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DOING BUSINESS IN ROMANIA

Theoretical article

THE PARADIGM OF THE (UN)LIMITED LIABILITY OF THE ENTREPRENEUR FOR THE PROFESSIONAL OBLIGATIONS OF THE TYPES OF ENTITIES WITHOUT LEGAL PERSONALITY

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Abstract

The present study focuses on the analysis of the legal status of the affectation patrimony of the registered sole trader authorised to carry out trading activity as well as that of the simple partnership.

Representing a distinct part of assets within the individual's own patrimony, the affectation patrimony attract the segregation of the professional creditors who can pursue the assets mainly for the professional obligations. But the effect of constituting the affectation patrimony is not that of preventing the creditors to pursue the other properties within the individual's own assets in the case where they have not been satiated from the affectation patrimony.

We conclude that the patrimony of the persons that form a partnership from the individual type of business are exposed up to various degrees to be being pursued for the obligations towards the third parties.

On the theory of the affectation patrimony of the natural person who carries out authorized economic activities

The patrimony, whose holder is any natural or legal person, includes, according to the definition of Art. 31, paragraph 1 of the Civil Code, all rights and obligations which can be monetised and belong to it, and the division or affectation of the unique patrimony can be achieved, according to the provisions in paragraph 2 of the same article, only under the assumptions and conditions set forth by law, thus establishing the principle of division and affectation *ex lege* of the unique patrimony: "*Art. 31. - (**1**)Any natural or legal person holds a patrimony that includes all the rights and duties that can be monetised and belong to it. (**2**) It may be subject to a division or an affectation only in the cases and under the terms set forth by law. (**3**) Patrimonies of affectation are fiduciary patrimony masses set up according to the provisions of Title IV of Book III, affected to the exercise of an authorized profession and other patrimonies determined by law.*"

Art.31, paragraph (1) of the Civil Code provides for the principle that the patrimony of the natural person is unique - *uniqueness of patrimony* - and inside it, according to Article 31, paragraphs (2) and (3), patrimony masses can be created.

According to Art. 31, paragraph 3 of the Civil Code, the affectation patrimony is grouped in the following categories:

a) fiduciary patrimony, constituted according to the provisions of Title IV of Book III of the Civil Code;

b) patrimony affected by the exercise of an authorized profession;

c) other patrimonies determined by law.

Further, on the regulation of patrimony division, the Civil Code provides at Art. 32: "**(1)** In case of division or affectation, transfer of rights and obligations from a patrimony mass to another, in the same patrimony, is done subject to the conditions provided by law and without prejudice to the rights of creditors of each of the patrimony masses. **(2)**In any cases pursuant to paragraph (1), transfer of rights and obligations from a patrimony mass to another does not represent an alienation." For the division-affectation complementarity, the distinction between patrimonial transfer - inter-patrimonial transfer is made (see Stoica, 2013);

In the latter category, as provided in Article 31, paragraph (3), c), which includes "other patrimonies determined by law", there is the affectation patrimony that can be represented by the types of authorized natural persons who carry out economic activities, namely, authorized natural person, individual entrepreneur holder of an individual company, natural person member of a family business, regulated by Government Ordinance 44/2008 and by the Civil Code (for the reflection of the theory affectation patrimony in jurisprudence see ICCJ jurisprudence with note by Rizoiu: *Authorized natural person. Legal status. Extent of liability* and analyzed in Rizoiu 2012, p.5 along with other relevant case studies in the field of affectation patrimony, p.8-11).

The affectation patrimony, as defined in Art. 2, letter j of Government Ordinance no. 44/2008 includes all assets, rights and obligations of authorized natural persons, holder of an individual company or members of a family business, affected for the purpose of exercising an economic activity, constituted as a distinctive fraction from the patrimony of the natural person, separate from the general bond of the personal creditors thereof. As indicated in the doctrine, (Piperea, 2012a, p.670) the affectation patrimony includes both the affected assets and those acquired during the course of business. Opposability of the affectation patrimony represented by the types of authorized natural persons carrying out economic activities can be done, according to Piperea (2012a), through the accounting of the affected patrimony, therefore the opposability may result from the accounting documents. The Catana doctrine (2013 p.97) also states that "*the problem of advertising and that of the opposability of the affectation patrimony is not solved*". It is obvious that this regulation is amorphous in this respect.

It is revealed (see Catana 2013, p.97), regarding the affectation patrimony, that there is the following distinction: formation of the affectation patrimony by the types of authorized natural persons who carry out economic activities constitutes "an inter-patrimonial separation, a division or fraction for a special affectation" of the personal property of the individual, not "a separation of patrimonies".

Government Ordinance no. 44/2008 states that an authorized person carrying out economic activities that meet the typologies listed above have the right to opt/right to choose for setting up, or not, an affectation patrimony. In practice, informing persons wishing to carry out an authorized business on the right to choose to form an affectation patrimony in relation to the obligation to register in the Trade Register under Government Ordinance no. 44/2008 is achieved through the NTC website which publishes, for each of the types of professionals regulated by Government Ordinance no. 44/2008, the documents needed for registration, which also includes the "act of establishing an affectation patrimony" v.www.onrc.ro; Art. 10 paragraph (2) of Government Ordinance no. 44/2008 refers to Annex 1 of the Ordinance, which also indicates the necessary documents for registration in the Trade Register.

But what is the reason for establishing an affectation patrimony by the types of authorized

persons carrying out economic activities and what are the consequences of their professional creditors or personal creditors? (see Lipcanu 2009, p.69).

Identifying the affectation patrimony as “a technique for organizing liability and also a way of limiting the liability of the holder for professional obligations”, the doctrine of Tuleasca (2014, p.3) and the doctrine cited there synthesizes the reason for creating an affectation patrimony so “.... maintaining the right balance between the professional and economic activity or activities and the risks inherent, and the need to protect the personal assets of the entrepreneur and his family.”

Following the analysis of the situation of the two categories of creditors - creditors of a patrimony mass/divisions, namely professional creditors and personal creditors of the natural person doing an authorized business in one of types provided by Government Ordinance no. 44/2008, doctrine (see Piperea 2012a, p.60-71; Catana, 2013, p.98) reveals “the segregation (separation, isolation) of professional creditors”, segregation founded on Art. 2324, paragraph 3 of the Civil Code:

*“Art. 2.324. - (**1**)The one who is personally obliged is liable for all his movable and immovable assets, present and future. They serve as common security for its creditors.*

***(2)** Undetectable assets cannot be part of the security referred to in paragraph (1).*

***(3)** Creditors whose claims have been born in relation to a division of patrimony, authorized by law, must first seek the assets subject to that property mass. If these are not sufficient to satisfy the claims, the other patrimony of the debtor can be pursued as well.*

***(4)** The assets subject to a division of patrimony affected by the exercise of a profession authorized by law may be pursued only by creditors whose claims have been born in relation to that profession. These creditors will not be able to pursue the other assets of the debtor.”*

According to these provisions, in the event that the affectation patrimony was established by the types of natural persons carrying out authorized economic activities, creditors who have a claim arising from the professional activity of the debtor authorized natural persons, will first pursue the assets that are subject to the affectation patrimony constituted for this purpose. Only if the assets included in this patrimony are insufficient to satisfy the claims, creditors who have a claim resulting from the professional activity on an authorized natural person will be able to pursue the personal property (patrimony), or the other patrimony of the individual debtor (for the relative autonomy of the affectation patrimony seeStoica, 2013).

As a consequence, we synthesize from the doctrine (developed extensively in Catana R., 2013 *Commercial Law in Power-point*, Bucharest, Juridical Publishing, p.98) the effects of the provisions of Art.2.324, paragraph 3 of the Civil Code under the following aspects:

- “an order of preference, following the formation of the affectation patrimony” is established among creditors, i.e. the creditors who have a claim resulting from a professional activity will pursue, with preference/priority, the assets subject to the affectation patrimony, but they may also pursue, to the extent that the debt will not be covered as a result of this priority, the other assets from the personal property of the individual;
- “a permanent ban” is established for personal creditors when it comes to pursuing the profession affected patrimony, given that the establishment of the affectation patrimony is separate from the general bond of the personal creditors of the authorized natural person who carries out authorized economic activities. (seeRizoiu, 2012, p.13-14 and Lipcanu, 2009, p.69).

For freelance professions, even if their analysis is not the topic of this study, we must note a stricter legal regime for creditors whose claims are born in relation to that profession, a regime stemming from the application of Art.2.324, paragraph 4 of the Civil Code; they can pursue only the assets of the patrimony affected by the exercise of the profession, excluding other assets from the personal property of the debtor, the individual exercising the profession (Rizoiu, 2012, p.13-14).

In the doctrine, the critique of how the affectation patrimony of the person carrying out an authorized economic activity vs. that of persons exercising freelance professions (Tuleasca, 2014, p.4), stems from this, namely the “inadequate and unfair” nature of the regulation, which violates “the principle of equality of creditors” and from the fact that for professional obligations, the person carrying out an authorized economic activity “is obligated, unlimited, to his professional creditors”, and even if this unlimited liability has a subsidiary nature, the authorized person “cannot protect its personal property from professionals creditors”. (Tuleasca, 2014, p.4 proposes amending and supplementing the legal framework of the affectation patrimony of the person carrying out an authorized economic activity in the sense of “waterproofing” the personal property by removing the right of professional creditors to pursue the assets belonging to the personal patrimony).

We conclude therefore that separate from people of a liberal profession, for the person carrying out an authorized economic activity there is no limitation of liability for professional obligations which operates *ex lege*for the affectation patrimony constituted for this purpose. The personal property is not protected from professional creditors, and the unlimited liability is attenuated only by its subsidiary nature.

In practice, the theory of creditor segregation finds polyform applicability in the realm of objection to enforcement (finality observed and developed in the doctrine by Piperea, 2012b), and given the creative nature of jurisprudence, the list of categories of appeals that can be made in the matter is not exhaustive:

-appeal filed by the person carrying out an authorized economic activity or by the creditor with a professional debt, assuming commencement of foreclosure by the personal creditor (ii) against the affectation patrimony established for professional reasons;

- appeal filed by the person carrying out an authorized economic activity, assuming commencement of foreclosure by the creditor with a professional claim against the assets from the personal patrimony that are not included in the affectation patrimony, without observance of the pursuing rule;

- appeal filed by the creditor with a professional debt, assuming commencement of foreclosure by the personal creditor against the affectation patrimony set up for professional reasons - competition between creditors.

Simple partnership

For a company without legal personality, such as a simple partnership, contributions become the co-ownership of the associates under Art. 1883, paragraph 1, sentence II of the Civil Code, unless they have agreed, expressly, that they will be used in common.

Not having its own patrimony, because it does not acquire legal personality, the legal status of the assets contributed in the simple partnership is provided by Art. 1883, paragraph 1: contributions are the co-ownership of the associates, unless they have agreed, expressly, that they will be used in common and it is circumscribed by the doctrine, for the co-ownership, as follows: - contributions have “undivided co-ownership” - “the contributed asset is taken out of the individual patrimony of the associate and enters into the co-ownership of the associates”; - “a common affectation patrimony is established” (see Piperea 2012a, p.306- 307, 313, 349-351).

As for the obligations of the associates to company creditors - professional creditors, Art. 1920, paragraph (1) of the Civil Code provides, mainly, that liability is engaged with the assets in undivided co-ownership of the associates, which creditors are required to pursue with priority, and responsibility of the associate’s own patrimony can be drawn proportionally to his contribution, only if the social creditor could not be satisfied from the common property of the associates; so, as indicated in the doctrine (see widely Piperea 2012a and Baias p.349-351 et al, 2012), a segregation of professional creditors exists.

The nature of company/associate liability to creditors of the company is thus unveiled: liability is subsidiary and limited to the contribution to the common affectation patrimony of the associates.

The provision relating to the segregation of professional creditors is similar, on a particular segment, to that regarding pursuing a natural person carrying out an authorized economic activity, who has established an affectation patrimony for this activity, by creditors whose obligations result from this activity. The segment common to both hypotheses is that the creditors who have a claim resulting from the professional activity will pursue with preference/priority the assets that are part of the affectation patrimony, either that set up by the authorized person or that established by the associations in the simple partnership and also, they can pursue, as an alternative, to the extent that the claim is not covered by this priority pursuit, other assets from the personal property of the person who is authorized or has set up a simple partnership. But when determining the extent of liability of the latter to professional creditors the joint segment separates, the regulation given having distinct facets: while the authorized person remains liable - unlimited - to professional creditors, associations /shareholders in the simple partnership are liable in a limited manner, depending on the proportion of their contribution to the simple partnership’s affectation patrimony.

What will be the situation of personal creditors of associations/shareholders in the simple partnership? Can they track the assets in undivided co-ownership? In accordance with the provisions of Art.1920 paragraph 2 of the Civil Code, the personal creditor of an associate/shareholder, to the extent that it could not be satisfied from its own assets, may request, as appropriate, to be returned or separated and to assign his debtor (associate/shareholder in the simple partnership) the due share of common property of its associates, with the proper application of Art.1.929 provisions relating to the rights of the associate in case of loss of this quality.

Art.1929 of the Civil Code “The rights of the excluded associate (1) An associate who loses his position though means other than by assignment or enforcement of foreclosure of its shares in the company can obtain the value of its shares from the date of termination of his association, and the other associates are held to pay them once they have been established, with legal interest, from the date of termination of his association.

(2) If the parties do not agree on the value of the shares, it will be set by the court under Art. 1901 paragraph (3).

Notwithstanding the provisions of Art.2324, paragraph 4 of the Civil Code regarding the personal creditors of the individual who exercises a liberal profession, for whom a ban is established for pursuing the assets in the affectation patrimony used in the professional activity, the personal creditors of the associate/shareholder in the simple partnership can pursue the assets in undivided co-ownership, as Art.1920 paragraph 2 of the Civil Code covers the creditor's right to request (optional): either to be returned; or to be separated and to assign his debtor (associate/shareholder in the simple partnership) the due share of common property of its associates, previous to this pursuit.

By virtue of the creative role of the doctrine, by corroborating the provisions of Art.1920, paragraph 2 with those of Art. 1908, paragraph 4: “In the absence of an express provision to that effect in the Civil Code, concluded that: the restitution of contribution or separation of common assets may not be requested by personal creditors unless the company has entered into liquidation.” (seeBaias*et al* 2012, p.1953; and also Piperea, 2012a, p.350).

Art.1908, paragraph 4 Civil Code: "The associate of a company with indefinite period may not request, before the expiry of the company, the restitution or equivalent for the share of the property that rightfully belongs to him, unless in the case of his withdrawal or exclusion”.

We conclude that, in consideration of this doctrinal perspective, during the existence of the simple partnership, the common assets of associates which represent an affectation patrimony are protected from the pursuit of the personal creditors of the associate/shareholder, which is beneficial in terms of time, but is incomparable with a 'permanent ban' of personal creditors to pursue the assets affected to the profession, a ban regulated for individuals of a liberal profession. If the simply partnership wants to be, as a result of the regulation in the Civil Code, a contract useful for un-professionals and professionals alike, the latter require greater protection in order to carry out their work.

The regulation according to which the associates/shareholders of the simple partnership answer to professional creditors in a limited manner is also beneficial. They are liable in proportion to their contribution to the common assets, the affectation patrimony of the simple partnership, unlike the authorized person whose liability, with identical context, is unlimited. In a unique way, the Civil Code regulates in Art. 1921 and Art. 1922, the liability towards third parties of apparent and obscure associates who are liable to good faith third parties just like other associates.

Partnership

Commonly used in business for the association of entities carrying out one or more expressly determined activities, for which they brought in the partnership only certain assets from their own patrimony, in order to share benefits and losses, without the need to form a legal entity distinct from the people who became associate, partnerships developed greatly after 1990.

From partnerships concluded in a public-private partnership, in order to develop the different categories of activities, to individuals and/or legal persons who became partners with the purpose of constructing buildings, one of the partner’s contribution being the land and the other’s the materials and labour required for the construction of buildings for recovery, the so-called "real-estate developers", the legal vehicle for this type of business was a partnership.

Given that the partnership contract ends without the need to form a legal entity that is distinct from the persons associated, therefore there is no own patrimony, distinct from the patrimony of the associated persons (please note that according to the provisions Art.1.950 of the Civil Code, the contract shall be tested only through writing), the state of assets brought into the partnership, according to Art.1952, has the following hypotheses: that provided by Art. 1952, paragraph 1, according to which, as a presumption in the matter of a partnership, the partners remain the owners of the assets made available to the partnership; that provided by Art. 1952, paragraph 2, paragraph 3 and paragraph 4, which targets two categories of assets, namely assets brought into the partnership and those obtained using the former, which the partners may use as we shall see below.

The partners may agree on joint ownership of the partnership for these two categories of assets, and on the transfer in the property of one of the partners for achieving the object of the partnership of the assets made available to the partnership and on regaining the assets made available to the partnership by the partners upon termination of the partnership. As a consequence, the legal regime of assets brought into the partnership, and those obtained using the former, is determined by the parties and can cover the hypotheses stated above.

The perfect hypothesis for a partnership is the one in which, in consideration of the presumption provided by Art.1952, paragraph 1, the partners remain the owners of the assets brought into the partnership and thus the partners’ liability is neither limited nor subsidiary, as we shall develop in the following.

Assuming the establishment of a common property of the partnership, in compliance with the

requirements of publicity, it cannot be pursued by creditors, so the partners would have no interest in its establishment; the formation of joint ownership of the partnership does not attract a limited pursuit, and to the extent that the creditor cannot be satisfied out of the common property of the partnership, the own patrimony of the partner is to be pursued, similar to a simple partnership; the contribution to the establishment of the partnership is not relevant, since liability is unlimited.

The transfer in the ownership of one of the partners, for achieving the object of the partnership, of assets made available to the partnership in compliance with the requirements of publicity, would it not mean (in terms of the regulation, also the possibility of extending liability toward the patrimony of an obscure partner) an unjust quasi-enrichment of the partner who receives the assets made available to the partnership? The patrimony of the latter would also include the assets made available to the partnership, thus emphasizing the patrimony of this partner on which creditors will exercise their pursuit, while reducing the patrimony of the partner from whom the transfer of ownership was operated, and who can be pursued in turn by creditors, if he gets into relationships with third parties.

Parties may provide, in transferring the ownership of assets to the common property of the partnership or one of the partners, corollary to the transfer of this right, that the transfer take place under the condition of regaining in kind the assets made available to the partnership by the partners upon termination of the partnership - could represent a problem and could block the pursuit by creditors, the transfer of ownership of the asset being affected by a suspensive condition.

Under the same regulation contained in Art.1951, according to which the partnership - in relation to third parties - is a distinct person from that of the partners, and cannot acquire legal personality, the relations between partners and those between partners and third parties are summarized in the regulation stipulated in Art. 1951 and Art. 1953:

- the third party has no right on the partnership, he contracts with one of the partners, the visible one (for relations between partners and third parties, underlining the relations: "representative" of partner - obscure partner and their responsibility (Baias et. All, 2012, p.1972), who enters into legal relations with third parties in its own name; the liability of the partner is unlimited, and the patrimony of this partner will be pursued by the creditors of the partnership;

- the other partners, obscure, ignoring the role of the visible partner, may exercise all rights arising out of contracts made by any of them, and in the event that they engage in relations with third parties, act and contract in their own name, their liability is joint with that of the visible partner for acts concluded by any of them, and the partner's own patrimony can be pursued by the creditors of the partnership. So as not to make the liability of partners to third parties ineffective, art. 1953, paragraph 4 provides that any clause in the partnership contract on limiting liability of partners to third parties is inapplicable.

In conclusion, the liability of the partners to creditors in the partnership is mainly un unlimited liability, in the own name of the visible partner; to the extent that other partners enter into relationships with third parties, they are liable in their own name, the liability being joint with the visible partner.

The mechanism of limitation of liability arising from the acquisition of legal personality is inapplicable to a partnership, liability being neither limited nor subsidiary. As a sanction/remedy for partners who go beyond the borders of the obscure nature of the partnership, given by the visibility of only one of the partners, who enters into relationships with third parties in its own name and has unlimited liability, liability also extends toward the patrimony of the obscure partner, acquiring a joint nature.

From a dual perspective, of the visible partner, and the obscure partner, the personal patrimony of each may be affected by the creditors of the partnership, according to *ut supra* conditions. The personal creditors of the partner, both the obscure and visible, can pursue the patrimony of each of them, entering into a competition with the creditors resulting from the partnership, in accordance with the Code of Civil Procedure, because, in the case referred to Art.1952, paragraph 1, there is no special affectation and the law does not establish any segregation or limitation for them.

When it comes to disputes, a relevant jurisprudence was highlighted in terms of partnerships, following the actions promoted by people who have signed a partnership agreement. The actions were based on the regulation included in the Commercial Code of 1868, Art.251-256, with special focus on: non-fulfilment of obligations to pay the amounts set by the partnership contract and compensations between partners; nullity of clause for establishing a minimum amount guaranteed by one of the partners, on the grounds that it is a leonine clause, because it is seen as an opt-out clause for losses; restitution of assets contributed by a partner; delimitation of the partnership contract legal from legal institutions, assignment of works contract; lease contract; partnership contract, to the extent to which the partnership is simulated to hide these other categories of contracts.

Each of the themes reflected in the *ut supra* case law designate, with pecuniary

connotations, a conditioning on the personal property segment of the partner in the partnership.

A change of the partnership regulation made by the Civil Code targets one of the constant themes revealed by jurisprudence: clause for establishing a minimum amount guaranteed for one of the partners, whose revocation is sought based on it being a leonine clause, because it is seen as an opt-out clause for losses. This clause has a new regulation. In this respect, Art.1954, paragraph 5 of the Civil Code states: *"Any clause that establishes a minimum guaranteed level of benefits for one or several of the partners is deemed unwritten." (*see Decision no. 327/2012)

The regulation given by Art.1954, paragraph 5 of the Civil Code for establishing a minimum guaranteed amount for one/several of the partners, is in line with the remedies introduced by the Civil Code, so it is considered unwritten in the partnership contract (for clauses deemed unwritten in the Civil Code see Iona cu 2011, p.27-36), which will cause a change of case law. Jurisprudence, in *ut supra* solutions, has established that the clause establishing a minimum guaranteed amount for one of the partners is not a leonine clause because this way of sharing the benefits, established by the partnership contract, does not preclude participation in losses and does not violate the purpose and conditions of the partnership or, more precisely, that leonine clauses are forbidden, which favours some partners at the expense of others, because that would violate the fundamental principle of equality of parties in a commercial business. The division of benefits established by the partnership contract, through the clause in which the claimant was not awarded all the gain and it was not exempt from participation in losses, but assumed participation in losses seeing as it accepted a minimum percentage “... no less than ...”, does not exclude participation in losses and does not violate the purpose and conditions of the partnership. (see Decision no. 1851/2003).

In another jurisprudential solution it was established that the clause establishing a minimum guaranteed amount for one/several of the partners is a leonine one, as it is equivalent to the claimant’s non-participation to any losses, leading him to cash in on benefits in any situation, even if in a smaller amount than expected. (see ICCJ Decision no. 1177/2004 and Sauleanu 2009, p.57-61).

The change of jurisprudence based on the provisions of Art.1954, paragraph 5 of the Civil Code, will consist in the fact that any clause which sets a minimum guaranteed level of participation in benefits for one or several of the partners shall be deemed unwritten, therefore the parties will determine the partnership clauses regarding bonuses and losses under the principle of contractual freedom, but subject to Art.1954, paragraph 5 of the Civil Code, such clause will be considered non-existent (see with regard to the legal norm and values in question, Bobos, Buzdugan, Rebreanu, 2008, p. 329, 334).

The new regulation of the clause for establishing a minimum guaranteed amount for one/several of the partners will remove the possibility to conclude partnerships that simulate other types of contracts, such as a lease, but also increases the risk of the contract, in that, in sharing the benefits of the partnership, one/several partners will not be able to collect - under a less fruitful partnership - a guaranteed minimum amount, which would take effect on the personal property segment of the partner in the partnership, attracting a possible reduction of it.

The conclusion that it made in such circumstances is that, the partnership, based on current and perspective conditions in the business environment, and the regulation given by the Civil Code, has no future.

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