Considerations on the legal regime of the unincorporated business forms in Romania

Assoc. prof. Anca POPESCU-CRUCERU PhD
“Artifex” University of Bucharest

Abstract
The analysis of the legal status of the companies aims to unify, in an approach for the comparative and historical method, the trends in relation to theories of legal status of the companies, more so as the rules made by the new Romanian Civil Code amended the institution of the company and partnership and thus its legal status. The methodology considers the logical and teleological analyze of the rules in relation to companies, both those of common law and those belonging to special laws, in the Romanian and comparative law.

Key words: company, partnership, legal status

Introduction
The French law is one that has shaped the idea of company establishment, which impose the administrative and judicial formalism to the mutual consent characteristic to contractual theory, the company having a predominantly legal organization, so the partnership agreement being built around the supremacy of the law that will govern the social will by enforcing provisions.

The contractual theory was statutory of the European Court of Justice of 90-thies, in the grounds of judgement in Powel Duffryn plc c. Wolfgang Petereit (CEJ, cauza C-214/89, JO C 109 29.04.1992), being stated that the legal nature of the incorporated companies is a contractual one – the articles of incorporation shall be deemed to be a contract.

The doctrine has made the a distinction between different types of companies based on their character, considering that the \textit{intuitu personae} companies’ contractual legal nature is stronger than the \textit{intuitu pecuniae’s}.

The contractual nature of unincorporated companies
According to art. 1998 al. 2, the companies with legal personality can be incorporated in the form and conditions of the special law, but, until the aquisition of the legal personality, the relations between the members are governed by the rules applicable to the simple partnership.

So far, the rule, expressly stated in art. 1892 NCC, is the lack of legal personality of the simple partnership, exception being the situation in which the members agree (unanimously), throughout the life of the company, changing its shape, by conferring legal personality in an institutional procedure.
The preeminence of the contractual nature of the companies results mainly from the regulations of the unincorporated partnerships.

The Romanian law is granting legal remedies in case of non-registration formalities (specific of the institutional phase), without considering the agreement of the partners in order to register a company as inefficiency.

The doctrine does not insisted on the unincorporated forms, although the former associations of civil society (the previous regulation), simple society (in Romanian current regulation may notice a similarity with simple society regulations *societa semplice*) contained in the Civil Code, Italian law system is also a tier system, as the current Romanian law, but especially of the joint venture, represented and representing, in determined historical periods, alternatives justified by clear economic interests.

Is growing interest in analyzing these forms, as much as there are assimilated to the simple partnership also the companies which remained unregistered and also the so-called companies in fact, the latter forms, which are not legally defined, gaining regulatory framework applicable.

In this latter situation, the law itself takes over, using the doctrinal terminology, the distinction made by the doctrine between the companies in fact (which is created by the members as such) and other illegitimate forms, referring to simulated or fictitious companies.

Companies can "become" in fact, if the company with legal personality is declared nule or the lifetime expired. These cases, which are not operated retroactively, transforms the company with legal personality in a company in fact starting with the intervening cause to the removal from the Trade registry.

Moreover, there are included into the regime of the simple partnership the companies whose purpose is an economic activity but, for various reasons, have not gained or lost the legal personality, remaining companies in fact.

The simple partnership, with its express contractual nature, shall be established by the mere agreement of the parties, expressed, ad probationem, in writing. The simple partnership has all the company’s specific elements, as they were revealed by the doctrine: input, affectio societatis (which entails the prohibition of competition stated in art. 1903 NCC) and implementation and benefit sharing, simple partnership falling into the category of professionals, as that term is defined in art. 3 NCC.

The effects of the conclusion of a simple partnership are analyzed in terms of the new regulations, being notable that the doctrine, so far, has not insisted in the analyses, although there are signalized issues of new aspets to be treated.

So far, the transfer of the shares (which has the effect of losses of the member quality, according to the art. 1925 NCC) can only occur with the principle of the unanimity, when the cession (in writing or in authentic form, when the cession is free of charge) is to a third party, the provision existing also in the special law, in the case of the *intuitu personae* legal entities.

However, the sanction violation of the principle of unanimity is mitigated in the case of simple partnership, as the law is giving the possibility of any member
to redeem from the third party the alienated shares, without the express consent of all members, to a value determined either by an expert approved by the parties of the cession contract or judicially determined. If this right is exercised by several associates, the shares shall be allocated in proportion to the share of profits (art. 1901 of. 2, second sentence).

It is noteworthy option legislature to relate to profit sharing and not to participation in social capital formation, usually likely to be different, which, consequently, would lead to a modification of the allocation of equity and thus the exercise of voting, as far as the memorandum of association contains a conventional determinism of the voting right in relation to the held shares.

It is reported that the enforcement of the personal assets of a partner by a personal creditor may have as an object also the shares of a simple partnership, the effect being the loss, ope legis, of the very quality of the member, according to art. 1925 NCC. The text of the law is objectionable both de jure and the facto, since the law does not show which are the legal consequences associated.

By contract or by decision of the general meeting of shareholders, they may establish different criteria for participation in profits and losses, including different percentages of participation in these, leaving as a condition of legality in determination the criteria of reasonability (art. 1902 al. 3 NCC).

Of course, the question arises is who can claim the unreasonable difference in assessing the different participation in profits and losses, since the company does not constitute a legal entity (such as the decision would have erga omnes effects) and as the quotas are fixed by the agreement of the members – i.e. who would have standing to bring an potential action in the annulment of such clause (as far as the interpretation of the law, this occurs to be the penalty applicable to the infringements of the criteria of reasonableness).

The simple partnership, although it is not a legal entity, enters into relationships with third parties through its representatives, being a quasi-legal subject; lack of legal personality (strictly speaking) is balanced by its ability to stand on their own in court, under its own name and also by the fact that it my be liable to third parties with the joint assets of the members.

The law does not require the appointment of an administrator, recognizing the right of administration and representation of the simple partnership on any member, as they usually have a mandate to manage each one to another for the benefit of the society (art. 1913 al. 2 NCC).

Here, therefore, the recognition of a self-interest of the simple partnership, which is distinct from the interest of members, which, within certain limits, outlines an early form of free will, which does not express, stricto sensu, the specific will of the incorporated.

The subject of the interpretation is the exercise of the right of administration and representation of the members, in which case the law does not expressly provide the presentation by the third party of the empowerment and its limits, inducing the idea of the mandate without representation governed by the provisions of art. 2039 et seq. NCC.
Thus, the partner acts versus third \emph{proprio nomine}, and the liability being of the simple partnership in principal and of the member, in particular. In this situation occurs the personal liability of such member for any damage caused to the simple partnership by the concluded operation. In respect to the third party creditor, he will enforce the members common assets and, in the alternative, the shareholder’s own goods of the contracting member, in the proportion to its contribution to the social heritage, according to art. 1920 NCC (in our opinion, the meaning is the limitation of liability to capital contribution).

The Romanian legislation contains provisions correlative with the laws of other countries in terms of the loss of the membership and the effects onto the simple partnership. According to the art. 1925 NCC, the loss of it occurs by cession of the shares, by enforcement, by the loss of the legal body or by the loss of legal capacity, by withdrawing or exclusion.

The classical doctrine revealed that the joint venture is simply a contract whereby one party (commercial or not, in dualistic) gives the other party a share in the profits and losses arising from the conduct of an activity (in the dualistic, mandatory commercial). This form is also revealed by French law, similarly, as \emph{societes en participation}, without legal personality, but personality tax (Chapter III, Art. 1871-1873 French C.civ.).

In the German law, is common a similar form of joint venture, \emph{Stille Gesellschaft} (German Commercial Code, art. 230-7), which is defined as the contract by which a person acquires an interest in a commercial transaction carried out by another person, as a contribution of capital, goods belonging to the person providing the share.

This form remains occult, as in Romanian law, not subject to any registration formalities. What distinguishes substantially the german regulation is the possibility to stipulate an exemption to participate in loss of a partner, not being possible the exemption from benefit-sharing – such a clause is considered, in Romanian law, being leonine.

The New Civil code restores a natural legal order of the termination of the unincorporated business form of the joint venture, being assimilated to the dissolution followed by liquidation (in the literal interpretation of art. 1954 NCC).

In the national regulations, unincorporated businesses take various forms, but built on the same contractual foundations obvious of which is distinguished as form partnership’s legislative option. Traditionally, the main feature of the partnership’s (and fundamentally distinguishes this form of conducting business) is the nature of relations between its members. This reflects as strongest the contractual nature, consisting of a mix of goods and skills of members acting for a common purpose.

The economic benefits of the regulations are that their taxation occurs only once to each of the members, while the companies with legal personality requires an initial charge of profit and dividend distribution. A long time, no recording of these forms has had a tax advantage can not be neglected, especially in Germany since 1990, however, the Council Directive of 8 November 1990 amending Directive 78/660/EEC on the annual accounts and Directive 83/349/EEC on
consolidated accounts as regards their scope encompassed within advertising and partnership tax liabilities sites.

Thus, both for Germany and for Great Britain and the U.S., the partnership there are two forms: that of the partnership's limited and unlimited liability partnership's. In the Romanian law, the simple partnership is characterized by limited liability of shareholders to the obligations contracted, and subsidiary liability under art. 1920 NCC; in terms of the joint venture, subsists the personal liability under art. 1953 al. 1 NCC, which is a main unlimited responsibility.

Conclusions:
Besides traditional forms of the legal personality incorporations, special legislation regulates the Societas Europea, the European Cooperative Company or the Cooperative company, these two forms justifying the confluence of the contractual and institutional theories. Irrespective of the doctrinal classification, all the incorporated or unincorporated business forms have a contractual nature which dilutes the concept of the legal personality, so a breakdown of the business forms according to such criteria seems to appear obsolete.

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