The joint venture contract. Practical aspects regarding the admissibility of the request for exclusion of the associate

Ph.D. student **Andreea STOICAN**[1]

Abstract

The present paper aims at pointing out an important aspect in the implementation of the professionals' activity through the joint venture, more precisely, it raises the problem of the admissibility of the request for exclusion of the associate. Thus, although one can tell that to a certain extent the joint venture can be regarded as a species of the partnership deed, it does not acquire legal personality, reason why we have set as objective to analyse the problem of the exclusion of an associate from the practical perspective, as the legislation does not offer a clear solution in this regard. Consequently, the present study shall have the following structure: 1) Introduction, 2) The concept of joint venture, 3) The relation between the joint venture parties and the third parties, 4) Exclusion of the associate, 5) Conclusions.

Keywords: *joint venture, exclusion, legal personality, administration, representation, third party*

JEL Classification: *K12, K41*

1. Introduction

The joint venture, due to the fact that it lacks legal personality, and therefore does not become a de jure distinct subject in relation to the legal personality of each associate, is much more accessible to those deploying their activity as professionals, being frequently used in their activity. In spite of that though, precisely through the particularities it presents to the partnership deed, certain aspects regarding the joint venture may result into situations more difficult to manage in the practical work.

Before the latest Civil Code entered in force in 2011, the joint venture was regulated through art. 251-256 of the Commercial Code. According to it, the joint venture existed when a "merchant or a company granted to another one or to several persons or companies, a participation into the benefits and losses of one or several operations or even of their entire activity."[2]

Thus, from the previous regulation, it is possible to draw the conclusion that this activity had a commercial character.

---

[1] Andreea Stoican – Bucharest University of Economic Studies, Department of Law, andreeastoican@yahoo.co.uk.

[2] See the provisions of art. 251 of the Commercial Code.

At present, the joint venture is regulated in Section 3 of Chapter VII regarding the partnership deed in Title IX of the 5th Book of the Civil Code, fact which leads to the conclusion that the law maker understood to regulate the joint venture as a form of the partnership deed.[3] [4]

2. The concept of the joint venture contract

Regarding the legal provisions, the joint venture is first of all a contract, and not a simple commercial operation, the law maker itself using this phrase, both in the definition provided by art. 1949 of the Civil Code and in art. 1950 of the Civil Code, regarding its proof, the "deed" being justifiable only in writing.

At the same time, the joint venture contract also shows a series of particularities. Thus, this involves the implementation of a complex activity, based on the shared input of certain amounts of money, goods or even the involvement in the industry of two or more legal or natural persons, for a lucrative purpose. Moreover, practice demonstrated that a party of a joint venture contract can be the State itself, many mayoralties making available to other persons surfaces representing commercial spaces, these producing the amounts of money necessary for the joint implementation of commercial activities.[5] In such situations of public interest objectives which are to be achieved through the joint venture between a legal person of private law and a legal person of public law, the joint venture contract shall borrow the characteristics of an administrative contract.[6] [7]

---

[3] See Smaranda Angheni, *Raporturile juridice dintre profesionişti-comercianţi (Legal Relations between the Merchant Professionals)*, C.H. Beck Publishing House, Bucharest, 2014, p. 139.

[4] In spite of this, the legal practice noticed that the joint venture can take place also between non-professionals, the party's capacity of professional or non-professional having no relevance for the conclusion of such contracts. In this regard, see Viorel Terzea, *Noul Cod civil. (The New Civil Code)* Vol. II, Universul Juridic Publishing House, Bucharest, 2012, p. 891-892.

[5] See S. Angheni, *op. cit.*, p. 143; the High Court of Cassation and Justice, Commercial Section, decision no. 713 of 18 February 2005 in *Buletinul Jurisprudenţei. Culegere de decizii pe anul 2005 (Jurisprudence Bulletin. 2005 Selected Decisions Digest)*, C.H. Beck Publishing House, Bucharest, 2006, p. 653-655.

[6] See Court of Appeal of Piteşti, Commercial Section, decision no. 1338/2010 in Viorel Terzea, *Noul Cod civil adnotat cu doctrină şi jurisprudenţă (The New Civil Code noted with the Doctrine and Jurisprudence)*, vol. II, Universul Juridic Publishing House, Bucharest, 2012, p. 891.

[7] On the other side, in the event of the conclusion of joint venture contracts having as object immovable goods that belong to the public domain – contracts concluded in the absence of an agreement of the holder of the right of public propriety -, if an already existing and current personal interest of the owner is demonstrated, the concerned owner shall be able to suit and the action shall be admitted for the confirmation of the absolute nullity of the respective contracts. The same solution shall be decided also in the case in which the respective associations are ended by those holding the goods in administration and do not comply with the interdiction created for them to rent such deeds. The fact that the plaintiff, in its capacity of owner of the concerned spaces, is not a party in the joint venture contracts is irrelevant as long as it is the owner thereof, and following the confirmation of absolute nullity of the joint venture, they shall resume the possession and usage thereof. For more details in this regard, see the High Court of Cassation and Justice, Commercial Section, decision no. 2338 of 8 October 2009 in *Înalta Curte de Casaţie şi Justiţie. Jurisprudenţa Secţiei comerciale pe anul 2009 (The High Court of Cassation and Justice. 2009 Commercial Section Jurisprudence)*, Hamangiu Publishing House, Bucharest, 2010, pp. 64-66.

In spite of that, though, the joint venture is differentiated from other forms of company through the lack of the legal personality, not leading to any distinct law subject. Consequently, the contracting third party shall acquire rights and obligations to the associate to whom it contracted, and not to the joint venture itself.

Therefore, the joint venture shall be exempted from all compulsory formalities for the creation of a company regulated by Law no. 31/1990 or other forms of law subjects.[8]

Even in these circumstances, although it lacks legal personality and consequently a patrimony of its own, the purpose of the implementation of activities in this regard is still a lucrative one, consisting in the participation into the benefits and losses resulted from the performed activities.

Moreover, the joint venture can be defined as a contract through which two or more persons, legal or natural, having the capacity of professionals or non-professionals, decide to contribute with amounts of money, goods[9] or their specialization for the implementation of activities having a lucrative purpose, thus expressing their agreement for the participation into the achieved benefits and losses, without acquiring a legal personality distinct from the associates, and therefore not becoming a distinct legal subject.

Consequently, we can state that the joint venture contract is a contract which is known under the name of synallagmatic contract, by onerous title, commutative, which usually involves a successive performance. Last but not least, it is a consensual contract, according to the provisions of art. 1950 of the Civil Code, the written form being therefore necessary only *ad probationem*.

3. The relation between the parties of the joint venture contract and the third parties

Regarding the implementation of activities in the form of a joint venture, between the associates hereof no subordination relation is created whatsoever, irrespective of the form of such joint venture,[10] the associates remaining independent one from the others.

Still, both in practice and in the specialized literature[11] the phrases of "managing associate" or "main associate" are encountered. In spite of that, the specified terminology has no relevance in creating relations of submission, of

---

8 On the other side, the joint venture benefits from special regulations in the fiscal field – the provisions of art. 28 of the Fiscal Code which in para. 1 stipulates that "in the case of an association without legal personality, the registered incomes and expenses are distributed to each associated, according to the corresponding participation quota".

9 One should not understand that associates may bring as their contribution only goods which are in their property. As long as there is the owner's agreement, they might contribute to the joint venture also with goods that they themselves hold for usage purposes.

10 For instance, the labour relation, the principal-agent relation etc.

11 See Liviu Stănciulescu, Vasile Nemeş, *Dreptul contractelor civile şi comerciale (The Civil and Commercial Contract Law)*, Hamangiu Publishing House, Bucharest, 2013, p. 303.

dependency between the participating associates. On the contrary, the law itself stipulates, through the interpretation of art. 1953, para. 3 and 4 of the Civil Code, that although one of the associates shall deal mainly with the activities necessary to reaching the purpose of the joint venture, it does not acquire any additional benefits in the relation to the other participants that only bring their contribution in funds or goods to the created joint venture.

In fact, nothing prevents the associates from involving all equally, in the conclusion of contracts and the implementation of legal operations with third parties.

On the other side, upon the liquidation of the joint venture, when the restitution in kind of the goods brought as contribution, if they were subjected to improvements or, on the contrary, their value decreased, the positive or negative difference shall still be considered in the setting of the benefits and losses of the joint venture.[12]

Regarding the relation with third parties, irrespective of the contracting manner – on behalf of the joint venture or personally– the associates shall conclude legal documents in their own name with the contracting third party. On the other side, when acting on behalf of the joint venture, they shall answer collectively irrespectively of the one that concluded the documents with the third person. In spite of that, the third party does not acquire any right towards the joint venture, and it shall not be obliged by law otherwise than towards that associate with whom he contracted. The only admitted exception is stipulated in art. 1953, para. 3, 2nd thesis, of the Civil Code, according to which if the associate declared its capacity from the very moment of the document conclusion, the third party shall not be held responsible anymore exclusively and only towards the person to whom he contracted.

From here one may draw the conclusion that the law maker did not understand to offer a certain quality to the main associate, that is to the one achieving effectively the operations characteristic to the joint venture, as he made it in the case of the associates and administrators of companies regulated according to Law no. 31/1990. Consequently, the managing associate does not act as an agent, a representative of the other associates of the joint venture, not when it declares such capacity to the third party from the very beginning, aspect that shall be relevant only as for the responsibility of the third person in front of all associates. And in such a hypothesis, the managing associate shall conclude documents with the third parties also in the own name.

At the same time, any clause that limits in any way the associates' responsibility towards third parties shall not be opposable to the latter ones. Moreover, the clauses that stipulate a level of the benefits with a guaranteed minimal value for one of the associates shall also be considered as not in writing.

---

[12] See Lucian Săuleanu, *„Contractul de asociere în participaţie în Noul Cod civil" ("The Joint Venture Agreement in the New Civil Code")*, in Noile Coduri ale României. Studii şi cercetări juridice (The New Romanian Codes. Legal Studies and Researches), Universul Juridic Publishing House, Bucharest, 2011, p. 319.

Therefore, although the leonine clause is prohibited, one can notice that the law maker did not understand though to forbid also the setting of the participation into the benefits and losses in different percentages, as long as they are not insignificant in relation to the participant's contribution.[13]

4. Exclusion of the associate

Due to the fact that the joint venture represents a type of company with no legal personality, we cannot place the equivalence sign between the position held by an associate in such a joint venture and the one of an associate in one of the forms of company regulated by Law no. 31/1990.

Moreover, the judicial practice provided in time the explanation according to which the sanction of the exclusion of an associate regulated by the companies' law cannot be decided in court to obtain the exclusion of an associate from a joint venture.[14]

Thus, in the discussed species, the plaintiff limited liability company sued the natural person AB requesting the court to pronounce for the exclusion from the company of the natural person associate AB, and to divide later on the social parts thereof between the other remaining associates within the limited liability company.

The cause of requesting the limited liability company through that petition to come to judgment was represented by the fact that the associate AB was put in default regarding the contribution to which he committed but which he did not provide, more precisely the transfer of the right of property over a building under construction. The building under construction on the concerned land represented an investment made by the plaintiff company based on a joint venture contract. At the same time, between the parties a sale-purchase pre-contract was also signed by the parties in this regard.

The legal base of the plaintiff's action was represented by the provisions of art. 222 para. 1 letter a) of the Companies' Law no. 31/1990. Or, according to it, "the associate that, after being put into default, does not provided the contribution it committed to can be excluded from the general partnership, limited partnership or the limited liability company". The claim thereof was based on the justification that the company activity was aiming at the completion of the construction and the usage of the building which was supposed to be brought as contribution by the defendant associate.

---

[13] Idem, p. 315; Court of Appeals of Galați, Commercial, Maritime and Fluvial Section, civil decision no. 93/A of 19 October 2009, p. 5, available online on the date of 15 April 2015 on the site http://www.jurisprudenta.org/Search.aspx, last access on May 1, 2015.

[14] High Court of Cassation and Justice, Commercial Section, decision no. 132 of 13 January 2011, in *Înalta Curte de Casaţie şi Justiţie. Secţia comercială. Jurisprudenţă 2010-2011 (The High Court of Cassation and Justice. 2009 Commercial Section Jurisprudence)*, Universul Juridic Publishing House, 2012, p. 226

Still, both the first court and the Court of Appeals pronounced for the rejection of such action (later of the appeal) started by the plaintiff company (appellant).

Thus, one cannot equate the contribution of the associates to the creation of a limited liability company, contribution referred to in the company's memorandum of association and the contribution each participant brings for the later deployment of certain operations through a joint venture.

Furthermore, the constitutive act of the limited liability company does not contain any provision as for the defendant's participation, as contribution to the constitution thereof, with the provision in kind of the good under litigation and the transfer of the right of property thereupon. Still, as long as this is not stipulated either initially, or throughout the implementation of the activity of the limited liability company, for a possible increase of the registered capital, the first court correctly allowed the action.

Thus, the fact that on the basis of a later joint venture contract, the defendant made available to the plaintiff company a land on which, based on the legal permits, there started the construction of a building, is not the object of the possibility of the application of the penalty stipulated by art. 222 para. 1 letter a) of the Companies' Law no. 31/1990, the text being one of strict interpretation.

Consequently, this aspect cannot be extended either through the clauses contained in the sale-purchase pre-contract concluded between the parties regarding the construction, the obligation which results from this deed being the one of later transmission of the right of property, while the plaintiff company shall pay in exchange for such transmission, an amount of money representing the price thereof, and in no circumstance it shall acquire another right in case of non-performance of the obligation by the defendant associate.

5. Conclusions

These being said, as the Civil Code does not stipulate special provisions regarding the modality of exclusion of the associates of a joint venture, we should understand that in this case the parties themselves precisely through the joint venture contract, must stipulate the situations in which one of the participating persons can be excluded.

Certain courts also pronounced in this regard,[15] admitting the fact that the form, extent and conditions of the joint venture are left to the latitude of the parties. Thus, it was considered that irrespective of the fact that a vehicle of the plaintiff was excluded from the performance of the joint venture transportation, this shall not equate with an exclusion of the plaintiff associate from the joint venture, although that means of transport represented the only good with which the

[15] Court of Appeal of Alba-Iulia, Commercial and Administrative Contentious Section, decision no. 55/A of 3 April 2006, available online on the date of 15 April 2015 on the site http://www.jurisprudenta.com/speta/ac%C5%A3iune-%C3%AEn-constatarea-nulit%C4%83%C5%A3ii-absolute-a-hot%C4%83r%C3%A2rii-consiliului-de-administra%C5%A3ie-al-asocierii-%C3%AEn-participa %C5%A3iune-v6ve/, last access on May 1, 2015.

concerned associate participates in the joint venture. This conclusion was reached precisely due to the permissiveness of the law in this matter of the regulation of the manners of ending the joint venture. Consequently, as long as the parties of the joint venture contract stipulated that an associate can be excluded only through the decision of the Board of Administrators, and not of the General Assembly, this shall be the only body that can decide in this regard. Moreover, if upon the creation of the joint venture it was stipulated that the exclusion of an associate may occur only through the express decision in this regard, the exclusion of a good brought with the title of sole contribution by one of the participants in the joint venture shall not equate under no circumstances with the exclusion of the associate as such.

Last but not least, an extremely important role must also be granted to the *intuitu-personae* character of the joint venture contract. This may lead to conflicts and misunderstandings between the associates, thus breaking apart the mutual confidence on which it was based, culminating in the end with the impossibility of implementing the activity for which the joint venture was created.

Bibliography

1. Angheni Smaranda, *Raporturile juridice dintre profesioniştii-comercianţi (Legal Relations between the Merchant Professionals)*, C.H. Beck Publishing House, Bucharest, 2014;
2. Stănciulescu Liviu, Nemeş Vasile, *Dreptul contractelor civile şi comerciale (The Civil and Commercial Contract Law)*, Hamangiu Publishing House, Bucharest, 2013;
3. Săuleanu Lucian, "Contractul de asociere în participaţie în Noul Cod civil" *("The Joint Venture Agreement in the New Civil Code")*, in *Noile Coduri ale României. Studii şi cercetări juridice (The New Romanian Codes. Legal Studies and Researches)*, Universul Juridic Publishing House, Bucharest, 2011, p. 307-320;
4. Terzea Viorel, *Noul Cod civil. (The New Civil Code)* Vol. II, Universul Juridic Publishing House, Bucharest, 2012;
5. Court of Appeals of Alba-Iulia, Commercial and Administrative Contentious Section, decision no. 55/A of 3 April 2006, available online on the date of 15 April 2015 on the site http://www.jurisprudenta.com/speta/ac% C5%A3iune-%C3%AEn-constatarea-nulit%C4%83%C5%A3ii-absolute-a-hot%C4%83r%C3%A2rii-consiliul ui-de-administra%C5%A3ie-al-asocierii-%C3%AEn-participa%C5%A3iune-v6ve/
6. Court of Appeals of Galaţi, Commercial, Maritime and Fluvial Section, civil decision no. 93/A of 19 October 2009, p. 5, available online on the date of 15 April 2015 on the site http://www.jurisprudenta.org/Search.aspx;
7. *Înalta Curte de Casaţie şi Justiţie. Secţia comercială. Jurisprudenţă* 2010-2011 *(The High Court of Cassation and Justice. Commercial Section, 2010-2011 Jurisprudence)*, Universul Juridic Publishing House, 2012;
8. *Înalta Curte de Casaţie şi Justiţie. Jurisprudenţa Secţiei comerciale pe anul 2009 (The High Court of Cassation and Justice. 2009 Commercial Section Jurisprudence)*, Hamangiu Publishing House, Bucharest, 2010;
9. *Buletinul Jurisprudenţei. Culegere de decizii pe anul 2005 (The Jurisprudence Bulletin. 2005 Selected Decisions Digest)*, C.H. Beck Publishing House, Bucharest, 2006.