On the dissolution of the limited liability company. Disagreement of the shareholders

Lecturer **Cristina COJOCARU**[1]

Abstract

The limited liability company, similar to the general partnership is set up and functions on the grounds of the trust between shareholders. Therefore, this type of company has an intuitu personae character, just like any company of persons. The limited liability company operates as long as the conditions laid down by law are met, and if any or more causes leading to the improper operation of the company, it shall dissolve. One of the dissolution cases is that stipulated by articles 227 paragraph (1) letter e) of Law no. 31/1990 – the dissolution by court decision respectively – when the dissolution cannot be decided following a decision of the general meeting – on solid grounds, which can be misunderstandings between the shareholders. Such misunderstandings are not by themselves enough to lead to dissolution, but it is necessary for them to determine the improper operation or lack of any company's operation.

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1. Introduction

A relatively recent case[2] in our Supreme Court gives us the opportunity to analyse some legal provisions on the dissolution of commercial companies in general and especially of limited liability companies, a type of company that is very common in our law. In the present case, some of the shareholders have requested the court to order the dissolution of the company because there were severe, irreconcilable disagreements between the shareholders, based on the provisions of art. 227 par. (1) letter e) of Law no. 31/1990 (hereinafter, "the Law" or "Law no. 31/1990").

The cessation of the existence of the company results in the termination of its legal personality and the liquidation of its patrimony. This activity requires – as a general rule – two distinct and successive phases: the dissolution phase of the company followed by the liquidation phase, when its patrimony is liquidated. Dissolution is therefore the first stage of the process of cessation of a company's existence[3] creating the premises for its liquidation.

According to the legal provisions, the decision to dissolve the company is made by the General Meeting or by the court, and only exceptionally, it is carried out exclusively based on the provisions of the law. It is worth mentioning that the

[1] Cristina Cojocaru – Department of Law, Bucharest University of Economic Studies, Romania, cristina.cojocaru@cig.ase.ro.

[2] See Decision no. 679/27 February 2015 of ICCJ, Second Civil Division.

[3] Stanciu D. Carpenaru, *Tratat de drept comercial roman, conform noului Cod civil*, Universul Juridic Publishing House, Bucharest, 2012, p. 263 et seq.

opening of the dissolution process does not affect the juridical personality of the company, which is needed for the accomplishment of the other activities related to the liquidation of the company.

2. General cases of dissolution of the company

These causes are provided by art. 227-229 of Law no. 31/1990 and are of a general nature, therefore applicable to any company; there are also certain causes of dissolution specific only to some forms of company[4]. The general causes of dissolution of the company are:

- Lapse of the period established for the duration of the company – art. 227 par. (1) letter a) of Law no. 31/1990. According to the law, the company contract shall provide the duration of the operation of the company and as a result, when this period expires, the company dissolves, as a consequence of the will of the shareholders. If the contract does not include any clause related to the duration of the company, it will operate indefinitely. However, it is worth mentioning that the dissolution of the company when the term is reached can be avoided by extending the duration of its operation under the terms of art. 204 of the Law. At least three months before the expiry of the company's duration, the shareholders will be consulted by the company's directors on the extension of the term, and if this consultation does not take place, the court will be able to order the consultation.
- The impossibility of achieving the object of activity of the company or its realization – art. 227 par. (1) letter b) of the Law. When it is found that for various reasons the object of activity of the company can not be achieved or has already been achieved, the company dissolves. The object of activity is mentioned in the company's constitutive act and as such it must be pursued. It may happen, however, that for different reasons – material or legal – this object can no longer be achieved and therefore the company itself loses its raison d'être. It may be that the impossibility was there from the very beginning, or it has intervened along the way, it is important that the object can not be achieved. However, if the object has already been achieved, the shareholders have reached their intended purpose and the company is also dissolving.
- Declaration of nullity of the company - art. 227 par. (1) letter c) of the Law. Failure to comply with the legal requirements for the establishment of the company always causes the nullity of the company, which is declared by the court. This is equivalent to the dissolution of the company. Some authors[5] argue that once the company is declared null and void, the court must also rule the dissolution of the company. Since the company can be dissolved by the declaration of its nullity, it is

[4] See also: O. Capatana, *Societatile comerciale*, Lumina Lex Publishing House, Bucharest, 1996, p. 371; Crina Mihaela Letea, *Dizolvarea si lichidarea societatilor comerciale*, Hamangiu Publishing House, Bucharest, 2008, p. 208.

[5] See M. Scheaua, *Legea societatilor comerciale nr. 31/1990*, Hamangiu Publishing House, Bucharest, 2007, p. 288.

understood that this automatically implies its dissolution, a company that is declared null being no longer able to operate.

- The decision of the General Meeting – art. 227 par. (1) letter d) of the Law. As every company is established and operates based on the will of the shareholders, they are also deciding on its dissolution, a manifestation of will expressed within the meeting of the shareholders. It must be noted that the shareholders are free to decide at any time the dissolution of the company, as the law does not provide any special case of dissolution by the will of the shareholders; the only situation governed by law is when the shareholders decide the dissolution before the expiry of the term established for the duration of the company.
- Decision of the Court – art. 227 par. (1) letter a) of the Law. When the dissolution of the company can not be achieved by decision of shareholders, it shall be decided by court. This dissolution has to be for sound reasons, such as severe disagreements between shareholders which prevent the operation of the company.
- Bankruptcy of the company - art. 227 par. (1) letter f) of the Law. If the company is undergoing bankruptcy in the insolvency proceedings, it dissolves, its assets being liquidated for the satisfaction of the creditors' claims. The dissolution shall be ordered by the syndic judge by the resolution approving the bankruptcy.
- Other cases provided by law - art. 227 par. (1) letter g) of the Law. These are cases of dissolution regulated by law or established by the constitutive act. According to art. 237 of the Law no. 31/1990 other cases of dissolution concern companies that exist only on paper, because they are no longer actually operating.

Thus, the company dissolves when:

a) it no longer has statutory bodies, or they can not meet;

b) it ceased its activity, has no known headquarters or does not meet the conditions regarding the registered office, the shareholders disappeared, or have no known domicile or residence;

c) it did not complete its share capital according to the law.

3. Special cases of dissolution of the limited liability company

The cases of dissolution of the company presented above are general causes, which apply to any company. In addition to these general cases, the law also provides in art. 227 and 237 other special cases of dissolution for the limited liability company:

- Decrease in net assets of the company. According to art. 153 index 24 of the Law, if the director finds that the annual financial statement shows that the net assets of the company diminished to less than half of the registered share capital, the General Meeting shall be summoned without delay to decide whether the company should be dissolved. If the General Meeting does not decide to dissolve the company, the law provides that until the end of the financial year subsequent to the one in which the losses were ascertained, the company shall reduce the share capital by at least the amount of the losses that can not be covered from the reserves.

- Reduction of the number of shareholders to one. If due to bankruptcy, incapacity, exclusion, withdrawal or death, the number of shareholders is reduced to one, the limited liability company dissolves, unless the constitutive act provides for the company to continue with the heirs or the remaining shareholder decides the continuation of the company in the form of a sole shareholder limited liability company. For limited liability companies with a sole shareholder, a special case of dissolution is regulated, *i.e.* the breach of the conditions provided by art. 14 par. (1) and (2) of the Law (the same person is sole shareholder in several companies).

4. Clarifications on the nature of the limited liability company

For the analysis of the decision issued by the Supreme Court in the above-mentioned case, we think some considerations on the characteristics of this type of company are relevant.

As stated in the doctrine[6], by their nature companies are divided into companies of persons and companies of capital.

Companies of persons have a small number of shareholders and are based on their mutual knowledge and trust. In other words, these companies are constituted *intuitu personae*. General partnerships and limited partnerships belong to this category. Capital companies, unlike the previous category, are made up of a large number of persons, their personal qualities being of no interest in this case, but only the share capital invested by these persons. This includes joint stock companies and limited partnerships by shares.

The differences between these two types of companies have consequences on the transmission of the shares and the social parts, but also on the dissolution of the company, the number and the quality of the shareholders being particularly important, while in the capital companies this feature has no relevance. However, considering the characteristics of the limited liability company, it is found that this type of company does not fit precisely in any of these categories. In fact, this type of company has characteristics from both companies of persons and companies of capital. Among these characteristics, trust and the quality of the shareholders is of particular relevance also for the limited liability company, as from this point of view it is a *intuitu persone* company.

5. Dissolution of limited liability company in case of disagreements between shareholders

Divergences, misunderstandings, sometimes quite serious, about the activity of the limited liability company may occur, thus the problem of dissolving the company arises.

[6] See St. D. Carpenaru, *op. cit.* p. 142; O Capatana, *Caracteristici generale ale societatilor comerciale,* „Dreptul" no. 9-12/1990, p. 9 ff.

The courts have been called upon to rule on such requests for dissolution of the company. Thus, in an earlier decision[7], the Supreme Court has made an extensive interpretation of the legal provisions, establishing that there is an impossibility to achieve the object of a company of persons also when there are severe disagreements among shareholders that prevent the operation of the company.

In the decision which gave rise to these considerations, the court was called upon to rule on the application of two shareholders of a limited liability company to approve the dissolution of the defendant company, citing serious, irreconcilable disagreement among the shareholders, relying the request on the provisions of article 227 (1) e) of Law no. 31/1990. The first court found that the parties to the dispute, individuals, shareholders of the company whose dissolution is required had several disagreements, which caused a number of court actions. The court disputes intervened between the defendant, majority shareholder and administrator, and the applicants, minority shareholders, but which had no adverse effects on the economic activity of the company, a situation that was not contested by either party.

For these reasons, the court dismissed the action as unfounded.

The applicants filed an appeal claiming that the court of first instance did not take into account the evidence submitted and issued a judgment by erroneous application and interpretation of the law. The Court of Appeal dismissed the appeal as unfounded, holding that the decision had been issued in accordance with the law and the submitted evidence.

Against that decision, the applicants filed an appeal, requesting acceptance of the extraordinary appeal, admission of the case and dissolution of the company, on the grounds that the contested judgments did not correctly interpret the law. Thus, although the company has made a profit – an issue that was not disputed by the parties – the operation of the company has not been properly carried out: this operation mainly concerns the management and administration of the company, the company is functional if the management and its management bodies meet and take decisions in accordance with the legal and statutory requirements.

In this regard, the applicants have indicated that, since 2011, the General Meeting has not made any decision, which would indicate that the management body is inoperative. It is also noted that although in the company, the capacity of director is held both by one of the defendants and one of the claimants, in the last years there has been no document attesting the co-operation of the directors.

In the trial, the Supreme Court held that art. 227 of Law no. 31/1990 establishes the causes of dissolution applicable to all companies, and in par. (1) letter e) it is stated that dissolution can be made by court decision, at the request of any shareholder, on sound grounds, such as severe disagreement between shareholders, which prevent the operation of the company.

However, the scope of the sound reasons is not limited to the case mentioned by the law as example – as suggested by the use of the conjunction *such as* – since it may include other causes such as: the inefficiency of the company's activity, the

[7] See Decision no. 419/1996 of the Supreme Court of Justice (CSJ), Commercial Division, in RDC no. 12/1996, p. 129.

loss of part of the share capital, the suspension of the activity for a long period of time, the refusal of the other shareholders to participate in the business of the company, etc.

Thus, in order to assess the occurrence of this case of dissolution, the legislator imposed as a necessary condition the substantiality of the grounds put forward by the shareholders, in this case the serious disagreements among them, and the condition that these disagreements have as a consequence the hindering of the company's operation.

This type of company has a mixed character with features from both companies of persons and companies of capital, but its existence is marked by the character of *intuitu personae* of the relations between the shareholders, so that serious disagreements among them can generate an impediment in the functioning of the company, by the absence or disappearance of *affectio societatis* as the intention of the shareholders to work together to achieve the common lucrative goal.

However, the dissolution of the company for severe disagreements among shareholders must remain an exceptional measure, and always the criterion to be given priority in such circumstances is that of the social interest which must prevail.

There are no sound reasons for dissolution when one of the shareholders opposed the other shareholder's wish to dissolve the company and expressed his or her willingness to continue the activity – even as a sole shareholder if necessary – taking over its management.

The court rejected the appellants' arguments that it is necessary to distinguish between the functioning of the company and the financial possibility of its operation with priority given to the activity of the management and management bodies which could no longer function properly, finding these considerations irrelevant.

In the present case it was argued that although there are severe disagreements among the shareholders, it was necessary to fulfil the condition that these disagreements prevent the operation of the company, an aspect that could not be substantiated, on the contrary, the evidence submitted showed the opposite. The economic and financial situation of the company proves that it not only operated, but also made profit, and thus the legal conditions for the application of the provisions of the Law were not met.

Moreover, the defendant holds the absolute majority of the share capital, and the appellants are minority shareholders, which ensures in the General Meeting the manifestation of the will of the collective management body, the vote of the majority associate being decisive. The defendant also has the capacity of director of the company.

Against the foregoing, the court dismissed the appeal as unfounded and maintained the challenged decisions.

6. Conclusions

According to the current drafting of the legal provisions and as a result of the harmonization of domestic legislation with the European law on companies, we

can affirm that the legal provisions on the dissolution of the limited liability company are comprehensive. However, the role of the courts remains important in this matter, especially when they are called upon to rule on the spirit of the law, as it was in the above-mentioned context.

Thus, the severe disagreements among the shareholders of the limited liability company, according to art. 227 of the Law no. 31/1990 may lead to the dissolution of the company by decision of the court at the request of one or more shareholders.

These severe disagreements may fall under the category of solid reasons for dissolution, but they are not sufficient in themselves, and the exceptional measure of dissolution must also be based on the criterion of the social interest which must always prevail in such circumstances.

Since the operation of the company has not been hindered, as the company has made a profit and the governing bodies can carry out their activities in a proper way, the disagreements among shareholders, no matter how serious, do not lead on their own to the dissolution of the company by the court, even in the case of a company constituted *intuitu personae*, such as the limited liability company.

Bibliography

1. O. Capatana, *Caracteristici generale ale societatilor comerciale*, „Dreptul" no. 9-12/1990.
2. O.Capatana, *Societatile comerciale*, Lumina Lex Publishing House, Bucharest, 1996.
3. Cărpenaru, St. D., *Tratat de drept comercial român*, fifth edition updated, Universul Juridic Publishing House, Bucharest, 2016.
4. Crina Mihaela Letea, *Dizolvarea si lichidarea societatilor comerciale*, Hamangiu Publishing House, Bucharest, 2008.
5. M. Scheaua, *Legea societatilor comerciale nr. 31/1990*, Hamangiu Publishing House, Bucharest 2007.
6. Companies' Law no. 31/1990 republished in Romanian Official Gazette no. 1066/2004, amended.
7. Decision no. 679/27 February 2015 of ICCJ, Second Civil Division.
8. Decision no. 419/1996 of the Supreme Court of Justice (CSJ), Commercial Division.