, or if it was ratified.

3. The effects of business management

The effects or the legal consequences of business management show, in turn, a particular interest. They can be seen primarily in terms of the gestor’s obligations (A), of the principal’s obligations (B), but also from the perspective of the business management ratification by the principal (C).

A) Gestor's obligations. Regarding the gestor's obligations, they are entailed by several articles of the Civil Code, among which:

a. the obligation of notification. This obligation arises from the provisions of art. 1331 of the NCC, meaning that the gestor will have to inform the principal on the management that he/she started, as soon as possible. However, since the management of business is, in our view, an exceptional situation, the gestor will notify the principal in reasonable time, from the moment when he/she began the management of the respective principal’s business. If this obligation is not fulfilled by the gestor, it will entail the nonexistence or the reduction of the principal’s obligation to compensation;

b. the obligation to continue management. Pursuant to art. 1332 of the NCC, the gestor is bound to continue the management that he/she started until he/she can abandon it without the risk of destruction or until the principal, personally or through a representative, or, where appropriate, his/her legal or testamentary heirs, is able to take it over. Also, if the gestor dies during the management, his/her legal or testamentary heirs who know about the management are obliged to continue it, in the same conditions as gestor did (art. 1333, NCC);

c. the obligation of diligence. This obligation is also legally sprang from art. 1334 of the NCC. The first paragraph of this text emphasizes that, from the beginning of the management, the gestor is obliged to care for the principal’s interests with the diligence of an owner for his/her own goods. In this respect, the
gestor’s diligence obligation produces the same legal effects as the diligence obligation of a debtor in the execution of his/her obligations, under art. 1480, para. (1) of the NCC. In this respect, the gestor is liable for any damage caused to the principal, with the exception referred to in paragraph (2) of the above-mentioned rule, when the management aimed to defend the principal from an impending damage. Only in this situation, the gestor is liable for the damages caused by intent or by serious misconduct, his/her deeds being subsequently determined in compliance with art. 16, which regulates a person's guilt under the new civil provisions;

d. the obligation to give account and hand over to the principal all the assets obtained during management. This obligation stipulated by art. 1335 of the NCC illustrates the obvious rapprochement between the management of business and the mandate institution. If this article provides for the gestor’s obligation to give account to the principal and to hand over all the assets obtained during his/her management, upon the cease of management, art. 2019 of the NCC provides, as far as it concerns the mandate, for similar obligations of the trustee. According to the legal text, the trustee is obliged to give account to the principal on the mandate management and to hand over all the assets obtained during the execution of the mandate;

e. the obligation to stop management in case of the principal’s opposition. This obligation has a limited incidence in the management of business and it intervenes only in case of the principal’s opposition to the gestor’s continuation of the business management that he/she started. Even if art. 1332 of the NCC highlights the gestor's obligation to continue the management he/she started until the moment when he/she can abandon it without risk of loss or until the principal himself/herself, or through a representative, or his/her heirs are able to take it over, art. 1338 of the NCC also provides for the situation where the principal, as the beneficiary of the business management, knows about the existence of this management and opposes the continuation of these activities. In this regard, paragraph (2) of art. 338 of the NCC provides for the sanction in case of tort liability, applying art. 1349 et seq. of the NCC, if the gestor ignores the principal’s opposition to continue the management.

B. The principal’s obligations. Although the management of business illustrates the actions which are naturally performed by the gestor, this can entail a series of obligations in his/her charge; on the other hand, the legislator considered it useful to regulate certain obligations of the principal, when the management conditions are met and even if its results have not been achieved. The principal’s obligations are governed by the provisions of art. 1337 of the NCC and they are the following:

a. The obligation to reimburse the necessary and useful expenses [4]. In accordance with paragraph (1) of art. 1337 of NCC, the principal has the obligation to reimburse the gestor with the necessary expenses, and, within the added value limit, with the useful expenses and their related interest from the day when they were engaged. It is well-known that the necessary expenses are those expenses incurred for preserving the principal’s business. These expenses shall be reimbursed in full to the gestor, regardless of the management conduct because, without these expenses, the principal’s business would have incurred special consequences (for instance, the emergency repair of a gas pipeline from the neighboring yard (the principal’s property), which would otherwise cause a deflagration). The useful expenses represent the amount of money given by the gestor for valuing the goods subject to management and for improving their material condition, expenses that, though unnecessary, in certain situations may enhance the value of those goods. Therefore, these expenses should be done within the limited added value, and if this limit is exceeded, the principal shall be obliged to reimburse to the gestor not only this difference in value, but also the related interest from the day when these expenses were incurred. For example, the gestor repaired the roof of principal’s house, which was in a bad condition, although this was not necessary. If this action brought an added value to the asset, the gestor shall be entitled to the reimbursement of the difference in value, and if these repairs were made with expensive materials, they can be considered as voluptuous expenses (of embellishment), so that the gestor shall not be entitled to their return. However, if the principal does not reimburse to the gestor the amounts deemed as added value, as a result of the useful expenses incurred, with the related interest, the latter shall have the possibility of a claim against the principal;
b. The obligation to pay the indemnity for the damage suffered by the gestor. The final sentence of paragraph (1), art. 1337 of the NCC highlights the principal’s obligation to indemnify the gestor for the damages suffered by him without his/her fault, due to the management conducted. This situation might arise when the gestor makes the expenditures necessary in order to repair the gas pipeline from the neighbor’s yard and, unintentionally, causes some damage to his/her own property;

c. The obligation to execute the obligations arising from the necessary and useful acts performed by the gestor. In order to better explain this obligation, we should note that the principal is bound to pay the company that repairs the gas pipeline in his/her yard, as a consequence of his/her obligation to third parties, as revealed by the provisions of art. 1336 of the NCC. In this regard, the legislator found it necessary to provide, expensis verbis, in paragraph (2) of art. 1337 of the NCC, for the principal’s obligation to execute the obligations arising from the necessary and useful acts, which were performed by the gestor on the former’s behalf or benefit. The only exceptional situation where the principal does not fulfill this obligation is when he opposes the beginning or continuation of the management in the sense of art. 1338 of the NCC. Otherwise, the fulfillment of the principal’s obligation equals the management ratification.

C. The management ratification by the principal. A particularly important effect of the management of business is the management ratification by the principal. The possibility to ratify the legal management acts by the principal, in the sense of art. 1339 of the NCC, approaches even more the institution of business management to the mandate institution. This results from the interpretation of the final sentence from the above-mentioned text, meaning that, by ratifying the legal acts of management, there are produced the effects of a mandate [5]. However, it is noteworthy that these effects retro-activate, as they are recognized upon the beginning of management. On the other hand, in our opinion, by management ratification, the legislator has pursued, first, the creation of an opposition in the principal’s benefit to all the acts that may regard the respective management and the recognition of these effects. The essential argument would be that, through ratification, the principal is notified about all the acts performed on his/her behalf or in his/her benefit and, if such acts or expenditures have not produced any advantage, the business management may be deemed as inopportune, in the sense of art. 1339 of the NCC.

Conclusions

The aim of this study is obvious to some theoretical aspects of the institution, but also incidents as this for jurisprudence. If we’re removed the corresponding elements for a better understanding of it, remains to be seen but more important will be the perception of the practice of the institution.

References

1. The new Civil Code was adopted by Law no. 287/2009, republished in the Official Gazette of Romania, Part I, no. 505, from 1 October 2011 and it was implemented by Law no. 71/2011, published in the Official Gazette of Romania, Part I, No. 409 of 10 June 2011;