

ASPECTS CONCERNING THE JOINT VENTURE¹ UNDER THE REGULATION OF THE NEW CIVIL CODE

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Abstract

The New Civil Code makes the transition, for the first time in the Romanian legal system, from the duality to the unity of private law. Consequently, the Civil Code contains a legal regulation more structured and comprehensive, although not entirely safe from any criticism, in relation to the company, with particular reference to the simple company, regulation that expressly characterizes itself as the common law in this field. Within these general provisions, the legislator has considered the joint venture, to which, however, as in the previous regulation contained in the old Commercial Code – now repealed –, it does not devote too many legal provisions, in order to maintain the flexibility of this form of company. Therefore, this approach appears particularly useful for analysts in law and, especially, for practitioners, since it aims to achieve a comprehensive analysis of the joint venture, form of company with practical incidence.

Keywords: *companies, joint venture, company contract, juridical nature and juridical characters*

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1. Preliminary considerations

By adopting the new Civil Code³ of 2011, the Romanian legislator has set an ambitious goal, namely the establishment of a modern legislative instrument, adapted in all respects, including the terminology, to the current economic and social realities. Equally, however, this normative act has achieved the abandonment of the traditional division (for our system of law) of private law, in favor of the monist approach, that integrates all regulations relating to individuals, the family and the business relations. In this respect, art. 2 of the Civil Code states the general applicability of the Civil Code to all categories of persons, both professionals and non-professionals, as subjects of law within patrimonial and non-patrimonial relations, this normative act constituting the common law for all areas of private law.

In relation to companies, in the same spirit of unification of private law, the Civil Code contains, in Chapter VII, entitled Company Contract, of Title IX - Miscellaneous special contracts, the general regulation applicable to all companies, according to article 1887 paragraph 1 of the Civil Code, which is, however, to be completed with the special legal provisions relating to different categories of companies, that have remained outside the Civil Code.

Among the forms of company prescribed by article 1888 of the Civil Code, the legislator has also included the joint venture, providing, in articles 1949-1954, a concise regulation, which focuses on its essentially contractual character and the flexibility that should characterize it. As a consequence, an analysis of the legal provisions in this matter is extremely useful both for the analysts in law and, especially, for practitioners.

2. The definition and the juridical nature of the joint venture

In accordance with the provisions of article 1949 of the Civil Code, "The joint venture agreement is a contract by which a person grants to one or more persons a participation in the profits and losses of one or more operations he undertakes."

Taking into account the quoted legal provision, we should define the joint venture as a contract by which two or more persons agree that one of them grants to the others a participation in

¹ This denomination does not accurately describe the juridical institution – societate în participațiune, which is the object of this analysis, because it is not regulated, under the form provided by the Romanian law, in the English or American system of law.

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³ Law no. 287/2009, republished in the Official Journal of Romania, Part I, no. 505/15.07.2011.

the profits and losses that would result from the joint performance of economic activities in exchange for the participation in such activities with a contribution in money, in kind or in industry⁴.

It is worth mentioning the uncertainty of the legislator regarding the denomination and, not in the least, the nature of this form of company, because apparently it does not decide in which category to include the joint venture, since most of the times it does not use the term company, but that of association. Thus, on the one hand, when it lists the forms of company prescribed by law (art. 1888 Civil Code), the legislator speaks of "societate în participație". However, Section 3 of Chapter VII - The company contract, which refers to it, is entitled "Asocierea în participație", and this denomination is then used in all legal texts that refer to the analyzed form of company. The denomination of association is still inaccurate and it is objectionable the inconsistency of the legislator in this regard, because it takes the denomination from the previous regulation, as traditionally used in practice, although it enumerates expressly the joint venture among the forms of company recognized by law. The joint venture is definitely a company because it has a patrimonial goal, the associates willing to perform a joint activity and to participate to it with different contributions, in order to obtain and share the profit or to use the economy that might result⁵.

Its main characteristic results from the fact that this form of company has no legal personality. As such, the joint venture agreement produces its legal effects between the associates, but it does not create a new legal person distinct from its members. In accordance with the provisions of article 1951 of the Civil Code, the absence of legal personality imposes both between the associates and to third parties⁶. An important consequence of the absence of legal personality is the lack of the necessary formalities for setting up companies with legal personality, and especially the registration in the Register of Trade, which undoubtedly is an important advantage of this form of company. Equally, having no legal personality, the joint venture has no company denomination, registered office or social patrimony as such, but a patrimony of appropriation, allocated to the economic activity that formed the foundation of setting up the company.

Nevertheless, the lack of legal personality can also be conceived as a disadvantage because, as a consequence of this fact, the joint venture is a form of company which does not have a sustainable character, being generally set up in practice for a single operation. This is because a complex and long-term activity is difficult to operate in the absence of a legal entity created for this purpose.

Also as a consequence of the absence of legal personality and, respectively, lack of the formalities required by law for its setting up and publicity, the joint venture may have, and often has in practice an occult character, because third parties usually do not know all members and, in general, cannot act against them. Likewise, third parties cannot know the value and importance of the contributions of the associates at the setting up of the company and during its operation, which is a disadvantage. Thus, as a rule, third parties only know the associate with whom they conclude the contract, but he may choose not to disclose his quality.

However, it should be kept in mind that the formalities of publicity required by law for companies with legal personality are intended to ensure adequate protection of the interests of third parties. As such, their absence in the case of the joint venture leads to the impossibility to protect good-faith third parties in this way, and for this reason the legislator chose to provide a system of guarantees for them based on the liability of the associates for the obligations resulting from juridical acts concluded on behalf of the company. In this respect, the text of article 1953 paragraph 1 of the Civil Code provides "The associates, even acting on behalf of the association, contract and

⁴ See, in this respect, in relation to the previous regulation of the joint venture, A.M. Lupulescu, *Reorganizarea societăților comerciale în contextul integrării europene. Strategii și cadru juridic*, Wolters Kluwer Publishing House, Bucharest, 2008, p. 187.

⁵ In this sense, article 1881 paragraph 1 of the Civil Code provides, in general, "Through the company contract two or more persons mutually undertake to cooperate in the performance of an activity and to participate to it with contributions in money, in kind, and in specific knowledge or activities, in order to share the profits or to use the economy that might result".

⁶ Thus, article 1951 of the Civil Code expressly provides "The joint venture cannot acquire legal personality and it does not constitute, in relation to third parties, a legal person distinct from the persons of the associates. The third party has no right towards the association and he assumes obligations only towards the associate with whom he contracted".

undertake obligations in their own name toward third parties", while paragraph 2 of the same article states "if the associates act in this quality in relation to third parties are held jointly liable for the acts concluded by either of them". It clearly results from the quoted legal texts that the associate who contracts with the third party is personally liable for the obligations thus undertaken, whether he has declared or not the quality in which he has acted and, moreover, all the associates are jointly liable for the obligations contracted by any of them, to the extent that they informed the third parties of their quality of associates⁷. Finally, in order to emphasize the importance of rules relating to the liability of associates towards third parties as a guarantee granted by the law in order to protect their interests, paragraph 4 of article 1953 expressly prohibits the limitation, through the company contract, of the liability of associates towards third parties, also providing that any clause stipulated in this respect cannot be opposed to third parties.

As any other company, the joint venture is also in the first place a contract. Concerning its juridical characters, we underline that the joint venture is a bilateral or multilateral contract, made by onerous title, commutative, with successive performance and consensual. The consensual character results expressly from the provisions of article 1950 Civil Code, which provides that the joint venture is a contract that must be proved by a written instrument. As such, the written form of the contract is only required by law *ad probationem* and it does not influence the validity of the juridical act⁸. Equally, although the law does not expressly stipulate it, the joint venture contract is an *intuituu personae* contract because the personal qualities and the confidence between associates are essential to its conclusion. Taking into account the strong personal character of the joint venture, if the company contract does not provide otherwise, it will terminate due to the death or judicial interdiction of the associates – natural persons, as well as the bankruptcy or cessation of the quality of subject of law of the associates – legal persons⁹.

The joint venture contract must fulfill the general conditions of validity prescribed by law for any contract, namely the full concrete capacity of the associates¹⁰, a genuine consent, lawful and determined object, legal and moral consideration. From the point of view of formal conditions, as mentioned above, the written form is required by law only in order to prove the contract, and it does not affect its validity, unless among the contributions there are immovable goods, in which case the contract shall be concluded in authentic form *ad validitatem*. In addition to the general conditions of validity applicable to any juridical act, the joint venture contract must also fulfill the specific conditions of validity applicable to all companies, respectively *affectio societatis*, the existence of contributions of the associates at the setting up of the company, sharing the profits and the losses arising from the common activity¹¹. In order to ensure the fulfillment of the latter condition, the law expressly provides, in paragraph 5 of article 1953 of the Civil Code, that any clause, inserted in the joint venture contract, by which one of the associates would get a guaranteed minimum level of benefits is to be considered unwritten.

Concerning the content of the joint venture contract, it is to be mentioned that the joint venture was conceived by law as a form of company quite flexible, because the parties are free to determine in the contract they concluded the object, the administration and the management of the company, its duration, the participation of the associates in the common activity, the arrangements

⁷ The legislator has provided a different solution concerning the simple company, equally without legal personality, and as such not obliged to observe the formalities of publicity required by law for companies with legal personality. Thus, according to article 1922 Civil Code, the occult associates, who therefore do not declare such quality, are liable towards third parties under the same conditions as the other associates, noting, however, that the personal liability of the associates within the simple company is a subsidiary liability, after pursuing the common goods that form the patrimony of appropriation of the company – see, in this respect, C. Gheorghe, *Societatea simplă, întreprindere comercială. Administrare și încetare*, in Revista de Drept comercial no. 10/2013, p. 8-9.

⁸ See, within the context of the previous regulation, N. Țândăreanu, *Contractul de asociere în participațiune*, in Dreptul no. 5/1995, p. 15.

⁹ The law expressly provides these cases of cessation of the company, implied by the disappearance or the incapacity of the persons who have the quality of associates, in the matter of simple company – article 1938 of the Civil Code, but they are fully applicable to the joint venture, taking into account its *intuituu personae* character.

¹⁰ The condition of full concrete capacity is essential in case of the joint venture, since in the absence of its legal personality, the associates conclude personally juridical acts with third parties.

¹¹ See, in this respect, in relation to the companies regulated by the Law no. 31/1990 republished, St. D. Cărpenaru, *Tratat de drept comercial român*, Universul Juridic Publishing House, Bucharest, 2009, p. 195-196.

for sharing profits and losses, the causes of dissolution and liquidation and so on, subject to the provisions of articles 1949-1953 Civil Code. However, this flexibility has also a disadvantage, because it raises the question of what will happen if the associates do not provide, within the joint venture contract, clauses referring to all aspects of the relations between them, concerning the functioning, the management, the administration and the termination of the company. Unlike French law¹², the Civil Code does not contain an express solution in this regard, to be included in the section dedicated to this form of company. However, taking into account the provisions of article 1887 paragraph 1 Civil Code, which states that the legal rules contained in Chapter VII - The company contract constitute the common law in the field of companies, keeping in mind that the simple company is the prototype of company, we consider that in such a situation the provisions of the Civil Code on the simple company will be applicable (articles 1890 to 1948 of the Civil Code), insofar as they do not contravene the provisions of articles 1949-1953 Civil Code¹³.

3. The functioning of the joint venture

The contributions of the associates are an essential condition for the existence of any company. In relation to the joint venture, taking into account the absence of legal personality and the fact that the ownership right cannot remain without holder, the contributions cannot be transferred and cannot become its property. For this reason the legislator has provided, in article 1952 Civil Code, several situations which compose the legal regime of contributions within this form of company.

Firstly, paragraph 1 of article 1952 Civil Code provides, as a principle, the rule that the associates remain the holders of the ownership right over the goods they contributed. It means that the associate that makes the contribution actually transfers the right to use the goods, in order to achieve the company's activity, but he retains the ownership right.

Equally, according to paragraph 2 of article 1953 Civil Code, the associates may agree that the contributed goods, and those resulting from their use, to be subject to their common ownership right, and upon the dissolution and liquidation of the company, the partition will occur, leading thus to the termination of the co-ownership status. Under the previous regulation, in the silence of the law, the common property of all associates over the contributed goods was the solution proposed by doctrine and jurisprudence and commonly used in practice¹⁴.

However, it may be agreed through the company contract that the contributed goods become the property of one of the associates in order to achieve the object of the company (article 1952 paragraph 3 of the Civil Code), the original owner being allowed to recover property upon the termination of the company, as stipulated by the parties. The solution must be the same, for the same reasons, when the associates participate at the setting up of the company with contributions in money, in order to purchase a thing that is necessary for its activity, which will become the object of the ownership right belonging to the associate who concludes the sale-purchase contract concerning the thing in question.

Finally, although the law does not expressly provide it, we consider that at the setting up of the joint venture some associates may also participate with contributions in industry, namely specific activities and knowledge, in accordance with the terms of the company contract.

¹² Article 1871-1 of the French Civil Code expressly provides that, if the parties fail to reach an agreement, the relations between the associates are subject to the provisions applicable to the general partnership, in case of the joint venture having commercial character, and to those applicable to the civil company, in the case of the joint venture having civil character.

¹³ Within the context of the previous regulation contained in articles 251-256 Commercial Code, in the same silence of the legislator, the doctrine had proposed the solution of the applicability of legal provisions contained in the Civil Code of 1864 that regulated the civil company – see, in this respect, for more details A.M. Lupulescu, *op. cit.*, p. 188.

¹⁴ In relation to the contributions of associates, article 254 of the Commercial Code, now repealed, had expressly provided that they cannot retain the ownership right of the goods contributed to the company, without further clarification. As such, the doctrine had proposed the solution that the contributed goods would become the common property of all the associates – see, in this respect, A.M. Lupulescu, *op. cit.*, p. 188.

Concerning the relations of the associates with third parties, taking into account that the joint venture does not create a new legal person so that it may assume obligations by itself, in a distinct manner, the law establishes the traditional rule that each of the associates, whether acting or not on behalf of the company, will be personally liable for the obligations that he has assumed, and the third party has no right except against the associate with whom he has concluded the contract, unless he has known the quality in which the associate has acted, at the time of concluding the contract. The same solution was proposed by the jurisprudence, under the previous regulation¹⁵. Moreover, if the associates disclose their quality to third parties, each of them will be jointly liable for obligations arising from juridical acts concluded by either of them.

Regarding the relations between the associates, the law provides only one rule in this regard, in order to emphasize, once more, that they are free to determine, in relation to these issues, within the company contract, their mutual rights and obligations concerning the performance of the activity that is the object of the company. Thus, paragraph 5 of article 1953 merely states the interdiction to provide, through the company contract, a guaranteed minimum level of profit for one of the associates, although such a clause was recognized as valid by the jurisprudence under the previous regulation and was not considered a leonine clause¹⁶.

As such, sharing the profits and losses between the associates will be made in accordance with the agreement of the parties, except for the leonine clauses. To the extent that there is no stipulation to this effect in the company contract, we consider that this distribution will be proportional to the contributions of each associate to the formation of the company.

As far as the administration of the company is concerned, through the company contract the parties may appoint one or more administrators, may provide their organization, the limits of their mandate etc. In the absence of stipulations in this regard, we consider that there are applicable the provisions of article 1913 paragraph 3 of the Civil Code, prescribed in such a case in relation to the simple company, which state that the administration of the company will be made by each of the associates, who are considered to have a mutual mandate to administrate each one for another in the interest of the company¹⁷.

4. The cessation of the joint venture

Although also in this respect there are no express legal provisions in relation to the joint venture, in the silence of the parties, one shall apply to it the general cases of termination of companies, namely the achievement of the object for which it was set up or, on the contrary, the impossibility of its achievement, the decision of the associates to its early termination, the judgment of the court, for good reasons, especially misunderstandings between partners, the expiry of the period for which the company was set up or the nullity of the company. The above-mentioned cases of termination, provided by article 1930 of the Civil Code in relation to the simple company, are not limitative, the legal text itself providing that the associates may stipulate, through the company contract, other cases of cessation.

Equally, if the parties have not provided otherwise, the joint venture will also cease for causes determined by the *intuitu personae* character of the contract, namely those related to the disappearance or the incapacity of the subjects of law – associates of the company.

The termination of the joint venture determines the dissolution and the liquidation of the company, which will be performed firstly in accordance with the clauses agreed by the associates. The liquidation operations must also take into account the particularities caused by the absence of

¹⁵ Thus, it was decided that "the applicant, as a third party to the joint venture contract, erroneously brought an action against the other associate, with whom he did not concluded any juridical relationship", the latter having no passive procedural quality in the case - CSJ, S. com., decision no. 842/1998, in Revista de Drept comercial no. 3/1999, p. 136-137.

¹⁶ CAB, S. com., judgment no. 23/1999, in Revista de Drept comercial no. 10/1999, p. 124.

¹⁷ Thus, in the absence of an express legal provision in this regard or the agreement of parties, we cannot accept the opinion expressed by the juridical literature, under the previous regulation, that the associate who has the initiative to create the joint venture will also fulfill the function of administrator – see St. D. Cărpănu, *op. cit.*, p. 432.

legal personality of this form of company. As a principle, the associates regain the contributed goods, to the extent that they have retained the ownership right, transferring to the company only the right to use them. If the contributed goods have become the object of the common ownership right of all associates, they will share them in accordance with the rules provided by the law in the matter of the partition of co-ownership. Equally, if the contributed goods have become the property of one of the associates, the partners who have contributed them are entitled to restitution in kind, if this right was stipulated by the company contract. Finally, after payment of all company debts, the associates are entitled to a part of the remaining assets proportional with the value of the contributions, if the company contract does not provide otherwise.

At the end of these considerations, we believe that some details concerning the practical incidence of the joint venture are necessary. As a principle, this form of company allows the participants to benefit from the advantages resulting from the pooling of goods, financial resources, specific actions or knowledge in order to perform more complex economic activities, without the involvement or the formalities that are necessary for setting up a company with legal personality. However, the absence of legal personality and, in particular, the absence of any formalities of publicity determine some uncertainty in respect to third parties and the protection system designed by the legislator in this regard, based on joint and personal liability of the associates, cannot fully counteract the mentioned disadvantage, because the occult nature (to some extent) of this company implies the impossibility, for the third parties, to know the identity of all partners or the moment when this quality ceases for some of them.

Nevertheless, the joint venture is used in practice, especially in order to share the risks of certain operations, to obtain financial resources for jointly performing activities that would not have been available to individual participants, to enter a particular market or into a new geographic area and so on, being an adequate juridical instrument of achieving strategic alliances between different economic operators.

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