

The company contract in the new Romanian Civil Code (art. 1881 - 1954). Comparison with the 1865 Civil Code

Associate Professor Ph.D. **Silvia CRISTEA**¹

Abstract

The Longevity of the Roman Civil Code from 1864, and the long duration of cohabitation with the Commercial Code of 1887 puts into question the issue of rapid enforcing of the New Civil Code! Therefore it is extremely important to compare the current drafting legal texts regarding companies in the New Civil Code, with the legal provisions contained in the Law 31/1990! Because the New Civil Code is put into practice recently, the present study relies solely on examination of the doctrine in this area. The results of the research have as targets the researchers and teachers from the faculties of law: the study is original due to the fact that the old Civil Code is compared with the new Civil code. The present study is exceeding this image, trying to create a new perspective and a more complete analysis!

Keywords: *commercial (trade) companies, the associates, company contract, Civil Code.*

JEL Classification: *K12, K20*

1. Introduction

Having the goal to reflect the deep changes undergone by the Romanian society and the current European realities, and to meet the requirements resulting from the commitments made by Romania within the framework of its European integration and from its capacity of a EU member (as stipulated in the justification of the Draft Law no 305/2009, submitted to the Chamber of Deputies), the new Civil Code promoted by the Law no 287/2009 (published in the Official Gazette no 511 dated 24 July 2009, republished in the Official Gazette no 505 dated 15 July 2011) entering into force on the first of October 2011, combines patterns from the new, modern regulations pertaining to foreign legislations with attempts made in time in Romania to modify and complete the Civil Code.

The New Civil Code (=NCC, a phrase that we shall use hereinafter to differentiate the 2009 regulations from the 1865 Romanian Civil Code, abrogated by the Law 71/2011, published in the Official Gazette no 409 dated 10 June 2011) integrates, in its new structure, all the regulations regarding individuals, family relations, commercial relations and international private law provisions.

This study is analysing the provisions included in Book V „On obligations”, chapter VII „The company contract and the contract of partnership”, that is articles 1881-1954 in the New Civil Code.

¹ Silvia Cristea – The Bucharest University of Economic Studies, Department of Law, silvia_drept@yahoo.com

Given our aim to reflect the trends in the Romanian business environment and the trends of the commercial companies legislation (especially the Law no 31/1990 regarding commercial companies, hereinafter referred to as the abbreviation „LSC”), this study has been structured in 4 sections as follows: Concepts. New institutions (section 1); Institutions no longer in the New Civil Code (section 2), Institutions and concepts totally changed by the New Civil Code (section 3), and Conclusions (section 4).

2. Concepts. New institutions

- art. 1882 paragraph 1 in the NCC regulates the case when a spouse brings an asset into the joint assets resulted from a marriage. In this case, the Draft stipulates, for the asset input be valid, that the **other spouse should give one's consent**, under art. 349 in the NCC.

- art. 1887 of the NCC creates a behavioral rule that changes entirely the concept of the civil law-makers, namely that the chapter dedicated to companies represents the common law in the field (paragraph 1); moreover, according to paragraph 2, the law regulates various types of companies depending on their form, nature or object of activity.

The interpretation of these provisions corroborated with art. 1888 in the NCC leads to the deduction that this is the **general regulation**, having a common law role, for both non-stock companies and commercial companies; other types of companies can be regulated by **special laws**².

Art. 1887 can be seen as a modernized art. 1531 of the Civil Code which stipulated that laws governing commercial companies could be enforced as long as there were no contradictions with legal provisions or commercial practices. Since the NCC stipulates nothing in this respect, a question arises - what will happen to the Commercial Code and to the LSC, and to other special commercial laws!!! Can we assume, based on the art. 1887 in the NCC, that the dichotomy civil law – commercial law disappears?

- art. 1888 listed the forms that companies/partnerships could have: a) simple partnership; b) partnership; c) general partnership; d) limited partnership; e) limited liability company; f) joint stock company; g) joint stock partnership; h) cooperative company; i) other type of company under the law³.

The list includes the types previously regulated in the Civil Code and those regulated in LSC and the Commercial Code.

- art. 1889 in the NCC stipulates the requirements for a company to acquire legal personality as follows:

- a) where, under the company contract, or in a separate document, the associates agree to set up a company with legal personality, in compliance with the law, the associates shall have **secondary, unlimited and joint liability**, whether

² O. Căpățână, *Commercial companies*, Lumina Lex Publishing House, Bucharest, 1996, p. 26.

³ St. D. Cărpenaru, C. Predoiu, S. David, Gh. Piperea, *Commercial companies-regulations, doctrine, jurisprudence*, All Beck Publishing House, Bucharest, 2001, p. 39.

non-stock companies or commercial companies, for their obligations to the company, unless otherwise stipulated by the law (paragraph 1);

b) **the form** chosen and the **terms and conditions** to set up a company shall comply with the special law governing the granting of the legal personality to the companies (paragraph 2);

c) **the time when the legal personality is acquired** shall be the date when the company is registered in the Commercial Register, unless otherwise stipulated by the law (paragraph 3)⁴;

d) **before the date when the company acquires its legal personality**, the company shall have the legal status of a simple partnership (paragraph 4).

This legal status reminds us of the general partnership, the prototype of the commercial companies, and the simple partnership is actually the creation of the commercial doctrine later on developed in the special commercial legislation (see chapter IV).

The consequences of the failure to comply with the legal requirements to set up a company, art. 46-59 in the LSC. For the assimilation with the de facto partnerships see art. 1893 in the NCC.

- An entirely new institution for the civil law is the **simple partnership**, regulated in section 2 of Title VII in the NCC in art. 1890-1893 as follows:

- Regarding the setting up formalities, under art. 1890 in the Draft, the written form shall be produced, requested *ad probationem* (according to art. 1884, paragraph 1, when the company has no legal personality, or the authentic form, when the company has legal personality (according to art. 1884 paragraph 2), and the requirements governing the nature of the assets brought in as contribution shall be complied with (art. 1890).

This provision should refer to art. 1883 regulating the status of the asset contribution depending on their nature: fixed assets / non-fixed assets, tangible / non-tangible. (See the comments in sect.3, especially for art. 1883 in the NCC).

- Regarding the **changes in the company contract**, the changes shall be made without impairing its validity (assumingly, the references are made to art. 1881-1886 in the NCC), unless otherwise stipulated in the company contract itself or in the law (art. 1891);

- Regarding the **legal personality**, the draft differentiates between:

- a) Simple partnership without legal personality (according to art. 1892 paragraph 1); or

- b) With legal personality; in this case, the document modifying the company contract shall clearly define the form of the company, by reconciling its provisions with the legal provisions applicable to the newly set-up company (art. 1892 paragraph 2). In this case, the dissolution of the simple partnership needn't be enforced but the associates and the newly set-up company shall have **joint and indivisible liability** for their obligations towards the company arisen before the company acquires its legal personality (art. 1892 paragraph 3).

⁴ *Idem*, p. 12, 13.

- Under art. 1893 in the NCC, there is a *juris et de jure* assumption according to which, unless otherwise stipulated, the companies subject to the requirements of the registration (under the law), but **remained unregistered**, and the de facto partnership shall be assimilated with simple partnerships.

- Subsection 2 „Effects of the company contract” divided into I. Rights and obligations of associates towards themselves, II. Company management, III. Obligations of the associates towards third parties, includes provisions that are typical of commercial companies (through the LSC) with modifications caused by the requirement to apply to 5 types of companies existing in the special commercial regulations, starting with the standard company that is the general partnership. We appreciate the efforts of those who have written the NCC to list the legal norms that reflect the general characteristics of the commercial companies. It is a big effort to put together and corroborate all the provisions; the LSC included special separate provisions for the partnerships, the venture capital companies and the limited liability companies in separate articles of law, with no common root as general provisions.

The provisions in this subsection refer to:

- **The formation of the equity**, as a total of capital and assets, as the case may be (according to art. 1894 paragraph 1);

- Although the LSC did not use the denomination of assets owned (the first reference to the assets owned as a reference to the group of economic interests called general partnership was made in the Law 161/2003 regarding measures to ensure transparency in the exercise of the public function and in the business environment, the prevention of and the sanctions against corruption), art. 1894 paragraph 2 in the Draft stipulates that assets owned shall be divisions of the equity that are distributed to the associates proportionally to their contributions, unless otherwise stipulated in the law or in the company contract.

- art. 1894 paragraph 3 in the NCC regulates the legal status of the contribution as work. Unlike the LSC that clearly stipulates that **input as work or services** cannot represent a contribution to form or increase the equity (according to art. 16 paragraph 4), the NCC considers this input to be a contribution to the assets of the **company**. In exchange for this input, the contributing associate, according to the articles of incorporation, shall take part in sharing profit and loss, and in taking the decisions in the company (similar to art. 16 paragraph 5 in the LSC).

We appreciate that the new legal status of the work input is more clearly defined; instead of emphasizing what is not stated, it clearly stipulates the rights granted. Hence, it can be accepted in the case of any company.

- The difference between the committed contribution and the paid in contribution is covered by art. 1895 in the NCC; each associate is liable to the company and to the other associates to contribute with or to pay in what he has committed to (paragraph 1); at the same time, the rights given by the assets owned shall be suspended until the contribution to the equity is made (paragraph 2);

- The NCC achieves the first regulating of the legal status of the assets owned (art. 1900), including the transfer of the assets owned (art. 1901) as follows:
 - a) According to art. 1900 paragraph 1, the assets owned shall be indivisible. Their partial transfer shall not be accepted;

- b) According to art. 1900 paragraph 2, only the assets owned and entirely paid in or put in shall give the right to vote in the assembly of the associates, unless otherwise stipulated in the contract.

We understand that *per a contrario*, if the assets owned have not been entirely paid in (if contribution in capital) or put in (if other contributions), the assets owned shall not give the right to vote (or the right to vote shall be suspended).

- c) When an equity share becomes the property shared by several individuals, they shall appoint a unique representative to exercise the corresponding rights in the company (according to art. 1900 paragraph 3)⁵.

- d) As long as an equity share is the joint property of several individuals, they shall bear joint liability regarding the payments or contributions to make (according to art. 1900 paragraph 4).

These provisions are not new in the Romanian regulations but only in the Civil Code! They were taken from the special commercial law, LSC, namely art. 83 regarding the general partnerships, and art. 101-102, regarding the joint stock companies.

- e) The transfer of the assets owned shall be done according to the law and to the company contract. The transfer of assets owned to individuals from outside the company shall be done only with the consent of all the associates. The assets owned can be transferred through heritage, unless otherwise stipulated in the contract (art. 1901 paragraph 1).

These provisions can be found under a different form in the LSC, art. 192-202, on the Ltd companies.

- f) A version of the pre-emption right regulated by the LSC can be found in art. 1901 paragraph 2 in the NCC which stipulates: any associate, by exercising the rights of an acquiring party, can buy back the assets owned bought by a third party without the consent of all the associates, within 60 days from the date when he learnt about or should have learnt about the transfer of the assets owned. Should several associates exercise this right at the same time, the assets owned shall be allocated proportionately with their contribution to the profit⁶.

- g) Regarding the assessment of the assets owned in the case of the transfer stipulated under art. 1901 paragraph 2, as well as any time a transfer is required under the law, this shall be done by an expert agreed upon by the parties involved in the transfer or, if no agreement can be reached, by the court of justice (according to art. 1901 paragraph 3).

- h) According to art. 1901 paragraph 4, the transfer of the assets owned free of charge shall be assimilated with a paid transfer and shall be subject to the above-

⁵ S. Cristea, *Business law*, University Publishing House, Bucharest, 2009, pp. 182-184.

⁶ S. Angheni, M. Volonciu, C. Stoica, *Commercial law*, 4-th ed, C. H. Beck Publishing House, Bucharest, 2008, p. 88, 89.

mentioned provisions regarding the buying back and the assessment (paragraph 2 and 3 of the same article). Regarding their forms, the transfer free of charge shall be subject to the same legal requirements as the donation.

The NCC clearly stipulates in art. 1903 the non-compete obligation of the associates. The Civil Code had some provisions in this respect, like the obligation of the associate that puts in his business, on the one hand, to be accountable for all his gains resulted from this activity, and on the other hand, this obligation was limited to the case where the work was an activity that was the very object of the newly set up company (art. 1505; also the obligation to pay damages to the company when one associate had caused those damages and the damages could not be compensated with benefits resulted from the work done by the associate for other businesses (art. 1508).

Some provisions in the NCC have been taken from the special commercial legislation (LSC art. 80 and 82), regarding the general partnerships as follows:

- according to art. 1903 paragraph 1, the associate shall not compete with the company on his behalf or on behalf of a third party and shall not perform any operation on his behalf or on another person's behalf that may cause damages to the company;

- according to paragraph 2, art. 1903, the associate shall not take part, on his behalf or on behalf of a third party, in an activity that may deprive the company from its assets, services or expertise that the associate has committed to;

- according to paragraph 3, art. 1903, the benefits resulting from any of the activities forbidden under the paragraphs 1 and 2 above shall be deemed to the company and the associate shall be accountable for any damages that may result thereof;

- art. 1904 in the NCC is a combination between art. 1517 point 2 in the Civil Code and art. 82 in the LSC as follows:

- unless other stipulated, any associate shall be allowed to make use of the company assets in the interest of the company, in compliance with their purpose, and without impairing the rights of the other associates (art. 1904 paragraph 1);

- the associate which, without written consent of the other associates, makes use of the equity for his personal purpose or for other person's purpose, shall give to the company the benefits resulted and shall pay the damages that may have resulted (art. 1904 paragraph 2)⁷.

- regarding the **joint funds**, art. 1905 in the NCC is similar to art. 81 corroborated with art. 80 in the LSC that regulates the legal status of the joint funds of the associates of a general partnership as follows:

- no associate shall take from the joint funds more than it has been decided for him to take for the expenses incurred or to be incurred in the interest of the company; (art. 1905 paragraph 1);

⁷ I. Schiau, T. Prescure, *Law of the commercial companies no. 31/1990 – analyses and comments per articles*, Hamangiu Publishing House, Bucharest, 2007, p. 129, 130.

- the associate that fails to comply with the above-mentioned paragraph shall be accountable for the amounts of money taken and for the damages that may result (paragraph 2);

- the contract of association may stipulate that the associates shall be allowed to take amounts of money for their personal needs from the company's in-house cash (art. 1905 paragraph 3).

The NCC includes new provisions regarding the transfer of rights as associates of the company in art. 1908 paragraph 2-4; they are new because, on the one hand, references are made to the articles on the transfer of assets owned taken from the LSC (e.g. art. 1901 paragraph 2 and 3) as above-mentioned, on the other hand, references are made to articles on the withdrawal or the exclusion of the associate taken from the LSC and never existing in the previous Civil Code. Thus:

- according to art. 1908 paragraph 2, the associate shall not have the right to transfer his shares without the consent of the other associates under the sanctions of art. 1901;

- according to art. 1908 paragraph 3, the associate shall not have the right to secure in any way the personal obligations of a third party with his shares, without the consent of all the associates, under the sanction of absolute nullity of the guarantees;

- according to art. 1908 paragraph 4, the associate of a company with unlimited duration shall not have the right to request to be paid back for his part of the company's assets before the closing of the company, except where the associate withdraws or is excluded. These provisions are a combination of art. 1527 in the Civil Code which stipulated that the company could be closed as a result of the will of the associates, under the provisions in the LSC regarding the exclusion and the withdrawal of the associates (art. 222-226);

A new regulation in the NCC is art. 1909 stipulating that any promise made by an associate to transfer, sell, secure in any way or give up his shares only entitles the beneficiary of the promise to be compensated for damages that may result from failure to keep that promise. On the one hand, this reinforces the rule in art. 1908 paragraph 1 stipulating that a third party cannot become an associate without the consent of the other associates and on the other hand, it is a repetition of the provisions in art. 1521 in the Civil Code which stipulates how a debt shall be distributed among the associates when they owe the debt to the same creditor.

- art. 1910 in the NCC introduces new civil law rules taken from the special commercial regulations (LSC), as follows:

- according to art. 1910 paragraph 1, the associates, even deprived of management rights, shall be entitled to take part in the collective decision-taking during the assembly of the associates. This provision results, implicitly, from art. 1517 points 1-4 in the Civil Code regulating the management of the company when there are no special provisions in the field. In the LSC, the right to vote of the person who has made his contribution to the equity and has acquired a share is clearly regulated by art. 101 paragraph 1⁸;

⁸ S. Cristea, *work cited*, 2009, p. 146.

- according to art. 1910 paragraph 2, the decisions regarding the company shall be taken by a majority of the associates' votes, unless otherwise stipulated in the contract or in the law. The provision is an „ad litteram” repetition of the provision in the LSC, applicable to the ordinary general assemblies of joint stock companies (according to art. 112 paragraph 1);

- the principle of unanimity as it is stipulated in the LSC regarding the decisions of the general partnerships is stipulated in the NCC in art. 1910 paragraph 3; thus, as an exception to the above mentioned paragraph, the decisions regarding modifications in the company's contract or the appointment of a single manager shall be taken with the consent of all the associates;

- according to art. 1910 paragraph 4, the obligations of an associate shall not be increased without his consent. Although it has no corresponding provision in the Civil Code, the provision can result implicitly from art. 1501 which considered the contract to be the foundation of the company and also the document covering the parties. *A fortiori*, a new agreement shall be needed to modify the contractual obligations.

To avoid listing the sanctions imposed in case of violation of art. 1910, the authors of the NCC preferred the phrase „any provision contradicting the provisions of this article shall be considered to be unwritten” (art. 1910 para 5).

The principle of the proof as a written document bearing personal signature needed to validate the consent of the parties has been kept (also stipulated in art. 1884 paragraph 1 in the NCC) by the authors of the NCC who also list the possibilities for the associates to express their consent: either in the form and the manner stipulated in the contract, or by written request to the associates, or by consent expressed in the presence of the associates. Thus according to art. 1911:

- the decisions shall be adopted by the associates during the assembly of the associates. The contract may stipulate the means of communication and the way in which communication should take place; in their absence, the decision can be adopted by written demand to the associates (paragraph 1);

- the decisions can also be taken as a result of the free consent of the associates expressed in the document concluded by the company (paragraph 2);

- regulations that did not exist in the Civil Code regarding the contesting of the decisions have been introduced by art. 1912 in the NCC. Thus:

- the associate dissatisfied with a decision taken with the majority of the votes shall be entitled to contest it in court within 15 days from the date when the decision was taken, if he was present, or from the date when he was informed about the decision, if he was not present. If he was not informed about the decision, the deadline shall be settled starting with the date when he learnt about the decision but within 1 year since the date when the decision was taken (paragraph 1); the provision is similar to art. 132 paragraph 2 in the LSC;

- the 15 days period of time above mentioned shall be the deadline when this right ceases (paragraph 2).

As we noted when we analysed art. 1892 in the NCC, the joint liability is an exception in the civil law and it should be clearly mentioned. The Civil Code started from the rule regarding the divisibility of the obligations clearly stating,

even in the case of several mandatories, that the joint liability shall be clearly stipulated (according to art. 1543 in the Civil Code). The fact that the NCC takes over the rule of the joint liability of the managers from the special commercial regulations (art. 73 LSC) proves the wish of the authors of the NCC to reinforce the liability of the managers in order to protect the interest of third contracting parties of the represented company. If there is joint liability towards third parties, there is proportional liability among the managers. Thus according to art. 1915 paragraph 2 in the NCC, „if several managers worked together, they shall be considered to have joint liability. However, depending on the relations between them, the court can establish for each one a liability that is proportional with each one's guilt when they committed an act that caused prejudice”.

Unlike the Civil Code that clearly forbids a manager to take action when the mandate stipulates that managers shall take joint action, even if one of them is unable to act (1516 C. civ.), the NCC takes over the provisions in the LSC (art. 76 paragraph 2) regarding the solution applicable in emergency situations when a significant damage has been caused to the company by omission. Thus according to art. 1917 in the NCC, „if it is stipulated that the managers shall decide either with unanimity or with majority of the votes, they shall be entitled to perform management only together, except for **force majeure situations when the absence of a decision** may cause serious damage to the company”.

A regulation regarding a right which does not exist in the Civil Code is included in art. 1918 paragraph 2-4 in the NCC: the right to be informed is regulated by the LSC in art. 117², corroborated with art. 136¹. Thus:

- according to paragraph 2, unless otherwise stipulated in the law, any associate shall be entitled to see the records and the financial situations of the company, to be informed about the operations of the company and to see any document of the company without disturbing the operations of the company and the others' rights;
- according to paragraph 3, the managers shall write an annual report on the evolution of the company that shall be sent to the associates. Any of them shall be entitled to request a discussion over the report with all the associates; in this case, the managers shall be bound to organize the associates' meeting at the main office of the company to discuss the report;
- according to paragraph 4, any provision that contradicts the provisions in art. 1918 shall be considered as unwritten.

Although the management mandate and the rules applicable in case of several managers were regulated in the Civil Code (art. 1514-1518), there were no provisions regarding representation. The NCC starts from the previous regulation as a difference between a mandate with and without representation and it regulates the institution of the manager as being a mandatory with representation and, in his absence, an associate with a right of representation. The principle is not new; it was

included in art. 79 in the LSC. Thus, according to art. 1919 in the NCC:

- the company shall be represented by managers with a right of representation or, in their absence, by any of the associates, if the contract does not stipulate the right of representation only for some of them (paragraph 1)⁹;
- the company shall be part in a trial in court under the name stipulated in the contract or the legal name registered, as the case may be. Third parties in good faith can accept any of these (paragraph 2). The provisions in this paragraph can be found in the Law 26/1990 regarding the Commercial Register, in the contents of the institution of the company, in the name of the trading entity and in the Emergency Governmental Ordinance 44/2008 regarding the economic activities carried out by authorized physical persons, sole proprietorship and family-owned business, whether the provisions concern a physical person acting as a trading entity or not.

The NCC includes new provisions regarding the case when a personal creditor of an associate cannot take enough from the associate's own assets. These provisions are not covered by the Civil Code. Thus according to art. 1920 paragraph 2, this creditor shall be entitled, as the case may be, to request the competent authority to give or to allocate to his debtor the part that the latter owns from the joint assets of the associates, under the provisions of art. 1939 regarding the continuation of the activity. These provisions resemble to those in art. 66 in the LSC.

Art. 1921 in the NCC includes provisions regarding the liability of the **apparent associates**. These provisions do not exist in previous regulations. Thus:

- any person claiming to be an associate or deliberately inducing to third parties a convincing appearance in this respect shall be liable to the third parties that act in good faith exactly like an associate (paragraph 1);
- the company shall be liable to the third party thus deceived only if it gave the third party enough reasons to be considered a new associate and in this case, being aware of the actions of the fake associate, does not take reasonable measures to prevent the deceiving of the third party (paragraph 2);
- new provisions have been introduced in the NCC regarding the **occult associates**; thus, according to art. 1922, the occult associates shall be liable to third parties that act in good faith as apparent associates;
- similarly to partnerships, regulated by the LSC, the NCC **forbids the companies to issue financial instruments**¹⁰. Thus:
 - the company shall not have the right to issue financial instruments, under the sanction of absolute nullity of both the documents concluded in this respect and the financial instruments issued, except for the case when otherwise stipulated in the law (art. 1923 paragraph 1);

⁹ I. Deleanu, S. Deleanu, *Little encyclopedia of law*, Dacia Publishing House, Cluj Napoca, 2000, p. 34.

¹⁰ L. N. Pirvu & I. F. Simon, *Law regarding the Commercial Register-comments and explanations*, C. H. Beck Publishing House, Bucharest, 2009, p. 248-250.

- the associates, even if they are not managers, shall have secondary joint liability in relation with the company for any damages that may be caused to third parties that act in good faith and are prejudiced as a result of the violation of the interdiction stipulated in the previous paragraph (art. 1923 paragraph 2);

- a new provision representing a clear regulation is art. 1924 in the NCC. It results from the capacity of the manager as a mandatory of the company, according to art. 1545 in the Civil Code. Art. 1924 stipulates that the managers of the company shall inform third parties about their competences before concluding a document with them.

- **The exclusion of an associate** was not clearly stipulated in the Civil Code. Art. 1928 in the NCC stipulates that, upon the demand of an associate, the court can decide the exclusion of any of the associate from the company for well justified reasons.

Unlike withdrawal which is initiated by the associate that wants to withdraw, exclusion is initiated by the other associates.

- **The rights of the excluded associate** are stipulated in art. 1929 in the NCC that takes over art. 224-225 in the LSC:

- An associate that loses his capacity, otherwise than by transfer or foreclosure upon his shares in the company, shall be entitled to be paid out the equivalent amount of his shares when he ceases to be an associate and the other associates shall pay out to him this amount immediately, including the legal interest starting with the date when the persons ceased to be an associate (paragraph 1);

- When the parties do not agree upon the amount equivalent to the shares, this amount shall be established by the court under the art. 1901, paragraph 3, (paragraph 2 in art. 1929).

- The NCC includes new provisions regarding the **nullity of the company**. Art. 1932 differentiates between the nullity of the company and the case when a clause violating imperative provisions is considered as unwritten:

- according to paragraph 1, nullity may exclusively result from the violation of the imperative provisions of this chapter (art. 1930-1940), stipulated under the sanction of nullity, or from ignoring the general validation conditions for contracts, unless otherwise stipulated in the special law;

- according to paragraph 2, any contractual clause that contradicts an imperative provision of this chapter and it is not sanctioned with the nullity of the company if violated shall be considered as unwritten.

These provisions take over the goal aimed at in art. 46 and 56-57 in the LSC, namely to safeguard the company at any price, and only in the case of violating an imperative provision, the nullity of the company (when the provision violated concerns the sanction of nullity).

• The provisions regarding the **nullity**, similar to art. 57 in the LSC, are included in art. 1933 in the NCC as well as follows¹¹:

▪ The nullity shall be covered and shall not be declared, if the cause of the nullity has been removed before one party's submitting the conclusions through the lawyer in court (paragraph 1);

▪ The court which receives a demand to declare the nullity shall invite the parties to discuss the possibility to remove the causes of the nullity that affect the company's contract and to decide upon a deadline useful to cover the nullity, even if the parties disagree (paragraph 2).

These provisions are similar to those regarding the regularization of companies in art. 47-48 in the LSC.

▪ The right to action to request nullity, except for the nullity for the illicit object of the company, shall cease within 3 (three) years starting with the date when the contract was concluded (paragraph 3).

While the company's account reconciliation ceases within 1 year according to art. 48 paragraph 3 in the LSC), the NCC stipulates the deadline generally applicable of 3 years in the case of the nullity.

• Provisions taken from the special commercial legislation (LSC), for the protection of third parties and to cover the nullity are promoted in art. 1934 in the NCC under the title **regularization of companies**. Thus:

▪ In case of the nullity of a company because of the alteration of the consent or because of the inability of an associate, in cases when regularization is possible, any interested persons shall have the right to ask the competent person to invoke nullity, in order either to perform the regularization, or to open a case in court in order to ask the nullity within 6 months since it was notified by the creditor to pay, under the sanction of the loss of the rights. The company shall be informed about the notification of the creditor about the due date (paragraph 1);

▪ The company or any associate, within the period of time stipulated under the previous paragraph, can suggest to the court in charge with the actions of annulment any measures to cover the nullity, especially by buying back the rights of the plaintiff. In this case, the court, without pronouncing the nullity, can declare the measures proposed as mandatory, if these measures have been adopted by the company under the conditions required in order to perform the modifications to the company contract. The vote of the defendant associate shall not be taken into account when these measure are adopted (paragraph 2);

▪ In case of contesting the value of the shares of the associate, their value shall be established according to the provisions in art. 1903 paragraph 3.

We can see that the NCC introduces a range of legal institutions previous not known to the Romanian legislation in the field, like for instance avoidance of nullity by buying back the shares of the plaintiff. The ultimate goal is to save the company and any practical means shall be possible!!!

¹¹ St. D. Cărpenaru, C. Predoiu, S. David, Gh. Piperea, *work cited*, 2001, pp. 139-141.

- New civil regulations are included in art. 1935 in the NCC regarding the consequences of the nullity. They are not new in the Romanian legislation as they can be found in the LSC (art. 50, 51 and 58-59). Thus:

- The company shall cease starting with the date when the decision by which it has been contracted becomes final or, as the case may be, declares its nullity and initiates the liquidation of its assets (paragraph 1);

- The liquidators shall be appointed by a court decision including a statement or an ascertaining court decision, as the case may be (paragraph 2);

- Neither the company or its associates shall be entitled to take advantage of the nullity in their relations with third parties that act in good faith (paragraph 3).

Art. 1936 in the NCC includes new provisions regarding the liability for the nullity **of the company**. Thus:

- The right to action for compensation for the prejudice caused by stating or ascertaining, as the case may be, the nullity of the company shall cease after 3 years starting with the date when the decision of stating or ascertaining the nullity becomes final (paragraph 1);

- The removal of the cause of the nullity or the regularization of the company shall not affect the right to take action in court for compensation for the prejudice caused as a result of the nullity. In these cases, the right to take action in court shall cease after 3 years starting with the date when the nullity was covered (paragraph 2).

The 2 paragraphs differentiate between the case when a prejudice caused by declaring or ascertaining the nullity of the company, in which case the deadline when the rights cease starts from the date when the court decision becomes final, and the case when the cause of the nullity is removed or the regularization occurs, in which case the right to take action in court for compensation for the prejudice shall not cease but the deadline within which the rights cease starts from the date when the nullity was covered.

- Rules that did not exist in the Civil Code and have been taken from the LSC in the NCC are those regarding the appointing and the revoking of the liquidators, for partnerships and Ltd companies (art. 262), and general provisions regarding the liquidators (art. 263 LSC). The specific rules are the following: appointment with the unanimity vote of the associates or by court decision, the capacity of physical person or legal person, the vote of the majority; thus, according to art. 1941 in the NCC:

- The liquidation shall be put in practice, unless otherwise stipulated in the company contract or by an agreement concluded afterwards, by all the associates or by a liquidator appointed by them with unanimity. In case of disagreement, the liquidator shall be appointed by the court, upon the request of one of the associates (paragraph 1);

- The liquidator appointed by the associates can be revoked by the associates with unanimity of votes. He can be also revoked for justified reasons by the court, upon the request of any interested person (paragraph 2);

- The liquidator appointed by the court can be revoked only by this court, upon the request of any interested person (paragraph 3);

- Both physical persons and legal persons can be appointed liquidators as long as they have the capacity of practitioners in insolvency (paragraph 4);
- When several liquidators act, their decisions shall be taken with an absolute majority (paragraph 5).

The general provisions regarding **the obligations and the liability of the liquidator** have been taken from the LSC, i.e. art. 253 paragraph 2, which stipulates that the liability of the liquidators and the liability of the managers are equal. According to art. 1942 in the NCC, the obligations and the liability of the liquidators are subject to the provisions applicable to managers except for the case when otherwise stipulated in the law or in the company contract. The liquidators have the capacity of specialized mandatories, similar to the managers in many cases, except that they are meant not to give value to the assets by performing commercial activities but to liquidate the assets of the company. The rules of the mandate shall apply, like in the case of the managers.

Art. 1943 in the NCC regarding the taking over of the documents from the managers are also taken from the special commercial legislation (corresponding to art. 253 paragraph 3 and 263 paragraph 1 in the LSC). Thus:

- The managers shall hand in the assets and the documents to the liquidators as well as the last annual balance sheet (paragraph 1);
- The liquidators shall make an inventory of the equity and shall establish the assets and the liabilities of the company. The inventory shall be signed by the managers and liquidators (paragraph 2).

When they work with the administration of the company to liquidate, the liquidators need the cooperation of the administration bodies in order to make the inventory and to ascertain and establish the situation accurately.

Regarding **the competences of the liquidators**, although the Civil Code does not include provisions in this respect, the NCC takes some of the rules existing in the LSC, giving them new interpretations in some cases. Thus according to paragraph 1 in art. 1944, the liquidators shall have the right to draw all the documents for the liquidation and, unless otherwise stipulated by the associates, to sell the equity, even in bulk, to conclude agreements that shall be solved by arbitrator in case of litigation and to do transactions¹².

Although the Emergency Governmental Ordinance 82/2007 modifies the LSC in the sense of the abrogation of some provisions regarding the competences of the liquidators to represent the company during trials in court, to sell the assets in auctions but not in bulk; to liquidate and incorporate the debts of the company, the Civil Code Draft accepts the selling in bulk. Like art. 255 paragraph 1 letter d) in the LSC, the NCC also admits the competence of the liquidators to perform transactions.

Paragraph 2 in art. 1944 in the NCC takes over the competence stipulated in the LSC in art. 255 paragraph 1 letter a, that is competence to represent the company in court, according to the conditions stipulated under the law.

¹² S. Cristea & C. Stoica, *Company's laws*, University Publishing House, Bucharest, 2008, pp. 177-179.

Similar to the art. 255 paragraph 3 in the LSC, paragraph 3 in art. 1944 in the NCC takes over the rule according to which the liquidators shall not have the right to initiate new operations, under the sanction of personal, joint liability for all the damages that may be incurred.

Art. 1945 in the NCC tries to summarize the contents of several articles in the Civil Code and in the LSC (art. 1510 corroborated with art. 1517 point 3 in the Civil Code and 258 and 259 in the LSC). According to art. 1945 in the NCC, the associates or the liquidator, as the case may be, shall pay the creditors of the company, shall ascertain the amounts of money needed to pay debts that will be requested later on, or debts that have been contested or debts that have not been requested by the creditors and shall pay back expenses or advance payments made to the company by certain associates.

- New provisions in the NCC refer to the paying out the contributions to the equity and the distribution of the surplus left after the liquidation. The rules stipulated in art. 1946 cannot be found either in the Civil Code or in the special commercial legislation; they will not have an important practical role yet. Thus:

- according to paragraph 1, after paying the debts of the company, the assets left shall be used to pay out the contributions committed and paid in by the associates, and the surplus shall be considered as net profit and divided among the associates proportionally with their contribution to the benefits, unless otherwise stipulated in the articles of incorporation or in the decision of the associates, and according to the provisions of art. 1912 paragraph 2, the final thesis (on the contesting of a decision adopted by the assembly of the associates that shall be contested within 15 days). This provision is not entirely new; both the Civil Code and the LSC included provisions regarding the participation of the associates to the profit;

- according to paragraph 2, the assets brought in for usufruct or for use shall be returned as such. In the absence of this provision, the ownership right would still belong to the associate that brought in those assets and he would have the right to return those assets on behalf of any person, including the company;

- according to paragraph 3, if the asset brought in is still part of the equity, the asset shall be returned as such to the associate upon his request, under the obligation to pay the difference between the amounts, as the case may be. This provision contradicts the concepts in the LSC that stipulated that the asset brought in becomes part of the equity of the company and the associate shall only be entitled to the amount of money corresponding to the asset brought in. The NCC introduces a pre-emption right of the associate that brings in assets;

- according to paragraph 4, after being paid out the contributions in capital and assets, the associate that contributed to the equity with specific expertise or services shall be entitled to receive, proportionally with his participation in the profit, the products of this contribution, if they are still part of the equity of the company, under the obligation to pay the difference between the amounts, as the case may be;

- according to paragraph 5, if after the liquidation, the asset left cannot be distributed to the associates according to the law, the liquidator shall sell that asset

in auction, with prior consent of the competent court, and the amount of money resulted shall be divided among the associates, according to paragraph 1. We consider this hypothesis to be very important in the practices of the companies with legal personality set up in Romania whose associates are foreign physical persons and they cannot take possession of land in Romania in their own name as a result of the liquidation. Given this interdiction, the asset shall be sold and the amount received as a price shall be divided. It is the situation solved by art. 1946 paragraph 5.

- Entirely new civil law provisions are stipulated in art. 1949-1954 in the NCC regarding the partnership. This was previously regulated exclusively by the Romanian Commercial Code in art. 251-256(abrogated by the Law 71/2011).

- The definition of the partnership is given by art. 1949 in the NCC: the contract of partnership is the contract by which a person gives another person or several persons a participation in the benefits and the loss resulted from one or several operations done. There are some differences as compared to the art. 251 in the Commercial Code: the commercial regulations did not clearly mention the contract of association but the participation of at least 2 persons in an association; hence the contractual legal institution. In the commercial regulations, the initiator was always a commercial entity, either physical person or legal person, while in the NCC there is no stipulation regarding the capacity of commercial entity or non-commercial entity of the associate. Thus, art. 1949 includes the provision in art. 252 of the Commercial Code according to which the association can be formed by non-commercial entities as well.

- Similarly to art. 256 in the Commercial Code, the NCC imposes only one condition regarding the form, namely the written form; according to art. 1950, the contract shall be proved only in written form. These provisions correspond to art. 1884 paragraph 1 imposing the written form as a proof of the existence of the contract.

- Art. 1951 in the NCC takes over the provision of art. 253 in the Commercial Code regarding the lack of legal personality and the occult nature of the partnership towards third parties. Thus: the partnership shall not have legal personality and shall not represent a person separate from the person of the associates in their relation to third parties. The third party shall not have any right towards the association and shall have obligations only to the associate he concluded a contract with¹³.

The NCC therefore repeats the theory of the contract that is typical of the Romanian law, stipulated in art. 1491 in the Civil Code, according to which the company is a contract (contrary to the theory of the institution claiming that the company is not just a contract but it also generates a legal person).

- Art. 1952 in the NCC takes over the provisions of art. 254 in the Commercial Code with the difference regarding the ownership over the assets brought in. While the Commercial Code clearly stipulated that the participants had no right over those assets, according to art. 1952 paragraph 1 in the NCC, the

¹³ C. Leaua, *Commercial companies, special procedures*, C. H. Beck Publishing House, Bucharest, 2008, pp. 144-149.

associates shall remain the owners of the assets made available to the association. While the Commercial Code had no clear stipulation about who would acquire the ownership of the assets brought in (since the association had no legal personality, it could not own assets), the associates were allowed to stipulate that the assets brought in could be returned as such or, if not possible, the associates would be paid out compensations. The NCC accepts the returning of the assets as follows:

- The associates shall be entitled to decide that the assets brought into the association and those obtained as a result of using these assets shall become joint property (according to paragraph 2 in art. 1952) and the assets made available to the association shall become either totally or partially the property of one associate in order to fulfill the objective of the association, under the terms and the conditions of the contract and according to the advertising formalities stipulated in the law (paragraph 3 in art. 1952);

- The associates shall be entitled to stipulate that the assets stipulated in paragraph 3 shall be returned as such when the association ceases (paragraph 4 in art. 1952).

- A whole range of new provisions is included in art. 1953 in the NCC regarding the relations between associates and third parties; although they are not an *ad litteram* repetition of the rules stipulated in the Commercial Code, they preserve the concept regarding the occult nature of the partnership. Thus:

- according to paragraph 1, the associates shall make contracts and shall commit themselves in their own name in relation with third parties, even if they act on behalf of the association (similar to art. 253 in the Commercial Code);

- according to paragraph 2, however, if the associates act in this capacity, they shall have joint liability towards third parties for the documents concluded by any of them.

We can note that the NCC reiterates the joint liability of the associates when they act as representatives of the company in order to protect the interests of the third parties.

- according to paragraph 3, the associates shall exercise all the rights deriving from the contracts concluded by any of them; however, the third party shall be considered only in relation with the associate he concluded the document with, except for the case when the associate declared his capacity at the moment when the document was concluded¹⁴. While the associates have joint liability when they are debtors in relation to third parties, when the third parties are debtors, the only one who can pursue the payment is the creditor – the associate the debtor concluded the document with. We find here the principle of solidarity of debtors, not of creditors as well (passive solidarity, not active solidarity). Exceptionally, any associate shall be entitled to pursue the third party –debtor if the latter knew about the association and about the fact that the person he concluded a contract with was the representative of the association.

- according to paragraph 4, any clause in the association contract that restricts the liability of the third parties shall not be opposable to them. In other

¹⁴ L. N. Pirvu & I. F. Simon, *work cited*, 2009, pp. 49-50.

words, even if the associates stipulate a divisible liability towards third parties, the third parties shall be entitled to pursue them in their solidarity. These provisions did not exist in the Commercial Code. They are very important especially to solve conflicts in the legal practice;

- according to paragraph 5, any clause stipulating a minimum benefit for one or several associates shall be considered unwritten. This rule includes a form of the Leonine interdiction as it was stipulated in art. 1902 paragraph 4 in the NCC.

- art. 1954 in the NCC is a repetition of the provisions in art. 255 in the Commercial Code regarding the fact that, in the contract of association, the parties can establish the form of the association, except for art. 1949-1953. These are imperative provisions. For the remaining aspects, the parties can regulate their relations as they may wish in the contract of partnership.

3. Institutions no longer in the New Civil Code

Chapter II in Title VIII in the Civil Code entitled: On various kinds of companies in which the universal partnerships and private companies are presented is no longer in the NCC (that is art. 1493-1500).

- The NCC no longer includes provisions regarding the possibility of the associates to appeal to arbitrage for the disputes regarding their contribution in profit and loss, may the arbitrator be another associate or a third party (that is art. 1512 paragraph 1 and 2).

4. Institutions and concepts entirely modified in the New Civil Code

- Art. 1881 paragraph 1 in the NCC defines the company contract. The new elements, as compared to art. 1491 in the Civil Code are the following:

- New categories regarding the contributions (taken from the commercial legislation) accepted upon the setting up of the company: capital, goods, specific expertise or services (work). These categories existed in the old regulations in art. 1503 (goods), art. 1504 (capital) and art. 1505 (work); the idea is reiterated as an imperative norm in art. 1882 paragraph 3;

- Apart from the goal to share the benefits, the NCC includes, as an option, the goal of the associates **to use the gain that may result**;

- paragraph 2 art. 1881 stipulates the participation ratio to the loss of the company, namely, unless otherwise stipulated in the company contract, it shall be assumed that **each associate shall contribute to the loss proportionally with his contribution to the benefit-sharing**.

In the previous regulations, art. 1511 stipulated that, unless otherwise stipulated, the associates' contribution to profit or loss shall be proportional with their part of assets brought in (contribution in either money or assets), while in the case of contribution as work (in industry), participation was estimated depending on the lowest contribution in capital brought in by the associates. To note that according to the new legal requirements, the contributions must be estimated,

irrespective of their type (including work), for the participation in loss to be equitable, irrespective of the nature of their contribution.

- Paragraph 3 in art. 1881 stipulates the possibility that the **company newly set up may have or not legal personality**. This clarification is very important because the legal doctrine in the field dedicated hundreds of pages to the lack of legal personality of civil companies, as compared to commercial companies (as an interest from the registration). The practical situation changed since 1865, and this NCC reflects the new realities;

- Among the **requirements regarding the validity** of the company contract:

- a) The possibility for the associate to be either physical person or legal person. The previous regulations did not solve this aspect; a whole range of provisions lead to the interpretation that only the physical persons could be associates (e.g. ex. art. 1523 listed, under point 3, the death of an associate as a cause of the termination of the company; and art. 1526 regulated the clause of continuity with the successors);

- b) The case of a spouse that brings in a joint asset (see no 1 Newly introduced Concepts / Institutions);

- c) The object of the company shall be established, licit and compliant with the public order and the moral (repetition of the provisions in art. 1492 in the previous Civil Code);

- d) Each associate shall bring in either capital or assets, or services or specific expertise (see art. 1881 paragraph 1).

- Regarding the **status of the contributions**, the NCC stipulates:

- 1) **The transfer of the ownership right over the asset brought in** shall be done according to art. 1883 paragraph 1 as follows:

- When the company **has legal personality**, the asset shall be transferred to the company assets;

- When the company **has no legal personality**, the contribution brought in becomes **co-property of the associates**. Exception: the asset brought in shall remain the property of the contributing associate and shall be jointly used by the associates only if this is clearly stipulated in the contract. This exception has been taken from the regulation of the commercial companies in the Law 31/1990, i.e. art. 65 paragraph 1 (abbreviated as LSC).

- 2) When the asset brought in is a real estate or a real estate right (e.g. a mortgage right), the company contract shall have an authentic form; expression of the principle of legal symmetry; (art. 1881 paragraph 2);

- 3) The transfer of the ownership right shall comply with the advertising forms stipulated in the law, depending on the asset brought in, whether non-fixed / fixed, tangible / non-tangible. The date when the company is set up becomes the date when the ownership right is transferred from the contributing associate, even if the formalities of registration into the respective registers according to the law have been done before (according to art. 1883 paragraph 3).

- Regarding the **form** of the company contract, according to art. 1884:

a) The **written form** shall be produced, *ad probationem*, that is, if not otherwise stipulated in the law, the written form shall be produced only as a proof of the contract (paragraph 1);

b) The **written form** shall be produced, *ad validitatem*, only in the case of a company with legal personality; the written form shall include mandatory clauses regarding the associates, their contributions, the legal form, the object, the name and the main office. Failure to comply with these requirements shall cause absolute nullity of the newly set company (according to art. 1884 paragraph 2).

- Regarding **the duration of the company**, according to art. 1885 we differentiate between:

1) **Limited duration**, when the contract itself includes provisions in this respect. We can note a reiteration of art. 1502 in the Civil Code;

2) **Unlimited duration (not established)** when the does not stipulate anything regarding the duration. As compared to art. 1502 paragraph 1, we note that the NCC no longer stipulates anything regarding the duration of the company as being dependant on duration of the lives of the associates. As compared to the previous provision in which the object has a limited duration, the company contract shall clearly stipulate the duration of the company;

3) **The duration can be extended** before its expiry date (according to art. 1885 paragraph 2); this provision is a reiteration of art. 1524 in the Civil Code.

- Regarding **the liability of the founding associates and of the first managers**, we differentiate 2 cases, according to art. 1886, as follows:

a) A joint liability of the founding associates and of the first managers as to the prejudice caused as a result of the failure to comply with requirements regarding the form of the company contract, with the formalities to set up the company or to acquire legal personality (paragraph 1);

The joint nature of the liability has been taken from the commercial regulations; we note that the legal status of the liability is stricter than the one in the Civil Code whose art. 1520 clearly stipulates that the liability in nonstock companies shall not be joint (unlike the commercial companies where the solidarity is assumed) unless clearly stipulated.

b) If modifications to the company contract have been made, **the joint liability** shall be incumbent on **the managers with representation right**, i.e. the acting managers on the date when the modifications are made or on the date when the formalities to modify the contract were due (paragraph 2).

The provisions in art. 1886 in the NCC are taken from the LSC (art. 53 paragraph 1) and they introduce a liability that is derogatory from the civil law rules, compared to the regulations in the Civil Code.

- **The legal status of the contributions** is presented in detail in art. 1896-1899 in the NCC as follows:

A) In the case of the contribution in assets, others than fungible, the contribution shall be made by transferring the rights over these assets and handing them operational to be used for their purpose in the company (art. 1896 para. 1).

This article continues the previous regulations in art. 1503 paragraph 1 in the Civil Code which stipulated that each associate shall be considered a debtor to the company with everything he has promised to bring in, in compliance with the provisions of art. 16 paragraph 12 in the LSC stipulating that the contribution in kind shall be paid in by transferring the corresponding rights and handing in the assets to the company operational and fit to be used.

To differentiate between the contribution in property title and the contribution in use, the writers of the NCC introduce the formula according to which the associate that brings in property or another real right over an asset shall be liable for this contribution like a seller to the buyer, while the associate that brings in the use shall be liable like a landlord to a tenant (art. 1896 paragraph 2).

We consider these provisions to be updated versions of art. 1503 paragraph 2 and 1509 in the Civil Code (except for the risk in case of the loss of the asset, presented in detail in the Civil Code in paragraph 1 and 2 art. 1509).

B) In the case of contribution in **fungible or consumable assets**, these shall be accepted only as a property title (they cannot be accepted as use title), and they become the property of the associates, even if this is not stipulated in the company contract as such.

These rules are a combination of art. 1509 (paragraph 1 and 2) and art. 65 paragraph 1 in the LSC (according to which: „Unless otherwise stipulated, the assets brought in as contribution to the company shall become the property of the company when the company is registered with the Commercial Register”).

C) In the case of **contribution in non-tangible assets** the rules are those stipulated in art. 1897 as follows:

1) In the case of **debt**, the associate that brings in such a contribution shall be liable for the existence of this debt on the date he brings it in as contribution and shall be liable to recover it upon the pay date; he shall be also liable to cover its corresponding value, the legal interest that is incurred starting with the pay date, and any other damages incurred, if the debt is not totally or partially recovered (paragraph 1).

These provisions are a summary of the regulations in art. 1504 paragraph 1, 1506, 1507 and 1508 in the Civil Code and art. 16 paragraph 3 corroborated with art. 84 in the LSC.

2) In the case of the **contribution in shares** issued by another company, the contributing associate shall be liable for the contribution as a seller to a buyer (paragraph 2). To note that this kind of contribution is subject to the rules in art. 1896 paragraph 1, as fungible assets, and art. 1896 paragraph 2, because the very property title is transferred;

3) In the case of the contribution in bills of exchange or bonds, the special liability in case of debts shall apply, as it is stipulated in paragraph 1 art. 1897 (paragraph 3 in the same article).

D) In case of **contribution in capital**, the contributing associate shall owe, if he fails to execute: the amount of money he has committed, the legal interest upon the pay date and any other damages that may have resulted, being de facto notified by the creditor about the due date (art. 1898 in the NCC). These

provisions represent the putting into practice of the cumulating of the interest with the damages, accepted as an exception in the civil law when the associate incurs delays, and in the LSC in art. 65 paragraph 2 and 84 paragraph 2.

E) In case the **contribution in services or know-how**, the rules are stipulated in art. 1899 in the NCC as follows:

1) The contribution shall be owed **continuously**, as long as the associate that has committed the contribution is a member of the company, and the associate shall owe to the company the profit resulted from the activities that are the object of the contribution (paragraph 1). These provisions correspond to art. 1505 in the Civil Code.

2) Unlike the Civil Code and the special regulation in the LSC, the NCC listed the ways in which the contribution can be made in industry: by **performing**, by the associate that has committed to, of concrete **activities**, and by providing **certain information** to the company in order to fulfill its objective, in ways and conditions defined in the company contract (paragraph 2).

3) The sanction for the failure to contribute with services or know-how is represented by the company's right to exclude the associate, with the obligation to pay damages, as the case may be (paragraph 3).

The provisions in paragraph 2 and 3 art. 1899 are new; neither the previous civil regulations, nor the special commercial regulations included details about the concept of contribution in industry and about the sanction for failure to execute this contribution.

- Regarding the **participation in profit and loss**, the NCC includes new provisions in art. 1902 as follows:

- Unlike art. 1511 paragraph 1 in the Civil Code which stipulated that, when the contract does not mention the profit and the loss of each associate, these shall be proportional with the contribution brought in by each of them, according to art. 1902 paragraph 1, the participation in the profit of the company implies participation in the loss of the company; the conditions of this participation shall be stipulated in the company contract, in the civil code draft or in applicable company legislation, as the case may be.

We note two changes in the conception of the writers of the NCC: on the one hand, the participation of the associates is linked to the capital each one brought in, on the other hand, proportionality between equity and participation in loss is no longer mentioned and the associates are free to establish other proportions (this provisions must be corroborated with art. 1894 paragraph 3); however, in the absence of any clarifications, the participation of any associate in profit and loss **shall be proportional** with his contribution to the equity, unless otherwise agreed on (art. 1902 paragraph 2).

- Similarly to the Civil Code, the NCC stipulates in art. 1902 paragraph 2 that that participation in profit and loss of the associate whose contribution is services or know-how shall be equal with the participation of the associate who made the least contribution, unless otherwise agreed on, (similarly, there is a provision in art. 1511 paragraph 2 I the Civil Code).

- The principle of proportionality between the participation in profit and the participation in loss can be violated according to art. 1902 paragraph 3 in the NCC; thus, the associates can participate in profit with a proportion different from the participation in loss, if this difference is reasonable under the circumstances and clearly stipulated in the contract.

- The principle of proportionality is reinforced in the NCC in art. 1902 paragraph 3 which stipulates that, when the contract only establishes the participation in profit, the same participation shall apply for the loss.

- Unlike the Civil Code which stipulated an extremely serious sanction for the company contract including a leonine clause (either in the positive sense, when a single associate is entitled to all profits, either in the negative sense when one or several associates is/are exempted from participation in loss – according to art. 1513 paragraph 1 and 2), the NCC stipulates a sanction that does not affect the contract but only the leonine clause. Thus, according to art. 1902 paragraph 5, any clause according to which an associate is excluded from the distribution of the profit or from the participation in loss shall be considered as unwritten.

- The NCC, unlike the Civil Code, stipulates an exception in the case of the contribution as work; thus, according to art. 1902 paragraph 6, as an exception to art. 1881 paragraph 2, the associate whose contribution is work or know-how shall be exempted from participation in loss proportionally with his contribution, if this exemption has been clearly stipulated in the company contract.

A case previously regulated in the Civil Code has been taken over in the NCC in a new version. While in art. 1506 paragraph 2 in the Civil Code, when a person owes money both to an associate and to the company, unless otherwise stipulated, the payment shall be considered to be effected into the account of the creditor-associate. The creditor-associate is not entitled to claim anything only when the receipt proving the payment clearly shows that the payment has been effected into the account of the company (even if the payment has been made directly to the associate). Unlike this, in the NCC, when a joint debtor pays a part of his debts to the company and to the associate (when the two have the date pay date), the associate who has received the payment shall allocate this amount of money to cover his debt and the debt of the company, proportionally with the amounts (art. 1906).

- We consider that that difference between the NCC and the previous regulation only protects the interests of the company in this competition regarding the distribution of the payment for the debts of the joint debtor; both the company and the creditor are seen as equal. There is no preference for the crediting company, as it was the case previously when, according to art. 1506 paragraph 1, although it was clearly stipulated in the receipt that the payment has been effected for the creditor – associate, the assumption that it will be increased was that the payment has been effected for the crediting-company as well and the amount has been computed on proportional basis for both credits. This case is reinforced by paragraph 2 of the same article.

- Regarding the **expenses made by an associate for the company**, the NCC reiterates some rules in the Civil Code as follows:

- The associate shall be entitled to be paid back the expenses he has made for the company and to be paid compensations for the obligations or the loss committed to or suffered while acting in good faith (art. 1907 paragraph 1 in the NCC, reiterating the provisions in art. 1510 in the Civil Code);

- The associate cannot compensate the expenses and the loss mentioned in the previous paragraph with his debts to the company or the loss caused to the company because of his fault with benchmarks imposed as a result of various operations (art. 1907 paragraph 2 in the NCC, reiterating the contents of art. 1508 in the Civil Code);

- The rule according to which the compensation of the debt of a third party to the company with the debt of an associate to the third party shall be forbidden stipulated in art. 1907 paragraph 3 in the NCC is a clearer reiteration of art. 1507 in the Civil Code.

- **Older rules** in a new wording can be found in art. 1908 in the NCC as follows:

- An associates can become partner with a third party in his rights as associate of the company without the consent of the other associates but the said third party shall not be entitled to become an associate of the company without the consent of the other associates given under the provisions of art. 1902. These rules in art. 1908 paragraph 1 reiterate art. 1519 in the Civil Code which, however, had no clear provisions regarding the cases when the consent of the associates is needed for the transfer of the rights in the company;

- **The appointment of the managers** is regulated by the NCC with some modifications as compared to the Civil Code as follows:

- The provisions in paragraph 1 art. 1913, according to which the appointment of the managers, their ways of organization, the restrictions of their mandates and any other aspect regarding the management of the company shall be stipulated in the contract or in separate documents, are a combination of art. 1514 paragraph 1 and 1517 point 1 in the Civil Code;

- The provisions in paragraph 2 art. 1913, according to which the managers can be associated or not associated, physical persons or legal persons, Romanian or foreign, are reiterations of the regulations in the special commercial law, i.e. art.153¹³ paragraph 1 and 2 in the LSC.

- The provisions in paragraph 3 and 4 art. 1913 in the NCC are updated versions of art. 1517 point 1 in the Civil Code as follows:

- according to paragraph 3 in art. 1913 „Unless otherwise stipulated in the contract, the company shall be managed by the associates who have a mutual mandate to manage for each other in the interest of the company. The operation performed by any of them shall be valid for the others even without their prior consent”;

- according to paragraph 4 in art. 1913 „Any of them shall be entitled to oppose the operation, in writing, before it is completed”.

▪ We note that, as compared to the previous regulations, the NCC imposes the written form to express the opposition. The Civil Code specified no form for the opposition.

• A new regulation introduced by the NCC in order to protect the interests of third parties is paragraph 5 art. 1913, according to which „The opposition shall not produce effects for third parties acting in good faith”. The Civil Code had no such clear provisions but according to the principle of the relative effects of the legal documents, the legal documents shall produce effects only among the parties, not for third parties.

• A reiteration of the provisions of the Civil Code in an updated wording (art. 1514 paragraph 2) is art. 1914 in the NCC. Thus:

▪ The manager, in the absence of any opposition from the associates, shall be entitled to perform any act of management in the interest of the company (paragraph 1);

▪ The manager can be revoked under the rules of the contract of mandate, unless otherwise stipulated in the company contract (paragraph 2);

▪ The clauses restricting the lawful management powers shall not be opposable to third parties acting in good faith (paragraph 3). This provision shall be understood as linked to art. 1913 paragraph 5 previously mentioned;

• art. 1915 in the NCC regarding **the liability of the managers** is a combination of the regulations in art. 72 and 73 in the special commercial law and the provisions in the Civil Code as follows:

▪ the managers shall bear personal liability towards the company for any prejudice caused as a result of violation of the law, during their mandate by improper management of the company (paragraph 1). These rules can be found in art. 1514 paragraph 1 and 2 corroborated with art. 1508 in the Civil Code.

• the working procedure in the case of multiple managers is regulated by art. 1516 in the NCC summarizing the provisions of art. 1515 and 1516 in the Civil Code, similar to art. 76 in the LSC. Thus: „In case of multiple managers, without any mandate establishing the powers of each manager or forcing them to work together, each manager shall be entitled to manage on his own in the interest of the company, in good faith. If the mandate stipulates that the managers shall work together, none of them shall be entitled to perform the act of management in the absence of the others, even if the others are unable to act”.

• Regarding **the rights of the associates who are not managers**, the NCC reiterates some provisions from the Civil Code, art. 1918 as follows:

▪ according to paragraph 1, the associates that have no capacity of manager shall be forbidden to manage the company and to use the assets of the company if they have no capacity of manager, under the sanction of covering the damages that may result thereof. The right of third parties acting in good faith shall not be impaired. These rules are art. 1518 and art. 1517 point 4 in the Civil Code with a new wording;

• regarding the obligations towards creditors of the company, the NCC, in art. 1920 paragraph 1, reiterates the solution in art. 1521 in the Civil Code stipulating that, in executing obligations towards the creditors of the company,

each associate shall be liable with his own assets, proportionally with his contribution to the equity, only in cases when the creditor of the company cannot be paid back enough from the joint assets of the associates.

- Regarding the cases when a company ceases to exist, the NCC takes over the provisions in art. 1523 points 3-5 in the Civil Code and lists some additional cases as well. According to art. 1925, the capacity of being an associate is lost whenever the associate's right in the company are transferred, whenever a foreclosure procedure occurs, in case of bankruptcy, in case of court ban, in case of withdrawal and exclusion from the company. To note that new situations are listed: the transfer of the associate's rights in the company (voluntary or forced) and the withdrawal and exclusion. They correspond to practical situations that were not included in the Civil Code.

- **The withdrawal of an associate** is regulated in art. 1926 and art. 1927 in the NCC as follows:

- The associate of a company with **unlimited duration** or whose contract stipulates the right to withdraw shall be allowed to withdraw from the company with prior reasonable notification, if he acts in good faith and his withdrawal at that moment does not cause an imminent damage to the company, according to art. 1926. This article takes over the provisions in art. 1927 in the Civil Code and art. 1928 stipulating when the withdrawal is considered not to be done in good faith;

- Regarding the withdrawal from a company with **limited duration**, art. 1927 paragraph 1 reiterates the provisions in art. 1529 in the Civil Code as follows: the associate of a company with limited duration or whose object of activity can be achieved only within a certain period of time shall be allowed to withdraw for justified reasons, with the consent of the other associates, unless otherwise stipulated in the contract.

Unlike art. 1529 in the Civil Code stipulating that the justification of the reasons to withdraw can only be appreciated by the court, the NCC stipulates the possibility to withdraw with the consent of the majority of the remaining associates which facilitates the withdrawal.

According to art. 1927 paragraph 2, if the consent is not unanimous, the associate can go to the court; the court shall analyse the withdrawal request and the justification of the reasons, if the withdrawal does not affect the company upon the circumstances and the good faith of the parties. In all cases, the associate shall be requested to cover the damages that may result from his withdrawal.

- The cases when **a company ceases to exist** regulated in the NCC are more numerous than in the Civil Code. According to art. 1930 paragraph 1, with the reserve of special legal provisions, the contract shall terminate and the company shall cease to exist when:

- a) Either the object of the company has been achieved or it definitely cannot be achieved; the provisions reiterate point 2 in art. 1524 in the Civil Code;

- b) The associate agreement; this is not clearly stipulated in the Civil Code but it corresponds to the rule „*mutuo consensu– mutuo dissensu*”;

c) The court gives a decision, based on legitimate, justified reasons; the Civil Code did not include this requirement but the interdiction or the insolvency of an associate (point 4 in art. 1523) pronounced in court;

d) The duration of the company terminates, except for the case when the provisions of art. 1931 apply (tacit prorogation); this reason existed in point 1 in art. 1923 in the Civil Code;

e) The company becomes null;

f) Other situations stipulated in the company contract occur.

Although the death of an associate is no longer a distinct cause in the NCC (like in art. 1523 point 3), it can be found in art. 1938 in the NCC.

- A new provision included in paragraph 2 art.1930 stipulates that a company that initiates dissolution shall be liquidated.

- As compared to the provisions in art. 1524 in the Civil Code stipulating that the prorogation of the company shall be proved in the same way the articles of incorporation are proved, the NCC identifies the cases when tacit prorogation takes place: if the company continues its operations and the association continues to initiate operations pertaining to the object of activity and to behave as associates. According to art. 1931 in the NCC, prorogation shall operate for 1 year and shall be extended with one year term each time, from the date when the duration of the company ceases, if the same requirements are met.

- If the **assets disappear**, art. 1937 in the NCC reiterates the 2 situations possible for the assets brought in as contribution to the assets of the company: either a property title, or the right to use, regulated in art. 1525 in the Civil Code. Unlike the Civil Code, the disappearance of the asset brought in as contribution does not cause the company to cease; a way to save the company is the case when the company can continue to exist without the associate who brought in that asset. Thus:

- When one of the associates has promised to bring in the property or the use of an asset that disappeared or got lost before the contribution was made, the company shall cease to exist in its relation with all the associates, except for the case when the company can continue to exist without the associate who committed the asset that disappeared or got lost (art. 1937 paragraph 1);

- The company ceases as well in all the cases when the asset disappears, if only the use of the asset has been brought in as contribution, and the property stays with the associate, except for the case when the company can continue to exist without the associate that committed the asset that disappeared.

- art. 1938 in the NCC lists the cases when the company ceases to exist apart from the cases listed in art. 1930. From the point of view of the civil law, only one case is new, namely the case when an associate loses his lawful rights and obligations as a physical person the moment he becomes a legal persons. Since the NCC regulates the possibility for the associate to be physical person or legal person (according to art. 1882 paragraph 1), it becomes logical that the loss of the capacity of being a legal persons shall be a reason for the company to cease to exist. The other causes can be found in art. 1923 in the Civil Code. Thus, according to

art. 1938 in the NCC, unless otherwise stipulated in the contract, the company shall cease to exist when:

- i. one of the physical person associated dies or is placed under interdiction (corresponding to art. 1523 point 3 in the Civil Code);
- ii. one of the physical persons associated loses his capacity of having rights and obligations derived from the law;
- iii. the bankruptcy of an associate (corresponding to art. 1523 point 4 in the Civil Code).

• art. 1526 in the Civil Code can be found in art. 1939 in the NCC as follows: the company contract can stipulate that the company shall continue its lawful existence with the heirs of an associate when an associate dies. It corresponds to the clause of continuity with the successors regulated by the LSC for partnerships and Ltd. companies.

• The regulations in art. 1526 in the Civil Code regarding the **rights of the heirs in the company** are taken from art. 1940 in the NCC: if it has been stipulated that the company shall continue to exist with the remaining associates in the cases mentioned in art. 1938, the associates or his heir, as the case may be, shall be entitled only to his share or to the share of the person who made the contribution, depending on the situation of the company on the date when the event occurred. He shall be entitled to rights or liable for further obligations only to the extent to which these are the necessary consequence of operations done before this event.

• Art. 1947 in the NCC reiterates the provisions of art. 1881 paragraph 2 in the Draft regarding the participation in profit and loss. The proportionality of the participation in profit and loss is regulated in art. 1511 in the Civil Code. The NCC stipulates the following: if the net assets are not enough to pay back entirely the contributions and to pay the company's obligations, the loss incurred by the associates proportionally with their contributions shall be established in a contract. Unlike art. 1881 paragraph 2 stipulating the way in which profit is distributed, art. 1947 regulates the way in which liabilities are distributed (loss).

Another regulation taken from the Civil Code, art. 1530, is art. 1948 in the NCC stipulating that the distribution in kind of the company's assets shall be done according to the rules governing the distribution of the joint property. To note that, unlike the Civil Code stipulating that the distribution among the associates shall be done according to the heritage rules where the joint assets resulted from the kinship relations, the NCC does not restrict the application to a dependency upon the way in which the joint assets resulted.

Conclusions

The regulations in the New Civil Code regarding the companies combine elements of civil law (from the 1865 Civil Code) with commercial law (either from the 1887 Commercial Code, or from the special commercial legislation).

We understand that the new view promoted by the New Civil Code corresponds to the monist concept¹⁵ about regulating the private law relations in a single, civil code.

We are still wondering how certain issues will be solved:

a) The need to abrogate the 1887 Commercial Code, already done by the Law 71/2011; the Commercial Cod has been deprived of contents because a lot of topics have been taken over in the New Civil Code;

b) Many of the special provisions currently existing in the special commercial legislation (especially in Law 31/1990 regarding the commercial companies, abbreviated as LSC) have been already taken over in the New Civil Code;

c) Given the above-mentioned remarks under a) and b), we are wondering if the law-makers will consequently abrogate the special commercial legislation; it has been partially taken over in the New Civil Code but what about the rest?! Abrogation of this legislation and of the Commercial Code means disappearance of the commercial law?!

Our conclusion is that having the wish to reform the Civil Code is not enough; a unified concept about the contents of the civil law must be promoted which means that the entering into force of the New Civil Code is triggering a chain reaction to modify other laws and to conceive entirely new laws. The New Civil Code only begins the Change!

Bibliography

1. Angheni, S.; Volonciu, M.; Stoica, C., *Commercial law*, 4-th ed, C. H. Beck Publishing House, Bucharest, 2008.
2. Căpățână, O., *Commercial companies*, Lumina Lex Publishing House, Bucharest, 1996.
3. Cărpenaru, St. D.; Predoiu, C.; David, S.; Piperea, Gh., *Commercial companies-regulations, doctrine, jurisprudence*, All Beck Publishing House, Bucharest, 2001.
4. Cristea, S., *Business law*, University Publishing House, Bucharest, 2009.
5. Cristea, S.; Stoica, C., *Company's laws*, University Publishing House, Bucharest, 2008.
6. Deleanu, I.; Deleanu, S., *Little encyclopedia of law*, Dacia Publishing House, Cluj Napoca, 2000.
7. Leaua, C., *Commercial companies, special procedures*, C. H. Beck Publishing House, Bucharest, 2008.
8. Pirvu, L. N.; Simon, I. F., *Law regarding the Commercial Register-comments and explanations*, C. H. Beck Publishing House, Bucharest, 2009.
9. Popa, N.; Eremia, M. C.; Cristea, S., *General theory of law*, All Beck Publishing House, Bucharest, 2005.
10. Schiau, I.; Prescure, T., *Law of the commercial companies no. 31/1990 – analyses and comments per articles*, Hamangiu Publishing House, Bucharest, 2007.
11. Stătescu, C.; Bîrsan, C., *Civil law. General theory of obligations*, Hamangiu Publishing House, Bucharest, 2008.

¹⁵ N. Popa, M. C. Eremia, S. Cristea, *General theory of law*, All Beck Publishing House, Bucharest, 2005, p. 13; C. Stătescu, C. Bîrsan, *Civil law. General theory of obligations*, Hamangiu Publishing House, Bucharest, 2008, p. 16, 17.