Aspects concerning the lengths of the excluded shareholder's liability towards third parties in the case of limited liability companies in Romania

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Abstract

In the current context of reinventing the trading company law, at the end of a lengthy and extremely difficult economic crisis, when every participant in the economic life tried to find their own way to adapt and make their activity survive the new social and commercial realities, not few were the cases when some of the Shareholders were excluded and their liability was drawn onto the legal person itself. Nevertheless, there is a type of legal liability of the former Shareholders, excluded from the Company, that still is quite deficiently regulated and, despite the sound argumentation and comprehensive regulation of Law no. 31/1990, it fails to provide a clear and detailed explanation of the consequences, namely, of the consequences the exclusion of a Shareholder has over the Third Parties of good-faith that the legal person (the Company) had or continues to have legal relations with. This paper thus aims at analysing one of the main effects of excluding Shareholders from the company, namely the extent of their liability towards the Third Parties, and it is structured in five parts, as follows: 1) Introduction, 2) About the Shareholders' exclusion, 3) The effects of excluding a Shareholder from the Limited Liability Company, 4) The excluded Shareholder's liability towards the Third Parties and 5) Conclusions.

Keywords: *exclusion, affectio societatis, case studies, true and just causes, liability*

JEL Classification: K22

1. Introduction

The direct consequence of the legislative reform started in 2011, with the entry into force of the New Civil Code, certainly was the adoption of a monist private law system at the level of the Romanian legal system. However, we cannot even now clearly speak about a perfect transition achieved by unifying the civil law rules with the rules of other private law branches. Given that numerous regulations, especially civil law regulations, survived, and we refer here mainly at the provisions of the Company Law no. 31/1990, whose efficiency cannot be challenged, but not only, the commercial law anatomy cannot perish in the near future even when facing the law-maker's attempt at removing this law branch.

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economic life tried to find their own way to adapt and make their activity survive the new social and commercial realities, not few were the cases when some of the Shareholders were excluded and their liability was drawn onto the legal person itself. Nevertheless, there is a type of legal liability of the former Shareholders, excluded from the Company, that still is quite deficiently regulated and, despite the sound argumentation and comprehensive regulation of Law no. 31/1990, it fails to provide a clear and detailed explanation of the consequences, namely, of the consequences the exclusion of a Shareholder has over the Third Parties of good-faith that the legal person (the Company) had or continues to have legal relations with.

2. About the Shareholders' exclusion

According to the provision of art. 222 letters a) and d), and of art. 206 para. 2 of the Company Law no. 31/1990, the causes for exclusion, as regards the Shareholders of a limited liability company, are: the Shareholder in default failed to provide the contribution he/she undertook to provide, the Director-Shareholder committed activities damaging to the company, such as fraud or using the company authorised signature and seal or the share capital for his/her own benefit or for the others' benefit and, not least of all, the Shareholders' personal creditors filed petitions against the Shareholders' Meeting Decision to extend the company duration over the initially set term, if they hold rights settled via an enforceable title prior to the decision issue. In this final case, if the petition was admitted, the Shareholders must decide, within a month starting on the date when the decision remained final, whether they understand to give up on the extension or to exclude from the company the opponent's Debtor-Shareholder, the consequence being that, should they opt for the exclusion, the rights accruing to the Debtor-Shareholder are to be calculated based on the latest approved accounting balance sheet.

Although the Shareholders' exclusion situations seem to be expressly and restrictively provided for in the law, there are authors who consider they are merely illustrative,[2] on the grounds that the exclusion must be seen as a sanction for their refusal to collaborate with the other shareholders to the company benefit, so any deed imputable to Shareholder can be seen as a cause which does not read as the compliance with the corporate interests.[3] The consequence of this interpretation, which we disagree with, would entail that the Parties could also provide for, in the Company Articles of Incorporation, other clauses for exclusion, as well as offer the Courts-of-Law the chance to give sentences on other deeds that the claimants might invoke against them, as well. Nevertheless, in the case of serious

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[2] Constantin Ştefan Şelaru, *Consideraţiuni referitoare la posibilitatea excluderii asociaţilor din societăţile comerciale (Considerations concerning the possibility of excluding the Shareholders from the trading companies)*, in „Revista de Drept Comercial" („Commercial Law Magazine") no. 4/1995, p. 107.

[3] Stanciu D. Cărpenaru, Gheorghe Piperea, Sorin David, *Legea societăţilor. Comentariu pe articole (Company Law. Comments by articles), 5th* Edition, C.H.Beck Publishing House, Bucharest, 2014, p. 747.

misunderstandings which might interfere between the Shareholders, a safer and much more effective exclusion method, which would also ensure the survival of the legal company and the continuity of its activity, is sadly the simple case of dissolving the company, according to the provisions of art. 227 para. 1 let. e) of the Law no. 31/1990.

We therefore disagree with the authors supporting the theory according to which the exclusion causes shown in the Company Law are merely illustrative, which does not result, in any way, from the contents of the legal texts. Quite on the contrary! Out of the 4 situations provided for in art. 222 para. 1 of Title V of the Law, concerning the Shareholders' exclusion and withdrawal, only two of them are applicable to the limited liability companies. This should not be construed to mean that we find no deficiencies in the law-maker's failure to provide an effective solution to certain situations occurring in practice and in the trading reality. Such a hypothesis, for instance, and maybe the most frequently encountered, consists of the tensions and dissensions between the Shareholders having the same participation in the company share capital, to such extent that they reach a blockage in continuing the activity and making the decisions with the necessary majority, in the General Shareholders' Meetings.

In such a case, we believe that appealing to the Court-of-Law to dissolve the company as the only - and, actually, lawful - measure, is an excessively strong measure, often inefficient, and even inequitable, and unjust for some of the Shareholders, or even for the legal person itself.

At this time, the only way out we could see as an extensive regulation, and a legal solution in this sense to the multiplication of the Shareholder exclusion cases (although we still believe that a clearly regulated provision in the Company Law remains the ideal solution), consists of the provisions of art. 1928 of the Civil Code, in its capacity of general norm in relation to the Company articles of association. Thus, according to the provisions therein, "upon a Shareholder's request, the Court-of-Law, for true and just causes, can decide on the exclusion from the company of any of the Shareholders." There were authors in the legal literature *per se* who considered that in the case of loss of the spirit of *affectio societatis* (which should reign throughout the company duration), the Shareholder found guilty of the company impossibility to continue doing business under proper conditions can be excluded through the decision of the Courts-of-Law for having placed the company in danger of dissolution.[4] [5]

In practice, however, the opinions are divided, which confirms once more the major deficiency existing at this time as regards the illustrated hypothesis, and,

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4 Stanciu D. Cărpenaru, Gheorghe Piperea, Sorin David, *quoted works*, p. 748.

5 Another situation which might also be considered an exclusion is that of one of the Shareholders' interfering, usually the Majority Shareholder, or, in the case of a 50-50 ownership quota, of any of the Shareholders, in the company administration attributions, thus preventing the Director from performing the activity he/she was assigned for. We consider that such an interference, in the absence of a proper mandate for the Shareholder, might be considered a case of exclusion, under certain circumstances, following that the Court-of-Law decide on the Shareholder's good faith or ill-faith as regards his/her interference in the company administration.

perhaps, the need for an express regulation on other causes for exclusion in addition to the already existing ones or, at least, the need for a clarification made by the law-maker on the restrictive nature or merely illustrative nature of the causes for excluding the Shareholders.

In a case file,[6] for instance, the court-of-appeals considered that the respective cases for exclusion provided for under art. 222 of Law no. 31/1990 are not restrictive, but illustrative, so that if one of the company Shareholders culpably prevents the good performance of the company activity in other case files, as well, such Shareholder can be excluded from the company through a court order, the purpose of such measure being that of maintaining the respective company into being. Thus, in the respective case file, the Court noted that the Defendants' behaviour prevented the limited liability company from operating under normal conditions, which was why the Court found the Plaintiff's cause to be just and well-grounded. However, during the recourse phase in the same case file, the High Court of Cassation and Justice found that the provisions of art. 222 para. (1) had been breached; in the opinion of the High Court, the deeds committed by the Appellant-Defendants failed to entail the sanction of their exclusion from the Company. The assimilation of other condition entailing the Shareholder's exclusion from the Company to the ones provided for by the law is not possible since the serious dissensions between the Shareholders preventing the company operation account for the company dissolution, as the High Court stated.

Hence, the legal nature of the Shareholder's exclusion can be regarded as either a sanction for the said Shareholder's behaviour, or a partial termination of the Articles of Association. Not least of all, there were authors who considered it to be even "a remedy for saving the company existence to the benefit of the other Shareholders".[7]

3. The effects of excluding a Shareholder from the Limited Company

As regards the character of the exclusion regarded as a sanction for the Shareholder found in one of the situations listed in the law or as grounds for terminating the Articles of Association, this can be a standard termination for the case when the company contribution is not enough in case the company registration has not yet been processed (the situation provided for under art. 222 para. 1 let. a) of Law no. 31/1990), or it can be a partial termination, in case the company has already been registered and is performing its activity (the situations regulated under art. 222 para. 1 let. d), and art. 206 para. 2 of Law no. 31/1990).

The exclusion is given by court order upon the request of the Company or of any Shareholder, the court order being subject to remedy at law only by way of

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[6] ÎCCJ *(The High Court of Cassation and Justice)*, Commercial Section, Decision no. 2164/2013, consulted on April 16, 2016, on the website: http://lege5.ro/App/Document/gqydqmrsga/decizia-nr-2164-2013-privind-excludere-asociat

[7] Stanciu D. Cărpenaru, *Tratat de drept comercial român (Romanian Commercial Law Treaty)*, Universul Juridic Publishing House, Bucharest, 2012, p. 382.

appeal. Following the exclusion, the Court-of-Law shall also give orders, by the same decision, regarding the shareholding structure of the share capital for the other Shareholders. Since there are no legal provisions in this sense, the court-of-law must order the redistribution of the shares accruing to the excluded Shareholders between the remaining ones, on a pro rata basis, taking into account the number of shares each of them holds. However, when ordering the redistribution, nothing prevents the court from taking the remaining shareholders' opinions and requests under advisement and, thus, taking note of the solution they proposed and accepted.[8]

The main consequence of ordering the exclusion of a shareholder concerns the latter's liability towards the company. Thus, according to the provisions of art. 224 of the Company Law, the excluded shareholder is held liable for losses, while being entitled to the benefits up until the day of his/her exclusion. Nevertheless, he/she cannot request they be settled until they are distributed according to the provisions of the company articles of incorporation.[9]

At the same time, the excluded shareholder shall not be entitled to a proportional part of the company assets, but only to an amount of money equivalent to their value. Therefore, if the liabilities exceed the company assets, the excluded shareholder, by virtue of the provisions of art. 224 para. 2 of the Company Law, shall hold a right granted by law, which is however devoid of subject, following that he/she not take over any of the company liabilities.[10]

Not least of all, losing the capacity of Shareholder also entails losing the subsidiary rights, such as the right to attend the General Shareholders' Meetings, the right to consult the company ledgers and documents, etc., rights which are lost the moment when the court order admitting the exclusion petition remains final.

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8 Lucian Săuleanu, *Unele aspecte privind soluţionarea cererilor de excludere a asociaţilor (Aspects regarding the settlement of the Shareholders' exclusion applications)*, in „Revista de Drept Comercial" („Commercial Law Magazine") no. 4/2006, p. 89.

9 As regards the accounting measures to be taken as a consequence of excluding one of the Shareholders, the provisions of Order no. 897/2015 of the Public Finance Minister approving the Methodological Norms regarding the reflection in the book-keeping of the main operations of company merger, division, dissolution and liquidation, as well as of the withdrawal or exclusion of some Shareholders from the Companies, and the Annexes thereto, as published in the Official Gazette of Romania, Part I, no. 711 as on September 22, 2015 will apply. The Methodological Norms aim at ensuring the unitary application of the legal regulations into force on outlining in the accountancy the operations of company reorganisation, as well as of the withdrawal or exclusion of some Shareholders from the Companies.

10 However, as the judicial practice saw it, if, at the time of a Shareholder's exclusion operations were on-going, the excluded Shareholder is bound to bear the consequences and he/she can only withdraw the part applicable to them after the completion of such operations (ÎCCJ *(The High Court of Cassation and Justice)*, Commercial Section, Decision no. 278/27.01.2010, consulted on April 17, 2016, on the website: http://lege5.ro/App/Document/gqzdenjzge/decizie-nr-278-2010).

4. The excluded Shareholder's liability towards the Third Parties

In case, on the exclusion date, certain operations are still unperformed or are under performance, the Shareholder ordered to be excluded cannot withdraw the part accruing to the shares he had held until such time when the operations are completed. Thus, he/she is forced by the law-maker to bear some additional consequences and to continue to be liable towards Third Parties for the company operations until such time when the court order remains final and irrevocable. Nevertheless, his/her liability towards the company creditors shall be limited, according to the provisions of art. 3 para. 3 of the Company Law, up to the coverage of the subscribed share capital amount.

Thus, according to the provisions of art. 225 of the Law no. 31/1990, the excluded Shareholder remains liable towards Third Parties for the operations performed by the Company.

Therefore, by corroborating the provisions of art. 5 para. 1 of the Law no. 26/1990 with the provisions of art. 223 para. 4 of the Company Law, the effects of the exclusion in relation to the Third Parties occur upon the mention recording with the Trade Registry. The exclusion effects cannot be binding upon the Third Parties unless the publicity formalities provided by the law are complied with.

Consequently, in relation to the other Shareholders, the excluded person stays liable until the court gives a final and irrevocable decisions, whereas, in relation to the Third Parties, the excluded person stays liable until they become aware of such measure given the recording of a mention regarding it with the Trade Registry and the publication thereof in the Official Gazette of Romania, part 4. Nevertheless, according to para. 2 of art. 5 of the Law no. 26/1990, the person bound to request a recording to be made cannot hold the unrecorded deeds or facts to be binding to Third Parties, except for the case when such person provides evidence that the Third Parties were aware of such deeds and facts.

What we find interesting is one of the approaches existing in the doctrine.[11] According to it, starting from the rule according to which the mentions with the Trade Registry must be made within a maximum of 15 days as of the date of the General Shareholders' Meeting Resolution or of the amendment to the Articles of Incorporation, then, in the case of the exclusion, the Shareholders' liability towards Third Parties would cease to exist as of the date when the exclusion court order remains final and irrevocable. The reason consists of the fact that the Third Parties have already become aware of the measure when the exclusion case file proceedings were started, which is why they no longer need to wait until the court order disposition is made public. However, we consider that the provisions of the Law no. 31/1990, art. 223 para. 4 are clear and contradict the mentioned opinion given the fact that they impose the obligation to submit the final exclusion order, within 15 days, with the Trade Registry Office in order for it to be recorded with

[11] Adam Ioan, Savu Codruţ Nicolae, *Legea societăţilor comerciale. Comentarii şi explicaţii (Trading Company Law. Comments and explanations)*, C.H. Beck Publishing House, Bucharest, 2010, p. 804.

the Register, as well as to have the court order disposition published, upon the company request, in the Official Gazette of Romania, Part 4.

Thus, although the doctrinal opinion is a rather strong argument given the correct presumption, in our opinion, that the Third Parties are aware of the deeds and facts concerning the exclusion measure given the fact that the initial publicity measures are performed, one cannot oversee the exception instituted by the law-maker in the Company law concerning the publication of the final measure ordered by the Court-of-Law based on the invoked exclusion grounds. Or, considering the doctrinal and case-law disputes presented hereinabove regarding the restrictive or illustrative nature of the exclusion situations, we find it all the more necessary to wait for a final measure to be given on the future of the Shareholder whose exclusion is requested and only afterwards informing the Third Parties as to a certain measure to be put in place.

In certain cases, however, the length of the excluded shareholders' liability towards the Third Parties can even exceed the moment in time we mentioned hereinabove as being the one accruing to the law-maker's will based on the provisions of art. 225 of the Law no. 31/1990. Thus, when the Director-Shareholders are concerned, their liability will extend even subsequently to the moment of exclusion and of the publication thereof, since they can be cumulatively liable, on the one hand, by virtue of art. 225 of the Law no. 31/1990, and, secondly, they can be held liable from the civil, contraventional or criminal point of view for the way they understood to administer the company, as a special form of administration liability.

Even the courts-of-law gave sentences in this sense, mentioning, for instance, that the Director will be held liable for the entire company liabilities, since a clear distinction cannot be made regarding the fact that a part of them were generated by the deeds of the new Director who, as resulting from the latter's statement, he did not administer *de facto* the company he took over. Further more, if the debt to the Third Party was the result of activities from the time when the excluded Appellant-Director-Shareholder was administering the company, and the payment default situation is the exclusive consequence of how the latter administered the Company, then the excluded Appellant-Director-Shareholder is to be held liable, and he is not completely released from administration.[12]

5. Conclusions

The issue of the excluded Shareholder's liability is, therefore, a lot greater that it seems at first sight and a lot more complex. Despite the sound grounding of the Company Law no. 31/1990, as regards the debated topic, the law-maker omitted to give a decision regarding significant aspects causing important

[12] Craiova Court-of-Appeals, Decision no. 305/28.03.2007, consulted on April 17, 2016, on the website: http://lege5.ro/App/Document/gi4dsojshe/antrenare-liability-administrator-social-in-temeiul-art-138-lit-d-din-legea-nr-85-2006-conditii

consequences on the excluded Shareholder, Third Parties, as well as on the company itself.

Therefore, up until the listed deficiencies are not covered, in the absence of a unitary practice in the matter, a clear argumentation on the causes for exclusion cannot be settled, and this is the main reason why the consequences occur, and why the excluded shareholders' liability is held in relation to the other shareholders, as well as to the third parties.

Bibliography

1. Adam Ioan, Savu Codrut Nicolae, *Legea societăţilor comerciale. Comentarii şi explicaţii (Trading Company Law. Comments and explanations)*, C.H. Beck Publishing House, Bucharest, 2010;
2. Carpenaru Stanciu D., *Tratat de drept comercial român (Romanian Commercial Law Treaty)*, Universul Juridic Publishing House, Bucharest, 2012;
3. Carpenaru Stanciu D., Piperea Gheorghe, David Sorin, *Legea societăţilor. Comentariu pe articole.* 5th edition, C.H. Beck Publishing House, Bucharest, 2014;
4. Sauleanu Lucian, *Unele aspecte privind soluţionarea cererilor de excludere a asociaţilor (Aspects regarding the settlement of the Shareholders' exclusion applications)*, „Revista de Drept Comercial" („Commercial Law Magazine") no. 4/2006, p. 87-92;
5. Şelaru Constantin Stefan, *Consideraţiuni referitoare la posibilitatea excluderii asociaţilor din societăţile comerciale (Considerations concerning the possibility of excluding the Shareholders from the trading companies)*, in „Revista de Drept Comercial" („Commercial Law Magazine") no. 4/1995, p. 106-111.
6. Civil Code of Romania;
7. Company Law no. 31/1990;
8. Order no. 897/2015 of the Public Finance Minister approving the Methodological Norms regarding the reflection in the book-keeping of the main operations of company merger, division, dissolution and liquidation, as well as of the withdrawal or exclusion of some Shareholders from the Companies.