

THE SILENT PARTNERSHIP IN ROMANIA– THEORETICAL AND PRACTICAL ASPECTS

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Abstract

The silent partnership raised a significant number of controversies, both in doctrine and in jurisprudence, most of them generated by the regulation comprised in the Commercial code, where the concept is provided with a different notional sense – the contract. The actual regulation comprised in the New Civil Code reflects an approach of the silent partnership within the legislative context of companies, thus referring to this associative form as to an entity presenting all particular components of companies, respectively the contributions, the affectio societatis, as well as the distribution of the benefits. The silent partnership does not own and cannot acquire legal personality, unlike the simple partnership, which, upon shareholders' decision, it may become a company form regulated by the Law no. 31/1990 on companies.

Keywords: *silent partnership, companies, agreement, affectio societatis, contributions*

JEL Classification: *K12*

1. Introduction

The silent partnership (art. 1.949 – 1.954 NCC) is defined as a contract by means of which one of the parties (merchant or non-merchant) offers the other party a share of the benefits and losses generated along the development of an activity (in the dualist conception, it is mandatory that this activity is commercial).

This form is regulated as well within the French legislation, similarly, where it is referred to as *société en participation*, without legal entity, but having a fiscal personality (Chapter III, art. 1871 – 1873 Fr. Civ.c)².

Within the German law, a similar form resembling the silent participation regulated by the Romanian and the French legal systems is represented by *Stille Gesellschaft*³, which legal status is provided in the German Commercial Code, art. 230-7, containing a number of derogations from the general regime of the civil partnership, regulated by the German Civil Code, in art. 1871-1 and the following.

Stille Gesellschaft is defined as a particular contract by means of which an entity acquires a share to a commercial operation developed by another entity, under the form of a capital submission, the goods being under the property of the entity affording the participation. However, this form remains occult, such as in the Romanian law, as it is not submitted to any formality of registration.

Nevertheless, what makes a substantial distinction within the German law in what regards the regulation of this form consists in the possibility to stipulate in a contract that the partner is exonerated from the participation to losses, yet it is impossible for him/her to be exonerated from the distribution of benefits (art. 232 German Commercial code).

From the definition of this form of association, provided by the Romanian law, it could be converged towards the argumentation according to which the silent partnership contains all the specific elements of a real company, without legal personality⁴, especially since the art. 1.888 NCC includes it in the enlisting.

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² www.legifrance.gouv.fr., 30.10.2014

³ In such sense, Andenas Mads, Wooldridge Frank., *European Comparative Company Law*, Cambridge University Press, 2009, p. 133

⁴ For the opposite opinion, in the sense in which the silent partnership is not a company but a simple agreement, Lucian Săuleanu, *Societăți comerciale. Studii*, Universul Juridic Publishing House, 2012, p. 41.

2. The silent partnership contract – the legal nature and characteristics

The silent partnership is “born” on the ground of a contract – consensual, synalagmatic, *intuitu personae*⁵, commutative and onerous, with successive or immediate performance (depending on the object of the partnership).

The law does not impose any formality of disclosure. But the occult character of the partnership may be obviated, upon convention of the parties, by accomplishing certain disclosure formalities, such as the closure of the contract under an authentic form or even the submission of the partnership contract to the Trade Register for adduction. Thus, it has been considered⁶ that the silent aspect of the partnership, compared to the possibility of its infringement upon will of the partners, does not represent a genuine characteristic of the silent partnership.

The occult character of the partnership imprints to it a relative confidentiality, considering that the partnership is subject of fiscal law, while it is registered correspondingly at the fiscal authorities⁷.

It must be noted that in the case of partnerships without legal personality among foreign legal entities, developing their activity on the Romanian territory, the fiscal law impose expressly the obligation to assign one of the parties to observe the accomplishment of duties of all partners, provisions which are meant to eliminate *ope legis* the occult character of the association⁸.

The single condition imposed to the partnership is that this is approved in written, a demand imposed *ad probationem* (art. 1.950 NCC).

The legal doctrine⁹ classified the silent partnerships according to their objects into partnerships which object is a single commercial activity, partnerships which object consists of several commercial activities and partnerships which object refers to an entire commerce.

Also in the monistic approach, regarding the entire matter from the object’s perspective, the classification maintains its actuality, the quality of the parties of the legal nature of the operations from which the partners receives shares are not of interest.

The parties of the association, according to the interpretation of the art. 1.949 NCC, may be natural and/or legal persons; the partner who grants the share is known in doctrine as the “general partner”, while the one who receives the share is known as the “silent partner”.

The silent partnership cannot acquire, under any circumstance, legal personality, not being, as compared to the third parties, a person distinct from the partners.

Doctrine¹⁰ outlined that the absence of legal personality attracts the absence of a individual name, as well as the absence of a headquarters for the silent partnership.

3. The components of the silent partnership

The silent partnership comprises all the elements specific to companies: they are incorporated upon common will of developing an activity (*affectio societatis*)¹¹, the partners assume

⁵ In such sense, Lucian Săuleanu, *Contractul de asociere în participațiune. Încheiere, executare, încetare*, Hamangiu Publishing House, 2009, p. 6; Dumitru A.P. Florescu, Roxana Popa, Theodor Mrejeru, *Contractul de asociere în participațiune*, Hamangiu Publishing House, 2009, p. 153. The last opinion yet envisages the possibility of resolution of the contract of a silent partnership due to the disparition of *affectio societatis* (in the sense of severe misunderstandings hindering the development of the object stipulated in the contract); however, our opinion is that the apparition of severe misunderstanding between partners attract the dissolution of the partnership, by assimilating the norm comprise in the art. 1529 Civ.c., according to which it was provided also in art. 1.954 NCC, final thesis: “... the agreement of the parties determines the form of the contract, the duration and the conditions of the partnership, as well as the causes for its dissoluton and liquidation”.

⁶ In such sense, Lucian Săuleanu, *Contractul de asociere în participațiune. Încheiere, executare, încetare*, Hamangiu Publishing House, 2009, p. 4.

⁷ in the situation of an association without legal personality, the incomes and expenditures registered are attributed to each of the partners with Romanian nationality, correspondingly to the quota of participation in the association (art. 28 Law no. 571/2003 on Fiscal code, with adjustments and completions (consolidated version 2013).

⁸ Anca Popescu-Cruceru, Mircea Udrescu, *Logistică și sisteme logistice. Interferențe juridice în logistica firmei*, Ed. Tritonic, 2013, p. 146-147

⁹ Lucian Săuleanu, *Contractul de asociere în participațiune. Încheiere, executare, încetare*, Hamangiu Publishing House, 2009, p. 7

¹⁰ Lucian Săuleanu, *Societăți comerciale. Studii*, Universul Juridic Publishing House, 2012, p. 44

the risk of participating to benefits and losses, and, by means of an agreement, the partners may convene upon the constitution of a common patrimony for their association, under the form of co-property on the goods submitted in the partnership, as well as on those obtained as an effect of their utilization.

The jurisprudence¹² considered that *affectio societatis* expresses only the internal will of the partners to give birth to a new legal person, but it's structural elements, the voluntary collaboration, the active participation to the management and administration of the activity as well as the legal equity of the partners characterizing the silent partnership as well.

Thus, the partner submitting a participation seeks, as an internal psychological element, the maximization of the investment, while the partner receives the participation animated by the same intention to obtain a benefit, both partners following an effective collaboration in making the decision, so that both accomplish their purposes.

To the extent to which it would be appreciated the absence of the *affectio societatis*, the partnership itself would be affected by an occult interest, which transforms it from contract into simulated document¹³.

In what regards gaining benefits and bearing losses, these are concluded upon the will of the parties.

The regulation comprised in art. 1.953 para. 5 NCC, concerning the circumstance in which by agreement it is stipulated a minimum quota of profit¹⁴, puts an end to this extended jurisprudential contradiction concerning the interpretation of such clause, by considering that this is unwritten, the clause (according to art. 1.255 para. 3 NCC) is hit by effect similar to the partial nullity (yet absolute¹⁵), being replaced in fact by applicable legal dispositions, related to the provisions comprised in art. 1.881 para. 2 NCC, respectively the obligation to support the losses is to be established proportionally with the participation to the benefit's distribution.

Nevertheless, due to the fact that these provisions are applicable only to the agreements closed after the entrance into force of the NCC, they are imposed in continuance several clarifications regarding the interpretation of these forms of insurance of a minimal guaranteed income, depending on the concrete content of the rights and liabilities comprised in the agreements of association closed before 2011 and still in force currently¹⁶.

By exemplifying upon a decision in matter¹⁷, in a cause solved by the District Court of Bucharest, the claimant requested, by means of his/her writ of summons, the resolution of an agreement of silent partnership, essentially, for the non-performance of the contractual duties of payment at the maturity date of the amounts representing maintenance expenses of a space brought in the association by one of the partners, as well as the amounts consisting of a minimal quota from the monthly income.

Conventionally, the defendant requested that the court state the absolute nullity of the leonine clause inserted in the contents of the contract of association in the silent partnership, for the

¹¹ Although there are opinions according to which "the partnership lacks *affectio societatis*, the parties of the association no being driven by the idea of developing an activity in common, only the senior partner (the general partner) working for the partnership" - Dumitru A.P. Florescu, Roxana Popa, Theodor Mrejeru, *Contractul de asociere în participațiune*, Universul Juridic Publishing House, 2009, p. 129

¹² By exemplifying, CSJ – Secția comercială, decision no. 287/1996, in „Law Review” no. 1/1997, p. 124

¹³ This being one of the reasons for which, in many cases, one of the partners requests the qualification of the silent partnership as a lease, especially in the case where in the agreement is provided a minimal limit of the profit granted to one of the partners in exchange for leasing the other partners a good (usually, a property); we appreciate that in this circumstance, the qualification of the partnership rises serious issues regarding the cause (purpose) for the closure of the contract, the legal sanctions of the illicit cause being the annulment of the silent partnership, with the effect of bringing the parties back to their anterior condition.

¹⁴ in the sense of admitting such a clause as being leonine or not

¹⁵ Regarding the legal regime of the nulities, Ioana Nely Militaru, *Dreptul afacerilor, Introducere în dreptul afacerilor. Raportul juridic de afaceri, Contractul*, Ed. Universul juridic, 2013, p. 170 and following

¹⁶ In the sense in which the court pursues in legally qualifying the nature of the contract, depending on the nature of the essential duty which constitutes the object of the contract, Ion Turcu, *Aspecte din jurisprudență privind contractele referitoare la spațiile comerciale*, in the „Commercial Law review” no. 6/1994, p. 81-90.

¹⁷ The District Court of Bucharest, Commercial section VI, file no. 40519/3/2007, sentence no. 13281/27.12.2010, supported by the decision no. 482/31.10.2011 of CAB – Civil Section VI and the decision no. 3178/13.06.2012 of the HCCJ, irrevocable – Civil Section (unpublished)

breach of the imperative norms of the art. 251 Com.c. corroborated with the art. 1513 Civ.c. and 966 and the following. Civ.c, with the consequence of bringing the parties back to their anterior status, by obligating the claimant for the payment of the amount representing the minimal sum provided in the agreement and referred to as “quota of the profit” and, consequently, admit that the participation to the loss of the partnership of the claimant equals the quota established by the parties by agreement according to which are distributed the profits.

The defendant showed that the relationships between the defendant and the claimant are relationships generated by a contract of association in a silent partnership, of the nature/essence of which is also the proportional bearing of the benefits and losses¹⁸. In the agreement, there are no other provisions regarding the evaluations of the submission, the only disposition referring to the participation to profit.

In this case, the agreement of association provides that, after the deduction of the expenditures which it had been convened upon, the resulting profit obtained by the partnership is to be distributed in the following manner: the claimant is accounted for a quota of 10% from the total of the accomplished profit or a quota of _ % from the total value of the sales accomplished by the partnership, but not less that the equivalent in lei of a certain amount of money; the defendant if accounted for the remaining value of the profit accomplished by the partnership, after the deduction of the quota accounted for the other partner.

So as it resulted from the administered rules of evidence, the claimant had in view even since the moment of closure of the contract the imputation in the patrimony of association the totality of own expenditures, billing certain amounts of money under the title of expenses, and, at the same time, the imputation as well of a minimal quota of profit, per month (to which, in certain months, it was added the VAT).

From the insertion in the contract of the obligation of payment to one of the parties a minimal quota of the profit, it is obvious that, since the moment of closure of the contract, the claimant intended to be exonerated from the risks generated by the eventual losses registered by the partnership, which has the legal signification of exoneration from the participation to losses.

By means of the sentence pronounced in this cause, the court of first instance admitted in part the writ of summons formulated by the claimant, in the sense in which it obliged the defendant to pay the claimant a sum which represented penalties of delay correspondent to the quota of profit¹⁹, while being rejected the re-conventional request, by means of which it was solicited the admission of absolute nullity of the leonine clause, motivated by the fact that in the agreement of partnership in case there is no clear unbalance, with the consequence of admitting the nullity of the accessory penal clause²⁰.

More than that, from the interpretation of the art. 251 Com.c., it results that both parties contribute both at benefits and at losses.

In the case of the agreement providing a minimal amount considered quota of the profit, in the hypotheses in which the partnership does not register profits or the profits are equal to the counter-value of the sum established as minimal quota of profit or the partnership registers losses, the beneficiary of the clause containing the minimal quota of profit does not participate to the losses of the partnership under any circumstance.

¹⁸ In such sense, also Horațiu Sassu, *Consecințe ale clauzelor leonine în cadrul contractului de asociere în participațiune*, in the „Commercial Law Review” no. 6/2009, p. 21-30

¹⁹ On the grounds of the penal clause inserted in the agreement, regarding the admission to which the legal doctrine and legal practice have divergent points of view; in the sense in which the penal clause is inadmissible in the case of the silent partnership, the Court of Justice of Timișoara, decision no. 561/17.06.1999, in Lucian Săuleanu, *Contractul de asociere în participație. Încheiere, executare, încetare*, Hamangiu Publishing House, 2009, p. 65 – 66: “The court appreciated that, wrongfully, the parties stipulated in contracts also a penal clause, because this is not particular to the convention of the silent partnership the manner it is regulated by the art. 251-252 Com.c., thus countervailing to its purpose. The Court of Justice of Timișoara, by means of the decision no. 561/17.06.1999, rejected the appeal declared by the claimant as unfounded”. In the sense in which the penal clause is admissible, Florescu D. A.P., Popa R., Mrejeru Th., *Contractul de asociere în participațiune*, Hamangiu Publishing House, 2009, p. 101, thus appreciating with reference to the definition of the penal clause according to the art. 1066 Civ.c.

²⁰ Regarding the legal nature of the penal clause and its role, Smaranda Angheni, *Clauza penală în dreptul civil și comercial*, Oscar Print Publishing House, Bucharest, 1996, p. 18-19

At the same time, the general partner bears *in integrum* both the loss of the association as well as the minimal quota of the profit, which follows to be directly supported from the patrimony of the general partner, who also becomes personally obliged to bear the losses suffered by the partnership.

The admission of such a hypothesis as legal equals to the admission as possible of the integral transfer of the risk to one of the partners, which fact contravenes with the intrinsic value of the partnership.

It cannot be justified the availability of a clause by means of which is established a minimal quota of profit by the prevalence of legal disposition according to which the parties have absolute freedom in determining “the form, the duration and the conditions of the association”, as long as their convention breaches the imperative general norms, the public order and the good faith (art. 5 Civ.c.).

The insertion in the contract of the exclusive right of one of the partners to take possession of a minimal monetary amount considered as profit quota in the agreement of silent partnership (the insurance of a guaranteed minimal income by one of the partners, irrespective of the financial result of the association), expresses a leonine clause, illicit and, as a consequence, lacking any effect, countervailing the law, the good faith and the public order, under the penalty of absolute nullity.

4. The effects of the partnership

In what concerns the partners' liability, a part of the legal doctrine²¹ appreciated that, in the absence of a contrary contractual provision, the silent partner will be liable until the concurrence of the contracted submission, which theory is based on a similarity of the liability with that of the commendatory partner, argued by the fact that the impossibility of the administration attracts a limited liability for the initial submission and, *per a contrario*, the exclusive administration determines for the partner (apparently) an unlimited liability.

Legal practice²² yet contradicted this theory, by showing that “... *the silent partnership does not have a distinct patrimony from that of the partners who, according to the provisions of the art. 253 and 254 Commercial code, have a personal right upon the goods submitted within the partnership un-opposable to the third parties, constituting over them an internal mandatory relationship, without external reflexes, the latter entity not being subordinated, thus, to the relative law of the companies*”.

In the analysis of the regime concerning the submissions of the partners, it was retained, in an opinion²³, that the goods submitted by the silent partner (secret partner) go under the property of the general partner (apparent), this being an absolute legal presumption.

In another opinion²⁴, it was argued upon the character of simple presumption of the regime on submissions regulated in art. 254 para. 1 Com. c.: “*the participants have no right of property over the goods submitted within the partnership event though these were achieved by themselves*”.

The art. 1.952 para. 1 NCC statutes over the regime of submissions in the sense that “*the partners remained the owners of the goods submitted for the use of the partnership*”, from which norm the partners are allowed to derogate, by establishing the transfer to co-ownership of the submitted goods, as well as of those obtained as consequence of their utilization, which rules, in fact, are found in the regulation of the general regime of the submissions within the companies without legal personality (art. 1.883 para. 1 Second Thesis NCC).

The transfer of goods into co-ownership of the partners becomes, in the perception of the art. 1.952 para. 3 NCC, a faculty acknowledged for the partner, who can establish also their

²¹ In such sense, Gabriel Chifan, *Asociația în participație*, in the Commercial Law Review no. 2/2005, p. 38-39

²² In such sense, the decision SCJ no. 6913/23.11.2001, in Commercial Law Review no. 1/2004, p. 202-203

²³ In such sense, Clara Ștefan, Emanuela Casandra, *Asociația în participație*, in the Commercial Law Review no. 12/1998, p. 78

²⁴ Lucian Săuleanu, *Contractul de asociere în participație. Încheiere, executare, încetare*, Hamangiu Publishing House, 2009, p. 96

reacquisition of kind at the closure of the partnership, thus accomplishing, in our opinion, a promise of separation (conventionally) or a transaction²⁵.

In the interpretation of a part of the legal doctrine²⁶ (which could be applicable, by similarity, also in the case provided by the art. 1.952 para. 3 NCC), the regime of coownership of goods submitted is governed by the regulations of the resolvable property, according to which the accomplishment of the condition of resolution (in the moment of termination of the silent partnership) attracts the retroactive dissolution of the acquirer's right, with the consequence of annulment of documents of disposition regarding the respective good.

In what regards the partners' liability against the third parties, grafted on the absence of legal personality of the silent partnership, are created legal relationships between the third party and the partner with which it contracted (art. 1.953 para. 1 NCC), the liability of the contractant-partner against the third party being a direct one.

To the extent to which the general partner closes legal documents with the third party by prevailing from the qualification of partner, art. 1.953 para. 2 institutes a presumption of solidarity (passive) of the partners' liability against the third party.

By similarity, to the extent to which the general partner states, at the moment when the partner is signed, the quality under which he/she acts is that of a silent partner, the third party will be held (responsible) against any of the other partners (thus instituting a presumption of active solidarity of the partners).

The expression comprised in the art. 1.953 para. 3 NCC may give birth, apparently, to certain issues of interpretation – however, in essence, the sense of the legal text could be appreciated as that stating that the partners, by exercising the rights generated by the contracts signed with a third party, benefit from this presumption of active solidarity instituted by law and which, in the perspective of the Commercial code, would not exist.

The clauses of limitation of liability for the partners against the third parties (respectively an eventual conventional limitation of the direct liability against the silent partner) are un-opposable to the third party.

The legal text institutes that, in our opinion, a relative presumption may be alienated if the general partner proves the content of his/her liability; thus, it is alienated the un-opposability by means of effective acknowledgement²⁷, yet the third party does not remain unprotected, in whom favor becoming applicable the provisions in the art. 1.953 para. 2 NCC, the partners' liability becoming solidary, so that the third party may follow any of the partners.

A question of interest is that of the specific liability of the general partner within the silent partnership, in which case he/she is not one of the partners, hypothesis accepted only in the French legal doctrine, on the grounds of the regulations on the mandate. In the Romanian legal system, such hypothesis is disputed²⁸ (regardless of the inexistence of a legal interdiction), by appreciating that it is inadmissible the appointment of a third party as general partner of a silent partnership, in comparison with the personal liability of the partners.

Nevertheless, compared to the dispositions of the IVth Title of the NCC, regulating the institution of administration of a distinct individual or entity, it could be appreciated that the position of the classic legal doctrine may be attenuated.

²⁵ Of course, terminologically, the expression is apparently impossible from a legal point of view. However, compared to the regulations on separation (to which is submitted the regime of co-ownership), the separation is realized proportionally with the defined quotas, the attribution in kind being regulated strictly from the point of view of the criteria. From this perspective, to the extent to which it would be appealed to such criteria, the attribution in nature of the submitted good is circumstantiated by a balancing payment to the other co-owners, so that the sentence "reacquisition" of the good, employed by the legislator, without considering a balancing payment, is admissible only for the qualification of such clause as having the character of a bilateral promise or, in another acception, of a transaction made for the avoidance of a conflict generated by a future separation (under the conditions of the art. 2.267 para. 1 NCC "the transaction being the contract by means of which the parties foresee or terminate a conflict... or by transfer of certain right from one party to another").

²⁶ Lucian Săuleanu, *Contractul de asociere în participație. Încheiere, executare, încetare*, Hamangiu Publishing House, 2009, p. 97

²⁷ in such sense, Ion Deleanu, *Părțile și terții. Relativitatea și opozabilitatea efectelor juridice*, Rosetti Publishing House, 2002, p.88-90.

²⁸ Lucian Săuleanu, *Societăți comerciale. Studii*, Universul Juridic Publishing House, 2012, p. 45

Thus, by applying the rules referring to this institution, it can be appointed by convention an individual with full capacity of exercise to administer individual goods pertaining to someone else or a patrimonial mass or a patrimony which is not under his/her property.

The liability for the administration of the goods is grafted, legally, on the theory of the mandate (such as in the French law), so that the general partner will not be liable in front of the contracting third parties unless he/she acts on behalf of the beneficiary, according to the art. 813 para. 1 NCC (in this case of the partners, who, here, have a solidary liability, founded on the idea of mutual consent in the designation of the general partner).

There is, however, a legal disposition which would bring arguments in favor of the position of the Romanian doctrine in case, and which would be the art. 816 para. 1 NCC, according to which the beneficiary (in this case, the partners) is liable against the third parties for the prejudices caused culpably by the general partner in his/her performance of attributions only until the concurrence of the obtained profit.

The norm, apparently, contravenes with the general principles of the partners' liability within the silent partnership, yet, in our opinion, compared to the application of the principle of *specialia generalibus derogant*, such provision has not as effect the inadmissibility of appointment of another person as general partner of the silent association, but, the most, a derogation from the general regulation provided in the art. 816 para. 1 NCC, by means of the provisions comprised in the art. 1.953 NCC.

A distinct matter submitted to controversy is represented by the internal liability of the general partner within the silent partnership. Thus, in the legal doctrine²⁹ it has been shown that the internal liability of the general partner is rather a contractual duty grafted on deceit or negligence, and not a general contractual liability for the non-performance of the duties.

We agree with this opinion, in the sense in which the silent partner cannot make the general partner liable for the fact that the partnership does not, eventually, register benefits, given that the partners are liable, *ope legis*, also for the generated losses.

From this point of view, are wrongful the courts' solutions establishing a contractual direct liability in the burden of the general partner for the impossibility of covering the imputed expenses by the silent partner, or the eventual payment of certain damages³⁰.

5. Conclusions

The new regulation of the silent partnership brought clearance upon several disputes concerning the legal nature of this associative form, the legal effects it bears, both regarding the parties and the third parties, of a certain legal limits of the parties' will on the duration and conditions of association, by means of a normative construction which, though simple in development, structures this entity within the complex framework of companies. It was put an end, thus, to the opposition between legal doctrine and jurisprudence regarding the inclusion of this particular form in the category of either the contract of the company, with all their applicative forms. Additionally, it was normatively stated over a jurisprudential issue which raised multiple interpretations, referring to the right of one of the partners to stipulate a minimal quota of the benefits for him/herself, accepted by certain courts as being under legal limits, while considering this matter from the perspective of admitting the silent partnership as a contract, thus governed by freedom and un-applicability of the nullity clause with *leonine* connotation. This form of association remains subject for analysis with reference to the norms governing the company, in

²⁹ In such sense, Lucian Săuleanu, *Societăți comerciale. Studii*, Universul Juridic Publishing House, 2012, p. 62

³⁰ Although the legal practice did not excluded the possibility of inserting in an agreement a penal clause, argued by the principle of contractual freedom received in the art. 225 Com.c. "the parties have the freedom to establish the form, duration and conditions of their association" – in such sense, SCJ – Commercial Section, decision no. 7710/17.12.2001, in the Commercial Law Review no. 9/2003, p. 194. Yet, the contractual freedom is censured by legitimacy, so that the solution appears to us as disputable *ab initio*, considering that the courts must verify, under priority, if a criminal clause, by its content, does not tend to detour the sense of the partnership.

order to outline the particularities of regulation, which could render the silent partnership an attractive form of association.

Bibliography

1. Andenas Mads, Wooldridge Frank, *European Comparative Company Law*, Cambridge University Press, 2009
2. Angheni Smaranda, *Clauza penală în dreptul civil și comercial*, Oscar Print Publishing House, Bucharest, 1996,
3. Chifan Gabriel, *Asociația în participație*, in Commercial Law Review no. 2/2005,
4. Cucu Cristina, Gavriș Marilena, *Contractele comerciale. Practică judiciară*, Hamangiu Publishing House, 2006
5. Deleanu Ion, *Părțile și terții. Relativitatea și opozabilitatea efectelor juridice*, Rosetti Publishing House, 2002
6. Florescu D. A.P., Popa R., Mrejeru Th., *Contractul de asociere în participațiune*, Hamangiu Publishing House, 2009,
7. Militaru, Ioana Nely, *Dreptul afacerilor, Introducere în dreptul afacerilor. Raportul juridic de afaceri, Contractul*, Universul Juridic Publishing House, 2013
8. Moțiu Florin, *Contractele speciale în noul Cod Civil*, second edition, revised and enlarged, Universul Juridic Publishing House, 2011
9. Popa Ioan, *Tranzacții comerciale internaționale*, Economic Publishing House, 1997
10. Popescu-Cruceru Anca, Udrescu Mircea, *Logistică și subsisteme logistice. Interferențe juridice în logistica firmei*, Ed. Tritonic, 2013
11. Sassu Horațiu, *Consecințe ale clauzelor leonine în cadrul contractului de asociere în participațiune*, in „Commercial Law Review” no. 6/2009,
12. Săuleanu Lucian, *Contractul de asociere în participație. Încheiere, executare, încetare*, Hamangiu Publishing House, 2009
13. Săuleanu Lucian, *Societăți comerciale. Studii*, Universul Juridic Publishing House, 2012
14. Ștefan Clara, Casandra Emanuela, *Asociația în participație*, in Commercial Law Review no. 12/1998,
15. Turcu Ion, *Aspecte din jurisprudență privind contractele referitoare la spațiile comerciale*, in „Commercial Law Review” no. 6/1994.