

Considerations concerning the functioning of the simple company

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Abstract

This approach proposes an analysis of the legal rules applicable to the simple company, especially emphasizing significant issues concerning its functioning. The utility of such an approach is obvious, at least given the fact that, according to the legislator's express option, the rules on the simple company constitute the common law in relation to companies, being applicable in the silence of the special law regulating other forms of companies. The main characteristic of the simple company is that this form of company has no legal personality. Therefore, the simple company contract produces juridical effects between associates, and even towards third parties, but it does not create a new legal person distinct from its members. This aspect implies significant particularities in relation to the rules that govern the functioning of the simple company, as emphasized below.

Keywords: *simple company, functioning, parts of interest, the rights of the associates, administration.*

JEL classification: *K22*

1. Introduction

This approach proposes an analysis of the legal rules applicable to the simple company, especially emphasizing significant issues concerning its functioning. The utility of such an approach is obvious, at least given the fact that, according to the legislator's express option, in accordance with the provisions of article 1887 paragraph 1 Civil Code², the rules on the simple company constitute the common law in relation to companies, being applicable in the silence of the special law regulating other forms of companies.

Taking into account the legal provisions which govern it, and especially article 1881 of the Civil Code, the simple company may be defined as a contract by which two or more persons agree, in return for the participation in the profits and losses that might result, to perform together common economic activities, contributing to the performance of these activities through contributions in money, in kind or in industry. Therefore, the simple company has a lucrative patrimonial goal, because the associates want to pursue a common economic activity and to participate in it with contributions, in order to obtain and share the profit or use the economy that might result.

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² Law no. 287/2009, republished in the Official Monitor of Romania, Part I, no. 505 of 15 July 2011.

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2. The relations between the associates

2.1. The parts of interest

The contributions of the associates are an essential condition for the existence of the simple company, as well as of any company. Due to the absence of legal personality in the case of this form of company, according to article 1883 par. 1 Civil Code, the contributed goods are to be subject to the common ownership right of the associates, and upon the dissolution and liquidation of the company, the partition will occur, leading thus to the termination of the co-ownership status.

All the contributions made by the associates, excluding the contributions in industry, form the social capital of the company. In exchange for the contributions to the formation of the company and proportionally to their value the associates receive parts of interest that are fractions of the social capital, indivisible and non-negotiable.

The simple company contract is an *intuituu personae* contract because it is concluded taking into account the person of the associates, their personal qualities and the confidence between them. This aspect leaves its mark on the rules governing the transfer of the parts of interest, although it should be noted the legislator's option to the mitigation of the influence of the personal character in this matter, like in case of limited liability companies³, through the differentiation of legal regime between the assignment of parts of interest between associates and the assignment toward a third party, a person outside the company.

Thus, as a principle, the parts of interest of the simple company can be transferred freely between the associates, subject to restrictive clauses in the company contract, because this operation leads only to a different allocation of the social capital between the same persons and obviously does not affect the personal nature of the company contract.

³ In this regard, referring to the limited liability company, article 202 of Law no. 31/1990 on companies, republished, with subsequent amendments, imposes the distinction between transferring the social parts between associates, which can be done freely, unless provided otherwise in the constitutive act, and the transfer to third parties, which must be approved by the associates representing at least three-quarters of the social capital. In contrast, in the case of companies of persons, namely the general partnerships and the limited partnership, taking into account their strong *intuituu personae* character, the parts of interest cannot be transferred, to the associates or to third parties, unless the operation was authorized by the company contract (art. 87 of Law no. 31/1990 republished), which implies therefore the consent of all partners - see, for more details in this regard, Stanciu D. Cărpănu, *Tratat de drept comercial român*, Universul Juridic Publishing House, Bucharest, 2009, p. 338.

Instead, the transfer of the parts of interest to a third party determines the entry of a new partner in the company, which requires the unanimous consent of the other associates, in order to safeguard the *intuituu personae* nature of the company contract. Equally, it is worth mentioning that, from this point of view, the legislator has not maintained the solution applicable to limited liability companies, meaning the approval of the transfer to third parties by the associates representing at least a majority of three quarters of the social capital, but it has opted for the requirement of unanimity, closer to the rules governing the companies of persons.

The provision of the unanimity rule for the assignment of parts of interest to third parties is an important disadvantage of the simple company, because the link that unites the associates between them and to the company is therefore very strong, which may lead, in case of the opposition of others, to the inability of some of them to fructify their social rights under suitable conditions. Unlike the legal provisions applicable to companies regulated by Law no. 31/1990 republished, in case of simple company the legislator chooses to expressly provide rules that tend to diminish these disadvantages. However, it is regrettable the hesitant and unclear manner in which the legislator intends to settle this issue, unlike the unambiguous and more consistent solutions provided by other European legislations⁴.

Thus, although the energetic wording of par. 1 of article 1901 of the Civil Code might suggest that it is an imperative legal rule, the sanction of non-complying with it is not the nullity of the assignment contract concluded without the consent of all associates. Conversely, taking into account the paragraph 2 of article 1901 of the Civil Code, the contract is valid, but its effectiveness depends on the option of the other associates to exercise, within 60 days from the date they knew or had to know the assignment, a right to repurchase the parts of interest from the third party, at a value determined by an expert or by the court of law. Obviously this right of repurchase by the other associates depends on the manifestation of the will of the third party, which raises the question what happens in the event that he does not intend to express his consent. In the silence of the law in this respect, we believe that the solution expressly provided by the legislator in other matters should apply, to the extent that the question of a right of repurchase arises⁵, namely that the court of law will replace the opposing party's consent. However, to the extent that the associates do not intend to exercise this right of repurchase of the parts of interest within the period provided by law, the contract of assignment is

⁴ Thus, for example, in French law, in the case of the limited liability company, if the company or the other associates disagree with the transfer of social parts belonging to one of them to a third party, the law establishes an obligation of purchasing them by the associates, a third party designated by them or by the company, which will then proceed to the capital reduction in an appropriate proportion. To the extent that, within three months from the announcement of the intention of selling the social parts, none of the solutions provided by law is applied, the associate is allowed to perform the assignment in the form originally envisaged (article L 223-14 of the French Commercial Code) - see, for more details in this regard, Georges Ripert, René Roblot, *Traité de droit commercial*, tome 1 – volume 2, Les sociétés commerciales, LGDJ, Paris, 2002, pp. 194-195.

⁵ As for example, paragraph 2 of article 772 of the Civil Code, in the matter of redemption of the servitude of passage.

consolidated, the third party acquirer becoming an associate of the simple company.

Under these circumstances, we cannot fully agree with the view expressed in the juridical literature⁶ according to which art. 1901 par. 2 Civil Code establishes for the other associates a preemption right to acquire the parts of interest belonging to the associate-transferor, as the legal construction envisioned by the legislator in this matter does not entirely follow the legal regime of the preemption right, as regulated by articles 1730-1740 Civil Code. Thus, firstly, as shown in articles 1730-1740 of Civil Code, the preemption right may have a contractual or legal nature. In the case under analysis, it cannot be considered that the right of preemption arises from the law, as the legislator chooses, perhaps knowingly, another qualification also used on other occasions⁷, namely the right of repurchase of the parts of interest, which undoubtedly leads to a difference in legal regime. Equally, according to article 1733 of the Civil Code, by exercising the preemption right by its holder, the contract of sale is concluded with him, under the conditions contained in the contract with the third party-acquirer. Nevertheless, article 1901 par. 3 Civil Code expressly provides that the repurchase of the parts of interest may be made at a different price as compared with the contract concluded with the third party, namely a value determined by an expert or by the court of law.

Equally, the assignment contract with the third party presents some similarities with the legal regime of a contract under the resolutive condition of the exercise of the right of repurchase by the associates, provided that the legislator does not expressly mention in this matter, as it does in other situations⁸, the existence of a conditional obligations and the parties to the assignment may not insert in the contract such a condition.

Consequently, it would have been preferable a clearer choice of the legislator, together with the proper terminology, in order to show without any doubt the operating mechanism and the legal regime of the right of repurchase of parts of interest by associates within the simple company, especially since providing such a solution as a principle is a legislative progress that deserves to be mentioned.

In the same time, in accordance with the provisions of article 1938 of the Civil Code, another consequence of the strong personal character of the simple company is its termination due to the death or judicial interdiction of the associates – natural persons, as well as the bankruptcy or cessation of the quality of subject of law of the associates – legal persons, if the company contract does not provide otherwise. This legal provision should be corroborated with article 1901 paragraph

⁶ Cristian Gheorghe, *Societatea simplă, întreprindere comercială. Constituire și deliberare*, in „Revista de Drept comercial” no. 9/2013, p. 27.

⁷ As for example in matters such as the sale with option to repurchase, the redemption of the servitude of passage by the owner of the subjected land etc.

⁸ For example, in the case of the sale with option to repurchase, art. 1758 par. 1 Civil Code expressly states "The sale with option to repurchase is affected by a resolutive condition...".

1, third sentence, of the Civil Code, which states the possibility of transmitting the parts of interest by inheritance, unless the company contract provides otherwise.

In conclusion, the simple company contract may provide that the company will continue between the remaining associates and the successors of the deceased partner, which leads to the transferable nature of the parts of interest in such a case, subordinated, however, to the unanimous consent of the associates, expressed in the contract.

Equally, however, the law (art. 1940 Civil Code) provides another solution for continuing the simple company at the death of an associate. Thus, the company contract may provide that it continues among the remaining associates, to the extent that there are at least two, and the successor of the deceased associate becomes a creditor of the company for the value of his author's part in the company at the time of the death. Therefore, in such a situation, it is raised the question of assessing the social rights of the deceased associate in the company, as in the case of liquidation. According to article 1940 of the Civil Code, the value of the social rights is the one resulting from company's records. Assuming that this value is in dispute, in the absence of express legal provisions in this regard, we believe that the provisions of article 1901 par. 3, as well as of article 1929 par. 2 of the Civil Code may be applied by analogy, and the value may be determined by an expert appointed by agreement of all parties or, if the agreement cannot be reached, the value will be determined by the court of law.

Finally, according to article 1908 of the Civil Code, any associate may, without the consent of the others, to associate a third party to his social rights, or better said, to the benefits arising from these rights. However, the third party does not become an associate, but he remains a person outside the company, since he has no legal relationship with it⁹. Instead, the social rights cannot be transferred to a third party and cannot be used to guarantee certain obligations of associates or third parties without the consent of other partners¹⁰.

⁹ In the French law, such an operation is known as "convention de croupier", the French jurisprudence considering the corresponding contract as having the legal regime of a joint venture company contract - See in this regard, Paris, April 4th, 1997, Bulletin mensuel d'information de sociétés, 1997, p. 670, cited by Georges Ripert, René Roblot, *op. cit.*, p. 79. Basically it is considered that the third party participates in the benefits derived from the quality of associate, but he is also obliged to bear the losses. This mechanism does not seem applicable in our legal system, taking into account the spirit of the regulation contained in article 1908 of the Civil Code, but also the expression used by the Romanian legislator who mentions only "social rights". Moreover, in the French legal system, such an operation has been considered as possible for all legal forms of companies, including commercial companies.

¹⁰ Unlike the option of the Romanian legislator, under French law the assignment to a third party of the pecuniary benefits derived from social rights, and therefore from the quality of associate is possible. This operation was recognized legislatively through art. L 1861 French Civil Code, legal provision which now has a different content. However, the French doctrine and jurisprudence consider that the assignment to a third party of the pecuniary advantages are still a valid operation in all types of company - see, for more details, Georges Ripert, René Roblot, *op. cit.*, p. 79.

2.2. The rights of the associates within the simple company

One of the essential conditions for the existence of any company is *affectio societatis*, respectively the intention of the associates to collaborate in order to perform together the common economic activities that are the object of the company. Therefore, in the case of simple company the associates act and work together to achieve a common goal, which does not however preclude the existence and the exercise by each of them, towards the others, of the rights deriving from the company contract.

Thus, in exchange for their contributions to the formation of the company, the associates have the right to participate in sharing the benefits of the common activity, but also the obligation to participate in losses.

Equally, the associates have the right to participate in decision-making process within the company, by exercising the right to vote in the Associates Meeting. In principle, each associate has a number of votes proportional to his participation in the social capital, namely the parts of interest fully paid-up. However, the company contract may provide for a different solution, respectively a different allocation of voting rights in the company, such as allocation of one vote to each associate, regardless of the value of his contribution.

Regarding the Associates Meeting, in case of simple company the legislator chooses to institutionalize such a deliberative body, unlike the situation of companies of persons, more evolved juridical forms of company and having legal personality, in relation to which the law does not expressly regulate the existence of the General Assembly. Consistent to the contractual approach regarding the company, the legislator imposes, logically, the unanimity rule for decisions concerning the amendment of the simple company contract or the appointment of a sole administrator (art. 1910 para. 3 of the Civil Code). Again, however, the legislator chooses to reduce the severity of the unanimity rule, since the wording of the paragraphs 2 and 3 of art. 1910 of the Civil Code suggests that unanimity should be considered as an exception, the general rule regarding the decisions on the company being the majority of votes of the associates. However, it should be noted that decisions increasing the obligations of one of the associates require the consent of the latter and cannot be imposed only by a majority (art. 1910 para. 4 of the Civil Code). Moreover, the above-mentioned legal provisions are imperative because the law considers as unwritten any contractual clause that would provide for other conditions, more severe or even more permissive than those stated for making decisions within the Associates Meeting.

Concerning the decisions-making process, the law provides in principle the need to reunite the Meeting of the Associates, under the conditions provided by the company contract. However, the associates are free to agree through the contract that decisions can be taken by written consultation, without the need to bring together the Associates Meeting. Equally, taking into account the lack of legal personality of the simple company, the intended juridical act can be concluded by all associates, in which case their decision results implicitly from the concluded act.

Taking into account that the legislator institutionalizes the Associates Meeting as a body of deliberation and decision of the simple company, similar to the companies of capital or the limited liability company, article 1912 Civil Code also takes the possibility, provided by Law no. 31/1990 republished, of contesting the resolutions adopted by the associates therein. However, unlike the provisions of Law no. 31/1990 republished¹¹, which regulates it in detail, from the text of art. 1912 of Civil Code do not emerge very clearly the conditions under which the action for annulment can be brought in the case of simple company, because the legislator has regrettably opted this time for a more concise expression, which is not likely to facilitate the practical application of the legal provision in question. It may be considered, however, even in this situation, as it would appear from the provision contained in art. 1912 of the Civil Code, that the action for annulment of resolutions adopted by the Associates Meeting of the simple company is exercised in the same manner and under the same conditions as those provided for companies governed by Law no. 31/1990 republished.

Equally, in order to counterbalance the liability of the associates within the simple company, they have a right to control its activity, namely the right to inspect the books and financial statements, the performed operations, and any other document belonging to the company. In the same time, the associates have the right to be informed of the annual report, drawn up by the administrators, on the company's operations, which can be discussed, at the initiative of any of them, in a general meeting convened for this purpose (art. 1918 para. 2 and 3 Civil Code). The associates cannot affect, by their agreement, the right of control established by the law, any contrary clause inserted in the company contract being deemed unwritten.

Finally, as a result of their participation in the formation of the company, the associates have also the right to participate in sharing the result of liquidation upon the termination of the company. Thus, according to article 1946 of the Civil Code, in the event of liquidation of the simple company, after paying the social creditors, the contributions brought by the associates will be reimbursed, and any excess will be divided between them in proportion to their participation in benefits, unless otherwise provided in the company contract.

Regarding the reimbursement of contributions during the liquidation of the company, the law provides that the goods that are brought in order to be used by the company must be returned in kind to the associate who contributed them (art. 1946 para. 2 Civil Code). Furthermore, according to article 1946 par. 3 of the Civil Code, upon the termination of the company, the original owner is allowed to

¹¹ According to article 132 paragraphs 2-10, corroborated with article 196 of Law no. 31/1990 on trading companies (republished in the Official Gazette, Part I no. 1066 of November 17, 2004, as amended), the decisions of the General Assembly of associates of companies by shares, limited partnerships by shares or limited liability companies that are contrary to the law or the constitutive act may be annulled by the court of law, but only at the request of associates who did not attend the general meeting or voted against the decision and asked to record their opposition in the minutes of the meeting.

recover property of the contributed goods, to the extent that he expresses the wish in this respect.

It should be mentioned that, in case of contributions in industry, in relation to which there can be no question of repayment to the associates, the legislator has provided the right of the associates who contributed them to receive, within the limits of their participation in benefits, the goods that are the result of the activities performed as a contribution, to the extent that these goods may be found in the social patrimony after repayment of the other types of contributions.

3. The relations of the associates with third parties

Taking into account that the simple company does not create a new legal person so that it may assume obligations by itself, in a distinct manner, the law (article 1920 paragraph 1 Civil Code) provides the personal liability of the associates for the social debts. However, consistent to the idea of the patrimony of appropriation, the legislator chooses to nuance this personal liability of associates, as being a subsidiary liability, after pursuing the common goods belonging to the company. Moreover, the associates of the simple company are responsible for the social debts with their own patrimony, but in proportion to their contributions, and thus to their participation in setting up the company¹².

It should be mentioned that an important consequence of the absence of legal personality and, respectively, lack of the formalities required by law for its setting up and publicity, is that the simple company may have an occult character, because it is possible that the third parties do not know all the associates and, therefore, they cannot act against them.

As a consequence, in order to protect good-faith third parties, art. 1922 of the Civil Code provides that the occult associates, who therefore do not disclose their quality, are liable towards third parties under the same conditions as the other associates. Also as a guarantee for the third parties the legislator regulates the reverse situation, namely the hypothesis of the apparent associates, persons who, lacking such quality, claim to be associates or create a convincing appearance in this respect. These persons will also be liable towards third parties like the associates. Moreover, in the latter situation, the liability of the company towards the third party can also occur, but only to the extent that it did not take steps to prevent his error or it consolidated the created appearance (art. 1921 paragraphs 1 and 2 Civil Code).

¹² See, in this respect, Cristian Gheorghe, *Societatea simplă, întreprindere comercială. Administrare și încetare*, in „Revista de Drept comercial” no. 10/2013, p. 8-9.

4. The administration of the simple company

Through the company contract or by their subsequent agreement the associates may appoint one or more administrators, associates or non-associates, natural or legal persons, may provide their organization, the limits of their mandate etc. In the absence of stipulations in this regard, the administration of the company will be made by each of the associates, who are considered to have a mutual mandate to administrate each one for another in the interest of the company.

In relation to the person of the administrators, it should be noted that the legislator expressly acknowledges that a legal person can be administrator of the simple company, although it provides no further details on how to exercise the mandate of administrator in such a situation. Therefore, in the silence of the company contract, we believe that there may be applicable the provisions of Law no. 31/1990 republished governing the exercise of the mandate of administrator of companies by shares by a legal person¹³. It should be noted, however, that it is surprising the option of the legislator to allow a legal person to become administrator of the simple company, since in case of the companies with legal personality governed by Law no. 31/1990 republished, the quality of administrator is exclusively reserved for natural persons with the exception of the company by shares¹⁴.

With reference to the powers of the administrators in relation to the associates, they are basically determined by the company contract, which may include a number of limitations in this regard, namely categories of acts and operations that can be performed by the administrators only with the consent of associates. In the absence of provisions in the company contract or the opposition of the associates, the administrators have wide powers which allow them to perform any act of administration in the company's interest, in the words used by the legislator, meaning any act necessary in order to achieve the object of the company (art. 1914 par. 1 Civil Code). However, in order to ensure the security of civil circuit and the protection of third parties, taking also into account the lack of formalities of publicity in the case of simple company, the restrictions on the powers of the administrators, provided by the company contract, do not operate in relation to good-faith third parties, article 1914 paragraph 3 of the Civil Code stating that the clauses of the company contract that limits these powers cannot be opposed to third parties.

¹³ In this respect, art. 153¹³ paragraph 2 of Law no. 31/1990 republished provides: "A legal person may be appointed administrator or member of the supervisory board of a company by shares. With this appointment, the legal person is obliged to appoint a permanent representative, natural person. This person is subject to the same conditions and obligations and has the same civil and criminal liability as a director or member of the supervisory board, natural person, acting on his own, but the represented legal person is not exempted from liability or it has not lower joint liability. When the legal person revokes its representative, it shall appoint a replacement at the same time".

¹⁴ See, in relation to the administration of companies regulated by Law no. 31/1990 republished, Stanciu D. Cârpenaru, *op. cit.*, p. 254.

If there are more administrators, the company contract may provide that they should work together or alternatively the powers related to the administration of the simple company may be distributed among them. To the extent that there are no clauses in this respect in the company contract, each one can perform by himself any act of administration, in good faith and in the interests of the company.

5. Conclusions

This approach does not propose an exhaustive analysis of the legal rules applicable to the simple company, but it only emphasizes significant issues that underline its functioning.

It should be mentioned that the legal regulation applicable to the simple company, contained in the new Civil Code, is more coherent and comprehensive than the one dedicated to the company contract, and therefore to the civil company, by the Civil Code of 1864. Moreover, the current legislator had tried, and in some occasions had succeeded to clarify legislatively certain issues which had remained unaddressed by the previous regulation. Equally, however, the new Civil Code proposes some legislative solutions which are questionable or insufficiently described, at least compared to the legal regulation dedicated to companies having legal personality by Law no. 31/1990 republished, taking also into account the particularities of the simple company.

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