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Just in Case

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In this issue

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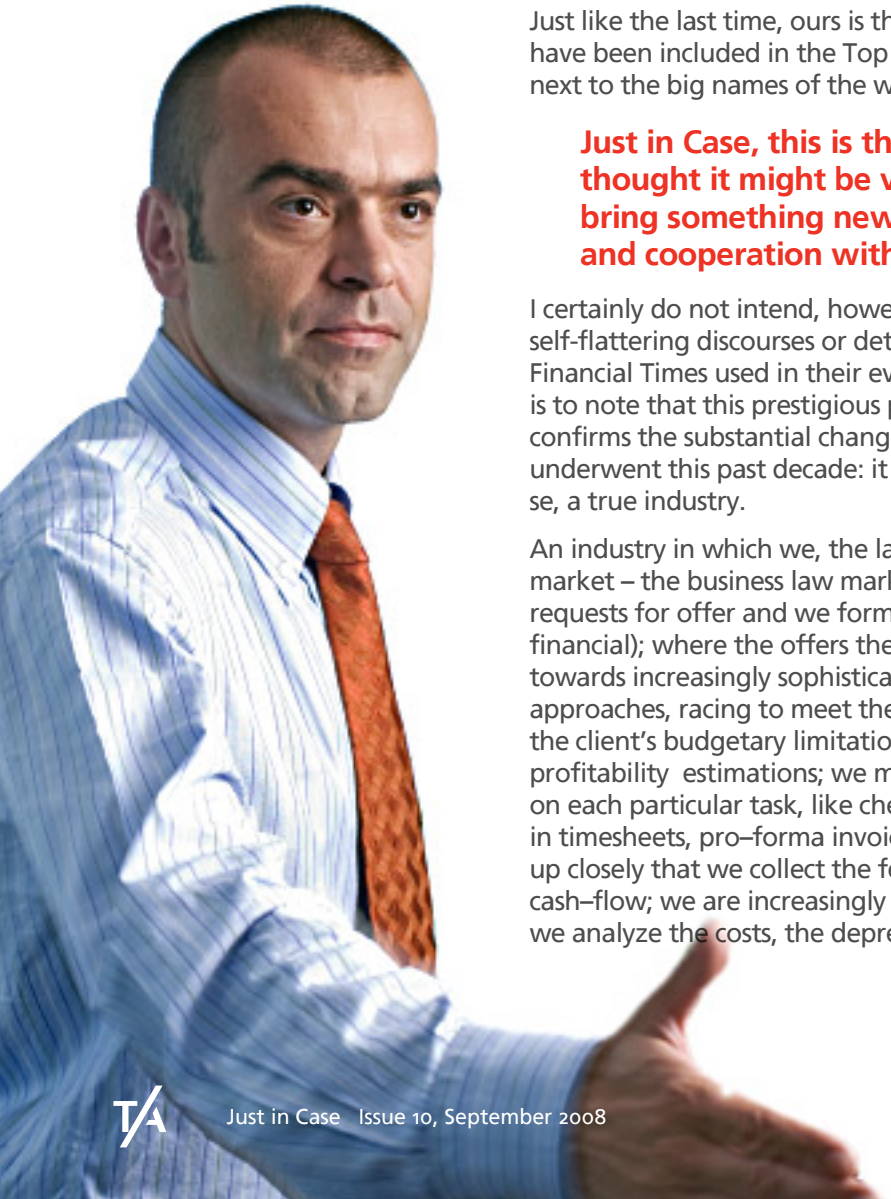
Foreword



When I write these few lines, the fastidious ceremony I attended last night still bears on my mind: the Financial Times Awards for the most innovative law firms in Europe. Just like the last time, ours is the only Eastern Europe firm to have been included in the Top 50 (ranking an honoring 18) next to the big names of the world's law firms.

Just in Case, this is the spirit in which we thought it might be very useful that we bring something new in our communication and cooperation with you.

I certainly do not intend, however, to waste your time with self-flattering discourses or details about the arguments the Financial Times used in their evaluations. My only intention is to note that this prestigious publication's initiative confirms the substantial change the business law market underwent this past decade: it became itself a business per se, a true industry.

An industry in which we, the lawyers, act as players on a market – the business law market; where we receive requests for offer and we formulate offers (technical and financial); where the offers themselves constantly evolve towards increasingly sophisticated formulations and approaches, racing to meet the quality-price imperatives, the client's budgetary limitations and the lawyers' own profitability estimations; we meticulously log the time spent on each particular task, like chess players do, and wrap it up in timesheets, pro–forma invoices, fiscal invoices; we follow up closely that we collect the fees and carefully watch the cash–flow; we are increasingly preoccupied by the turnover; we analyze the costs, the depreciation, we pay interest and penalties, we invest, we discount, we pay professional insurance policies, we deduct VAT, we make profitability calculations and financial projections. All these crammed together in the faithful ranks of our all-powerful ruler, the PROFIT—that we indefatigably pursue and which comes from an activity we call "being a lawyer". That is, the same activity which, before the War, was carried out—strange, is it not?—in libraries and in the Academy aula; which, in the Communist era, was the classic example of civil mandate, paid by fees capped in the name of Collectivism and by Kent cigarettes; which, after '89, turned into something meant to make—make adoptions, make LTDs, sell them by the piece; which then became commercial law practice, business law practice, business law and then, simply, suddenly, BUSINESS. An industry in which, as we may find out with some surprise from our London confrères, outsourcing becomes more and more a topic and in which, as the Financial Times project demonstrates, dynamism and innovation play a crucial part.

This is the spirit in which we thought it might be very useful that we bring something new in our communication and cooperation with you, too. Something freed of all the above exigencies, of subordination to profitability and profit, something not to remind of a legal opinion, a contract or an argument, something that we give you for nothing in exchange. Our lawyers' opinions, ideas and points of view. Information about us and what we do. News from and about Romanian justice. Interesting trends in practice. The law practice seen from a different perspective. In one word, a magazine. Just in Case, it will not take more than 15 minutes of your precious time to read. If this is too expensive, then pay whatever you want. We thank you either way.

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The Refined Fragrances of the *'Stinky Gypsy'*

For those amongst you who are not yet aware of it, our law firm was requested by the President of Romania to represent him in a case enjoying a fair amount of media attention, dubbed by the press 'The Stinky Gypsy'.

The decision rendered by the High Court of Cassation and Justice in this case has an important precedent value for the future practice of the local courts, reason why we believe it may be useful for you to learn the arguments and principles which ground it. And this is not (necessarily) because this case is about defining what rights the President, in particular, enjoys, but because the decision may be regarded as a precedent for the protection of anyone's right to privacy, in general.

The Facts

On the day of the referendum organized for his demission, the President was out shopping with his wife in a Bucharest mall.

Upon leaving, he was stopped in his way by a journalist who, while filming him with her cell phone, asked him about the results of the still ongoing referendum.

Under the psychological pressure of the referendum day, heatedly fueled by the media, the President understood the journalist's conduct as aggressive and as an intervention in his private life and prevented her from continuing to take his pictures. Whereupon he took the cell phone from her hand (to be restored the next day) and, after going into the car, he had a short conversation with his wife about the incident. During this conversation he alluded to the journalist's aggressiveness by using the words 'stinky gypsy'. This conversation was taped, without his knowledge, by the cell phone which was still on.

After the cell phone was given back, the TV station "Antena 3" broadcasted the private conversation taped in the car and the new was then taken over by other agents of th media.

It is important to keep in mind that the President was not on an official visit, nor was he engaged in a political campaign; h was involved in a strictly private activity, like the average citizen would.

In fact, considering the previous decision of the Parliament to suspend him from his function, he couldn't have been involved in any official visit at that point in time. In addition, electoral activities are forbidden, by the law, on a referendum day.

This conversation was taped, without his knowledge, by the cell phone which was still on.

Also, at no time during the conversation about the incident he had with his wife was the President aware that the words he uses may be made public. The Antidiscrimination National Council (the "ADNC") disposed that the President should be sanctioned by warning, upholding that "the use of the words 'stinky gypsy' constitutes discrimination and that, by using these words, the dignity of the members of the Roma community has suffered". →

Our Legal Arguments

In the name of the President, our law firm contested the legality of this sanction and, even though our arguments were initially denied by the Bucharest Court of Appeals, the High Court of Cassation and Justice admitted them through an irrevocable decision. Essentially, our lawyers presented to the courts the following arguments:

- That the ADNC wrongly qualified the deed under the law (a technical argument we will not insist upon here).
- That the deed did not meet the legal requirements to be qualified as discrimination. According to the legal definition, „by discrimination, one understands any differentiation, exclusion, restriction or preference [...] aiming at, or causing, a limitation or denial of the recognition, enjoyment or exercise, under equal conditions, of the fundamental human rights and liberties or of the rights recognized by the law in the political, economical, social or cultural life or in any other field of public life" (Art. 2 par 1 of Government Emergency Ordinance No. 137/2000). However, in the case at hand, as argued in detail in our post-hearing briefs as well as in the arguments presented orally to the courts, the President's impugned affirmation cannot be characterized as "discrimination" under the text quoted above.
- The ADNC took the opposite view in similar cases. For example, the ADNC was notified that Senator Puiu Haşoti referred to the "România Mare" Party parliamentarians as "gypsies". Even thoughit deemed the Senator's choice of words as potentially vexing, the ADNC upheld that the deed "does not meet the constitutive elements required by Government Emergency Ordinance No. 137/2000 [...] to be qualified as discrimination". In its brief motivation, the ADNC showed that "it cannot be maintained that the elements regarding differentiating treatment (restriction, exclusion, preference), treating persons in comparable situations in a different manner depending, in our case, on their ethnic origin, and with the purpose or the effect of limiting or denying the recognition, enjoyment or exercise of their rights in equal conditions, were cumulatively met". Also, the ADNC maintained that the condition that "the differentiating treatment be meant to, or produce the effect of, restricting or denying the recognition, enjoyment or exercise of the fundamental human rights and liberties in equal conditions, as such are recognized by the law in the political, economical, social and cultural life or in other areas of the public life" was not met either in that case.
- The President's lack of guilt and his right to protection of his private life. The ADNC itself upheld the President's innocence in saying, in its decision, that "The Council has no doubt about the claimant's good faith and does not find that Mr. Băsescu intended to subject the persons belonging to the Roma minority to any unjust treatment [...]" (page 13 par.5 of the ADNC Decision). In addition, one may not find someone guilty for an affirmation made in strictly private circumstances, where one is entitled to believe his right to privacy is protected. Such conclusion follows from the relevant national legislation as well as from the jurisprudence of the European Court for Human Rights.
- The warning, as sanction, is illegal: since the antidiscrimination legislation does not provide for any such sanction.

Conclusions

All the arguments we briefly summarized above have certainly been elaborated in our lawyers' briefs and oral arguments. The judges of the High Court of Cassation and Justice admitted these arguments and concluded that, even though the affirmation as such ('stinky gypsy') contains a discriminatory streak, it may however not be sanctioned, mainly owing to the fact it was made in private.

The President, as any other citizen, must be able to enjoy the protection of his private life. It is true that, in his case, distinguishing between public life and private life requires particular accuracy, as the European jurisprudence also recommends; however, there is, undeniably, a line that the curiosity of the public must not be allowed to cross. A historical decision for Romanian law practice. A decision which allows all of us to swear, in our homes and in our thoughts, at anyone we choose, at any time we choose.

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Was That Person Entitled to Sign?

This is a question which is being asked obsessively in such instances as when litigating a contract with a company, in due diligence data rooms or during negotiating a contract.

Whereas the aspect of the proper legal representation of a company is a matter often neglected when making big business and relegated to the lower status of the purely "legal technical" discussions, make no mistake: the failure to observe the relevant legal requirements might render the transaction invalid or not opposable towards the company. The personal liability of the person acting on behalf of the company without due mandate may also be involved.

The scope of this article is to review several issues to be considered when assessing the existence of due company representation either in a particular transaction or in the general course of company's business. Below we shall discuss the main legal rules applicable to limited liability companies and joint stock companies as regards the representation system (1) and delegation of representation powers (2). Other two related articles, upcoming in the next editions of Just in Case will include issues related to limits provided by law to the representation powers and specific rules for statutory representation for certain fields of activity like banking, capital market, insurance. →

Simply put, the power of representation defines the ability to legally bind the company by entering agreements in its name and behalf. In current wording the power of representation may relate also to the decision-making powers within a company. This article focuses on the first issue and only briefly references, when the case, to the second one.

The main legal enactment regulating the company's representation is Law No. 31/1990 on commercial companies (the "Company Law")[1]; relevant general rules are as well provided by Decree No. 31/1954 regarding individuals and legal entities ("Decree 31/1954")[2].

In addition, certain special requirements are established by the legal enactments applicable to publicly traded companies or those governing particular fields of activity, especially in the financial area (e.g. banks, insurance companies, asset management companies, investment firms).

The power of representation defines the ability to legally bind the company by entering agreements in its name and behalf.

While the rules regarding the company's representation depend to a certain extent on the legal form of the respective company (e.g. limited liability company, joint stock company etc) or on the management system it uses (whether one-tier or two-tier system), certain general principles may be drawn from the legal provisions:

Scope of the representation power; limitations:
although towards third parties the company is bound by the deeds entered by its statutory representatives, in limited cases provided by law, the conclusion of an operation by the statutory representatives is not sufficient for ensuring the legal validity of the transaction and/or for it to be opposable towards the company (details in a future issue of this magazine).

Formalities to be made in relation to the company representatives:
the law requires to register with the Trade Registry the persons empowered to represent the company and their signature sample and the company cannot raise before third parties the appointment of certain statutory representatives or the termination of their position with the company in case such have not been made public through registration; furthermore, once the registration formalities finalized, the company may not oppose to third parties any irregularity related to the nomination of such persons, except for the case when the third persons did know of the respective irregularity.

Persons entitled to represent the company:
customarily, the companies are represented by persons entrusted with executive management prerogatives (for details, see Section 1 below); however, in particular cases, the companies may also be validly engaged by non-managers, to whom the representation power was delegated by way of a special empowerment issued by the abovementioned statutory representatives (for details see Section 2 below).➔

[1] The Company Law was republished in Part I of the Official Gazette of Romania No. 1066 of 17 November 2004.

[2] The Decree No. 31/1954 regarding the individuals and the legal entities was published in the Official Bulletin No. 8 of 30 January 1954.

Rules Applicable to Company's Representation

Below is a brief presentation of the main rules to be considered in relation to the persons having, as per law and/or company's constitutive act the general right to represent a company. As broadly used in practice, we shall refer to such persons as "statutory representatives" of the company (Rom. reprezentanți legali).

Taking into account that limited liability companies (Rom. societăți cu răspundere limitată) and joint stock companies (Rom. societăți pe acțiuni) the main types of companies incorporated in Romania, we shall limit our presentation to these two types of company.

Representation of Limited Liability Companies

The norm is that each director (Rom. administrator) has the right to represent the company. This general rule shall apply whenever the constitutive act of the company does not comprise special provisions on the representation rights of company's directors.

The exception is the inclusion of special powers or limitations of the ability to represent a company within its constitutive act, including, for example, that:

- only certain directors are entitled to represent the company, case in which the other directors could not validly engage the company (however this shall not impair such directors to exercise their management prerogatives);
- the directors may validly bind the company only by acting together as per a certain algorithm (e.g. the respective operation requires the signature of all directors, or of a minimum number of directors, or of a minimum number of directors always including a particular director, etc);
- the directors are granted with general representation powers only as regards particular types of legal operations or whose value does not exceed certain thresholds; any operations exceeding the scope of the above could legally bind the company only on the basis of special shareholders' meeting approval.

Representation of Joint Stock Companies

In case of joint stock companies the Company Law provides for different rules depending on the type of management system adopted by the respective company, whether one-tier or two-tier management system[3].

Company representation under the one-tier management system
Under the one-tier management system[4], the joint stock companies are customarily represented before third parties, including before courts or arbitral tribunals[5], by the chairman of the Board of Directors (the "Board"). To be more accurate, the law says that the company is represented by its Board, through its chairman, which takes us to the issue of decision-making: while the chairman has the representation power, having the right to sign documents on behalf of the company or represent it in front of third parties, each such act of representation should have the support of the Board.

In case of joint stock companies managed by a sole director (i.e. not by a Board) such director shall be the one entitled to represent the company.

The exception to this standard is the inclusion in the company's constitutive act, of provisions to the effect that the company may also be represented (i.e. besides the chairman of the Board) by →

[3] In addition, it should be considered that the regulations applicable to the companies activating in the financial field provide for some specific requirements in relation to company representation (i.e. sometimes also customized for each type of management system).

[4] In case of the one-tier management system the company is managed by a Board of Directors (Rom. consiliu de administrație) that may delegate its executive prerogatives to certain managers (Rom. directori).

[5] However, the company may employ an internal legal counsel (Rom. consilier juridic), who shall also have the right to represent the company before dispute resolution bodies and to also ensure its juridical representation before other authorities or entities in matters of legal nature (see Law No. 514/2003 regarding the organization and performance of the legal counsel profession – "Law 514/2003").

other members of the Board. In such case, the constitutive act should also stipulate the manner in which the chairman and the respective Board members shall exert their representation right, whether by acting separately (i.e. each respective member of the Board having full and equal right to represent the company) or jointly (i.e. the company being duly represented based only on the joint signatures of a minimum number of the respective Board members).

In the cases when the Board members represent the company only by acting together, the Company Law further allows the Board members to empower one of them to execute particular operations or types of operations, based on their unanimous consent.

The corporate documents should mention if they may act jointly or separately, as described above for the Board members.

In case the Board delegates the executive management to one or more executive managers[6] (Rom. directori)[7] (members or non-members of the Board)[8], the general manager (which, in this case, shall always be one of such appointed executives) shall be the statutory representative of the company. However, the shareholders may provide in the constitutive act that in addition to the general manager, the company may also be represented by other managers to whom the executive management was delegated. The corporate documents should mention if they may act jointly or separately, as described above for the Board members.

Company representation under the two-tier management system

In case of a two-tier management system[9], the standard is that the representation of the joint stock companies before third parties, including before courts or arbitration tribunals, is the prerogative of the Management Board. To this end, the members of the Management Board shall have to act together (i.e. the signature of all of them would be required for validly entering into a transaction).

The Company Law also allows the members of the Management Board, based on their unanimous endorsement, to appoint one of them for representing the company in respect of certain particular operations or types of operations.

The law allows differing from these rules by the constitutive act of the company. For example, it may be provided that any of the members of the Management Board would be entitled to individually represent the company towards third parties, or alternatively, to provide an algorithm of minimum number of members whose signature is needed for entering a transaction and/or the requirement for a particular member to always countersign an operation. ➔

[6] Please note that delegation by the Board of the executive management to managers is mandatory in case the joint stock company is legally required to audit its financial statements.

[7] The concept of "manager" has a specific meaning under the Company Law, as it entails a limited category of persons entrusted by the Board with the executive prerogatives as regards the daily management of the company; this concept does not include the heads of various departments of the company whose job position could include the "manager" term as per the general ordinary meaning.

[8] In case managers are appointed also from among the Board members it should be observed for the number of non-executive Board members be always higher than the number of the executive ones.

[9] The two-tier management system entails the existence of a sole General Manager or of a Management Board (Rom. directorat) comprising at least 3 members of uneven number, that is in charge with the daily management activity, and of a Supervisory Board elected by and reporting to the shareholders' meeting, that appoints and supervises the Management Board; the members of the Supervisory Board cannot also be members of the Supervisory Board.

Delegation of Representation Power

For practical reasons, the Company Law allows the directors (or, as the case may be, other statutory representatives of a company) to delegate to other persons the representation powers, but only if they were expressly granted with such right by the company's shareholders, either by stipulation in the constitutive act or by means of a resolution of the general meeting of shareholders.[10]

However, the delegation cannot concern the entire right to represent the company, as a whole, but only individually determined or determinable transactions or types of transactions and/or operations.

Therefore, granting representation powers to third parties or employees of the company (e.g. heads of departments), via special powers of attorney or through the internal regulations of the company approved at management level should always rest on a pre-existed empowerment of the directors by the company's shareholders to delegate the representation prerogative and should also observe the abovementioned boundaries.

When the right to represent the company was delegated for a range of operations (not for individual transactions), it would be in accordance with the principles established by the Company Law for the respective appointees to be registered with the Trade Register as representatives of the Company for those type of operations. In fact, that would help the company for easily accepting the signature of such delegates for concluding operations of that kind.

Should a director substitute itself by another person without having such right, he/she shall be jointly liable with the respective person for any damages caused to the company by the operations entered by said substitute on company's name. The company shall be also entitled to request from the substitute the benefits resulting from the respective operation.

A typical case of delegation of representation powers is the case when, given the particularities of certain agreements in the financial field and/or which entail fiduciary duties (requiring easy and undisputable identification of a company's representative), the parties contractually agree that only a particular person shall be considered their legal representatives for the respective transaction, many times different than the representative of the company. In relation to such representative, the company generally provides its counterparty with his/her full identification data and also with the signature sample. The parties also generally regulate strict formalities to be observed in case this person needs to be replaced.

Should a director substitute itself by another person without having such right, he/she shall be jointly liable with the respective person.

Examples of such type of contracts are the banking agreements for account operations (i.e. where the bank shall perform only the banking procedures ordered by the persons specifically indicated by the company and for which a signature specimen was submitted with the bank) and the escrow agreements (i.e. where the escrow agent would release the assets in escrow only pursuant to due documentary instruction issued by persons specially appointed for this purpose under the escrow agreement).

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[10] This provision of the Company Law (Article 71(1)) is included in a chapter addressing the partnership company (a type of companies where the shareholders have unlimited liability). It is deemed that the rules provided for such type of company are generally applicable, unless special rules for other types of companies contradict them.

Asiban's Takeover by Groupama

Since its establishment in 1996 as a composite insurance company, Asiban has grown organically and has become Romania's third largest insurer, with a market share of 8.8%, allowed by a successful green-field growth model, based on network development across the country, promotion of new types of insurance policies and diversification of the distribution channels.

Țuca Zbârcea & Asociații has been retained by three of Asiban's shareholders (BCR, BRD and BT) to act as their legal advisor in connection with the prospective transaction. The core team of our lawyers consisted of Florentin Țuca (managing partner), Sebastian Radocea (managing associate) and Cristian Radu (senior associate), with other partners and senior lawyers joining the core team from time to time during the busiest periods of the transaction phases. Across a period of one and a half years, our team assisted BCR, BRD and BT in dealing with virtually all legal aspects inherent to a complex M&A transaction.

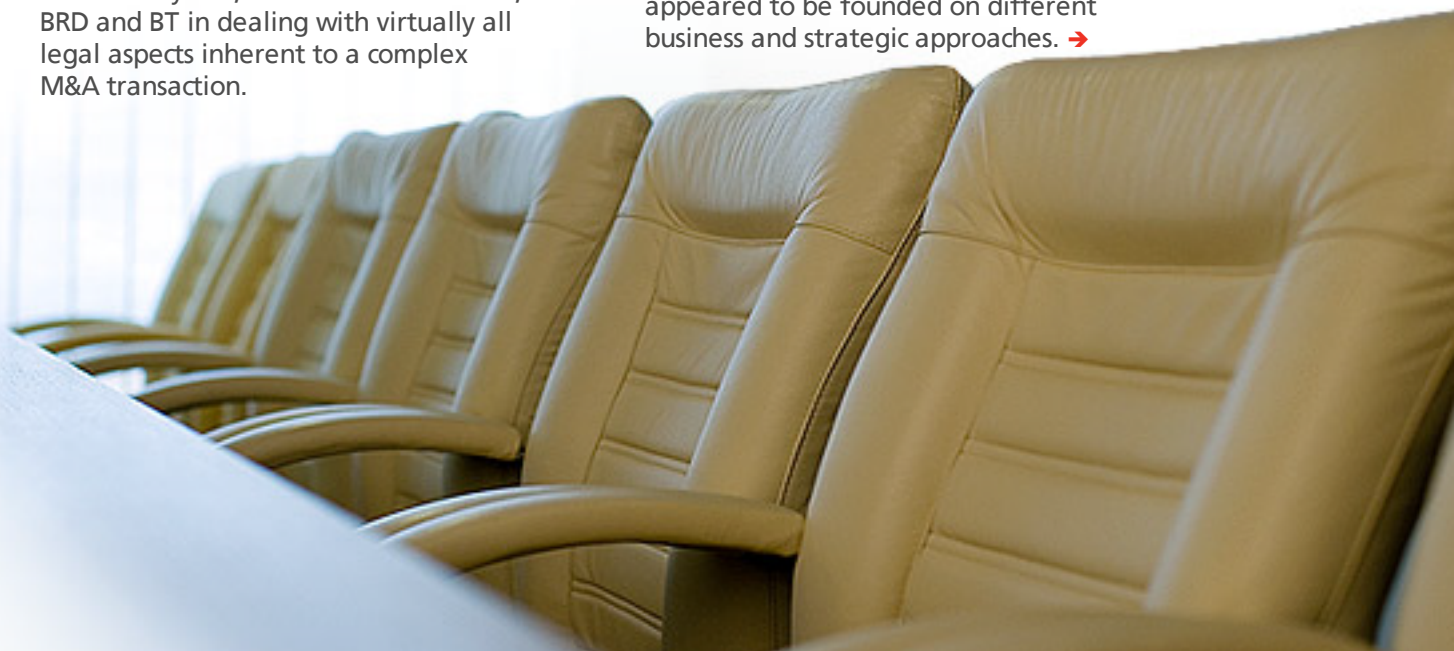
Compared to most local competitors, Asiban has benefited from a stable group of shareholders that have constantly supported the company in various ways...

Compared to most local competitors, Asiban has benefited from a stable group of shareholders that have constantly supported the company in various ways, including injections of additional funds for financing a fast growing activity and meeting growing solvency requirements further to aligning the Romanian insurance market to the relevant EU directives and regulations.

In 2007, Asiban's shareholders—Banca Comercială Română (BCR), BRD-Groupe Société Générale (BRD), Banca Transilvania (BT) and Casa de Economii şi Consemnațiuni (CEC), each of them holding, directly or indirectly, 25% of the company's shares, decided to divest their shares to a reputable investor or group of investors.

our law firm's involvement in the transaction started with advisory work on the preliminary and preparatory aspects of the deal. This included identification and analysis of all legal implications of a joint sale procedure, of related contractual limitations under Asiban's constitutional documents and presentation of recommended solutions.

Furthermore, our mandate included advice on the reporting and regulatory requirements to be fulfilled under the applicable insurance, capital markets, competition and other laws and regulations. Perhaps one of the the most challenging task faced by the firm was to harmonize the shareholders's interests that, in a transaction of this kind, naturally appeared to be founded on different business and strategic approaches. ➔



To this avail, a memorandum of understanding was initially prepared and negotiated by our team with all shareholders to mark the foundation of a common position as regards the key transactional milestones of the sale scenario.

The next step was the initiation of a vendor due diligence process on Asiban, for providing the shareholders with an overview of Asiban's status and condition from a variety of legal perspectives, helping Rothschild & Cie (the investment bank retained by Asiban's shareholders in connection with the deal) to include relevant legal information on Asiban in the information memorandum circulated to the interested investors.

On the basis of their preliminary bids, Rothschild was able to shortlist a number of investors qualifying for the next stages of the process (due diligence on Asiban, management presentations, Q&A sessions with the management, submission of the binding bids, negotiation and signing of the SPA and of the other transaction documents).

Members of the our team organized the data room to facilitate the access of the short listed investors to information and documents necessary to prepare their own due diligence reports on Asiban.

Furthermore, Țuca Zbârcea şi Asociații participated in the Q&A sessions that were held between the investors and Asiban's management and addressed many of the investor's questions on legal matters concerning the company.

The discussion drafts of the SPA and of the other transaction documents were prepared by our lawyers and circulated to the short listed investors for their review and comments. The SPA was successully signed on 9 April 2008 with the selected investor, Groupama International, after passionate negotiations that lasted more than a week and which were lead by the legal advisors of the parties–Țuca Zbârcea şi Asociații, on behalf of Asiban's shareholders and Gide Loyrette Nouel, on behalf of Groupama.

As the SPA provided for a series of conditions precedent to the closing of the contemplated transaction, we continued to provide post–signing assistance to Asiban's shareholders. The transaction was eventually closed on 6 August 2008, when the ownership over Asiban's shares was transferred to Groupama in exchange of the latter paying the purchase price to the exiting shareholders.

We were proud to have succesfully assisted our clients in what probably can be coined as the most important M&A deal of 2008. Such deal significantly strengthens Asiban's position and prospects as a composite insurer.

At the same time, through its other acquisitions in Romania, namely BT Asigurari and OTP Garancia Asigurari, Groupama, one of the largest European insureres, consolidates its strategic position on the Romanian insurance market, on which it will hold a share of approximately 13%, after Vienna Insurance Group and Allianz-Tiriac.

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/ **The materials included herein are prepared for the general information of our clients and other interested persons. They are not and should not be regarded as legal advice.**

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