THE VOLUNTARY DISSOLUTION OF A LIMITED LIABILITY COMPANY - A WAY OF ABUSING THE LAW?

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Abstract

Law 31/1990 on companies provides a series of cases that lead to the dissolution of a company either by the will of the associates, either by the decision of the court of law, either by law. As such, even though the cases in which the dissolution can operate by law - therefore imposed by the legal provisions - or through the decision of the court are clearly stated, not the same can be said for the dissolution of a company intervened by the decision of the partners. Due to a more general definition that the legislator gave to this legal means, it created, without anticipating at the moment of the drafting of the legal text, a method for the associates to breach certain legal provisions regarding the rights of their creditors. Therefore, the current study aims to draw the attention on a frequent practice operated by more and more merchants in their trade activity which leads to an impossibility for their creditors to have their debts recovered.

Keywords: *voluntary dissolution, breach of law, law enforcement, liquidation.*

JEL Classification: K22

1. Introductory considerations

Law no. 31/1990 on companies provides a series of cases that lead to the dissolution of a company either by the will of the associates, either by the decision of the court of law, either by law. As such, even though the cases in which the dissolution can operate by law - therefore imposed by the legal provisions - or through the decision of the court are clearly stated, not the same can be said for the dissolution of a company intervened by the decision of the partners. Due to a more general definition that the legislator gave to this legal means, it created, without anticipating at the moment of the drafting of the legal text, a method for the associates to breach certain legal provisions regarding the rights of their creditors.

Therefore, the current study aims to draw the attention on a frequent practice operated by more and more merchants in their trade activity which leads to an impossibility for their creditors to have their debts recovered.

The matter, regulated in Law no. 31/1990 on companies, republished (r2) in the Official Monitor of Romania no. 1066 from the 17th of November 2004, provides that the dissolution of a company can take place both voluntarily and also by following certain events independent of the will of the associates. The manner of dissolution and liquidation of the company is established by the articles of incorporation, whether the company is a general partnership, a limited partnership, joint-stock company, limited partnership by shares or a limited liability company.[2]

2. The voluntary dissolution of a limited liability company

The company is dissolved by the decision of the general meeting or in the other cases provided by art. 227 of the law, the procedure being done according to the provisions of art. 237, as well as of art. 228 paragraph 1 from Law no. 31/1990, the latter providing for specific cases of dissolution for the joint-stock company.

As a definition, the dissolution of the company represents the total amount of operations that prepare the cessation of the company's existence and ensure the premises for the liquidation of the patrimony. Therefore, the dissolution terminates the normal activity of the company, but its legal personality continues to exist until the end of the liquidation procedure.

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[2] In what implies the termination of the activity of the individual merchants – authorized natural person, individual enterprise and family enterprise, please see Lefter Cornelia, Dumitru Ovidiu Ioan, *Reglementarea desfăşurării activităţilor economice de către persoane fizice autorizate, întreprinderi individuale şi întreprinderi familiale în baza Ordonanţei de urgenţă a Guvernului nr. 44/2008 – între noutate şi controversă*, „Revista Română de Drept Privat" no. 1/2009, p. 104-116.

The company retains its legal personality for the liquidation operations, until its completion.

According to art. 233 from Law no. 31/1990, the dissolution of the company has the effect of opening the liquidation procedure of the company, while from the moment of dissolution, the directors, administrators, respectively the directorate, can no longer undertake new operations, prohibition that applies from the day of expiration of the term set for the duration of the company or from the date when the dissolution was decided by the general meeting or declared by court.

According to article 227 paragraph 1 letter d) from Law no. 31/1990, the dissolution can occur even through the decision of the general assembly, creating, therefore, the possibility for the associates of a company to end the company's existence through their own will.

This voluntary dissolution is not exempted from strict rules of application, but even so, the legislator didn't specifically provide more conditions or even interdictions when it can operate, giving as such the possibility for the associates to take such a decision against the interest and rights of their creditors.[3]

The most frequent type of company to which this method applies is the limited liability company.

The problem that usually occurs is the fact that certain business partners, due to the will to develop quickly a fast increase of their business, create, apart from the main company they set-up, a group of smaller companies in order to support their activity. Even though this situation is completely possible from a legal point of view and in many times it proved to be beneficial for the economy in general, not only for the implied persons, often times it was seen in practice that it leads to abuses of law.

Therefore, in many situations, the support companies are set-up as limited liability companies, as it is not only one of the easiest to set-up in Romanian law, but it also provides the particularities of a small minimum value of its patrimony and also a possibility of being set-up by a sole associate as well.

This being said, it is not rarely that this companies start performing their object of activity with other business partners as if its existence was never going to cease easily.

And the abuse of law created implies that after some time from its start of activity, the associates decide to cease the company's existence through a decision taken in the general meeting, leading to the voluntary dissolution of the company, even though no real reasons occur for such a measure.

As seen, unlike other situations of termination of the company's existence, like, for example, the reach of the term for which the company was created or the impossibility to continue to perform the object of activity, or even the case of the occurence of the nullity of the company,[4] the case of the voluntary dissolution is mainly related to the will of the partners.

Even so, according to the provisions of art. 227 paragraph 1 letter b) from Law no. 31/1990 on companies, the company is dissolved due to the impossibility of achieving the object of activity even when its shareholders may decide to voluntarily dissolve it on the grounds that the company has not been able to provide a minimum net capital in accordance with the legal provisions and, by order of the National Securities Commission, the company's operating license has been withdrawn.[5]

Also, in the situation of nullity of a company, according to the Romanian law, which is in perfect compliance with the European Union law, as an exception from the principle of retroactivity,

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[3] Interesting will also be to see how the evolution of the European company and its structure and functioning will develop and change in the future, after Great Britain left the European Union, as they had a major influence from the national cultures of the member states, and less by the acts of the European Union, most conservative being Germany and Great Britain. Such event, as some authors consider, will definitely lead to a major change in the corporate law practiced at the European level. See more in Dumitru Ovidiu Ioan, *The European Company, Perspectives after Brexit*, „Juridical Tribune - Tribuna Juridica", vol. 7, no. 2, 2017, p. 143.

[4] For more information see Lefter Cornelia, Dumitru Ovidiu Ioan, *Theory and practice concerning the nullity of commercial companies*, in the volume "*Accounting and Management Information Systems – 4th International Conference AMIS 2009*", the Faculty of Accounting and Management Information Systems, Academy of Economic Studies, ASE Publishing House, Bucharest, 2009.

[5] Decision no. 1004 from the 10th of September 2002 of the Tribunal of Bucharest - Department V – Commercial trials, on https://avocatstoean.ro/acasa/societate-comerciala-dizolvare-opozitie-la-hotararea-actionarilor-de-dizolvare-voluntara-a-societatii/ (accessed on January 15, 2020).

which does not apply to the situation of the companies, it can be seen that the legislator, as in the favour of the third parties and the good performance of legal relations, considers that the acts the company concluded, together with its own existence, were valid until the date when the nullity was irrevocably pronounced by a court of law.[6]

But the problem that occurs with the voluntary dissolution of the company at the simple will of the associates, taken through the decision of the general meeting, is that they can, anytime, decide upon the dissolution of the company, register the measure at the Trade Register[7] and therefore, as a consequence, create an unlike situation for its creditors.

The dissolution represents the first step towards the termination of the company and it implies measures that prepare it for its end of existence. However, during the period of dissolution, the legal personality of the company still exists, even though it can no longer perform its usual activity.[8]

The practical problem that occurs is that of the creditors towards which the company in dissolution has debts to pay. Even though the creditors manage to obtain a final and irrevocable decision of court regarding the debt, the enforcement of the decision will be blocked by the decision of the general meeting of the debtor company and its registration in the Trade Register.

During the period of time of the trial started by the creditor to recover its debt, as well as that of passing of time of submitting an appeal, if the case, the debtor company can always operate in such a manner.

It is true that if the debtor's request for the dissolution and liquidation is approved by the Trade Register, the decision needs to be published in the Official Monitor of Romania for opposability, so that third parties can file an opposition, in 30 days from the date of the publication.

But in the meantime, the debtor can manage and prepare the accounting documents, namely the liquidation report and the liquidation balance sheet, so that when the erasure of the company from the Trade Register is requested, all the additional steps are already taken.

In case of a trial still going on, it is very difficult for the creditor to take any measures regarding the opposition, especially as a lot of debtors continue to submit procedural documents in court, leading to the confusion of both the creditor and the judge towards the existence and performance of the activity of the company.

As such, even though it is the duty of all interested parties to verify the Official Monitor of Romania and to make the considered opposability against the decision of dissolution of a company, frequent times it happens that either their opposability is rejected, as they do not have enough evidence to stand for the rejection of the dissolution, either it is already too late for any actions.

The question is, in such a situation, whether the creditors still have any measure left for the enforcement of the decision of the court and forced execution of their debt or not, as the moment the dissolution appears registered in the Trade Register, the enforcement officers usually refuse to start the enforcement any more, due to the lack of chances to still obtain a payment of the debt.

However, it is not to be forgotten that the main effect of the dissolution is the liquidation of the company, after which the legal person ceases to exist. Even during the liquidation procedure, the legal person still holds the legal personality, though only limited to having rights and assuming obligations that are necessary for the fulfillment of the liquidation procedure, therefore for the payment of the liability.[9]

From the moment of the dissolution, the directors, administrators, respectively the directorate,

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[6] Lefter Cornelia, Dumitru Ovidiu Ioan, *Theoretical and Practical Aspects Regarding the Nullity of Commercial Company*, „Revista de Economie teoretică şi aplicată", no. 11, 2009, p. 38.

[7] Unlike, for example, the situation of the termination of the company's existence due to reaching its period of existence. In such a case, no additional formalities are needed due to the fact that its duration of functioning was publicly brought to attention through publishing the constitutive act in the Official Monitor of Romania. Therefore, the dissolution does not need to be notified to third parties anymore. For more information please see Lefter Cornelia, Dumitru Ovidiu Ioan, *Dissolution of the Commercial Companies due to the Passing of Time Established as a Duration of the Company – Theoretical and Practical Aspects*, „Revista de Economie teoretică şi aplicată", no. 11 (564), 2011, p. 60.

[8] Dumitru Ovidiu Ioan, *Business Law. Lecture Notes***,** Chapter 16 – Dissolution and liquidation of companies, ASE Publishing House, Bucharest, 2019.

[9] Ibid., p. 219.

can no longer undertake new operations, prohibition that applies from the date when the dissolution was decided by the general meeting, having to name liquidators for the final stage of the termination of the existence of the company.

Related to this aspect, previously, an exception of unconstitutionality was submitted, regarding the provisions of art. 260 paragraphs 1 - 3 from Law no. 31/1990 on companies, as what implied the changes brought by art. VI of the Government Emergency Ordinance no. 43/2010. Examining the exception of unconstitutionality, the Constitutional Court observed that its author seeks to base its arguments on the fact that the criticized legal provisions contain inconsistencies between legal regimes applicable to successive moments in the liquidation and dissolution of companies. This is not, however, relevant for the review of constitutionality, as the legal provisions to be taken into account were those from the date of adoption of the dissolution decision. Moreover, it was argued by the court of law that successive legal regulations may naturally present differences determined by the objective conditions under which they were adopted and therefore it rejected, as unfounded, the exception of unconstitutionality.[10]

But due to the liquidation period and to its implications at a legal level, we consider that any moment, even if the opposition of the creditor was rejected or it simply was not made, they have the possibility to submit an enforcement of the decision obtained in court for the payment of their debts in the last stage of the existence of the company, as it represents an enforceable title.

3. Conclusions

Because the set-up of the company is based on the will of the associates, as mentioned in the constitutive act, the dissolution of the company should be operated through their will as well. This is the reason for which the legislator provided such a possibility in article 227 paragraph 1 letter d) from Law no. 31/1990, as he considered that the associates should be free to choose the moment in which, even before the expiry of the duration of the company, they want it to end. The reason for which no conditions were included for such a measure inside the law were due to the fact that such a voluntary dissolution can intervene whenever the associates consider it as being in their own interest.[11] However, in such a circumstance, the legislator omitted to identify the need of a legal reason to avoid payments in the detriment of the creditors of the company.

It is for this reason for which the law should create a change in regulation for the manner in which the associates always abuse the provision of article 227 paragraph 1 letter d) from Law no. 31/1990 in their favour, by prejudicing the creditors and their economical power. Unfortunately, for the moment, the law, as it is, does not provide any solution, neither does the rest of the legislation related to the matter, such as the one regarding the functioning of the Trade Register, which is forced to apply the law as it is and register the dissolution as long as the submission documents where in conformity with the forms requested by law. Or, as long as the Trade Register makes the registration of the dissolution, an enforcement of a decision of court by the creditors is considered to be irrelevant and therefore, the practical side demonstrated in time its inefficiency. Without an actual provision of such cases, the associates of limited liability companies will continue to perform such practices by bringing damages to a series of commercial partners, also being able to escape further payments, as the companies' assets are no longer enough to pay the creditors.

[10] Decision no. 755/2015 of the Constitutional Court regarding the rejection of the exception of unconstitutionality of the provisions of art. 260 para. (1) - (3) of the Companies Law no. 31/1990 by reference to the provisions of art. VI of the Government Emergency Ordinance no. 43/2010 for the modification of some normative acts in order to reduce or simplify administratively some authorizations/ opinions/procedures as a result of the measures assumed by the Romanian Government within the Simplification Plan related to the Memorandum of Understanding between the European Community and Romania, signed in Bucharest and Brussels on June 23, 2009, published in the Official Monitor of Romania no. 105 from the 10th of February 2016, on https://lege5.ro/App/Document/heztcnjqhe/ decizia-nr-755-2015-referitoare-la-respingerea-exceptiei-de-neconstitutionalitate-a-dispozitiilor-art-260-alin-1-3-din-legea-societatilor-nr-31-1990-prin-raportare-la-dispozitiile-art-vi-din-ordonanta (accessed on January 15, 2020).

[11] Cărpenaru Stanciu D., *Tratat de drept comercial român*, Universul Juridic Publishing House, Bucharest, 2012, p. 266.

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