Clientele and goodwill

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Abstract
The present article intends to asses the legal nature of clientele, its place and role within goodwill elements and we shall also analyze clientele by comparing it to the goodwill itself. Given the lack of a legal regulation as far as the clientele is concerned, its legal nature is controversial, both in its theoretical and in its practical aspects. The following question becomes evident: is the clientele a constitutive element of goodwill, or is it just the result, the logical outcome and aim of all the other goodwill components? Is there such a good or right, and, if the answer is affirmative, what is its legal nature? Can it be subject to a legal act? The clientele determines the legal nature of trade fund (goodwill) itself. The mere existence of a clientele dictates the existence and the property of goodwill: the moment the clientele appears or disappears shows the moment goodwill comes to life or end its existence. Therefore, it is necessary for us to ascertain the concept of clientele, as the practical consequences of having a clientele are very important: every time an operation (demise, guaranty, lease or bringing capital to a company) is performed on the clientele, it is consequently performed on goodwill.
Key-words: *clientele, goodwill, incorporeal property, commercial venue, competitive conditions, profit*

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Introduction – The concept of clientele. Comparative legal aspects

The notion of trade is undeniably bound to the notion of gain or profit (finis mercatorum est lucrum). The idea of gaining, of making profit can only be achieved by attracting and keeping one's clientele. Traditionally, clientele is considered to be the essential, indispensable element of goodwill, as it directly reflects in the trader's turnover. Without a clientele as a constitutive element, we cannot find goodwill, but only isolated and disparate elements, with little connection between them. Without a clientele, the trader could not perform its activities. Does the right on the clientele (which some authors equalize to the commercial venue or avviamento or achalandage) exist? What is its legal nature? Can it be subject to a legal act? Among the incorporeal elements of goodwill one should undoubtedly find a clientele the trader has earned and that makes profit possible [1]. One point of view [2] defines goodwill as "an incorporeal form of property which refers to the clientele attached to the particular trade fund by the elements that serve its running". As important as the clientele is as far as the trading activity is concerned, the Romanian legislation does not regulate this concept.

The clientele is defined by the doctrine as the assembly of people, natural and legal persons, usually relating to the same professional trader, more specifically to its goodwill, in order to obtain or acquire goods and services [3]. We often define clientele by the value of the relations between goodwill and persons regularly requesting goods and services to the trader. According to this definition, the clientele represents an actual monopoly, based on a probable public influx and on constant contractual relations to a well-determined economic agent. The clientele is the indispensable hinge/ element of goodwill, its main source of prosperity, as it offers originality, as far as the law is concerned, and economic value [4]. Another definition [5], significantly similar, states that the clientele is the assembly, or the entire sum of people, natural or legal persons, closing deals or developing trading activities with a certain trader. It becomes obvious by looking at the trader's turnover. Or, following the same line, the group of people, natural or legal persons, having legal relations with a certain trader. As far as the accounting is concerned, it is expressed through a number [6]. In the Romanian accounting law, the incorporeal elements of goodwill are registered as assets, and as a consequence we can find here elements of the business clientele: the loyalty of the clients, the number and quality of the clients, the opportunities to develop or increase the clientele [7]. In the Chart of Accounts position no 207, one can find the term “trade fund” (goodwill); within class 4 “third parties accounts” we can see details and categories, such as groups 40 and 41, suppliers and clients accounts. These two categories constitute the trader's clientele. Moreover, law no 82/1991 [8], modified and republished, relating to the Romanian accounting system, names as main components of goodwill its incorporeal elements, especially the clientele and the trading/ commercial venue [9].

Nevertheless, due to the lack of a legal definition and regulation, the legal nature of the clientele is a controversial topic, both in its theoretical and in its practical aspects. By taking this into consideration, we can ask the following questions: is the clientele a constitutive element of goodwill, or is it just the result, the purpose, the aim, the objective or the destination of trade? Is there such a good or right, and, if there is, what is its legal nature? Can it be subject to a legal act or document? Within the Italian legal system, this problem has been vividly debated upon. According to Cesare Vivante, the

clientele (avviamento) could be defined as “the entire assembly of legal and actual relations by which a trader ensures for itself the contribution of clients”. According to this definition, the clientele is practically mistaken for the trading venue. As an incorporeal right, the clientele can be subject to property rights and, as such, can be given away or sold separately from the goodwill. Consequently, the trader, as owner of goodwill, in order to protect it, may take legal action (eviction actions, actions for disturbance termination). It also has the right to claim reimbursement every time it can prove the existence of prejudice, and the moment it leaves the location it can be reimbursed by the owner of the building where it developed its business [10]. Another point of view states that clientele cannot be separated from goodwill or from the business itself, as it represents the hope for future earning which are variable and inconsistent, and cannot by guaranteed by the law. So, clientele is a feature of goodwill organization, it is a form of existence, an exterior quality, a result of all other elements, especially the personal qualities of the business owner, and definitely not an independent right [11]. The first opinion, the one that finds the clientele to be an incorporeal mobile good is closer, as I.L Georgescu shows, to every day life considering the existence of old trade houses which follow clear traditions and a fixed clientele, which can be transferred. The Italian jurisprudence took this under consideration and regarded such transfers as valid transfers. In a decision issued by the High Court of Justice in Rome, on June 19th 1903, one can read the fact that the clientele is a form of contribution of the old trader to the future activity of its successor, the reputation of the former helping increase the income of the latter, in other words the adequate price of the clientele represents the legitimate “bonus” for such a contribution, meaning a participation to the future profit of the business.

The Romanian jurisprudence walked on the same path, by considering clientele to be a patrimonial element. The High Court of Justice constantly decided that, in case of expropriation on grounds of public interest, one should be reimbursed not only for the corporeal goods being expropriated, but also for the clientele or for the commercial venue [12]. Even though commercial venue as a concept referring to a patrimonial element which can be damaged or dissolved is not regulated by our legal system, still the judges are obliged to take into consideration this element which, as a good, can be

a part of one's patrimony, and they can also offer reimbursement when legal support can be found [13]. As a consequence, from this point of view, as the clientele is an incorporeal mobile good, having a distinct existence, it can be subject to a separate transfer [14]

Within the French legal system, the law issued on March 17th 1909 [15] represents the basic regulation on goodwill but it only distinguishes the different elements which create the goodwill. The French doctrine showed two ways of determining the constitutive elements of goodwill: the first one is established by law and assesses the elements which are susceptible to form a trade fund (goodwill) and the limits of this concept, and the second one the necessary and indispensable elements of any trade fund (goodwill). Among these indispensable elements that we can certainly find every time is the clientele, as a common and necessary element for any trader. The doctrine and the practice agree on this topic. The divergent opinions one can sometimes find are easily explained. To some authors, the clientele is not a goodwill component, but the goodwill itself, which can be defined as as the right to a clientele; it is common knowledge that goodwill is inconceivable without a clientele. The moment other elements started to be considered necessary (the right to bail, alcohol trade license, transport license) came because: firstly, the clientele is never the sole element of goodwill, as one cannot conceive clientele without a physical or intellectual support; secondly, clientele has only one base that specifically appears of the essence itself.

Thus, it is important for us to define the concept of clientele, as the practical implications of this notion are significant. Every time an operation (transfer, guaranty, lease, bringing a contribution to the company assets) affects the clientele, it affects goodwill as a whole. Generally speaking, the existence of the clientele also implies the existence and the property of goodwill; the appearance or the disappearance of the clientele determines the moment goodwill is created or comes to an end. In order to claim the ownership on a trade fund (goodwill) one must find a real and certain clientele; a potential clientele or a clientele belonging to another trader would not be enough. Therefore, there is no goodwill in the absence of an independent clientele, moreover, goodwill belongs to the person creating the clientele.

Placing clientele among goodwill elements

Most legal systems grant significant consideration to the clientele, while considering it indispensable to the existence of any business. A common feature of all legal systems is the fact that this incorporeal element is closely linked to the potential of any business and to the business organization during its development.

Regarding the importance of the clientele for any trade fund (goodwill), one can consider relevant the fact that all goods belonging to the goodwill are organized and arranged in order to satisfy the needs of a clientele. Goodwill may represent an important patrimonial, if the clients it attracts and keeps are numerous. But the clientele is not always loyal or constant. Within a free economic market, it can be drawn by a more dynamic and powerful competitor. This explains the fact that goodwill value may vary in time considerably, so its uncertainty and vulnerability is due to the ever changing clientele. The clientele determines the legal nature of goodwill itself. It is commonly accepted that within an heterogeneous system of corporeal and incorporeal goods an immaterial element changes the legal nature of the whole. By having an inconsistent nature, the clientele generates important controversy and debate [16]. Although it is an essential component of any trade fund (goodwill), having a clientele is not a sufficient condition; one has to add a fixing point (the venue, trading bail) or an element which attracts (sign, logo, trademark). While goodwill remains a relative concept, its key elements are well known and classified by all legal systems. One controversial aspect remains: is the clientele an element of goodwill or is it not? What is its nature? Is it necessary for the mere existence of goodwill? What are its indispensable qualities? Is the clientele a constitutive element of a trade fund (goodwill) or is it the result, the objective, the ultimate aim of any trader and consequently of all other constitutive elements?

Within all legal systems, no matter the emphasis laid upon any of the theories regarding the legal natural of goodwill, it is unanimously acknowledged that goodwill represents the assembly of goods, whether corporeal or incorporeal, that a trader uses while unfolding its activity or trade. Still, beyond the diversity of goodwill constitutive elements, clientele plays a very important role for the business, as it represents the common and indispensable element of all trade funds (goodwill). The clientele

determines by its size, quality and loyalty the economic situation of the trader, its success or failure. This is the very reason why clientele appears as an indispensable element of goodwill, and for some authors it represents the. Without it, one cannot find a trade fund (goodwill), but only isolated and dis main constitutive element of goodwill parate elements. It is important for one to know the moment goodwill is created or comes to an end. The creation of goodwill is linked to the moment elements are gathered in order to create the clientele. Nevertheless, this is insufficient. Should one claim it since its use starts, since the first customers appear? Or can we admit that goodwill exists before clients exist, since the means to serve the clientele are already there? All hypothesis find their source in the jurisprudence. It seems excessive to expect clientele to manifest itself as a genuine business trend or “wave”. To settle for a virtual or potential clientele, as soon as elements used to attract it are created and put together, generates confusion between clientele and commercial venue and opens the door for unacceptable consequences, since the location of any building, as prepared as it may be for serving a business (trading activity), may be considered a lease of goodwill. The reasonable seems to be the public opening, as the project of the business comes to life and constitutive elements of goodwill turn into clientele. The French High Court of Justice ruled as far as this aspect is concerned by deciding that a strong clientele is not sufficient to generate the existence of goodwill, but admits in some cases the actual and real existence of clientele before the business is officially open, under the same ownership of the same person owning the business. The disappearance of goodwill is, at the same time, bound by disappearance of the clientele. The moment the clientele seizes to exist for a certain trader is when goodwill comes to an end, too. Maintaining a potential clientele due to the trading venue that continues to exist is not enough to make goodwill continue its existence. A temporary suspension of the trader's activity, followed by a continuance of goodwill exploitation (by the trader or by a successor) may allow the trader to find the clients who have not changed their habits and as long as a percentage of the clientele is still there, the goodwill continues its existence, too.

Nevertheless, as far as the legal nature is concerned, is the clientele a constitutive element of goodwill, or is it simply the outcome, the result, the purpose of all

other goodwill elements? As arguments in favor of the idea that the clientele represents a constitutive element one can rely on legal provisions [17] which clearly name the clientele as one of the incorporeal elements of goodwill. As far as the Romanian law is concerned, law no 298/2001 [18] does not enlist clientele as one of goodwill constitutive elements [19]. Given that, the legal text regulates penalties for unfair competition, and this leads to the conclusion that the final beneficiaries of this law are the customers, as they are affected by unfair competition acts. One may also support this idea based on steady and constant legal precedents: “of all goodwill elements, the clientele represents the most important component, as without it a trade fund (goodwill) could not exist” [20]. Another decision of the High Court of Justice states that the contribution the clientele has within a limited-liability company constitutes at the same time a contribution to the trade fund (goodwill) [21] Some authors disagree this assessment and state that the clientele is not a good from the legal point of view, and the trader has no right on its clientele or customers, as they are free to obtain supplies from anyone and any trader. The clientele belongs to the economic agent that is able to attract it, and so, on a free economic market, customers belong to no one. G. Ripert [22] defined the clientele as “a possibility for future and renewable contract”, and as such it does not constitute an element of goodwill, but a quality, a trait, a feature of goodwill. It represents not an ingredient, but a result, an objective. It also represents the binding element between different elements the business owner uses, it offers a sense of unity and cohesion to the assembly, without being a part of it. Moreover, a change within the clientele does not generate a change within the goodwill, just as the establishment of a new line of activity does not imply a transformation as far as goodwill is concerned, as long as the economic activity is continuous [23]. This point of view, which highlights the originality of clientele compared to the other goodwill elements, is preferable, but it totally overlaps the idea that the mere existence of a clientele determines the existence of a trade fund (goodwill) [24]

The role of the clientele within goodwill

The jurisprudence and the doctrine agree on considering the clientele as the key element and the essence of goodwill, “its revealing sign”, while strongly arguing that there is no goodwill where clientele is missing or no longer exists. This idea leads to a

series of practical consequences. A new goodwill comes to life only when it attracts a clientele, in other words if the economic activity has begun. If a location (building) is arranged in order to host a certain trade (for example a cinema, a casino, a garage, a hotel, etc) its lease is a mere bail right as long as the activity has not yet started; otherwise it is just an administrative location where goodwill is managed [25]. The transfer of the activity makes the goodwill disappear after a while, due to the loss or fluctuation of the clientele [26]. A contract is not considered to regard goodwill as long as it does not influence the clientele. In case the goodwill is sold, it is necessary for the clientele to be given away, too. This does not mean that all elements the seller had acquired should be transferred globally; it is sufficient for the seller to give away the elements which attract clients [27]. So, it becomes obvious that clientele, as an essential condition for goodwill existence, is based on specific elements that attract it and turn it into a loyal clientele, and it cannot be dissociated from them. These specific elements vary from one type of activity to another: in retail trade the bail is very important, for a transport company the transportation license is of the essence, etc. The same professional trader uses multiple trade funds (it has more than one goodwill) if it relates to different customers in different locations. It is not the same for the business which, alongside its headquarters, it also has one or more subsidiaries. Each subsidiary has a functional and legal autonomy, its manager has a certain freedom as far as his activity is concerned and can even close deals and sign legal documents with third parties. Still, there is a controversy when taking into consideration the autonomy of the subsidiary regarding the goodwill. In fact, the means by which customers are attracted (sign, logo, trademark), even if they are geographically dispersed, are common for the main business and office (location) and the subsidiaries. Yet, the subsidiary becomes a separate goodwill if sold separately [28], provided the elements which are sold be able to dissociate the clientele of the main business from the clientele of the subsidiary.

No matter its legal nature, whether we consider clientele to be a constitutive element or a purpose of goodwill, it needs a series of specific features.

Clientele should be real and certain. A virtual or potential clientele is not enough to generate goodwill. Goodwill comes to life starting with the first operations between the trader and the customers (the clientele). Nevertheless, the High Court of Justice

raised an exception to this principle, every time the company has undisputed fame and reputation up to the point where it constitutes a mandatory “passage” for the clientele. The issue has been debated upon on the occasion of a particular and practical situation, namely the situation of new gas stations; if such a gas station is built and equipped by a certain oil company, while being used or exploited by another company for the first time, to whom does the goodwill belong? Does it belong to the company which made all the investments, or does it belong to the company that has opened the station for the first time? The logical answer would be that it belongs to the latter, since it opened the business for the public and by doing so it attracted the clientele. Still, the High Court of Justice ruled in favor of the (former) oil company, considering that even before the gas station was opened it had a real and certain clientele, previous to the use of goodwill, belonging to the oil company. This ruling is based on the idea of “trademark notoriety” [29]

The owner of goodwill should also personally own the clientele. The difficulty of this problem appears both on a practical and on a legal level: the existence of the clientele is undisputed and unquestionable, while its attachment is uncertain. One needs to face the hypothesis of two businesses commercially and legally dependent on one another (bound on each other). One may find a commercial dependence every time a trader uses a huge surface while developing its business (for example a supermarket). The problem is a real one and one should not be surprised by the conflicting rulings of different courts of law. The problem of a derived (secondary) clientele, which belongs to someone else becomes obvious in the case of traders unfolding their activity within a perimeter which belongs to another business having its own customers – luncheon bars or restaurants functioning in railway stations, airports, racecourses, theaters, etc. Retail traders located within large commercial centers do not generally speaking have their own, independent clientele [30] A contrary solution could be admitted in case the trader developing its business in such an area can prove the fact it owns its clientele based on its competence and fame/ reputation [31]. For example, a restaurant placed in a railway station or an airport might claim its own clientele, but this would be more difficult for a luncheon bar or a taproom placed by a highway. The situation is similar in case of a legal dependence, for example the traders

incorporated in a modern distribution network, such as an exclusive concession (lease) network of an automobile constructor (Peugeot, Renault, Opel) or a franchise network, by which the franchisor gives to the beneficiary its commercial name, its trademark, its know-how and a series of products which are to be sold by means previously used by the franchisor. For all these traders it is very important to know whether they have their own clientele or if they use the common clientele, a clientele which belongs to the commercial center or to the company using a franchise network (the franchisor, as this type of legal dependence brings together the grantor and the grantee, the franchisor and the beneficiary. The problem is raised by the grantees that lose their contracts, whether because the contracts are not renewed or because they are terminated by the grantors; many times they try to get compensation for the clientele, which they helped create and which they have lost. The High Court of Justice conditioned such compensations by the proof that the grantor had made an abuse when refusing to renew the contract. Such a ruling is based on the idea that each grantee has a personal clientele which is not attached to the grantor, to its trademark or reputation; this clientele stays until the moment the contract is terminated. All these being said, within the French legal system [32], an attached clientele is the only acknowledged type of clientele, although one can notice a recent evolution of cases within this legal field (the franchise): some courts of justice have started to take into consideration the entire personal clientele of the trader benefiting from a well-known trademark or commercial name while bound by a very strict contract, and as such they have started to assess the attachment of the clientele to one of the parties, by taking into consideration the particularities of each case. This proves that goodwill, a concept based on the existence of clientele belonging to the particular trader, based as well on an individualistic view of making business, is no longer adequate to some forms of modern distribution.

The clientele must be lawful and legitimate. The business relations developed by the trader with its customers show a lawful nature as long as the economic activity unfolds according to the legal provisions, usually based on an administrative authorization. On the contrary, an illicit type of trade or a trade which refers to on object forbidden by the law (drugs, for example), even if it attracts some customers, it cannot be fostered or defended. A similar situation can be found in the case of an unauthorized

gambling facility, a liquor store which functions illegally, or an illegal brothel. As any trade performed and unfolded under such conditions, conditions which go beyond the admissible legal and moral limits, this kind of trade does not have a clientele, as its customers do not meet the conditions requires in order to form the clientele. The trader's relations remain occult and lack the normal effects of a healthy competition, and the defense the trader might claim against potential abuse from some rivals cannot function.

Last but not least, clientele must have a commercial character. The distinction must be made by comparison to the civil clientele which forms around the business owner which unfolds a liberal profession (lawyers, medical doctors) [33]. The relation to this person is fundamental, even more than if we look at the free competition, since one cannot underestimate the objective, economic variables, such as product quality or commercial venue. On the contrary, the value of the services rendered by a lawyer or a doctor is indestructibly bound to the person (professional) rendering these services. The physical conditions (the office) have a lesser significance in comparison to the commercial venue. The skills, the experience, the professional expertise and talent of the person rendering such services are of the essence, as well as the confidence and trust he or she inspires. His or her personality represents the main factor. The jurisprudence assessed the following case: does a medical facility (hospital, clinic, etc) have its own clientele, separately from the clientele of the doctors working for that facility. The French High Court of Justice considered that patients attracted by the surgeons' personality form the clientele of the clinic [34]. Going further, they consider that the moment the owner of the civil clientele terminates his activity, the clientele scatters. As a consequence, unlike the commercial clientele, the civil clientele is not susceptible of financial evaluation [35]. It is commonly acknowledged that it comprises, aside from groups of consumers, some handicraft clientele, even if the owner of the goodwill is a mere craftsman, and not a professional trader.

The clientele attached to a trade fund (goodwill) represents an economic value for the owner of goodwill, this value needs protection from the law. Even if the right to a clientele is not acknowledged as an exclusive right of goodwill owner, still this owner has a certain incorporeal right on the clientele. It can defend itself from unlawful acts

performed by the clientele. If these acts represent forms of unfair competition, the trader may use the defense tools provided by law no 11/1991, modified and republished, regarding unfair competition. As far as the transfer of clientele is concerned, most Romanian authors we have quoted consider that, since clientele is strongly bound by goodwill, the right to the clientele may not be transferred separately, but just alongside the entire goodwill

Conclusions

All of the above being said, there are two general opinions within the Romanian and the French doctrine: the clientele is the most important element of goodwill, on the one hand, and, on the other hand the clientele is not a constitutive element of goodwill, but the aim, the purpose of using goodwill. Firstly, the clientele, within a free market, is not susceptible of transfer, secondly, in order to attract and keep customers, the trader puts together the constitutive elements of goodwill. Following this idea, goodwill is an incorporeal asset, more precisely the right to a clientele. I find this idea to be extremely interesting, more so as it supports the theory which attributes to goodwill the legal nature of a incorporeal property right. One should also notice that the theory which reduces clientele to a mere constitutive element of goodwill can no longer be considered sufficient.

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