THE LEGAL STATUS OF COMPANIES UNDER THE NEW CIVIL CODE

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Abstract: The new Civil Code sets provisions regarding the liability of shareholders, organization and functioning of legal entity, annulment of documents issued by the management bodies of the legal entity, company contract, regime of contributions, company types, simple partnership, unlimited, simple limited partnership, with limited liability, joint stock, partnership limited by shares, cooperatives, other type of company.

Keywords: legal entity, annulment, liability, partnership, contribution, registered capital.

On October 1st, 2011, *Law no. 287/2009 on the Civil Code* came into effect, by means of which the dualist theory of private law (civil law – commercial law) was abandoned, and the new vision of private law unification implicitly led to losing the autonomy of commercial law.

From a normative point of view, the unification of private law has brought again into attention the problem of the commercial law autonomy[1], an old topic in legal literature[2].

In this context, the objective theory focused on trading deeds was abandoned (art. 3 of the *Commercial Code of 1887*) for the subjective theory that has the person as reference point, meaning the professional, so that the provisions of the *new Civil Code* also apply to the relations between professionals, as well as to the relations between them and any other topics of civil law (art. 3).

The legislator went even further in the attempt to unify the private law and formally remove the traces of the commercial law, setting by art. 18 position 31 of

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[1] To develop the topic of the commercial law autonomy versus the unity of private law, see St. D. Cărpenaru, *Tratat de drept comercial*, Universul Juridic Publishing, Bucharest, 2009, pp. 15-18; Gh. Buta, *Noul Cod civil şi unitatea dreptului privat*, in the paper *Noul Cod civil* (The New Civil Code). Comentarii, Universul Juridic Publishing, Bucharest, 2010, pp. 15-39; Smaranda Angheni, *Dreptul comercial – între dualism şi monism*, in the paper *Noul Cod civil. Comentarii*, Universul Juridic Publishing, Bucharest, 2010, pp. 40-57.

[2] In this regard, see I.L. Georgescu, *Drept comercial român*, vol. I, Bucharest, C.H. Beck Publishing, Bucharest, 2002, pp. 64-79.

Law no. 76/2012 (for implementing *the Civil Procedure Code*) the replacement of the phrase "trading companies" with that of "companies", following that all companies registered with *the Trade Register* to conduct the steps necessary to the replacement within 2 years after the law comes into effect[3].

In relation to the companies, the normative sources are two, as follows: the *new Civil Code* and *Law no. 31/1990* regarding the companies.

In this study, we aim not only to identify some of the most important provisions of the *new Civil Code* (which is the common law regarding the companies), but also to outline the status of the companies in terms of *Law no. 31/1990* (special law).

To be noted that *Law no. 31/1990* thoroughly regulates in the 294 articles the status of the 5 types of companies (unlimited company, joint stock company, limited liability company, simple limited partnership and partnership limited by shares), as well as the European company (art. 270^{2a}-270^{2e}).

In *the Civil Code*, we may find provisions concerning:

- The legal entity (art. 197-251).
- The association contract (art. 1881-1954), a chapter where the simple company and partnership are regulated *in extensor*.

I. The legal entity (Book I, Title IV, art. 197-251)

Liabilities of the Associates

Art. 193 – "The effects of the legal entity" – on the one hand, the article regulates the own legal liability of the legal entity, and on the other hand, the unenforceability of the legal entity.

Art. 193, par. 1 stipulates that the legal entity "is liable for the obligations assumed with their own property, unless the law stipulates otherwise", a provision that is also found in *Law no. 31/1990*, in art. 3, par. 1: social obligations are guaranteed by social patrimony.

Art. 193, par. 2 sets forth the unenforceability of the legal personality, respectively that "no person may invoke to a bona-fide person the quality of legal subject of a legal entity, if it is thus aimed to hide a fraud, an abuse of law or a detriment to the public order".

In other words, a direct liability is established, that of the legal entity's associates who committed a fraud or an abuse of law or prejudiced the public order in relation to a good-faith individual, without being able to use the distinct quality of legal subject of the legal entity and its own liability.

One may find this provision in art. 237^{1} par. 3 and 4 of *Law no. 31/1990* setting forth that the associate who, in the fraud of creditors, abuses the limited nature of their liability and the distinct legal entity of the company is unlimitedly responsible for the unpaid and liquidated obligations of the dissolved company.

[3] The law came into force on February 15th, 2013.

Regarding the **anticipated capacity of use**, the legislator has extended its scope meaning that besides the situation of acquiring rights and assuming obligations to the extent where they are needed for the legal entity to validly emerge (regulated by art. 205, par. 3) the capacity of any legal entity has also been regulated, to receive liberalities since the date of the establishment document, even if they are not required for the legal entity to legally exist.

Regarding the operation of the legal entities

To be noted that by art. 213, **the obligations of the administration bodies members** have been set, establishing that "they must operate in its interest, with the prudence and diligence required from a good owner". A similar provision may be found in *Law no. 31/1990*, but art. 144^1 being applicable only to the administrators from the joint stock companies, and not to the limited liability companies, according to art. 197, par. 4; in the context where *the Civil Code* establishes this obligation for members of the administration bodies of the legal entity in general, we believe that it also applies to limited liability trading companies.

Art. 214 regulates the **separation of patrimonies**, imperatively establishing that "the members of the administration bodies have the obligation to ensure and maintain the separation between the patrimony of the legal entity and their own patrimony.

They cannot use for their interest or for the interest of third parties, as applicable, the assets of the legal entity or the information they acquire by virtue of their office, unless they have been authorised for this purpose by those who appointed them.

These obligations may be found in *Law no. 31/1990*, in art. 237^1 par. 3 (unlimited liability of the associate) and art. 272 position 2 which incriminates the deed of the associate, administrator, manager who "uses in bad faith the assets or credit the company enjoys, for a purpose that is contrary to its interests or their own benefit or to favour another company where they are directly or indirectly interested in".

Regarding the annulment of the documents issued by the bodies of the legal entity (art. 216)

Art. 216 stipulates that the decisions and resolutions contrary with the law, Articles of Incorporation or Articles of Association may be appealed by any of the members of the management or administration bodies who have not taken part in the assemblies or who have voted against and requested to insert this matter in the meeting minutes, within 15 days since the date when they were submitted the copy of that decision or resolution

This regulation is largely similar to that in art. 132 of *Law no. 31/1990 regarding the companies*, but this time, the legislator stipulated in par. 7 that this art. 216 applies to the extent where it is not otherwise provided by other laws.

In this respect, the Companies Law also expressly stipulates in relation to the text of *the Civil Code* that:

– The administrators cannot appeal against the decisions by means of which they were dismissed;

– The action for annulment on the grounds of relative nullity is formulated within 15 days since publishing the decision of assembly in the Official Gazette and regarding the reasons of absolute nullity, the right to action has no statute of limitation.

The presumption of relative nullity (art. 1252), so that it intervenes in the cases where the nature of the nullity is not determined or does not undoubtedly result from the law.

This provision is important in relation to the nullity of the decisions of the General Assembly of Shareholders, taking into account that most of the provisions of *Law no. 31/1990* does not expressly include the sanction that intervenes.

Positive effect: Restricting the litigations where absolute nullity is invoked, therefore the safety of the civil circuit, no longer being able to appeal against the decisions of the General Assembly of Shareholders after long periods of time.

Negative effect: The means of defence of the minority shareholders requiring their greater vigilance in relation to the deadline of 15 days to promote the action.

Art. 231 provides **the mandatory mentions that all documents must contain**, regardless of the form emanating from the legal entity, an obligation also established by *Law no. 31/1990*, in Art. 74, the difference being that it is stipulated in *the Civil Code* that prejudiced individuals have the possibility to request damages if the mentions are missing.

II. The association contract (Book V, Title IX, Chapter VII; art. 1881 – art. 1954) structured in three sections:

– A first section called "general provisions".

– The second section on "simple companies".

– The third and last section called "partnership".

A) In the first section – "General provisions", in the 9 articles, the legislator outlines a few rules applicable both to the companies having legal personality and to those without legal personality.

Thus, just as with the variant of *the Civil Code of 1864*, the legislator has understood to provide **a definition even from a beginning**, art. 1,881 establishing that "by the association contract, two or more individuals mutually undertake to cooperate in order to perform an activity and contribute to it by money contributions, assets, specific knowledge and services, with the purpose to share the benefits or use the economy that could result".

The **principle of freedom of association** is established[4], art. 1882 establishing that any natural person or legal entity can be an associate, unless the

[4] The right of natural persons and legal entities to associate and establish companies is expressly established in art. 1 of *Law no. 31/1990* and is the expression of the principle of associating liberty, also regulated in the Constitution of Romania, in art. 40, par. (1). Art. 1, par. 1 of *Law no. 31/1990* stipulates that "in order to perform trading actions, the natural persons and legal entities can associate and establish companies, by complying with the provisions of this law".

law stipulates otherwise, and in art. 1889, par. 1 it is stated that associates may agree upon the constitution of a company with legal personality, by complying with the requirements provided by law.

Exercising this right to the establishment of companies is done only within the limits set forth by law, so that the natural persons and legal entities can associate only in one of the company forms listed in the law[5].

Although it is expressly stated in art. 1887 that this chapter is the **common law** regarding the companies, yet no other types of companies have been expressly regulated (except for those two forms of company: simple company and partnership).

Furthermore, par. 2 of art. 1887 stipulates that the law can cover different types of companies when considering the form, nature or object of activity.

The forms of companies. The dichotomy of the *old Civil Code (1864)* was given up, namely the universal companies[6] and private companies (art. 1493), *the New Civil Code* making a classification according to the form criterion.

Thus, art. 1888 expressly establishes that, according to their form, companies can be:

a) Simple;
b) In partnership;
c) Unlimited;
d) Simple limited partnership;
e) With limited liability;
f) joint stock;
g) Partnership limited by shares;
h) Cooperatives;
i) Other type of company particularly governed by law.

The first two types of companies, namely the simple and partnership ones have no legal personality, art. 1892, par. 1[7] and art. 1951 being explicit in this regard.

Although an inventory of the corporate forms is desired (it is true by the form criterion) and the very companies with small practical amplitude (limited partnership) are repeated in the listing, however, not all companies are mentioned, such as the European companies expressly regulated by art. 270^{2a}-270^{2e} of *Law no. 31/1990*, it is however true that the listing is declarative once letter i) is a reference also to other types regulated by special laws.

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[5] Provided that *Law no. 31/1990* is to be the special environment for establishment, operation and termination of companies, we cannot deem that the company forms are the limiting ones provided in art. 1,888 of *the New Civil Code* as reference is also made to other types of companies even in its very content (letter i).

[6] Which however did not find their applicability in practice (F. Deak, *Contracte speciale*, vol. III, Universul Juridic Publishing, p. 124).

[7] However, according to art. 1892, par. 2, if the associates want the simple company to acquire the legal personality by the document of amending the association contract, they shall expressly indicate its legal form and shall bring into agreement all its clauses with the legal provisions applicable to the newly established company.

We deem that mentioning the simple companies and partnership companies among the forms of companies (art. 1888 letters a) and b) is not an appropriate one, increasing the confusion once they have no legal personality, so that we cannot find the justification for their annexation to the other forms in relation to which the use of the concept of corporate forms is appropriate; the simple company and partnership are and remain contracts (art. 1,892, par. 1 and art. 1,951), moreover, regarding the partnership, by reading art. 1,888 one may understand that the name of partnership company is correct, although the third section regulates the partnership. We deem that it was required to mention these forms right in art. 1881, par. 3 where it is stipulated that the companies may be established with or without legal personality, structuring the listing based on this criterion.

Generally, the manner of structuring this chapter is not likely to clarify the matter, as although its name is "The association contract", besides the institution configured *in extensor*, that of simple company, it has also been tried to establish the status of companies, so that it would have been appropriate that the title of the chapter would refer to companies ("About companies") and avoid the unjustified mixture between the association contract and company; for example, art. 1930 establishes the cases where "the contract terminates and the company dissolves", art. 1931 having the marginal name "tacit renewal of the association contract" states that the "company is tacitly extended", etc.

The regulation in the first section "of the general provision" would have been useful only regarding the companies (general aspects of their configuration, classifications, manner of acquiring the personality, the principle responsibility etc.) and separately the simple company (as it actually realised it) and the partnership.

The status of contributions. In the case of a company with legal personality, the contributions enter the company's patrimony, and in the case of a company without a legal personality, the contributions become the co-property of the associates, except for the case where they have expressly agreed they shall be transferred into their joint use (art. 1883).

As a novelty, the status of spouses' contributions has been clarified, art. 1882 establishing that a spouse can become an associate by contributing with movable assets only based on the consent of the other spouse.

The status of the contributions of joint assets has been expressly regulated in art. 349 *NCC*, stipulating under the sanction of relative nullity that none of the spouses can make use of the joint assets by themselves as contribution to a company or for acquiring shares or stock, as applicable, without the other spouse's consent. In case of companies whose shares are traded on a regulated market, the spouse who did not consent on the use of joint assets can only claim damages from the other spouse without affecting the rights acquired by third parties. As applicable, in all cases, the shares or stock are joint assets. However, that spouse who has become an associate exercises by themselves all the rights resulting thereof.

B) Regarding the second Section – "Simple company", we note that in art. 1890-1948, the *New Civil Code* broadly regulates the status of the simple company corresponding to the civil association contract in regulating the *Civil Code of 1864*.

As novelties in the vision of the new legislator, we mention the regulation of the legal status of the **actual companies**, thus removing the various doctrinal opinions that only recognised the legally or regularly established companies and those illegally established or unregulated[8].

Regarding the **duration of the company** as novelty in relation to the current *Civil Code*, we mention the tacit renewal: "the company is tacitly extended when, although its duration has expired, it continues to perform its operations, and the associates continue to initiate operations falling within its object and act as associates. The extension operates for one year, continuing from one year to another, from the date of expiration, if the same requirements are met" (art. 1931).

The concepts of **apparent associates** (art. 1921) and **occult associates** (art. 1922) are defined so that any individual pretending to be an associate or deliberately creates for third parties a convincing appearance in this regard is liable to good faith third parties, just like an associate. However, the company shall not be liable to the mislead third party, unless it has given sufficient reasons to be considered as associate, or, if knowing the manoeuvres of the alleged associate, it does not take the reasonable steps to prevent the misguidance of that third party.

By art. 1910-1912, the legislator has understood to regulate the **associates' assemblies**, establishing the associates' right to participate in making collective decisions based on the principle of majority of associates' votes, if it is not otherwise stated by contract or law. An exception from the principle of majority is the decisions having as object the amendment of the association contract or appointment of a sole administrator when the vote of all associates is required (art. 1900 stipulates that the equity shares paid or transferred provide full voting rights). The parties have full freedom on how to call and conduct the associates' assembly.

The decisions taken may be appealed within 15 days, a period which begins on the date when the decision was taken, if present or on the date of communication, if absent. If the decision was not communicated to them, the period begins on the date when they acknowledged it, but not later than one year as of the date when the decision was taken (1912).

The loss of the quality of associate occurs according to art. 1925 (general cases) by transfer of the shares, enforcement, death, bankruptcy, forced execution, withdrawal and exclusion of associates from the company.

We deem that a objectionable aspect would be the provisions of art. 1925 regarding the loss of the quality of associate following the **enforcement on the equity shares.** We believe that as long as the basis of the simple company is the

[8] I.L. Georgescu, *Drept comercial român*, vol. II, Bucharest, All Beck Publishing, 2002, p. 102.

mutual trust, by fully recognising their *intuitu personae* feature, implicitly the shares cannot be subject to an enforcement. Moreover, on this subject regarding the companies, with reference to art. 66 of *Law no. 31/1990* regarding the companies, there are discussions on the different status of the shares/equity shares/stock. It results from art. 66 that the personal debtors of the associate debtor can seize the rights related to the shares held and only the stocks of the shareholders can be sequestrated and sold. The difference of legal status starts from the classification of the companies into partnerships *versus* capital companies, so that from this perspective, we believe that the phrasing of art. 1925 is inappropriate, in this case the creditor's rights needing to be related to the associate's benefits, particularly since the simple company is not a legal entity.

C) Regarding the third section – "Partnership"

The new Civil Code defines *the Partnership contract* as that agreement in which a certain person grants one or many other persons a certain share of the benefits and loses of one or many operations it is undergoing.

From the very beginning, a first remark concerns the legislator's lack of a major interest regarding this contract, the latter benefiting from only 6 articles. One may say that the situation is directed towards "improvement", if we take into account that this contract had 5 articles reserved in *the Commercial Code of 1887*.

The legislator's uncertainty is maintained regarding the nature and legal status of this contract, a conclusion that is drawn from the global mode of regulation. For this reason, the partnership was considered to be an improper form of trading company[9]. We do not agree with this point of view[10]. Obviously, the best approach of the partnership is of contractual aspect, as it is content to be just a association contract. The partnership does not tend to exceed the contractual stage in order to become an institution. Moreover, the use of the term "association" betrays the legislator's original intention to distinguish them from companies.

The existence or inexistence of the legal personality was done by the legislator and by assigning a different name. As by association we now understand the legal entities without patrimonial purpose, it has been suggested to change the name so there is no confusion between them, following that the partnerships would be called "venture companies"[11]. Once the new legislators establishes in art. 1951 that the partnership has no legal personality, such doctrinal opinions are not justified anymore.

Art. 1952 regulates the legal status of the assets brought as contribution, establishing as a principle that the associates remain the owners of the assets made

[9] Dumitru A.P. Florescu, Roxana Popa, Theodor Mrejeru, *Contractul de asociere în participație*, Universul Juridic Publishing, Bucharest, 2009, p. 8; I. Schiaua, *Drept comercial*, Bucharest, Hamangiu Publishing, 2009, p. 488.

[10] For details, see L. Săuleanu, *Contractul de asociere în participație*, Bucharest, Hamangiu Publishing, 2009, p. 8. and following.

[11] M. A. Dumitrescu, *Asociațiunea în participațiune*, in "Revista societăților şi a dreptului comercial", no. 2/1924, p. 166.

available to it; they may agree that the assets brought or those acquired would become joint property. The associates may establish to fully or partly pass the assets into the property of one of them and to also reacquire them upon the cessation of the association.

Regarding the associates' liability, it has been expressly stipulated they are liable in their own name in relation to third parties, and the associates operating as such are held severally liable.

A new aspect resulted from the jurisprudence of recent years regarding the interpretation of the association contracts simulated by art. 1953, par. 5, any clause establishing a minimum guaranteed level of benefits is considered to be unwritten. Regarding the sanction (of considering the clauses unwritten), we observe a constancy of the new legislator in embracing the theory of inexistent documents, once this reference is done in several situations: as an example, art. 1910, par. 5, 1918 par. 4, art. 1932, par. 2 etc.