Rodica Diana APAN
"Dimitrie Cantemir" Christian University of Bucharest, Faculty of Law Cluj Napoca

Theoretical article

DOING BUSINESS IN ROMANIA

THE PARADIGM OF THE (UN)LIMITED LIABILITY OF THE ASSOCIATE FOR THE PROFESSIONAL OBLIGATIONS OF THE COMPANY WITH LEGAL PERSONALITY

Keywords
Separation of patrimony
Confusion of patrimony
The creditors of the company
The creditors of the partner
Extension of the partner's liability for the company obligations

JEL Classification
K20

Abstract

The types of business with legal personality have as one of the main traits the own patrimony. The company with legal personality is liable with its own patrimony.

The new Civil Code launches the theme of the separation of patrimony, which means that this own patrimony shall be different from the personal patrimony of the person having the capacity of partner or administrator in one of the types of business with legal personality.

Company Law 31/1990 provides for cases of extension of liability for the company's obligations, from the legal personality company's own patrimony to the partner's patrimony in certain types of business.

The partner's own patrimony is not protected in this case either but rather exposed to being pursued by the partnership's creditors. The subsidiary character of the pursuance softens the liability but is insufficient to ensure the full protection of the partner's patrimony.

On the concept of patrimony

The concept of own patrimony of the legal entity, as a constituent *sine qua non* of its legal personality is developed in the doctrine (Reghini, Diaconescu, Vasilescu, 2013, p. 303-305) which reveals that, in general, the assets of the legal entity, and therefore of corporate types with legal personality « *is INHERENT, in the sense that it exists distinctly from the patrimony of any other legal entity, and from the patrimony of each of the subjects of law that make up the entity in question and is also AUTONOMOUS, independent from any other property, with which there is no necessary relationship.* »

When it comes to companies with legal personality, the contributions go into the corporate assets, according to Art.1883, paragraph 1, sentence I of the Civil Code (explained in Baias et al. 2012 Art.1-2664) nothing that, in accordance with the provisions of Art.1887 of the Civil Code, it represents common law in terms of companies.

The principle mentioned above is reiterated in the case of companies with legal personality regulated by Law no. 31/1990, in Article 65 of this law, namely:

"Art. 65. - (1) In the absence of a stipulation to the contrary, the assets established as a contribution in the company become its property since its registration in the trade register. «

The legal entity, under Art. 193, paragraph (1) of the Civil Code, is liable with its own patrimony (own assets) for its debts, except where the law provides otherwise.

"Art. 193. - (1) The legal entity participates in its own name at the civil circuit and is liable for the obligations undertaken with their own assets, except where the law provides otherwise."

Companies with legal personality regulated by Law no. 31/1990 are liable with their patrimony (the company's) for their obligations, under the provisions of Art. 3, paragraph 1 of this Law: « Social obligations are guaranteed with the social patrimony, the principles governing being that companies regulated by Law no. 31/1990 are holders of rights and obligations in their own name and are liable with their own patrimony, so the company creditors can pursue the corporate assets, and the liability of the partners is limited to the contribution brought to the company's capital. Moreover, the doctrine (Piperea, 2012, footnote 1) sends to the type of legal person and identifies it as « *the technique for limitation of liability.* »

Application of the principle of separation of patrimonies by establishing a legal entity, as a technique of limiting the extent of liability, although effective in itself, is generally hindered by the guarantee of obligations of the company with legal personality by the partners and/or their managers, particularly for obligations arising from the credit contract, which are secured by endorsement of promissory notes and by concluding personal suretyship contracts, (see Turcu, Botina, 2013).

Separation of patrimonies vs. confusion of patrimonies; theories applicable to the patrimony of corporate type legal entities governed by Law no. 31/1990

Based on the regulation contained in the Civil Code, in Art. 214 regarding the separation of patrimonies, in doctrine (Baias, et al. 2012 p.207-213 and 243-246), approaches of one of the core concepts for circumscribing the legal entity were outlined - the separation of patrimonies.

The theory of separation of patrimonies is included in Art. 214 of the Civil Code and consists of: - the separation of the assets of the legal entity and the inherent patrimony of its management members - paragraph (1); - prohibition for management members of the legal entity (*cannot*) to use in their profit or interest or in the interest of third parties, the assets of the legal entity or any information they obtain in virtue of their office, unless they have been authorized to do so by those who have appointed them.

"Art. 214. - (1) Members of management are required to ensure and maintain separation between the patrimony of legal entities and their own patrimony.

(2) They cannot use in their profit or interest or in the interest of third parties, the assets of the legal entity or any information they obtain in virtue of their office, unless they have been authorized to do so by those who have appointed them. «

The theory is provided in the Civil Code as an obligation of members of management, obligation which has two components: ensure the separation of patrimonies and maintain this separation. The two components are located in a temporal progression: if the first component refers to the *ab initio* time, the one in which, due to the legal establishment of the legal entity, members of management, exercising their powers in full, conferred by the articles of incorporation and/or by law, must ensure separation of patrimonies; the second follows the character of continuity, the constant exercise of this obligation, and it means maintaining this separation during the "*life*" of the legal entity. (The separation of patrimonies in jurisprudence is held as follows: "Talking about two distinct patrimonies - the one of the company and that of the partner - it is not possible to transfer property values from the first to the second, except under the law" (see Decision 402/C/2009/R), as the doctrine states "Le droit de sociétésn'organise pas toujoursuneséparation absolute de patrimonies" (V. Merceron, 2013, p.20)

The separation of patrimonies, as an obligation of the members of management of the legal entity, subsumes the general obligation stipulated in Art. 213 of the Civil Code, according to which members of management of a legal entity must act in its interest, with the prudence and diligence required of a good owner. (For legal entities of administrative law, the conditions which establish and according to which the patrimonial liability of public administration can be held, see Fodor (2008, p.231-299). The same theory of separation of patrimonies is continued by the regulation on conflict of interest. All 3 components of the regulation contained in Art.213, 214 and 215 of the Civil Code have their counterparts in Law no. 31/1990, namely: Article 3, paragraph 1 corresponds to Art.214 of the Civil Code and regulates the separation of patrimonies; Art.144 corresponds to Art.213, and a number of articles correspond to Art.215 and regulate the conflict of interest. Law no. 31/1990 to prevent confusion of patrimony, namely the confusion between company assets and the patrimony of the founders, shareholders, partners, administrators and their relatives, includes a series of legal means which establish a strict regime applicable to the relationships/transactions of these people and the company. (Settlement given under the principles developed at the *OECD Principles of Corporate Governance* 2004, Organisation for Economic Co-Operation and Development).

The theory of separation of patrimony (distinct from inter-patrimonial separation, which cannot be mistaken for patrimonial divisions or affectations, (Piper, 2012) is opposed by the theory on confusion of patrimony (Turcu, I., Botina, M., 2013, p.35 and Catana R., 2013, p.102) synthetically expressed in the doctrine as "The reverse of separation of patrimonies - which reveals the actual legal personality"(Catana R., 2013);

A statement regarding the scope of Law no. 31/1990 is that the entity which is obliged to keep a separation of patrimonies, that is the holder of the obligation shall be given an extended sense, to include not only the manager, but also partners/shareholders, founders, which is also included in the doctrine. "If the separation of patrimonies it violated by the founders, members or partners of the legal entity, and if the administrative members violate the separation of patrimonies, we reach a confusion of patrimonies, with consequent liability of the one who created the confusion, at the expense of the separation of patrimonies, liability which is undertaken for the debts of the legal entity"(Baias, *et al* 2012, p.208).

On the extension of liability for company obligations

From company patrimony to partner patrimony for certain corporate types

Defeating the thesis on limited liability of partners for company obligations and its consequences

The partners of certain corporate types with legal status, under Law no. 31/1990, namely those of the general partnership and the general partners in limited partnerships and those in limited companies, under the law/*ex law*, are liable for the company's obligations, unlimited and jointly - Art. 3, paragraph 2. (Doctrine in Sauleanu, 2014, 2nd and 3rd note cited refers to efforts during the XIX - XX centuries of avoiding "liability in infinitum").

Notwithstanding the principle established by Art.3, paragraph 1 of Law no. 31/1990, according to which social obligations are guaranteed with social patrimony, the liability of the general partners in a general partnership and of partners in limited partnerships and limited companies for company obligations is characterized by unlimited extension to the contribution to company capital and the solidarity among partners.

An essential component which is added to the liability covered by Art. 3, paragraph 2 of Law no. 31/1990 is the subsidiarity of partners' liability towards the company's liability, subsidiarity regulated by Art.3, paragraph 2, second sentence of Law 31/1990. Creditors of the general partnership and those of the limited partnership and limited company will go against it first of all, for corporate obligations, and only if the company fails to pay within 15 days from the date of notice.

Position of company creditors in relation to the patrimony of the partner

In essence, the position of company creditors in a general partnership and in a limited partnership and limited company in respect of the partner's own patrimony is: they can pursue, based on the provisions of Art.3, paragraph 2 of Law no. 31/1990, the patrimony of the partner, its liability for company obligations being unlimited and joint, subject to a correlative condition, namely the subsidiarity towards society liability. (Sauleanu, 2014, says the hypothesis of conditioning creditors to go first for the foreclosure of the company dilutes the unlimited and joint liability of the partners, but also that the legislator does not distinguish between the obligations of the company, neither about the object nor the nature for which liability can be attracted).

Practice reveals that, in terms of the potential of litigation, the hypothesis of an appeal on enforcement, formulated by the partner or by his personal creditor, to challenge the foreclosure initiated by the company creditor against the

partner, without previously addressing the company, that is, in relation to the non-fulfilment of the subsidiary nature of the partner's liability. (see the doctrine, Carpenaru, 2012).

We note here, unlike the conclusions of the patrimony analysis carried *ut supra* for the authorized individual and the simple partnership, in terms of pursuit by creditors of the patrimony of an authorized individual or simple partnership:

- the professional creditors of the individual pursue the assets affected to the profession in the affectation patrimony, an inter-patrimonial division of this person, and the professional creditors of the company pursue the common assets of the partnership;

- creditors who have a claim deriving from the professional activity - the creditors of the company, this time, will pursue - with preference/priority - the assets that are part of the company patrimony and, in the alternative, to the extent that the debt will not be paid within 15 days, the assets from the partner's own patrimony.

The extent of liability for partners to company creditors is unlimited, similar to that of the authorized individual to professional creditors, while the partners in a simple partnership are liable in a limited manner, in proportion to their contribution to the partnership's affectation patrimony.

In conclusion, the legal entity is the holder of rights and obligations in its own name and liability for the obligations of the company, in determined cases, based on the provisions of Art.3, paragraph 2 of Law no. 31/1990, *ex lege* hypothesis on the extension of liability for company obligations toward others, namely towards the patrimony of partners.

This extension operates *de jure*, it is the exception, where "the law provides otherwise" stipulated by Art.193, paragraph 1, final sentence, that is, *in concreto*, regarding the liability of partners for the company's obligations contained in Law no. 31/1990 for partners in general partnerships and partners in limited partnerships and limited companies.

Law no. 31/1990 provides, in Art.3, paragraph 2, in order to protect the company's creditors, the ownership by them of other assets, which join the company's patrimony. I am talking about the personal patrimony of the partners of a general partnership and limited partnership and limited company, if and only to the extent that the company does not pay within 15 days from the date of delay.

As a consequence, the constitution of the legal entity - company, in these circumstances, is not meant to be technical, in legal terms, for the types listed above. For the categories of partners indicated *ut supra* limiting the extent of liability is no longer maintained, being removed *ex lege*, in order to protect company creditors, so it has a protective nature.

Interference with insolvency proceedings

A provision with consequences similar to Art.3, paragraph 2 of Law no. 31/1990 existed in insolvency matters in Art.126 of Law no. 85/2006 and in Art. 164 of Law no. 85/2014 and was characterized as "an automatic extension of procedure, from the debtor wealth to the personal wealth of the partner, with unlimited liability toward company debts." (TurcuBotin, 2013, p.417), bringing forth the possibility of foreclosure for the categories of partners nominated *ut supra*, by creditors, applicable if the assets that make up the wealth of a general partnership or a limited partnership (as well as an economic interest group) are not sufficient to pay the debts recorded in the consolidated final table of claims. For such a hypothesis, the syndic judge will authorize foreclosure, under the law, giving a final and enforceable sentence against the partners with unlimited liability, which will be executed by a liquidator, through a bailiff.

"Art. 68. - (1) In the case of a claim made by a general partnership or limited partnership, the claim will be deemed made by the partners with unlimited liability or, under Art. 70, and against them.

(2) A claim made by a partner having unlimited liability, or against him, for his debts, will be without legal effect regarding the general partnership or limited partnership of which he is part of.

(3) The provisions of paragraph (1) and (2) shall apply, accordingly, in respect of claims brought by economic interest groups or their members."

"Art. 164. -If the assets that make up the wealth of an economic interest group or a general or limited partnerships are not enough to pay the debts recorded in the consolidated final table of claims, against the group or company, the syndic judge will authorize foreclosure, under the law, giving a final and enforceable sentence against the partners with unlimited liability, which will be executed by a liquidator, through a bailiff."

Thesis for the limited liability of partners for company obligations and their consequences

The provisions of Art. 3, paragraph 3 of Law no. 31/1990 regulate the situation of liability for company obligations for shareholders in the joint stock company, limited partners in a limited partnership and limited company, as well as for partners in a limited liability company who are liable only to the extent of the subscribed capital, consequential, the position of creditors for these corporate types (social creditors) will be different in relation to their members. Given the thesis set

forth *ut supra* on limited liability, company creditors will not pursue a partner's patrimony as the liabilities of the company are limited to the contribution to the capital of the company.

Another category of creditors, the personal creditors of shareholders in a joint stock company, limited partners in a limited partnership and limited company, as well as for partners in a limited liability company, in accordance with the provisions of Art. 66, paragraphs 1 and 2 of Law no. 31/1990, may exercise their rights throughout the duration of the company, only on the part of the partner benefits due after the balance sheet, and after dissolution of the company, on the part that belongs to the partner by liquidation. The personal creditors of the partner may still withheld, during the duration of the company, under the provisions of Art. 66, paragraph 2, the parts that belong to the partners by liquidation (the non-admissibility of garnishment on the shares held by the partner - debtor; the garnishment being admissible only for the parts belong to the partners by liquidation, (Oprina, Garbulet, 2013 p.291 - the ensuring nature of garnishment regulated by Art.969 of the Civil Procedure Code; Adam, Savu, 2010, p 217) or they may seize and sell the shares of their debtor. The provisions of Art.66 have not been exempt from doctrine interpretations in terms of their field of application, meaning that the seizure and sale of the debtor's actions, as regulated, targets only shareholders of joint stock or limited companies. See Carpenaru, Piperea, David, (2014, p.241), Sauleanu, (2012, p.72) and Adam, Savu, (2010, p 217).

So, during the company's lifetime, the personal creditors of shareholders in a joint stock company, limited partners in a limited partnership and limited company, as well as for partners in a limited liability company cannot execute their rights on the assets brought by the partner as a contribution to the company because they were transferred, in accordance with the provisions of Art.65 of Law no. 31/1990 to the corporate patrimony (given that the parties have not stipulated otherwise, i.e. a contribution in use), becoming the company's own assets, and such a patrimony is essentially distinct from each partner's own patrimony.

The personal creditors of the companies listed above may exercise their rights only on the part of the benefit-dividends due to the partner after balance sheet, and after dissolution of the company, on the part that belongs to the partner by liquidation, as it enters into his own patrimony at the time of distribution.

This provision differs from the one regarding the status of personal creditors of the partner in a simple partnership because they are entitled to a restitution or a separation, and attribute his debtor (partner in a simple partnership) his due share from the common assets of all partners, but also only after the dissolution or liquidation of the simple partnership.

The provisions of Art.66 of Law no. 31/1990, Art.206, paragraph 1 of the same law, provide for the right of personal creditors of the partner in a general partnership, limited partnership or limited liability company, to oppose the decision to extend the duration of the company over the initial fixed term, if they have rights established by a prior enforceable decision. (The argument for which the personal creditors of shareholders of joint stock companies and limited companies are not entitled at opposition is that they can exercise the right provided by Art. 66, paragraph 2 during the company's life (Carpenaru, Piperea, David., 2014 p.720 and Adam, Savu, 2010, p.734). Admission of opposition obliges the partners to decide, within one month from the date on which the judgment became final, if they wish to discontinue the extension or exclude debtor partner of the opponent from the company.

Acknowledgment

**The present article is part of the research project "Guide to the legal regime of foreign investments in Romania – Doing business in Romania" that is carried out during the university year 2014-2015 within the "Dimitrie Cantemir" Christian University of Bucharest, Faculty of Law Cluj Napoca.*

BIBLIOGRAPHY

[1] Adam, I., Savu, C.N, *Legea societatilor comerciale;Comentarii si explicatii*, Ed.CHBeck , Bucuresti, 2010;
[2] Baias, F.,A., Chelaru, c., Constantinovici, R., Macovei,I., 2012, Noul Cod Civil, Comentariu pe articole, art.1-2664, Bucuresti: Editura CH Beck;
[3] Carpenaru,S., 2012 ,Drept comercial roman, Bucuresti: All Beck;
[4] Carpenaru,St.,D, Piperea, David., 2014, *Legea societatilor comerciale. Comentariu pe articole*, ed.5, Bucuresti, Editura C.H.BecK;
[5] Codul Civil republicat in Monitorul Oficial, Partea I nr. 505 din 15 iulie 2011;
[6] Decizia 402/C/2009/R, Curtea de Apel Oradea, accesata pe www.jurisprudenta.org la 11.09.2014;
[7] Fodor, E. M. 2008,*Drept Administrativ*, Editura Albastră, Cluj-Napoca;
[8] Legea 31/1990 privind societatile comerciale, publicata în Monitorul Oficial nr. 1066 din 17 noiembrie 2004;
[9] Merceron, M., 2013, *L'effectivité du droit de gage général et la préservation du patrimoine*, accesat pe http://www.lepetitjuriste.fr/wp-content/uploads/2013/12/M%C3%A9moire.pdf?47184c, la data de 11.09.2014;

[10] Oprina, E. Garbulet I., 2013, *Tratat teoretic si practic de executare silita,*Ed.Universul Juridic, Bucuresti;
[11] Piperea,G., *Simularea personalitatii juridice in Noul Cod Civil,* Revista Romana de Drept al Afacerilor 1/2012;
[12] Reghini, I., Diaconescu,S., Vasilescu,P., 2013, *Introducere în dreptul civil,* Bucuresti, Hamangiu;
[13] Sauleanu,L 2012, *Societatile comerciale.Studii,* Bucuresti, Universul Juridic;
[14] Sauleanu,L., *Raspunderea asociatilor in societatile in nume colectiv,* Revista Romana de Drept al Afacerilor 1/2014;
[15] Turcu, I., Botina, M., 2013, *Dreptul afacerilor intreprinderii.Vol.I, Praxis,* Bucuresti: CH Beck.