

THE COMPANY CONTRACT IN THE NEW ROMANIAN CIVIL CODE, REPORTING TO THE SPECIAL PROVISIONS OF LAW NO. 31/1990

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Abstract

This study proposes its principal objective the analysis of the company contract, one of the most updated and used in the present, both regulated by the Civil Code and the Law no.31 / 1990. The general conditions of validity and the specific elements of the contract are presented and analyzed as well as the effects and changes made to the contract and the legal consequences concerning the constitution of the society. The desire to reform the Civil Code is not enough, a unitary conception of matter has to be promoted in the sphere of civil law, to avoid a chain reaction that will include amendments to other laws in force and to determine the development of others. The present study provides an overview of trying to create a new perspective and a more complete analysis.

Keywords: *limited liability company, company contract, associate, Civil Code.*

JEL Classification: K12, K22

1. Preliminary considerations

On the regulations of the Civil Code of 1864, the company contract became misfit to the needs of those who choose to join efforts by making a deposit to jointly pursue an activity in order to obtain benefits. The introduction of new regulations in the matter of the company contract is absolutely necessary so that this legal instrument to meet the requirements of modern legal relations and European legal standards.

As a result of joining in the same body of law the relationships of both civil and commercial law of the company contract, governed by the art. 1881-1948 from the Civil Code, it represents the foundation of formation of the company called simple, even of the companies with legal personalities which make the subject of regulation specific to the Law no. 31 / 1990.²

The company contract in the light of the Romanian legislator, is a special legal instrument so that it can be translated into real economic relations, characterized primarily by speed and pragmatism. Becoming a legal nature complex, different from all other contracts, by the rights and obligations it guarantees between members, determines the creation of an entity that will manifest itself in the field of legal relations, but distinctly, as it is equipped or not by the law, with legal personality.³

2. The company contract in the new Romanian Civil code

The company contract is the core of the meeting of wills of the associates to manifest itself in the field of legal relations as a unit, the society it creates. Of legal texts, the contract of society can not be imposed under any circumstances by law or by the court of justice. Regarding certain situations it is true that the law may require the parties, decided to conclude the partnership agreement, some form of a company but can not substitute their will to conclude the legal act of its generation.

If the intention of the parties according to Code art.1881 civ., is superior in terms through the option of closure of the company contract, once asserted, it should come under the legal provisions regarding the general and special conditions of substance, form and content of the contract and demands of morality.

The Civil Code provides through art. 1881, paragraph 1 that the company's creative act of association is the foundation of the company and the exclusive result of the agreement between the

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² Codariu-Lungu, I.E, *Definiția și caracterele juridice ale contractului de societate în lumina dispozițiilor generale ale noului Cod civil prin raportare la prevederile speciale ale Legii societăților*, in „Dreptul” no. 1/2014, p.21.

³ *Idem*, p.16.

wills expressed by contractors associations. The company contract is a lucrative contract, consensual, mutually binding, with a honor title, cumulatively, with a successive performance while in principle intuitu personae, whereby two or more persons undertake mutually cooperate for the conduct of joint activities and contribute to it by certain contributions in money, goods, or subject specific knowledge in order to share the benefits or to use the economy that may result.⁴

As a rule, the company contract includes obligations by partners animated by a common purpose. For other sinalagmatic contracts parties are lenders and borrowers at the same time in the contractual relations between them, meaning that each owe each other something (do ut des - each gives and receives something in return) while in the company contract associations are not in a legal relationship creditor - debtor, they do not owe each other something, but they take the responsibility to cooperate mutually, to exercise and to contribute to it through some consideration for the stated purpose of obtaining a patrimonial advantage.

According to the contract terms regarding profit made by the company, associations do not owe their contributions to one another, but put them together to form the share capital, the activities they undertake are not carried out one over another, but in the benefit of the company and the benefits they get are not from each other, but by division among them.

The provisions of paragraph 2 C. civ. art.1549, is an argument in support of a mutually binding character of the contract regarding „... if the agreement is by both sides, the failure of a party to terminate the contract does not trigger the obligation to other parties unless the benefit unenforced had after circumstances to be considered essential”⁵.

The company contract must fulfill all general conditions of validity required by law to fund any legal act: the ability to conclude the legal document, the valid consent expressed, a specific object and legitimate, lawful and moral cause.

Regarding the issue of the potency to conclude the partnership agreement we considered appropriate that every part must be investigated separately on each of these subjects of law, because neither the provisions of Law 31/1990 and any current Civil Code does not contain express provisions on the ability that the individual must have signed the contract of company, becoming incidents the general rules contained in the Civil Code in conjunction with the specific company contract.

Conclusion of the legal consequences company has outstanding heritage associations that lessens as a result of the contributions, it is essential that the individual to have full legal capacity to serve as a society.

The effect of the article of companies in the case of companies with legal personality translates through out the good from shareholder assets and assets of the company's entry in the case of companies with legal effect is to exit the asset from the individual heritage and enter it into joint ownership with the members which make up society.

I considered appropriate and of modern time to analyze and to point out that the very welcomed regulation contained in the new Civil Code in the matter of contributing in the company with the common property of spouses, which will have important implications important especially in limited liability companies governed by Law No. 31/1990.⁶

According to art.348 Civil Code these items are subject to doubt the limited liability company under the conditions provided by law, supplementing the provisions of art.1882 alin.1 C.civ, which sets the conditions under which such goods can be achieved, by providing that „A husband can not become associated with contribution of common property without the consent of the other spouse ...”⁵

Therefore, the legislator establishes the rule that the lack of prior written consent of the other spouse is sanctioned by making the company contract nule in the conditions set by the art. 347 alin. 1 Civil Code.

Any person may obtain an associate quality, unless the cases in which the law provides otherwise, in result any company which has acquired legal personality under the law can earn an

⁴ Codariu-Lungu, I.E., *Societatea neregulat constituită în configurarea noului Cod civil și a Legii societăților nr.31/1990*, in „Dreptul” no. 6/2014, p.12.

⁵ *Idem*, p.13.

⁶ Gheorghe C., *Nulitatea contractului de societate și nulitatea persoanei juridice în noul Cod civil*, in „Dreptul” no. 6/2010, p.14.

associate quality in another company by the conclusion of the company contract according to article. 1882, alin. 2 of the Civil Code.

Exercising the rights and obligations of the legal person is achieved through their management from the date of their creation. To produce juridical effects, the general rule is that the consent must be externalized, emanated from a person with discernment, to be expressed with the intent to produce legal effects and is not affected by vitiated consent.⁶

According to article content. 1204 of the Civil Code. „Consent of the parties must be serious, expressed freely and knowingly”. According to art. 1205 paragraph 1 from the Civil Code., Is voidable in the terms of the contract if it is concluded by a person who at the time of its conclusion is, if only temporarily, in a state that puts her/him in the inability to realize the consequences of his act

In certain specific cases, it might not be possible to establish a company or the initiators of the future company may not want its immediate establishment. Therefore, in such situations, it is considered that the possibility of making promises to end later contract can not be excluded.

The promise is a simple pre-contract and not a contract by the company itself. Therefore such a promise obliges parties in the future, within a certain period to constitute a company.⁷

The essential elements of the future bylaw must include in addition to the promise of the companies will to associate for the joint conduction of an activity by setting up contributions in order to share profits, associations, the shape of the society to be born, duration, subject, nature and extent of contributions, their share profits and losses. The practice court ruled not to consent to replace the promissory judgment that refuses to conclude the contract, regardless of the reasons for refusal and even if the beneficiary has executed its own obligations. Such a decision would conflict with the *affectio societatis* element which is exclusively the result of the will of the parties, which element is the exclusive result of the will of the parties to associate and can not be substituted by other ways.

Under paragraph 2 of the Civil Code art.1225., for the validity of the contract the company contract must be determined and licit, under penalty of nullity and the parties benefit must be determined or at least determinable and lawful, also under penalty nullity collaborated with paragraph 2 of the Civil Code art.1226.⁸

I considered it appropriate to emphasize that the object of the company contract in no way be confused with the object of the company. The object of the contract is the association of two or more persons, by pooling the contributions for pursuing common purposes, of sharing the benefits and use of economy that may result, and the object of the company is the totality of activities that the company will carry, specified in the contract. The goal of each partner in a limited liability company proposed by the conclusion of the company contract is achieving pecuniary advantages, respecting the legal entities established as vehicles for achieving them, in compliance with legal requirements for validity.

Making a social capital by bringing contributions from the partners (key element of the articles of association) constitutes the premise for creating the future company and an essential condition for operating the company. The nature of the rights the associates received in exchange for contributions made as a contribution to the capital formation.⁸

Participating associates in profits and losses in the company is an important element of the contract of the company, according to article 1881 of the Civil Code the term benefits designates any patrimonial gain or a gain in fungible material or other material gain.

Art.1881 regulation contained in paragraph 2 stipulates that: „each associate contributes to bear losses proportional to the distribution of benefits, if the contract does not otherwise provide "dividing the profit realized by the company determines the existence of the associates correlative obligation of supporting the losses incurred by it. The percentage of bearing losses is equal to the profits in the absence of a contrary rule in the partnership agreement. Both the Law no.31 / 1990 and the Civil Code as regards of determining the extent of profit participation rights and correlative

⁷ Codariu-Lungu, I.E *op.cit.*, (Dreptul nr. 6/2014), p.16.

⁸ Veress, E., *Modificările aduse societăților cu răspundere limitată prin O.U.G. nr.54/2010* în „Curierul Judiciar” no. 9/2011., p.21.

obligation of bearing the losses, establishes the freedom of decision for the associates, they have the possibility that within the company contract, to act jointly in this regard.⁹

Unless otherwise agreed between the partners, the criteria for determining the extent of the right to participate in and profit from the losses is the obligation of the associates and is one of the contributions to social capital by the associates.

Regarding the contractual freedom of the contracting parties, this is manifested both in terms of the freedom of members to decide the completion of the contract or ending of the contract and even in the form of freedom for the associates to decide the wording of the articles of association, including the choice of the form of company to take shape as well on their common interests, but also individual.

Companies Act and the Civil Code give the parties the possibility that the limits specified, to decide the wording of the articles of association, giving them entitlement in certain circumstances to derogate from its provisions. Law No.31 / 1990 establishes clauses concerning companies which are subject to its regulatory domain, clauses to be included in the contract.

These clauses are regulated differently, the company is a general partnership, limited partnership or limited liability Article 7, or it constitutes a joint stock or limited liability article

Regardless of the form of company constituted, the company contract is a company contract that must contain clauses about the identity of the members, identifying future entity (company name, legal form, registered office), on the company's subject duration society, social capital, on administration and representation of the company, rights and obligations of associates, associates withdrawal and on the dissolution and liquidation of the company.¹⁰

Companies with legal personality provided by Law 31/1990 are the result of wills associates manifested by the conclusion of the contract, in which there must be presented cumulatively all three features: the contribution of associates, *affectio societatis*, and common participation in profits and losses of the company. The fundamental difference between simple companies and companies with legal personality is made with subjectivity, they are endowed with legal personality, which allows them to act as a matter of law different and distinct from community associates that compose them, but they are confused with them.¹¹

Within companies governed by Law 31/1990, associates have, in principle, a limited liability for the debts of social, borderline contribution to capital formation. Regarding the Law no.31 / 1990 that regulates the establishment, forms, organization and arrangements for the termination of the companies with legal personality, but without giving them a definition. In these circumstances, the definition of consumer company will be outlined by calling the regulations of Law 31/1990 and specifically the general provisions of the Civil Code, Article 1881 defines the contract. The provisions of the Civil Code art. 1881., can establish the ground for the companies regulated by the definition of Law 31/1990 only to the extent that they are based on setting up their contract. Law No.31 / 1990 provides a particular form of limited liability sole ownership that are not within the art.1881 Civil Code regulations. Whereas it is the fruit of will manifestation, can never have a bylaw, which requires *ab initio* at least two wills which collide. The limited liability company with sole shareholder is established only by statute, which is a unilateral legal act. The regulation contained in the Civil Code in matters of the company contract is not in itself sufficient to define the concept of a company within the meaning of the Law no.31 / 1990, it must be supported by special regulation contained in this law. The company with limited responsibility regulated by Law 31/1990 is, by essence, a company with legal personality for its setting it is not sufficient to close the company contract, but, it must be met by subsequent formalities of registration and licensing for it to operate, and advertising for opposing third parties.¹²

⁹ Gheorghe C., *op. cit.*, 2010, p.16.

¹⁰ Veress, E., *Discuții privind revocarea administratorilor și transmiterea părților sociale la societățile cu răspundere limitată*, in „Dreptul” no. 9/2010, p.15.

¹¹ Codariu-Lungu, I.E., *op.cit.* (*Dreptul nr. 1/2014*), p.12.

¹² Săuleanu, L., *Regimul juridic al asocierii în participație în noul Cod civil*, in „Revista de Drept Comercial”, no. 12/2011, p.13

Legal personality of these companies according to art. 1889, paragraph 3 of the Civil Code., is acquired within the registration in the trade register at the date of the registry, unless the law provides otherwise. Exceptionally, a limited liability company may have a capacity of anticipated, restricted use and may acquire rights to assume the obligations of the date of the act of creation, but only if they are required to take place legally.

Companies under Law No.31 / 1990 will be subject to a prior special regulations contained in this law, and only in the alternative and in addition, the rules concerning both the Civil Code of association and those relating to the legal entity general. The limited liability company acquires legal capacity from the date of registration in the trade register if by the company contract has been appointed the administrator representing the company. If the administrator has been appointed subsequently by the will of the associates expressed within the conditions imposed by law, legal capacity is acquired from the date of appointment of the administrator.

According to art. 193 of the Civil Code, the most important effect of legal personality is the limitation of liability for company debts for the associates, although this does not directly refer to this effect.

Under the articles of association non-property rights are born, referred to in legal literature „French political rights” (the right of the associate to inform about businesses and the situation of the company, the right to participate in the decision making within the company, the right to administrate the society when, by the articles of association administrator where not appointed) and rights of patrimonial nature (the right to participate in the benefits from the profits made by the company, the right to transmit the parties of interest held in the company, the right to transmit parties of interest held in the company, the right to use the social goods, entitled to reimbursement of expenses incurred in the interest of the company, the right to join a third party on social rights, the right to refund contributions and sharing surplus remaining after liquidation) Interesting the obligations from the company contract, the obligations which the associates have between each other (the obligation to bring something of interest to the society, the obligation to cooperate for obtaining the common purpose of the association, the obligation to contribute to the losses of the company), common obligations of the associates for the company (the obligation for fidelity and non-contest), and the obligations of the associates for the third parties which come in juridical proximity with the society.¹³

Comparing the particularities which are presented by the rights and obligations born in the person of an associate from the company contract from which the company is formed, from the Law no. 31/1990 with a simple company contract, it is noticed that the contract constitutes the common right. For the rights and obligations which are born from the company contract, for the associates they are the same no matter the juridic form of the company with the juridical personality which is constituted and they are similar to the rights and obligations resulted from the contract of a simple company.¹⁴

We analyzed the non-property rights and the patrimonial rights of the associates, underlining their specificity in relation to the form of company that presents itself through the contract of society. In the category of non-patrimonial rights it is included: a) shareholders entitled to participate in decision-making in a company involving two components, namely, the right to attend shareholders meetings and voting rights therein; b) associates right information and have control on the situation of the company; c) the right to request the convening of the general meeting of shareholders on matters falling within its remit. Patrimonial rights of the shareholders are mainly: a) the right to dividends; b) the right to cancel shares in the company; c) the right to the side remaining due to the liquidation of the company.¹⁵

French doctrine took shape three views on the functioning of the company being created: a first support absence of any current activities of the company during this period, on the principle that is not yet registered, the company may not engage in economic activities; the second current

¹³ Săuleanu, L., *Regimul juridic al aporturilor din cadrul contractului de asociere în participațiune*, in „Revista de Drept Comercial” no. 2/2002, p.25.

¹⁴ Codariu-Lungu, I.E., *op. cit. (Dreptul nr. 1/2014)*, p.142.

¹⁵ Piperea, Gh., *Concepția monistă în noul Cod civil: intenția și realitatea*, in R.R.D.A. no. 6/2011, p.18.

admits an activity limited both by importance and by term, the third current, more generous, admits the event of a real exploitation of social activity on the grounds that the company begins work on the day the contract was signed by the company.

Our legislature has opted for a limited function in society during its founding period, strictly limited to signing legal documents necessary for its establishment to apply through art. 205 para 3 of the Civil Code.

The founders have the opportunity, both before the closure of the company, and subsequently in other moments until the company registration in the trade register is finished, to close certain legal acts in account of the future legal entity so that it becomes necessary to determine the effects and the legal nature of such acts.

I appreciated that the distinction between legal acts completed before the materialization of the company contract and legal documents concluded after this date but prior to the registration in the commercial register of the company.

It must also be distinguished between legal acts necessary for obtaining legal personality of the future company and those which are not necessary for this purpose.¹⁶

Determining the legal nature of the legal documents concluded in its behalf while the company is still being formed will be differentiated as they are needed or not in legal foundation of the future company. According to legislature, the legal acts concluded on behalf of the company are needed to acquire legal personality will be automatically given, after registration, in the trade register under art. 205 paragraph 3 of the Civil Code, while legal acts which are not necessary for a future society, concluded either by persons designated, but exceeding the powers established by the articles of association or non-designated persons oblige the future company to undertake business management. (Art.210 Civil Code).¹⁷

These latter legal documents are subject to ratification by the company after the acquisition of legal personality under Art. 53 of Law No.31 / 1990 in conjunction with Article 205, Paragraph 4 of the Civil Code. Whether the entity that is born has legal personality or not, the legislature has provided special rules derogated from ordinary law for failure to comply with the legal situation for the formation of the company.

Both the Civil Code and the Law 31/1990, provides the opportunity for the partners or for the company to remedy by its management bodies the irregularities committed when the company is incorporated, ultimately nullity being an external solution.

The legislator gives the right, separated from the right of associates, to any person wishing to apply to court, the obligation of the associates or for the company to take the necessary measures to regularize the company, to prevent the disappearing of the wrong created company.

Conforming art. 1933, paragraph 1 C. civ., even if the nullity is absolute or relative, the society can be saved by removing the causes of nullity before the procedural stage of conclusions on the base of the cause in the face of the instance.

The judge is obligated to, in a action of affirming nullity or not, to bring in discussion the possibility to remedy the cases of nullity that affect the contract.

Conforming to the article 1933, paragraph 2 C.cv, the judge is obligated to fix a term for the parts to have a possibility to cover the nullity even if those are against it. In the case of the law no 31/1990, the consequences of not respecting the legal dispositions concerning their constitution differs after the moment of seeing the irregularities made.

In all the situations in which you notice irregularities, the judge delegates at the registry office to notice the associates to have them fixed, and, if not, he will close the company registration.

The elimination of the irregularities noticed after the company being enrolled in the registry of commerce and obtaining juridical personality is a much needed obligation, which is made through its executive organs.

¹⁶ Man, A.Golub, S. *Efectele patrimoniale ale pierderii calității de asociat la societățile comerciale de persoane și societatea cu răspundere limitată*, in „Revista de Drept Comercial” no. 7-8/2006, p.13.

¹⁷ Veress, E., *op. cit.*, 2011, p.16.

The obligation of removing those irregularities is noticed in article 48, paragraph 1, from Law no 31/1990 which, does not mention the sphere of knowledge of these irregularities. The action of removing can be made in case of seeing a irregularity for the making of the company no matter of its objective.

In the situation of such irregularities which have gone out of control of legality from the judge delegated and where noticed after the enrolling of the company, the company is obligated to take measure for its remedy, in 8 days from the date of notice. If the company does not remedy these irregularities in the term from the article 48, paragraph 1, Law no. 31/1990, the remedy can be made as an action in the face of judgment at the solicitation of any person which has a legitimate interest.¹⁸

The legislator gives priority, in all the circumstances, to the save of the existing company, in the purpose of assuring the stability of the law circuit, to protect the third parties which have encountered the company in law suits because of its problems during registrations, but even the associates which are out of decision power. In consequence, even when the nullity appears, it produces a particular effect, not typical, from the general effects of the nullity.

In the last part of the study, we will be analyzing the normal formed company, representing the company created with all the conditions of form and form, general and specific, seen by the law for the validity of the company contract, even if the case is that all the formalities constituted by the law for becoming a law personality. In the case of the societies with law personality despite of irregular made company. The law takes action with precise and detailed rules, organizing their function and the competences of the organs by their well-established principles.

In the case of those companies, after the enrollment moment in the registry of commerce and after they take the juridical personality status, the will of the associates is very much blurred, being replaced with the will of the legislator. The rules of functioning of the company are established, in the first place by the legislator and only in auxiliary by the associates, there where the legal text permit the derogation or adding from or to their summary.¹⁹

In no case, however, can not be derogated from the company's organizational structure governed by law, stipulating the company contract other organs of society, nor can take certain tasks from one organ to be assigned to another body corporate.²⁰

It follows from the whole of the Law 31/1990 that the company's operation irrespective of the legal form which it takes, is provided by three categories of organs: organs of deliberation and decision, administration and representation bodies, supervisory bodies and controller of the company. The existence of such bodies is forthcoming in the organizational structure of each form of company governed by the law 31/1990, in turn, their functioning and powers are less or more clear-cut legal, depending on a specific type of society. Regarding the dissolution and liquidation of the company, completion of these transactions are equivalent to stopping the company, but additionally for delisting from the trade register, after which their legal personality is ceased and they disappear as subjects of law in the field of legal relations.

3. Conclusion

We can affirm that the exclusive will of the associates, the contract of the company can be qualified as a foundation of society. Despite all of this it is very well known that, in the absence of the contract, the company can not be made, because the society contract does not play the same role in the constitution of the simple company, like those from the Law no. 31/1990. In this case, of this company, as how we sustained previously, the society contract must be completed with a series of formalities which constitute the effect of getting a juridical personality from them. In conclusion, the society contract is the act which conditions the existence of the society, fixing its rules by which it will function.

¹⁸ Gheorghe C., *op. cit.*, 2010, p. 15.

¹⁹ Codariu-Lungu, I.E., *op. cit. (Dreptul no. 6/2014)*, p. 28.

²⁰ Man, A, Golub, S, *op.cit.*, 2006, p. 28.

Not taking in account the mutations in social, economical and juridical life of our country and not taking account of the age under which our existence will be present, the company contract will never become unimportant, making a live interest stay, the interest for studying these complex problem.

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