Reflections on the Distinctions between the Unincorporated Business Forms and the Corporations in the U.S. Law

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Abstract
The opportunity of the analysis of corporate forms in American law lies in the need to eliminate potential confusion in terminology, as American legal system has a different foundation as the francophone legal systems, which also the Romanian system belongs. From another perspective, given the incidence in the Romanian law of a terminology similar to the one used by the American law, but also the insinuating reception of a characteristic American theories, it is clear that the differences are negligible conceptually, becoming not essence but shaded. The approach is reflective desired insight on U.S. regulation forms corporate legal personality and the unincorporated, outlining the view that the concept of legal personality must acquire new meanings.

Key words: partnership, legal personality, corporation

1. The partnership in the American legal system
In American law, the partnership’s legal regime was regulated for the first time in 1914, by the Uniform Partnership Act, successively revised until 1997 (RUPA 1997).

The classic American doctrine\(^1\) considered the partnership as a conglomerate of individuals, without legal entity (according to the so-called aggregate doctrine), a vehicle through which the partners are conducting their business. The aggregate theory views each partner as having an undivided, pro rata share of partnership assets.

This theory had serious problems with regard to identifying the subject of the passive subject, meaning the defendant, because lack of legal personality attracted the compulsory identifying as defendants of all partnership’s members.

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\(^1\) A. Ladru Jensen, Is a Partnership under the Uniform Partnership Act an Aggregate or an Entity?, 16 VAND. L. REV. 377 (1963)
Thus, as shown 2, „Notwithstanding its economic significance, the partnership had no legal rights or responsibilities and accordingly was not recognized as a legal unit. The partnership could not sue or be sued; litigation had to be brought by or against the individual partners. The partnership could not acquire, hold, or dispose of property in its own name; the assets of a partnership for legal purposes were the collective property of the individual partners as tenants-in-partnership. The partnership could not contract; contracts made by a partner for the firm were the joint and several obligations of the partners.”

Another part of the doctrine 3 considered that “The entity theory treats the partnership as a separate legal entity, completely distinct from the individual partners. Similar to the treatment of a corporate shareholder, under the entity theory each partner has separate legal rights, and ownership of partnership assets is in the partnership entity. However, unlike a corporate shareholder, each partner has unlimited liability for partnership debts.”

The Federal courts, in the silence of the law, took the opportunity to give the possibility to sue the partnership itself (defining the partnership as a combination of two or more persons acting jointly to conduct a business for profit), without thereby recognize the legal personality, subject to the identification of its members.

The Federal judicial practice was considered in the subsequent revisions of the Uniform Partnership Act, so that, in the present, the Section 201 „Partnership as entity”, determines that „A partnership is an entity distinct from its partners”, but in order to attract personal liability of members is necessary to identify, as parties to the proceedings of all members.

However, this concept (entity) is not identical to the concept of „legal personality”, as it is understood in Romanian law.

The concept of legal personality in American law is recognized as “legal person” or “legal entity” – “A corporation is called a legal person or a legal entity. It may also be called a child of a state, since its birth, existence and termination are regulated by statutory law. Upon the

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completion of certain requirements a state will grant a charter of incorporation which is in effect a birth certificate for the corporation.”

As currently regulated, the partnership arise either by express agreement of the members, embodied in the agreement, either implicitly (where people actually act as partners in the absence of an express agreement).

In this type of partnership, all members share equally control, being the business owners, the active involvement of their being presumed; however, one member takes direct pursuit of acting as „managing partner”; its powers are basically full, except where expressly decided their limitation.

As a general rule, all members participate in profit sharing; however, by contract, in reality, it is stated the limits / quotas of each.

Revised Uniform Partnership Act 1997 changed the way ownership rights over property assets; so, if Uniform Partnership Act 1914 stated that the goods belong either to members under common ownership or partnership’s own, the new regulation provides that the goods belong exclusively unto the partnership.

In the American law, the legal relations of RUPA 1997’s partnership grafted on the institution of agency (institution corresponding to a certain extent mandate Romanian law), with the particularity that each member has simultaneously the quality of „agent” and „principal”.

The liability to third parties in the regulatory framework of the Revised Uniform Partnership Act 1997 mainly belongs to the entity, to the extent that they have contracted with the representative (Authorized Agent); the partnership is proprio nomine responsible for the acts concluded by the members without power of representation (servants), if they acted for the benefit of partnership. The partnership’s members respond alternatively, unlimited and jointly, being the guarantees of the obligations contracted by the partnership.

The Revised Uniform Partnership Act 1997 establishes two categories of specific obligations of the partnership’s members, non-existent prior to the review, namely the duty of loyalty (which includes the obligation not to make their mutual competition) and duty of care.

The withdrawal of one of its members, according to the Revised Uniform Partnership Act 1997, does not, as a rule, have any effect on continuing partnership, excepting the case that is contractually agreed that

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4George D. Cameron, Phillip J. Scaletta, Jr., Business Law. Legal environment, Transactions and Regulation, BPI/Irwin, 1989, p. 1062
5To be see Daniel M. Warner, „Understanding and Teaching the Revised Uniform Partnership Act”, The Journal of Legal Studies Education vol. 18, issue 1, 2000
the withdrawn has as a result the dissolution, followed by liquidation. In the Uniform Partnership Act 1914, the withdrawal was a legal cause of dissolution, independent of the members convention.

The members can opt for another form of partnership where their liability is limited, regulated by the National Conference of Commissioners on Uniform State Laws (NCCUSL)\(^6\), onto the base of the Uniform Limited Partnership Act, revised 2001 (ReRULPA).

The limited partnership is subject to registration in an institutionalized procedure, according to Section 201 of the above mentioned regulation, „Formation Of Limited Partnership; Certificate Of Limited Partnership”, which shows that:

In order for a limited partnership to be formed, a certificate of limited partnership must be delivered to the [Secretary of State] for filing. The certificate must state:

- the name of the limited partnership, which must comply with Section 108;
- the street and mailing address of the initial designated office and the name and street and mailing address of the initial agent for service of process;
- the name and the street and mailing address of each general partner;
- whether the limited partnership is a limited liability limited partnership

According to Section 303. No Liability As Limited Partner For Limited Partnership Obligations:

“An obligation of a limited partnership, whether arising in contract, tort, or otherwise, is not the obligation of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership”, its legal regime approaching a regime somewhat to the distinct legal regime of the corporation.

2. The corporation in the American legal system

In the American law, the regime of the corporation is similar, but not identical, to the legal regime of the companies with legal personality in the Romanian law. In short, they present five basic elements, as follows:

\(^6\) www.uniformlaws.org
• legal personality, which means that the company is itself a person capable of entering into contracts and capable of suing and being sued in its own name
• limited liability, which is a nearly universal feature of the corporate form, but, as shown before, not a specific characteristic of a corporation. Beside this, the American doctrine of piercing the corporate veil permits, in certain cases, to eliminate the entity shielding which protects the shareholders or the stockholders of a corporation from the creditors’ claims
• transferable shares, a specific characteristic which distinguish the corporation by the other forms of business organization, such as partnerships. But it has to be shown that there are two kind of corporation, from this point of view: corporations with freely tradable shares (named ‘open’ or ‘public’ corporations) and corporations that have restrictions on the tradability of their shares (named ‘closed’ or ‘private’ corporations). Beside this, the shares of open corporations may be listed for trading on an organized securities exchange (the so-called ‘listed’ or ‘publicly-traded’ corporation), in contrast to an ‘unlisted’ corporation. Also, a company’s shares may be held by a small number of individuals whose interpersonal relationships are important to the management of the firm, in which case we refer to it as ‘closely held’, as opposed to ‘widely held’
• delegated management under a board structure, which mainly means that the business corporations are distinguished by a governance structure in which all but the most fundamental decisions are delegated to a board of directors, presumed by the law. The partnerships, business trusts, or limited liability companies may have also a governance structure, but in these cases, the premises in not given by the law but by the will of the partners/associates.
• investor ownership, which gives them the right to control the company and the right to receive the firm’s net earnings

What characterizes the corporate structure is the regulation of the potential conflicts that may arise among them, which can take various forms, summarized in three categories: conflicts between managers and shareholders, conflicts among shareholders, and conflicts between
shareholders and the corporation’s other constituencies, including creditors and employees.

These five main characteristics are traces in all major legal systems, such as the French SARL, the German GmbH, the Italian Srl, the UK private company and also the American close corporation and (more recent) limited liability company. In Romania, we will find the regulated form of the SRL and also the common closed SA.

Sometimes, the specific legal provisions make a departure from one of the five core characteristics, for instance in the case of the delegated management, case in which in some legal systems is permitted to eliminate the board in favor of the shareholders’ direct management (such in the case of Romanian SRL).

Beside these consideration, as shown in the American literature⁷, “some jurisdictions have, in addition to these special closed corporation forms, quasi-corporate statutory forms that can be used to form business corporations with all of our five core characteristics, though some of these characteristics must be added by contract. One example is the limited liability partnership, which has been provided for recently in the law of the U.S. and some European jurisdictions. This form simply grafts limited liability onto the traditional general partnership. U.S. law now allows the partnership to have something close to strong form entity shielding (by limiting the rights of partners or their creditors to force liquidation).”

Conclusions

The conceptual delimitation between the forms with legal personality and those without legal status in American law reveals a dilution of the concept of legal personality and its effects especially in the realm of separation of patrimonies and entity liability to third parties, which in the Romanian legal system, still anchored in the shield of the legal personality, it is hard to imagine. Since the expansion of liability and also the limitation of liability is recognized in American law as forms of legal personality and those without legal personality, becomes necessary to address the concept of legal personality in the Romanian law from another perspective, in which it has to be revealed the modernity of the Anglo-American systems, oriented,

in terms of liability, to the protection of the thirds rather than the protection of the members.

References
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[www.uniformlaws.org](http://www.uniformlaws.org)