

# THE TRADING COMPANY IN THE LIGHT OF THE NEW CIVIL CODE

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## Abstract:

*The New Civil Code submits to doctrinary debate preeminently the principle of the shareholders' agreement in what concerns the option to represent or not a distinct legal subject, under the circumstances of the accomplishment of certain specific formalities for legal persons, which formalities are exhibited within the special laws governing the form of trading company upon which the shareholders decide. Compared to these, in order to trace delimiting lines between the theories trading company-contract and trading company-institution, it is of interest the conceptual approach within compared law, especially since the new company law rely on elements belonging to legal systems with self-standing features.*

**Key words:** shareholders, patrimony, legal entity, articles of association, trading company, simple partnership

**JEL classification:** K12, K22

## INTRODUCTIVE CONSIDERATIONS

One of the most remarkable Romanian theorists of company law outlined the fact that "legal entities with commercial character, the trading company[1], claims, unlike natural persons traders, a laborious regulation, purposing to establish under which conditions can be constituted and act in social environment, which are the authorities requested to issue and express the social will, since they do not represent but a technical procedure, requested to empower an amorphous collectivity of individuals to develop a legal activity, in which the element of individual disappears and leaves place to a new subject of law." [2]

To what extent such synthesis remains actual, analyzed in the light of the New Civil Code's provisions, constituting the common law in the matter of companies, this shall be established in practice.[3] For the time being, we are able only to determine the admirable effort of the legislator to revitalize the legal framework of the trading company (having in view the nonstock professional corporation), to adjust this legal institution to the realities of the contemporary economical-social life; a relevant example for this is the renouncement to obsolete notions of private and universal trading company, or the investment of the corporation (nonstock professional) with legal entity [4] etc.

Nevertheless, the legislator's attempt to unify the applicable regulations of the great majority of legal relationships established between individuals, between natural and/or legal persons of private law, to which we increment the professional institution, generate a series of confusions towards the acceptance of the Civil Code.

Based on the New Civil Code, in which is attenuated the difference between these associative forms (associations, foundations and companies), in which the distinction between the partnership and the trading company is much more diminished, all these forms of organization [5] entering in the category of profession, changes substantially the vision on the companies.

## THE CONCEPT OF TRADING COMPANY

The New Civil Code maintains the duality of the trading company's institution [6] understood firstly as a contract, secondly as a distinct legal person. Thus, according to Art.1881 Civ.c.:

*(1) By the articles of association it is understood that two or more persons bind mutually to cooperate in order to conduct an activity and contribute to it by means of financial contributions, goods, know-how or services, with the purpose to share the benefits or to use the remaining assets. (2) Each shareholder shall contribute to the support of the losses proportionally with the participation to the benefits' distribution, unless stipulated differently. (3) A trading company may be constituted with or without legal entity.*

The legal text surprises the complexity of the legal institution, the trading company being in the first place the agreement of two or more persons convening to unite their efforts and resources in order to conduct together, on their own risk, certain activities, aiming to accomplish a mutual purpose: to obtain benefits – which they share between them –, or to realize together a certain economy. In the event that they consider it appropriate, the members of the trading company will take the necessary steps for the investment of the trading company with legal entity, and thus constituting an autonomous organism, an independent legal subject.

By trading company we shall therefore understand also the legal person newly resulted on the grounds of the articles of association, subject of law acting in the civil circuit, independently from the members constituting it, assuming its own liabilities guaranteed by its patrimony for the accomplishment of its function to realize the purpose established by the articles of association.

In the light of the New Civil Code, the trading company possesses a double legal nature, combining indissolubly a volitional dimension, concretized in the articles of associations and a *ope legis* institutional dimension.[7]

In contemporary doctrine it is underlined the institutional nature of the trading company, especially in the case of partnerships, while it prevails against the contractual character, under the circumstances in which it is possible the constitution of a trading company by a single member acquiring the quality of sole shareholder.[8]

It is interesting the fact that the Romanian legislator, although while drafting the Romanian New Civil Code he was influenced by the provisions of the Civil Code in Quebec (Q.Civ.c.), he did not eventually take *tale quale* the text of Article 2186 paragraph 1 regarding the contract of partnership and gave up paragraph 2 regarding the contract of association, hence:[9]

*A contract of partnership is a contract by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share any resulting pecuniary profits.*

*A contract of association is a contract by which the parties agree to pursue a common goal other than the making of pecuniary profits to be shared between the members of the association.*

Starting from the comparative analysis of the two articles – Art.1881, para.(1) R.Civ.c. and Art.2186 para.1 Q.Civ.c. we may determine that the Romanian text omits the mention regarding the operation of an enterprise, as object of the contract of partnership. A possible explanation could be exactly the general formulation of the legal definition of this type of activity, comprised in Art.3, para.(3) R.Civ.c., which is much more ample than the acception given by the similar text from the Q.Civ.c. by means of which the sphere of comprehension refers only commercial activities. In our opinion this omission is welcomed, since inserting in the text the references regarding the operation of an enterprise being redundant, given that any trading company presumes a systematic and organized activity, (these are the two defining elements of the enterprise, in the legislator's perspective).

Secondly, we may notice that the legislator in the Canadian province makes no allusion to the liability of the shareholders to support together the registered losses, since this is a defining element of any trading company.

Finally, we underline the fact that unlike the Romanian law providing the possibility to constitute a trading company with or without legal entity, in the legal system in Quebec, only the joint stock trading company enjoys a legal entity, while the other forms of trading company represent simple contractual partnerships only.[10]

Such situation should constitute a further reason for the Romanian legislator in order to avoid a deficient legal model difficult to correlate with the rest of the Romanian legislation and should lead him towards the French trading company regulation. Thus, Art.1832 of the French civil code [11] which defines the trading company, transposed by Art.1 of Law no.85-697 (of June 11 1985) in the second paragraph it refers expressly to the trading company constituted of a single member, indistinctly – natural or legal –, as follows:

*The trading company is established by two or several persons who jointly agree by contract to appropriate a common enterprise goods or their own work in order to share the benefits of to profit from the resulting economy.*

*It can be constituted, under the conditions provided by law, by agreement of a single member.*

*The shareholders agree to contribute to losses.*

We cannot miss that certain common facts between the French and the Romanian texts defining the trading company, in particular on one side the lucrative purpose of the trading company consists of not only obtaining benefits, of a certain positive value, but also an economy of the material and financial resources; on the other side the contribution of all members of the trading company to the liability to support together the losses could be registered in the development of the common activity, defined as enterprise by the French legislator.

In the French law, the provisions of the law of January 4 1978 complete the provisions of the Art.1832 of the F.Civ.c. by adding a new purpose that the shareholders follow by constituting a trading company such as realizing certain assets. In such way, the lucrative purpose of the trading company was not altered since the realization of assets equals a gain, by reducing several costs related to the conducted activity. The trading company is essentially "capitalist", its purpose being to obtain and distribute the resulted profit and implicitly to value the registered economy.[12]

In the French legal literature [13] it is stipulated that the trading company responds to the preoccupation of organization and efficiency of the activity by accomplishing three functions: organizing the partnership, organizing the enterprise and organizing the patrimony.

The constitution of a trading company had as first purpose the accomplishment of a framework of organization of the shareholders for the common deployment of an activity from which shall result certain gains ulteriorly shared between them. Obviously, this function is absent in the case of the limited liability trading company with a sole shareholder.

Secondly, the trading company represents the legal structure under which an enterprise can be operated [14], forming the object of the trading company's activity. But not any kind of enterprise can be operated within a trading company, yet it can be organized also by the sole trader or together with his family. Yet, the trading company, rejoicing legal entity, constitutes a legal habit according to the operation of the enterprise; for example, by the means by which it can enter in relationships with third parties it can attract funds, constituting a technique of financing the operation of the trading company, or together with other companies it can form holdings, conferring a force of action on the market.[15]

Finally, the trading company disposes of a proper patrimony affected to the accomplishment of the purpose for which it was constituted. Unlike the simple partnership, the trading company is an organized patrimonial community by means of which it is traced also the profitable administration of a patrimony, be it proper to the legal subject, or detained by the shareholders in indivision. The latter hypothesis, specific to companies without legal entity, determined the theorists to consider the trading company as a comfortable technique to defeat and subordinate the unicity and indivisibility of the patrimony, by affecting this fictional legal subject's certain masses of rights.[16]

## **DELIMITATION OF THE CONCEPT OF TRADING COMPANY AND THE OTHER COMMERCIAL FORMS PROVIDED BY THE NEW CIVIL CODE**

In its effort to elaborate a unitarian legal framework, the Romanian legislator resorted to a supple legal technique for the elaboration of the provisions regarding the companies comprised in the New Civil Code, which, the way we mentioned earlier, represents the common law in matter of trading company, regardless the form, nature or their object of activity.[17] Consequently, Art.1881-1889 knit together the applicable legal system of each trading company form, so that the special laws regulate in detail the different species of trading company, such as Law no.31/1990 regarding companies.

According to Art.1888 Civ.c., companies may have several forms, such as: simple partnership, partnership, general partnership, limited partnership, limited liability trading company, joint stock trading company, joint stock partnership, cooperative trading company and any other type of trading company under the law. Superposing over this enlisting the one provided in Art.2 of Law no. 31/1990, comprising the following trading company forms: unlimited trading company, limited partnership, joint stock trading company, partnership limited by shares and limited liability trading company, we conclude that the New Civil Code regulates two trading company forms: simple partnership and partnership, also known as joint venture.

In what concerns the simple partnership, we are able to establish certain elements of resemblance with the trading company, as follows: they both are constituted on the grounds of an agreement of its member (sole member) who, theoretically, shares the same characteristics (onerous, comutative, usually with successive execution synallagmatically and consensually etc.)[18].

For both types of companies, the associates agree to contribute with certain patrimonial values, known under the title of contribution to the social capital subscription; the capital is to be divided into equal shares distributed to the associates proportionally with each other's contribution, unless stipulated differently in the articles of association.

Both companies have lucrative purpose, the associates aim to conduct together an activity in order to obtain benefits in exchange of which they are entitled to share in the distribution of profits or the trading company's assets remaining. Under this aspect, both forms of trading company distinguish from the partnerships with lucrative purpose, namely the associations and foundations.[19] By means of the articles of association, the associates assume the obligation to pay their share for the possible losses, proportionally with their quota of contribution to profits.

Although both trading company forms present as a partnership of individuals and capitals, yet there are various distinctions, regarding especially the function and structure of the two trading company form.[20]

The most significant distinction between the two forms is represented by the fact that the trading company is vested with legal entity, according to Art.1 para.(2) of Law no. 31/1990. The trading company constituted by means of the articles of association acquires subjectivity, having a proper patrimony, allowing it to assume personal liabilities and to respond for their accomplishment. In what concerns the simple partnership, according to Art.1892 Civ.c. it has no legal entity, it remains a simple contract. Under the hypothesis in which the associates wish to invest the trading company with legal entity, this shall transform into the trading company form with the desired legal entity.[21]

Between the trading company and the simple partnership there can be identified various differences regarding the conditions under which this one constitutes, functions and dissolutes.

If concerning the simple partnership the differences are not various, the joint venture detaches neatly from the trading company. Even if both associative structures have a lucrative purpose, based on an agreement, the joint venture constitutes only a contractual relationship by means of which one of the parties contributes to the profits or losses resulted from the exercise of one or several punctual operations. The joint venture has no legal entity, the associates are personally bound within the relationships with the third parties, even if they act on the behalf of

the partnership. The associates remain the proprietors of the goods they put at the disposal of the joint venture, pursuant to regain them at the end of the partnership. The partners may establish by contract that the goods brought into the partnership become common property or are transmitted in the property of one of the partners purposing to accomplish the object of association.

In the special German literature the joint venture is considered an occult partnership, remaining unknown to the third parties, suitable for financing operations of different projects of a natural or legal person lacking financial resources, or for crediting operations realized within a holding etc.[22]

The comparative analysis between the trading company forms regulated by the New Civil Code and the trading company represents a practical interest. The trading feature of a company structure determines a peculiar legal system, within which exists a series of professional liabilities, specific to traders, among which we mention the liability to register at the National Trade Register Office, the liability to organize the accounting of the social patrimony and to keep certain registers, the liability to operate the enterprise within the limits of a licit competition etc. Under the circumstances in which the trading company is in incapacity of acquitting the exigible debts, it can be implied the insolvency procedure, unknown for neither the simple partnership nor the joint venture.

## CONCLUSIONS

The complexity of the legal system governing the trading company – contractual institution –, is amply analyzed within foreign and Romanian literature, especially continental.

Thus, in the French special literature [23] were concomitantly developed the theory of the trading company as a contract and the theory of the trading company of trading law institution.

The qualification of the trading company as contract is based on the provisions of the Art.1832 para.1 of the French Civil Code. As it is already obvious, the central element of this theory is represented by the articles of association, constituting the framework for the relationships established between associates, opposed to the third parties as by means of its effects they create a legal reality that the latter cannot ignore or argue.[24] This contractual approach, exceptionally beneficial to the economical liberalism, presents certain limitations; since it cannot explain the constitution of the legal subject different from the parties signing the articles of association or the manner of manifestation of the social agreement by applying the rule of the majority or by means of the operations enterprised by the social authorities, with competence of representation and liabilities statuted by the law, exceeding the restrained framework of a simple mandate.

The theory according to which the trading company is an institution has in view precisely the most important effect of the articles of association, expressly the constitution of a legal entity, capable of having proper rights and liabilities. Yet, as the partisans of the theory sustain, the contract is not sufficient for the available constitution of the trading company, being necessary the accomplishment of certain formalities and the obtainance of certain authorisations issued by the competent authorities, in the name of the law. On this ground can be explained the ulterior adjustments of the articles of association under the imperium of the concrete conditions of conducting an activity, such as the complexity of the relationships in which is involved the trading company, as legal subject, signed both with the third parties and also with its own associates. Today, legal doctrine shows that none of the conceptions shown cannot be absolutized, since the trading company is a complex institution keeping its dual essence.[25]

Regarding the evolution of the Romanian law, we are tempted to ascertain the fact that profound simulations taking place at the moment in the Romanian law don't affect the legal institution of trading companies. Nontheles, the entrance into force of the New Civil Code, brings a deep and systemic changing to the entitre sphere of legal relationships established between individuals, brings substantial modifications in this domain also.

An argument in this sense is related to the usitated legal technique, by means of which the provisions of the New Civil Code continues to represent the common law in trading company

matter and implicitly in trading company matter. Thus, in order to have a picture as exact as possible of the physiognomy of the legal concept of trading company, we must corroborate the provisions of the Civil Code regarding the articles of association, those related to the legal person of private law as well as those of the company law, the National Trade Register Office law and those of other special laws.

Another argument has in view the integrative approach of the legislator who, by the abrogation of the commercial code, replaces the various categories of persons who systematically and organized develop activities without strictly theoretically minding its purpose. In such way, it is created the generic category of professional, within which there is no distinction between the civil and commercial act, among others.

This uniform vision could be based on reasons of practical nature, yet in this moment it is enough elaborated theoretically, and precariously anchored in the legal system in force.

## NOTES

[1]The concept of "trading company" was created in the Roman law and it had the meaning of partnership, association, community, fellowship, union; in principle, it remained at the level of a contract, except for *societas publicorum*, to which the Roman state conceded the perception of taxes or certain or certain public works.

[2]I.L.Georgescu, *Drept comercial*, vol.2 „Societățile comerciale”, Socec & Co. Publishing House, SAR, Bucharest, 1948, p.9.

[3]Art.1887 Civ.c.

[4]Art.1881, para.(3) The trading company can constitute with or without legal entity.

[5]See Art.25, para.(3) Civ.c.regarding the legal person.

[6]S.Angheni, M.Volonciu, C.Stoica, *Drept comercial*, 4<sup>th</sup> ed., CH Beck Publishing House, Bucharest, 2008, p.68

[7]O.Căpățînă, *Societățile comerciale*, II<sup>nd</sup> ed., Lumina Lex Publishing House, Bucharest, 1996, p.60

[8]G.Hubrecht, A.Couret, J.J.Barbiéri, *Droit commercial*, 11<sup>th</sup> ed., Paris, 1988, p.122.

[9]Art. 2186 Q.Civ.c.: A contract of partnership is a contract by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share any resulting pecuniary profits.

A contract of association is a contract by which the parties agree to pursue a common goal other than the making of pecuniary profits to be shared between the members of the association.

[10] Art. 2188 Q.Civ.c.: Partnerships are either general partnerships, limited partnerships or undeclared partnerships. Partnerships may also be joint-stock companies, in which case they are legal persons.

[11]Art.1832 F.Civ.c.: A firm is established by two or several persons which agree by a contract to appropriate property or their industry for a common venture with a view to sharing the benefit or profiting from the saving which may result therefrom. It may be established, in the cases provided for by statute, through an act of will of one person alone. The members bind themselves to contribute to losses.

[12]M.Coizan, A.Viandier, *Droit des sociétés*, 5<sup>th</sup> ed. Litec Publishing House, Paris, 1992, pp.9-10.

[13]M.Coizan, A.Viandier, F.Deboissy, *Droit des sociétés*, 21<sup>st</sup> ed. Litec Publishing House, Paris, 2009, pp.8-11.

[14]In the acception of the paragraph 3 of Art.3 Civ.c.

[15]M.Coizan, A.Viandier, op.cit., p.17; D.A.Popescu, op.cit., p.16.

[16]M.Coizan, A.Viandier, F.Deboissy, op.cit.p.11.

[17]See Art.1887 Civ.c.

[18]D.A.Popescu, *Contractul de societate*, Lumina Lex Publishing House, Bucharest, 1996, p.134

[19] C.Stoica, S.Cristea, *Drept societar pentru învățământ superior economic*, University Publishing House, Bucharest, 2008, p.84; S.L.Cristea, *Dreptul afacerilor pentru învățământ superior economic*, University Publishing House, Bucharest, 2008, p.110.

[20]St.D.Cârpenaru, *Tratat de drept comercial*, Universul Juridic Publishing House, Bucharest, 2009, p.140

[21]Pursuant to Art.1842 Fr.Civ.c.the trading company has legal entity. See G.Ripert, R.Roblot, *Traité de droit commercial*, vol.I.ed.13, LGDJ Publishing House, Paris, 1989, p.534.

[22]Gh.Piperea, *Drept comercial. Întreprinderea în reglementarea NCC*, CH Beck Publishing House, Bucharest, 2012, p.362

[23]G.Ripert, R.Roblot, op.cit., p.542

[24]C.Lefter, *Societatea cu răspundere limitată în drept comparat*, Didactic and pedagogic Publishing House, RA, Bucharest, 1993, p.24.

[25]C.Lefter, op.cit., p.25.

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