# A Company Contract According to the New Romanian Civil Code Regulation

Dr. TITUS PRESCURE
Faculty of Law
"Transilvania" University of Brasov,
44, Mihai Viteazul Street, Brasov
ROMANIA
prescure@schiau-prescure.ro; http://www.schiau-prescure.ro

*Abstract:* The article herein aims to emphasize the importance of the simple company contract, as per the New Romanian Civil Code that has been passed by the end of 2009. The following contains a comparison between the regulation of the simple company contract as per the Old Romanian Civil Code and the present regulation as per the New Romanian Civil Code; presenting the possibilities to transform a simple company, with no legal personality, into a trade company, with legal personality, in the fulfilment of the requirements as per the Company Law, not regulated by the Old Romanian Civil Code.

*Key-words*: Contract, Simple Company, Trade Company, Legal Personality, Associates, Share Capital, Capital Contribution, Administrator, Joint Operating Company.

## 1 Introduction

The main goal of this study is the identification, presentation and analysis, as briefly as possible, of the particularities of the new regulation brought by the New Romanian Civil Code (abbreviated NRCC) to the company contract. For this purpose, we have elaborated a comparative analysis between the older regulations (that will be designated in this study as the Old Civil Code or "OCC") and the new ones, a research method which, as we hope to demonstrate, has allowed us to extract some interesting and exciting conclusions, both scientifically and practically.

### 1.1 Legal Regulation

A first ascertainment, of quantitative nature, is the one that in the ancient regulation of the Old Civil Code (comprised in the Title VIII, entitled "About the company contract", contained in Book III of the Code), the company contract has been assigned with a number of 41 articles, while, according to the new regulation of NRCC, the same type of contract contains 67 articles (26 more than the prior regulation). From the beginning we can say that the NRCC focused on and conferred a great importance to this type of contract which has a special complexity and we can even speak of a reconsideration and reformation, as a whole, by means of pertaining to the functions and its practical usefulness, distinguished by over 145 years of the Old Civil Code enforcement.

### 1.2 Legal Definition and Conditions

The second finding emerging from the research carried out, is that *the legal definition* provided by NRCC seems to be more precise and relevant than the old one, contained by the Article 1491 of the Old Civil Code. Therefore, according to Article 1881, paragraph 1 of NRCC, "by means of the company contract, two or more persons are mutually obliged to cooperate for the development of an activity and to contribute thereto by financial contribution, in kind, specific knowledge or labour conscription, with the purpose to share the benefits or to use the saving generated thereof".

According to the dispositions set forth by Article 1491 of the Old Civil Code, "the company is a contract by which two or more persons decide to put something in common, with the purpose of sharing the benefits that might derive thereof". The definition that Article 1491 of the Old Civil code provides, is a lapidary one, which is missing some elements necessary to allow an adequate

characterisation of one of this types of contract, like the idea that in order to achieve their common goal, the associates are obliged to cooperate, to take actions together, having what the trade right doctrine calls especially *affectio societatis*. Then, the definition doesn't make any reference to what that "something in common" might be in order to exploit it and to share its benefits which might result.

In our opinion, the definition provided by Article 1881 of the NRCC, seems to be very close to what it should be, from the logical-semantic point of view, a relevant and complete definition. From its content a few fundamental ideas effuse: the natural persons and/or legal ones, associated for the cooperation purpose, in order to act together in *affectio societatis* for the development of an activity, usually, within a company; each of the associates is mutually obliged, and towards the created entity, to bring a certain *capital contribution* consisting in kind, specific knowledge (in industry, is more qualified this type of contribution) or in other performances; the association takes place with the direct and invariable purpose to share the benefits which may result from their activity developed in common or only to be able to use the saving that might result from this type of association.

Another aspect coming into our attention during the study of the legal regime of the company contract in its new regulation as per the dispositions set forth by paragraph 3 of Article 1881 of the NRCC, according to which, the company may be created with or without legal personality. As we already highlighted, the settlement of this type of legal possibility of creating companies which have legal personality, doesn't mean anything else than an unification of the specific regulations of the civil law and the trade ones, in the conditions in which, the present Romanian Civil Code, doesn't regulate the possibility that the civil union (the one regulated by the civil code) to obtain legal personality, this type of possibility being expressly consecrated only for trade companies.

Under the conditions of the law no. 31/1990 concerning the trade companies, this type of companies can obtain legal personality, by their registration within the Trade Registry. Otherwise, for any form of trade company is mandatory for their legal organisation and functioning in order to obtain legal personality.

Conditions and procedure, according to which a company can obtain legal personality are the ones regulated, relatively briefly, by the Article 1889 of the NRCC. By examining the content of this article, one could reach the conclusion that the company can acquire legal personality since its constitution through the company bylaws, if the associates, by their expressed will, accomplish all the legal requirements in order to obtain this type of legal attribute. A company initially created without legal personality, by means of a subsequent deed and separated from the company, will be able to be transformed in a company with legal personality, if all the requirements imposed by the legal regulations which apply to the type and form of the company with legal personality which is desired to be created are fulfilled. This type of regulation brings forward a new solution, new to the Romanian enforceable law regarding the companies and it essentially refers to a reorganisation/transformation measure, without liquidation, of one entity without legal personality having this type of quality.

Besides, the legal regime of civil companies' unification idea and the one of trade companies, is illustrated in the best way possible by the dispositions set forth by Article 1887 of the NRCC, according to which, the chapter herein constitutes the companies' *common law*. In consequence, according to the dispositions of paragraph 2 in the same article, *"the law can regulate different types of companies in the consideration of the form, nature or, activity object"*.

Under the aspect of forms under which we can organise (create) a company, as legal entity, the article 1888 of the NRCC, points out the following company categories: *simple company, joint operating company, unlimited company, limited liability partnership, limited liability company, joint stock company, partnership limited by shares, cooperative company, any other type of company regulated by the law.*

Out of all the company types pointed out by Article 1888, only the simple company and the company or the limited liability partnerships are regulated by the NRCC. The other types of companies, are regulated by the law no. 31/1990 regarding the trade companies, Law no. 1/2005 regarding the cooperation and also other special normative deeds, like the Law no. 32/2000, concerning the insurance and insurance surveillance companies, Law no. 287/2004 regarding the market, and also other laws and normative deeds. This type of companies regulated by other normative deeds than the Civil code, are considered to be trade, by the determination of the law, as set forth by Article 1 of the Law no 26/1990 concerning the trade registry.

## 2 Simple Companies

Another new company related regulation within the NRCC, concerns the *simple company*. We must

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notice from the beginning that the new regulation doesn't define the simple company, although its regulation is rather broad. By examining the existent provisions, we could deduce that the simple company is an entity without legal personality, created only on the basis of a company bylaws. Besides, Article 1893, assimilates the simple companies, the companies submitted to the registration condition and which have remained unregistered due to various reasons. Even the fact companies – even though this type of company is not defined by the law – are assimilated with the simple companies.

## 2.1 Legal Definition

From the corroboration of these legal elements we can asses (utter the opinion) that *the simple company regulated by the NRCC, is that type of company, without legal personality, constituted based on a company bylaws and has an activity object and a labour goal, which is different from the ones with legal personality.*

Before we start the analysis of the simple companies, from the perspective of the new regulations, we think it is important to highlight that in the present Romanian Civil Code, the simple company it is not regulated insomuch, but only the *universal company*, under the two forms: *the company of all gods of their members and the universal company of gains (Article 1494-1498) and also the private company* (Article1499-1500), company which may be compared and even assimilated to the simple companies taken into consideration by the new regulation. So, according to Article 1499 of the present code, *the private company* is the one that has as object the determined things or the use of their fruits. From this type of enunciation – what is right, very lapidary – one could reach the conclusion by comparison with the definition of the simple company that the private company, is according to the law, a simple company.

Starting the analysis of some of the new regulation of the simple company, we will be able to notice that lawgiver has expressly established the principle of commensalisms in what concerns the form of the contract of simple company, the written form being required only *ad probationem*. The authentic form will be imposed any time that capital contributions are paid out, with joint ownership right or only with dismembered right of the ownership right, lands, real estates with or without constructions.

## 2.2 Effects of the Simple Company

Regarding the *effects of the simple company bylaws*, a series of problems are given solution by the new regulation and they define precisely a series of problems concerning the rights and the obligations of the associates between them like aspects referring to: the categories of capital contributions, the title with which they can be bought, the associates liability, the legal regime of the interested parties, the participation to profit and losses, the non-competition obligation, the social goods use regime, common debtors debts regime of the company and of the associates, the regime of the company expenses, the problem of association on the social rights and their submittal, the legal regime of the decisions concerning the company. Also, an important number of articles is attributed also to the problems concerning the administration of the company and the obligation of the associates towards the third parties.

By analyzing the regulations contained in the section concerning the effects of the contract, firstly, of the ones concerning the rights and obligations of the associates between them, we can extract the following ideas:

- The new regulation (Article 1894 and the following) introduces the notion of *share capital* replacing the capital contribution, in the conditions under which, as we know, the notion of share capital belongs to trade companies with legal personality. Similarly the trade companies collectively, the share capital is divided *in interest parties*, equal as value, which are distributed to the associates proportionally with the share in the total of the share capital of the contribution of each, or in other proportion settled by the special law or by the articles of the company incorporation, as the case might be.

- The capital contribution can consist *in kind* (contribution in kind, as this type of contribution is known) *in cash* and also in bringing specific contribution, namely, making available for the company industry linked aspects of the associates in the case, or in other performing categories necessary to the company. The contribution in kind, with goods other than the fungible ones (so non-fungible) is considered liberated (accomplished) under two cumulative conditions: if the rights of the goods are transferred to the company (to the associates) and if they are rendered effectively, in ownership (Article 1896, paragraph 1). From this point of view, we can consider that, under the conditions of the new law, the simple company bylaws might be qualified as being a real contract and not a consensual one. We appreciate the fact that, the contract herein is a

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consensual one as the actual delivery of the goods promised as capital contribution, doesn't bind over the valid contract subscription but only over its execution. If fungible goods and expendable goods are bought as capital contribution, necessary and automatically, this type of goods become the joint ownership of the associates, even if the associates have settled a contrary solution.

- The contributions in kind can have in view also the incorporeal goods, like the claims rights, the rights on some shares or social parties issued by the trade companies, also in bills of exchange or other credit titles circulating in the commerce (promissory notes, cheques, bills of freight, bill of landing, depositary receipt, etc).

- The contributions in performances or on specific knowledge, are explained by Article 1899, as follows: this type of contributions are owned continuously, during the entire duration during which a certain associate has taken the obligation, this one being liable to the company to explain all the revenues obtained outside the company by deploying the same work or making the same specific knowledge available to thirds;

- The profit share of each associate at the constitution of the share capital is important in order to determine the share of profits at the benefits sharing and at the support of the possible losses, the rule being the proportional participation. The same quota is decisive in order to settle the share of the voting right of each of the associates in the general meeting.

- The contributions which were undertaken contractually by the associates must be paid off (liberated) by the company, in kind, according to the amount, conditions and the terms set forth, under the sanction of the double contractual responsibility: towards the company and towards the other associates. Until the payment of the promised contributions, the voting right of the inexact debtors, is suspended by law, according to the dispositions set forth by the paragraph 2 of Article 1895.

- The contribution to the transferable ownership right or other legal right, constitutes both for the persons and for the patrimony of the associates, a guarantee against eviction and also against the hidden damages, similarly to the purchase agreement and other transferable contracts or constitutive of rights (Article1896, alin.2).

A very remarkable novelty is represented, in the section dedicated to the effects of the company bylaws, the regulation *of a non competition clause of the associates towards the simple company.*

We mention that a non competition clause - similar to the one regulated by Article 1903 of the NRCC - we find it in the matter of the trade companies, in this case, the companies in collective name, Article 82 of the Law no. 31/1990 concerning the trade companies being relevant in this sense.

According to the dispositions set forth by Article 1903, of the NRCC, the associates of a simple company, are prohibited to compete directly or indirectly with the company to which the belong, on the one hand, and on the other hand, they are prohibited to make operations based on the company which might bring any prejudice to the respective entity. In right, we can notice that paragraph 1 of Article 1903, institutes *an non competition obligation but also one by which we impose the avoiding /prohibited of the interests conflict between the company and the associates, including an obligation of exclusivity /fidelity*. This type of exclusivity and fidelity obligation is more emphatic and clearly regulated by the paragraph 2, according to which "the associate cannot take part on his own on based on other third person at an activity that might lead to the deprivation of the company of the goods, performances or specific knowledge that the associate has undertaken". The specific sanction for the non concurrence obligation violation, in order to avoid the interests conflict, of the exclusivity and fidelity obligations, is a specific one and it consists in the substitution of the company in the place of the associate guilty of violating the mentioned obligations, at the gathering and perception of the benefits which would be due of the prohibited operations performing (we have a subrogation potestative right of the company in the rights of the abusive associate). Complementarily, the associate will be accused of felony and he will answer in front of the company also for the eventual prejudices that this entity could try as a result of the mentioned interdiction violation.

In what concerns the problem of *social goods and common funds use*, the rules instituted by Article 1904 and 1905 of the NRCC are not substantially different of the ones of the present regulation. The situation is similar also in what concerns the new regulations concerning the *distribution of the debts due and the support of the expenses made by the associates for the company (see Article 1906 and 1907).* The basic idea which emerges of the new regulations mentioned is the one specific to the company bylaws, otherwise, none of the associates has the right to put its personal interest above the one of the company at which he is an associate, in the situation of several interests thereby, the reimbursement of some expenses and of the losses caused by the debts of the associate to the company as well as the compensation of the

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damages caused to the company by the associates with benefits brought by them to the company.

The provisions of the Articles 1908 and 1909 of NRCC constituted a special interest for us, according to which *each of the associates had the right to associate third parties at the social rights but doesn't have the right to transfer them to those third parties, only with the agreement of all the associates*. Such an association of some third parties at the association rights of one or more associates could be done in *the conditions of the conclusion of a joint operating contract*, with the observance of the provisions of Article 1949-1954 NRCC. We have the opinion that the transfer operation of all the social rights of an associate, with the consent of the other associates, toward third parties should not be produced and a transfer of the company bylaws and implicitly the loss of the associate quality by the transferor and gaining the quality of associate by the transferor, because, article 1925 (which we shall analyze at the right moment) doesn't not provide through the modalities of loss of the associate quality and the transfer of the social rights toward third parties. Being in that manner, we have the opinion that the legal transfer of the social rights to third parties, the transferor remains associate, exercising his remained social and fulfilling his obligations that belong to him toward the company and toward the other associates. The transferors of rights shall be able to keep under observance the company and the associates, after case, for the capitalization of the rights that were transferred to them.

In the case in which a transfer shall be produced- with onerous or gratuitous title – of the social rights of one or more of the associates toward third parties, without the consent of the other associates, each of that persons - or even all- shall have the right to use the procedure of redemption of the interest parties, or after case, to submit a action for annulment or in the verification of the absolute nullity, of the alienation with gratuitous title acts, in the manner the provisions of art 1901, paragraph 2 and 3 allow.

Another specific effect of the company bylaws is the one that it is prohibited, without the agreement of all the associates, the guaranteeing by an associate of a personal obligation or of a third part with the social rights under the sanction of absolute nullity of such a guarantee. Such a prohibition has at the basis, in our opinion, exactly the character *intuitu personae* of the relations between the associates, respectively the "closed" character of the simple company.

If an associate in a simple company organised on an undetermined period shall desire to obtain the restitution or the value of the party that belongs to him of the common goods of the company, can obtain it only at the closure of the company, or in the case of the retreat or exclusion of the company.

Article 1909, evokes, in premiere, the legitimacy of a convention between the associates and third parties through which the first ones promise to the latter that they shall transfer, sell, guarantee in any manner or renounce at the social rights. Such a unilateral promise offers to its beneficiary, in case of non fulfilling of it, only the right to claim compensation and not the right to ask the execution of the contract, in the manner it happens in the case of synallagmatic promises of sale-purchase.

As a rule, the decisions of the company are taken in the associates meetings, present or represented, the summon of the meetings being carried out in the manners and with the procedure established through the company bylaws. If the associates' meetings shouldn't effectively happen, the associated can be asked in writing, which means that they can vote through correspondence. Also, the decisions of the company can be taken also on the basis of the expressed consent expressed anticipated through the company bylaws, in the sense of th respective decisions. .

Article 1912, regulates for the first time in the Romanian Law, expressly, the right of an associate that is not satisfied by a decision taken by the majority, to make an appeal in front of the competent Court, within 15 days of the date it has been taken (in the case in which the associate has been present at the meeting) or of the communication, if he hasn't been present. This term of 15 days is one qualified as *expressis verbis* by the law as being a decadence one. We have the opinion that the competent Court, lacking an expressed mention, to judge this kind of requests, is the Court near the headquarter of the company, and active procedural legitimacy shall have only the associate that was present at the meeting, or asked in writing, voted against the decision of which he is not satisfied, or the one that hasn't been present at the meeting and could not vote. Through exception, if the decision hasn't been communicated to the associates, the term in which it can be appealed starts of the date in which they had knowledge about it, but in that moment they shouldn't exceed a year of the date of its adoption. We consider that for identity of knowledge also this term of one year should be qualified as one in decadence as the one of 15 days. Of the analysis of the legal dispositions

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mentioned, results a certain tendency of the lawgiver to bring closer (even uniform) the judicial regime of taking an appealing the decision taken by different associative structures (simple companies, associations without profit activity, commercial companies) with or without legal person, with the purpose of creation of a common judicial regime.

The new regulation of the company bylaws can be noticed also through the manner in which the lawgiver conceived the rules concerning *the administration of this type of company*, in this sense being allocated a number of 7 articles (from Article 1913 to Article 1919). There are retaken, with other formulations, some of the dispositions of the regulation from nowadays, but there are introduced also other new, clear and precise.

The rule that Article 1913 institutes in the matter of simple company is the one that the problem of denomination of the administrators, their way of organisation, the limits of their powers and other aspects related to this issue are established through the company bylaws or through separated documents (decisions of the associates) and that the administrators can be Romanian natural or legal persons or foreigners, named by the associates or by the foreign persons within the company. If in the company bylaws is not provided differently, all the associates have the right of administration and that have reciprocal mandate, by law, to administrate one for the other, in the priority interest of the company. As a consequence and through the effect of such a reciprocal mandate, the operations made by any of them is available also for the parts of the other ones. As way of provision, paragraph 4 and 5 of Article 1913, institutes the right of each associate - administrator to oppose in writing of a certain operation that one of them intends to make before it is made. Such an opposition could have more restraint effects than the ones followed, in the sense that shall not be opposable to third parties by good faith.

## 3 Conclusions

As a conclusion, from this study, we believe that emerges, without a doubt, the superiority of the new regulations on simple society, superiority once and so the number of items subject to regulation and not least, the accuracy and precision of the solutions chosen by the legislature to solve problems which may involve such a form of society.

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