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JOINT VENTURES

Abstract:

When the new Romanian Civil Code entered into force (in 2011), both legal regulations on partnerships and joint ventured were expressly abolished, as the two regulatory documents (meaning the Civil Code of 1864 and the Business Code of 1887) were repealed in full (express repealing according to art. 230 of Law no. 71/2011 for the application of the new Civil Code).
However, by means of a similar regulation, the new Civil Code took over the two types of companies without legal personality in Chapter VII (Company Contracts) of Book V (On Obligations), Title IX (Various Special Contracts). The chapter concerning company contracts consists of three distinct sections of which we will hereby approach the 2nd Section (Partnerships) and the 3rd Section (Joint ventures).
In fact, in the chapter on company contracts, the new Civil Code includes special provisions referring only to the two types of companies without legal personality. Therefore, the two sections of Chapter VII (the 2nd and the 3rd Section) are the legal framework for the companies without legal personality in Romania and, at the same time, they are a special legal regulation in the matter, that is no other law may govern in this field. As we have previously shown, the Tax Code may rule on various aspects concerning the organization of this type of companies, as a special legal regulation (which applies with preference against the provisions of the Civil Code); nevertheless, we believe that, in legal terms, the tax regulations should not be allowed to change significantly the legal requirements set by the Civil Code for the establishment and operation of the companies without legal personality. Unfortunately, the regulatory contradictions between the two legal instruments (the Civil Code and the Tax Code) are obvious and of essence in some cases, therefore they cannot be overlooked; this is why we have thought it appropriate to approach such matter, namely the interference of civil and tax regulations, as this interesting topic may give rise to many debates in practice.

Keywords:

Contract, joint venture, company contract, partnership, companies

JEL Classification: K00, K12, K20

1. Legal ruling

The current Civil Code addresses joint venture contracts in Book V (On Obligations), Title IX (Various Special Contracts), Chapter VII (Company Contract), Section 3 (Joint Ventures), throughout six articles, namely art. 1.949 to 1.954.

Furthermore, in terms of tax treatment, the Fiscal Code also regulates joint ventures under the Romanian phrase ”asocierile în participațiune” (and not ”în participație”) probably under the influence of the name used for years in popular language and, as we will see herein, under the influence of the Commercial Code (which was abolished once the new Civil Code entered into force). Discussing such name difference would waste time and require useless arguments; however, even if in our opinion the name used by the Fiscal Code should be preferred (including based on traditional grounds), we will use the legal terminology, thus referring to such joint ventures as asocieri *în participație*. Yet the debate regarding the name employed by the Fiscal Code is not relevant (as it concerns, in fact, just a different name of the contracts in question, that is a slight difference in the structure of the phrase, with no legal impact), what is important is that, according to this ruling and from the perspective of the fiscal material law only, the category of joint ventures includes ordinary partnerships, too. In other words, the Fiscal Code sees the two forms of partnership as identical and considers them (rightly) companies with no legal personality, thus addressing them fiscally as a whole.

In the past, this type of venture was regulated by art. 251 – 256 of the Commercial Code, which was abolished when the new Civil Code entered into force. The Commercial Code referred to such contract as a ”joint venture” and, throughout six articles (similarly to the new Civil Code), it dealt with it as a venture with no legal personality. The essence of such contract in this legal construction was the existence of a merchant or, at least, of some trading operations carried out by non-merchants, a distinction which is no longer possible, given the unitary concept of approaching the civil legal rapports established by the new Civil Code; otherwise, it should be noted from the very beginning that the current regulation of the joint venture contract is roughly similar to the former one.

In order to complete this first section dedicated to the location of the matter, we think it is appropriate to have a historical overview of joint ventures. Therefore, we hereby note that, after 1989, joint venture contracts were used as an intermediary stage for the assignment of state-owned company assets to the private sector, but such contracts were regulated, besides the Commercial Code, by other special legal instruments passed in the matter of privatization, as well as by the first law allowing for such ventures, namely Law no. 15/1990. In essence, such contracts required that two parties enter into a partnership, that is the state-owned company, which brought along the assets into the partnership and the private company that made investments in such assets so that business could be conducted in such premises; all business operations were to be carried out exclusively by the private

company (which used its own employees, companies, clients etc.). In return, the state-owned company would receive regularly a certain share of the profit from such business operations. There have been countless litigations in the practice of the legal courts concerning the performance of such contracts (with regard to the profit share, the investment that should have been made in the assets) and, more frequently, concerning the conversion of such contracts into sale agreements or property leasing agreements with an irrevocable sale clause. Furthermore, throughout the years, a criminal case-law has been created, as there have been numerous cases where such contracts were used to fraudulently transfer state-owned assets to and in the exclusive interest of private companies.

2. Concept

Joint ventures, although they always require a mutually agreed partnership between two or more persons, do not result in legal entities and, from this perspective, they are similar to ordinary partnerships and different from all forms of companies with legal personality (as regulated by Law no. 31/1990 and Law no. 1/2005, respectively). A joint venture can never be included in the traditional concept of a *company*, despite the unfortunate phrasing of art. 1.888 of the Civil Code (namely ”joint company”) and despite some (few) opinions in the doctrine. This is a similar situation to that of ordinary partnerships; however, as shown on other occasions, if for ordinary partnerships there could be an excuse in the takeover of such concept from the Civil Code of 1864, there is no reasonable argument for joint ventures to be called, even accidentally, ”companies”. Firstly, nothing of the current ruling on joint venture contracts leads to a company. Secondly, such partnerships have never been associated to companies, as the Commercial Code itself (the main legal instrument being a historical source for such contracts) regulated at the time, on the one hand, the companies and, on the other hand, the partnerships. Finally, the Fiscal Code sets straight the debate on this matter, as it states that such partnership is not a distinct taxable entity (for this purpose, see art. 321 par. 5 of the Fiscal Code).

For this purpose, joint ventures should be approached exclusively from the perspective of *a contract.* Even if we acknowledged that such contract were a company contract (as it is currently referred to by the Civil Code), we hereby emphasize that a company contract is something completely different from the company itself (distinct entity). Therefore, we will avoid references to „company” or even ”entity” (the latter is to be found in the legal literature, as well as in the fiscal laws). In this regard, we agree to use the doctrine phrasing, according to which joint ventures do not tend to extend beyond the contractual stage in order to become an institution[1].

[1] L. Săuleanu – Elementele specifice ale asocierii în participație. Regimul fiscal, in Revista de Științe Juridice, no. 1/2010.

However, we cannot overlook the characteristic elements of company contracts as they are defined by art. 1.881 of the Civil Code and as we have to deal with them in cases of ordinary partnership agreements. Such elements and, particularly, the joint intention of the parties signing such contracts to carry out an activity whose benefits they will share (*affectio societatis*) lead us to consider a company as defined by Law no. 31/1990. Nevertheless, a venture is not and cannot be such company on the grounds that it has no legal personality. Furthermore, as we will see below, only the intention of carrying out the business that represents the subject matter of the partnership must come from both parties, whereas the business itself can be performed by one of the partners only.

3. Definition

According to the definition provided by art. 1.949 NCC, a joint venture contract is an agreement whereby an individual gives another or several individuals a share to the benefits and losses of one or more businesses the former performs.

Therefore, the following two fundamental elements should be identified here:

- There should be at least two persons that will acquire the capacity of *partners*, for a joint venture with only one partner is impossible.

- There should be some *business* to be performed in order to obtain profits that will subsequently be shared among partners.

We will deal separately with these two elements, because they have a few peculiarities as compared to other association or partnership forms.

3.1. The Partners. A joint venture can be set up following the conclusion of an agreement – called a joint venture contract – between two or more persons. From this perspective, such contract is similar to an ordinary partnership agreement. Therefore, a joint venture cannot be formed by the will of one individual, as it is the case with limited liability companies with sole proprietorship, the latter being in fact the only exception to the ruling provided by the Romanian Company Law.

In practice, in case of joint venture contracts, different names are used for the partners in view of determining their role within the venture, which also occur in the Fiscal Code. Thus, we speak about a *main partner*, that is the partner actually performing the business operation and about *secondary partners,* respectively, that is the other parties that bring in assets or amounts necessary for the main partner to carry out business. Finally, the name of, *administering partner* may also be used to designate the partner keeping the venture accounts and being responsible with the tax documents of the venture before the tax authorities.

As a principle, any natural or legal person may be a partner in a joint venture, irrespective whether such is a professional or non-professional. Nevertheless, at least one of the partners must be a professional, as defined by the new Civil Code, because only in this case a commercial activity (”operation”) is carried out, which can bring profit to the venture and, subsequently, to the other partners.

As far as natural persons are concerned, the only requirement to be met is, in our opinion, related to the individual capacity of exercise. Such natural person does not have to be registered as a self-employed or be part of a family association; as stated before, being an individual with full capacity of exercising their rights suffices. Moreover, in this matter and unlike the companies with legal personality, a natural person does not have to hold the certificate of good standing required by Law no. 31/1990; in other words, there is no interdiction of being part of a joint venture for the persons that were previously convicted for economic operations-related crimes. In conclusion, even an individual with a tax record may become a partner in a joint venture. The essential condition that such venture come into existence is that, besides a non-professional individual (not registered as a self-employed, for example), there should be at least one other individual with the capacity of a professional.

As far as legal persons as partners are concerned, they may be other private companies, as they are regulated by Law no. 31/1990. In addition, other legal persons may enter into a joint venture, such as cooperatives under Law no. 1/2005[2], non-profit legal entities set up as associations and foundations in accordance with GO 26/2000[3], and, as a rule, any other private law legal person, even if such does not have the capacity of a professional. With respect to public law legal entities, in our opinion there is no legal restriction for such to become partners in a joint venture contract; for instance, the territorial-administrative units, which, in compliance to Law no. 215/2001 and subject to the local council approval, may establish joint ventures in order to promote the interests of the local community[4]. However, a public authority or public enterprise (state-owned or state-controlled companies or autonomous administrations) may conclude a joint venture contract provided that the deciding body has previously consented to it, for example, by means of a government or

[2] A cooperative may carry out every lawful operation provided that they are performed with view to reach the objective they were set up for (art. 8 of Law no. 1/2005).

[3] The associations, foundations and federations may perform any other direct economic activities of an accessory nature provided that they are strictly related to the main object of the legal entity (art. 48 of GO 26/2000). Thus, as far as such non-profit organizations may take part in setting up companies with legal personality (as regulated by Law no. 31/1990) and may carry out direct business activities (according to art. 47 of GO 26/2000 that clearly stipulates the income sources of non-profit organizations), we do not see why such organizations would not be allowed to become partners in a joint venture partnership. In our opinion, the listing of the income sources given by the law on associations and foundations is not restrictive, as the article refers to ”other lawful income”. However, we believe that, taking into consideration the objective of setting up such a legal entity (which is not lucrative, according to art. 1 par. 2 of GO 26/2000), an association or foundation cannot act as a main partner, but only as a secondary partner, who could invest assets or monies in view of obtaining additional income from the joint venture in order to carry out the objective of such association or foundation.

[4] For this purpose, the supreme court case-law is very relevant: ” *Irrespective whether it is about one commercial operation or a whole business, the joint venture may be set up for non-merchants, too, therefore it is wrong to state that the city hall cannot be part of the joint venture agreement on the grounds that such is a non-merchant, as non-merchants may also enter into such agreements ”* (S.C.J., Comm. Dept, D. no. 713 / 2005, on the website www.scj.ro).

local council decision or a shareholders' general assembly decision or a decision of the board of directors[5]. Furthermore, such shareholders' general assembly decision approving the conclusion of a joint venture agreement is required, in our opinion, for all companies, either privately owned or public authorities/enterprises.

Therefore, even if the current legislation does not forbid the public authorities to be part of a joint venture contract (the laws after 1989 and, particularly, the privatization laws in the 90s that ruled on such associations), unfortunately, we cannot ignore the sometimes fraudulent goal of concluding joint venture agreements with public authorities, for there are frequent sanctions by the legal courts with regard to the actual (hidden and illicit) aim of such partnerships. In such cases, the case-law has based its judgements on a fundamental principle in private law, according to which a legal entity may acquire rights and take obligations regardless of their nature and source, provided they range within the limits set by law, as the limits of a legal entity's capacity to use is subject to the objective of such entity. In one case, the supreme court has found that "*the limits of the capacity to use are violated when a legal entity – a public institution- concludes a joint venture agreement that does not serve its business purpose and the purpose for which such entity was established and that stipulates the assignment of a significant part of its assets to the other partner – a business company, without taking into consideration the legal provisions ruling on the use and legal regime of its assets which such entity cannot use freely, as a privately-owned company, therefore the court's decision to rescind such contract is right*"[6]. Or, even more serious, when the only aim of such joint venture agreement is, in fact, the *de facto* assignment of a state-owned property, in which case, the court rightly found that " *with regard to the joint venture agreements whose object are state-owned properties, which were concluded without the consent of the owner of the public property and even despite the ban for those having the assets under administration of concluding such contracts, the owner's current and arisen personal interest is justified for the claim for absolute nullity of the agreements in question*[7].

[5] In the practice of the supreme court it has been constantly stated that, should a joint venture agreement be concluded with a public enterprise, the consent of such enterprise is necessary, by means of its deciding or deliberative body, whereby the conclusion of such contract be approved, for a consent in principle is not sufficient. For instance, in one case, the plaintiff SC G.P.H. SA requested that the defendant R.A.A.P.P.S. be ordered to enter into the joint venture contract concerning the refurbishing, upgrading, extending and operating of C.H.T., as the plaintiff stated that there had been negotiations and exchange of mail between the parties regarding the conclusion of such contract and that all its essential elements had been settled, but no instrumentum probationis had been concluded. The supreme court found that, for a valid consent, the Government General Secretariat, in its capacity of competent ministry, had to analyze the plaintiff's offer and to approve the conclusion of the joint venture agreement. It was justified that, by means of the Decision of the Board of Directors of RA APPS of 14 December 2005, the joint venture had been approved in principle, but such approval had required the performance of the procedures to determine the conditions needed to conclude the joint venture agreement and not the approval of the joint venture itself. But the mere offer made by one party bears no legal effects in the absence of a validly expressed consent and of the its acceptance by the other party; in this case, there had been no validly expressed consent and no acceptance of the offer by the other party, so that the plaintiff could not prove full correspondence between the contracting offer and offer acceptance, for the purpose of achieving a consent of will (HCCJ., Comm. dept., no. 35 /2009, on the website www.scj.ro).

[6] 2nd Civil Dept., Decision no. 1578 of June 9, 2015, on www.scj.ro.

[7] HCCJ., Comm. Dept., Decision no. 2338 / 2009, on www.scj.ro.

3.2. Operations of joint ventures. Firstly, we must emphasize the essence of this contract element, namely a *lucrative* activity, which can be performed only by a professional. The object of the venture (as it is stated in the joint venture agreement) does not have to fall under the NACE listing; however, the operations carried out by the professional partner in order to achieve the objective of the partnership should be one of those listed under NACE and, therefore, it shall be authorized accordingly.

Certainly, the numerous possibilities regarding the object of a joint venture is quite obvious, therefore all the concrete activities to be performed cannot be elaborated on. Nevertheless, just for the sake of exemplification, we will try to deal with a few potential variants based on the assumptions provided by the Fiscal Code.

Thus, for instance, there could be a joint venture consisting of three partners, of whom two (professional or non-professional) undertake to contribute some industrial machines to the partnership, which the third partner (who must be a professional) could use for production and, eventually, to obtain revenues according to the objective of such partnership. In this case, the third venturer, in its capacity of a professional (that is a company established and organized under Law no. 31/1990) shall record such production, as well as the revenues resulting from the sale of the manufactured goods in the accounting books; on the contrary, the other two partners, who contributed the assets they owned, as a principle, have no legal obligations, even if they are professionals. Or another example: a company owning real estate, namely, a building that may be leased to third parties to establish offices. In order to be leasable, such building needs significant investing, which, in turn, requires some costs that the owner cannot afford. Under such circumstances, the owner of the building may resort to the financial contribution of another person, who will invest the necessary funds for the refurbishing of the building so that it can be leased; this is, in fact, the objective of the partnership. The regular revenues obtained from leasing shall be recorded, cashed in and declared for taxing purposes by the company owning the building; this partner, in its capacity of a lessor, shall conclude a leasing contract for the spaces of the building, but such partner (a professional established under Law no. 31/1990) must have the NACE code for leasing real estate as its business object, duly authorized by the Trade Registry. Finally, the net revenues obtained (after deducting some costs and expenses) shall be shared by the two venturers (the owner of the building and the investor) in accordance to the clauses in the joint venture agreement.

On the other hand, according to the accounting regulations and regardless of the name given by the signing parties, a partnership is not deemed as a joint venture if two partners make an agreement to erect a building and one of such partners (the owner of the land) receives in exchange for his contribution (the land) a certain number of flats in the building to be constructed by the other partner (who contributes the amounts required to erect such building). In this case, the owner of the land will share neither the costs nor the revenues with its partner, and the purpose of the partnership is not the delivery of goods or services

to third parties. In conclusion, such agreement shall not be a joint venture agreement and shall not be treated as such fiscally. However, if the flats built or part of such flats are alienated to third parties, then the contract shall be deemed as a joint venture contract.

As rightly and constantly stated by the judicial practice, the joint venture agreement is similar to a commercial agreement, for it is concluded for the obvious purpose of sharing the profits and losses of a business operation. Thus, in case the concluded contract does not set a percentage regarding the parties' contribution to profits or losses, but only the payment of an amount corresponding to the use of a property by one of the parties, it is more obvious that the purpose of such agreement is not at all to share the profits and losses, but to use the premises by such party in exchange for the agreed money accounting for the use of the assets so assigned. With regard to such agreements, the supreme court has found that they are lease contracts and not joint venture contracts[8].

4. The form and content of a joint venture contract

4.1. Form of the contract. The law provides the same principle set by art. 1.884 par. (1) NCC, according to which "*a partnership contract shall be concluded in writing. Unless otherwise provided by law, the written form is required only to prove such contract* ".

Therefore, art. 1.950 NCC states as clearly as possible that such a contract may be proved only in writing. As a result, the written form is required *ad probationem*, and not *ad validitatem*, as it is the case with companies with legal personality. The written form of a joint venture agreement is under private signature and it is not authenticated (by a Notary Public). Even for companies with legal personality, the written form required by law means the document under private signature and not the authenticated deed (with the three exceptions expressly laid out by the law, when, subject to absolute nullity, it requires the authenticated written deed). As already shown, the only difference is the sanction for failing to comply with requirement of a written form, namely, the impossibility of evidence in case of joint ventures and company nullity in case of companies with legal personality.

Nevertheless, as an exception, when a partner's contribution is a real estate whose ownership is shared either among all the partners in the joint venture or with another partner (art. 1.952 par. 2 and 3 NCC), the joint venture contract shall be concluded as an *authenticated* document (otherwise it is subject to absolute nullity); furthermore, in such case, changes shall be made in the Land Register as well. On the other hand, if the contribution to a joint venture means only the use of a real estate, in our opinion, an authenticated deed is not required, as we would be led to believe by reading the lacking and confusing provisions of art. 1.883 par. (2) NCC.

Unlike companies with legal personality, joint ventures are apparently not required to be registered or incorporated and, generally, as compared to the same companies with legal personality, such a venture is exempted from the publicity obligation concerning its

[8] HCCJ, Comm. Dept., Decision no. 874 / 2016, on www.scj.ro.

establishment or possible changes to the agreement on which such establishment is based. Thus, at least at a first glance (after reading the Civil Code) neither the joint venture agreement itself nor the activity of such venture must be declared / registered with any public or private authorities. As this is an association that does not lead to legal personality, it is natural to be excluded from the obligation of incorporation, as the Civil Code has no provisions for this purpose. The civil ruling is quite coherent in this matter: as long as the document (as *instrumentum*) determining the conclusion of the joint venture agreement is not even required *ad validitatem*, it would be discrepant that the law require the registering / recording of such contract (which, at least theoretically, is not even concluded in writing) in any registers.

However, one must note that such characteristics are valid only when it comes to civil material law and they change when it comes to tax law; moreover, we may say that they are exactly the opposite. According to art. 125 par. (2) letter f) of the Fiscal Code, a partnership agreement shall be *registered* with the relevant tax authority within 30 days of its conclusion. Furthermore, by virtue of the same legal instrument, the tax authority is entitled to refuse the registering of a joint venture contract should such contract fail to include certain mentions set by the Fiscal Code. Two extremely important consequences arise from the (apparently imperative) provisions of the Fiscal Code.

Firstly, a joint venture, which in all the cases requires at least one professional (this is also the important element from the perspective of tax law), can never be actually consented to without a document, as the sanctions set by the Fiscal Code are quite drastic so that such hypothesis be avoided. Thus, according to art. 125 par. (2) of the Fiscal Code, in any partnership without legal personality (therefore, including joint ventures), the partners *shall* conclude agreements in writing upon the start of its operation. Secondly, although the Civil Code expressly states that the signing parties of a joint venture contract are free to decide on its content (art. 1.954 NCC), the Fiscal Code states something completely different, namely that such agreement shall contain at least *certain* compulsory clauses, which, as a strict legal matter, is not about the form of a contract, but about its content, which we will elaborate on below.

4.2. The content of the contract. These minimum requirements in the absence of which the tax authorities are entitled to refuse the registration of a joint venture agreement are the following:

- *The contracting parties*. Although the law does not expressly demand what must be here stipulated, one should provide the identification data of the partners – natural entities (last name, first name, address, personal code number, identification document) and, where applicable, of the partners – legal entities (name / company, head office, registration number in the trade register or other registration number, VAT number, legal representative, bank account).

- *Business object of the venture*. The agreement shall expressly declare what lucrative activities (operation, as called by the Civil Code) the signing parties intend to carry out jointly; for example, one of the partners will contribute an estate where the other partner will carry out public food services. Certainly, as shown before, the joint venture agreement does not have to list the operations as classified by NACE, as the venture itself means the joint performance of an activity on those premises; on the contrary, the partner actually carrying out the public food service must be incorporated as a company and one of its business objects must be the operation as described by NACE concerning public food services.
- *Head office of the venture*. Only for tax purposes, a joint venture agreement should mention a head office of the partnership, which is, in our opinion, in obvious contradiction to the concept of legal entity, taking into consideration that a head office is the main element of identification of a legal person. (art. 225 and following of NCC). However, we must comply with the provisions of the Fiscal code as well, which, as shown earlier, for taxing purposes, requires a permanent head office for any lucrative operations, irrespective of the form in which they are performed (art. 8 of the Fiscal Code).
- *Partners' contributions*. This clause shall expressly state the assets and/or rights contributed by each partner to the venture, for instance, as shown above, a partner may contribute the use of a property, whereas the other partner (or partners) may contribute the amounts necessary to renovate/ refurbish the property so that it could be used for public food services or even the public food service itself. All the elements of such contribution shall be detailed, for example, in case of real estate, its minute description in accordance with the land register, or in case of monies, their exact amount. Moreover, the actual share shall be laid up as a percentage for each partner based on the assets and rights brought into the venture.
- *Each partner's share to profits and losses*. As we will see, such share shall be calculated in compliance with the agreement between the parties and, in the absence thereof, based on each partner's contribution. Therefore, the unfortunate phrasing of the Fiscal Code according to which the shares shall be "in accordance with the individual contribution" cannot be applied, as long as the Civil Code states that such a calculation method is to be applied unless "the agreement provides otherwise" (art. 1.881 par. 2 of NCC).
- *Appointing the partner liable for the venture's fulfilling its obligations before public authorities*. This clause is also worth mentioning on taxing grounds, for the Fiscal Code requires such clause expressly. However, we cannot overlook that there is another obvious contradiction with the principles arising from the Civil Code as far as legal entities are concerned, where a person that is "liable" for the venture's fulfilling of its obligation applies only to legal entities, as only such have management bodies that have the capacity of a representative of such legal entity.
- *Termination of the venture*. We believe that this is a very appropriate clause, as it does away with potential disputes among the partners, once the venture is terminated. Therefore, we completely agree with this requirement of the Fiscal Code and we support the drafting of a clause that is as clear and detailed as possible, which cannot be subject to interpretations concerning to assets, investment, expenses etc. (generally, matters related to the partners' settling of accounts) incurred by the partners during the joint venture.

Nevertheless, we remind and emphasize that none of these tax obligations and none of those included in the Fiscal Code (which will be elaborated on later) makes a joint venture into a legal entity and that, in our opinion, such a conclusion is not to be taken into consideration in relation with the tax authority either.

4.3. The duration of a joint venture agreement. According to art. 1.885 par. (1) of NCC and applying to all forms of associations / partnerships, with or without legal personality, the duration of a partnership is indefinite, unless the contract states otherwise. Thus, the duration of a joint venture agreement is indefinite unless the parties have decided on a certain time. In case a time for the venture has been stated, the partners may extend such time before it expires and, in the absence of an extension covenant, the contract shall cease to be effective when such time has been reached. In this case, the assets subject to the joint venture shall be returned to the partner who made them available; for example, some business premises that were used for the operations of the venture shall be returned by the partner having conducted the business there to the partner who contributed such premises to the venture[9].

In case of faulty termination of the joint venture contract before its due time, such termination shall be subject to the rules of contract termination and not to those of rescission, as this is a contract of successive performance, therefore the ceasing of the venture shall be effective only for the future and not for the past as well[10]. Should a joint venture contract have more than two partners, its termination will be in full, even if only one partner has violated the joint venture conditions, because a ”partial” termination would actually mean to exclude the partner at fault, which is not possible for the partnerships without legal personality, but only for the companies with legal personality[11].

4.4. Changes to the joint venture contract. As a rule, to change a contract, one must observe the form and substance conditions required by law, just as in the case of its conclusion. According to general rules, a joint venture contract may be altered by complying with the legal provisions related to its valid conclusion.

As, with regard to its form, the Civil Code has no validity requirement for the conclusion of a joint venture contract, it means that there is no condition either for its change, according to the principle *accesorium sequitur principalem* and according to the general principles provided by art. 1.243 of NCC. On the other hand, if one takes into consideration the provisions of the Fiscal Code, such change shall be made in writing (under private signature), just as its conclusion, and shall observe the same minimum content requirements mentioned earlier, otherwise it shall not be registered by the tax authorities.

As far as the substance conditions are concerned, the altering deed, as any other legal document, shall observe the four validity requirements, namely capacity, consent, object and cause; one cannot consider that, once such contract is concluded, all these four

[9] HCCJ, Comm. Dept., Decision no 2689 / 2006, on the website www.scj.ro.
[10] HCCJ, Comm. Dept., Decision no 4033 / 2004, on the website www.scj.ro.
[11] ” The joint venture contracts have as legal ground the *art. 251 and following of the Commercial Code and concerns the establishment of a partnership without legal personality; the capacity of a partner in a joint venture shall not be mistaken for the capacity of a shareholder in a limited liability company. Thus, the sanction of excluding a partner, by virtue of art. 222 par. (1) letter a) of Law no. 31/1990, cannot be ordered, as the legal text refers to a company contract and not to a joint venture* ” (HCCJ, Comm. Dept., Decision no. / 2011, on www.scj.ro).

conditions are fulfilled *de plano*, but they must be analyzed at the time the altering deed of the joint venture agreement is entered into.

By way of exception, provided that such altering deed to the joint venture agreement sets up its conversion into a company with legal personality (which is highly unlikely and actually inapplicable, but it is stated as such by art. 1.889 NCC), the addendum shall observe different condition, for the rule according to which no form is required for the validity of the joint venture agreement will no longer apply (which is also quite theoretical, as seen above, taking into consideration the imperative provisions of the Fiscal Code. Thus, in such a case, the addendum shall be concluded in writing, otherwise it is null, and the substance conditions applicable shall be those of Law no. 31/1990 on establishing companies.

5. The effects of a joint venture contract

5.1. Introductory remarks. We must state right from the set-out that, unlike ordinary partnerships, for which the Civil Code has really vast and detailed provisions, for joint ventures, things are quite different. Rather on the contrary. The Civil Code provides only the definition of a joint venture, it shows the *ad probationem* nature of the written form of a joint venture agreement, it reminds us that such a partnership has no legal personality and, finally, it gives little detail on the partners' contribution regime and their rapports with third parties. Nothing more. However, the last article of the section on joint ventures (art. 1.954 NCC), called "The form and conditions of venture", "solves" the problem of a lacking regulation, namely: " *Except for the provisions of art. 1.949 - 1.953, the agreement between the parties determines the form of the contract, the scope and conditions of the venture, as well as the circumstances of its termination and liquidation.* "

Thus, it is all clear: except for the five articles (art. 1.949 – 1.953 NCC), the parties have full freedom in negotiating and agreeing on the contract clauses of a joint venture. The ruling methods prove that the legal norms in this matter are highly suppletive, as long as the parties will agree at will upon the conditions of their partnership. The limits shall be certainly those provided as principles by the Civil Code, namely, public order and good morals, as well as the five articles of the Civil Code actually elaborating on joint ventures. Yet, strictly legally speaking, not even these five articles are imperative legal norms, some of them are obviously suppletive. In conclusion, in the absence of legal provisions (which cannot be considered an anomie, rather an intention of the legislators to give free movement to professionals, as joint ventures occur exclusively in the business environment), we believe it is our duty to clarify some rules and principles based on which joint ventures function. However, it is worth mentioning that, although such rules and principles are not compulsory (not required by law), they are necessary for one to better understand the concept and, in our opinion, they are the result of a coherent and logical analysis, as they stem from the economy of the whole legal ruling concerning contracts, partnerships (companies) or obligations, as they are currently included in the Civil Code. Furthermore, such rules are also a result of the Fiscal Code regulations (which, like it or not, are in contradictions to the provisions of the Civil Code as far as this type of partnership

is concerned, for they have stricter stipulations) and, last but not least, of the professionals' practice, because joint ventures are used more frequently than ordinary partnerships.

5.2. Lack of legal personality. According to art. 1.951 NCC, ”*A joint venture cannot acquire legal personality and is not an entity distinct from its partners in relation to third parties. A third party has no right in relation to the venture and is bound only to the partner with whom he contracted*”.

Therefore, it is of essence for a joint venture that, just as an ordinary partnership, the former does not acquire legal personality. From this perspective, a joint venture is obviously different from companies with legal personality, that is the five types of companies as ruled on by Law no. 31/1990 or from cooperatives. At the same time, a joint venture is similar, from this perspective, to an ordinary partnership, which the Civil Code regulates as a partnership *without* legal personality.

The lack of legal personality leads to (or should lead to) a series of consequences, if we are to think about the provisions of the Civil Code (the chapter on legal entities), taking into consideration that joint ventures are not a distinct subject with regard to rights and obligations and they are not a subject of civil law (separate from the partners they consist of). For instance, the venture as an entity does not own any patrimony, there is no person who has the capacity of the representative of the venture, there is no head office, the venture cannot acquire own rights and obligations, such venture cannot be sued separately, etc. All the above should be essential to distinguish between joint ventures (and, generally partnership without legal personality) and companies with legal personality. Bu the reality is different, for, as seen earlier, the Fiscal Code has opposing provisions that eliminates many of the elements making the distinction between partnerships without legal personality and companies with legal personality possible, which, at least theoretically, may be inferred from the overall theory of legal entities. Therefore, all these tax law stipulations quite change the nature of joint ventures as partnerships without legal personality (as well as the nature of ordinary partnerships), because we actually deal with a special legal personality, of its own kind, a so-called ”legal half-entity”, but only form the perspective of tax law.

5.3. The contribution regime. Just as for ordinary partnerships, when it comes to about contribution, we will firstly refer to *the broader meaning* of the concept, which differs from the concept of contribution for companies with legal personalities. Thus, the partners' contribution to joint ventures from the perspective of contributed assets are amounts in cash, movable or immovable assets or performances. On the other hand, the contribution as an *obligation* of bringing an asset into a partnership is, as mentioned earlier, quite different, that is, unlike the companies with legal personality, where such obligation is fulfilled as a principle by assigning the ownership of assets by a shareholder to the company, with joint ventures, such obligation is fulfilled as a principle by bringing assets into use.

The Civil Code lays out one rule and two exceptions, that is two derogations from the general legal regime of partners' contribution in a joint venture agreement.

The rule means that a partner's contribution is the *bringing of an asset into use* so that the operations of the joint venture could be achieved; this is the most frequent form of contribution in practice firstly because it is very easy. Such contribution is implicitly but unequivocally set by the provisions of art. 1.952 par. (1) NCC, which stipulate that the partners Hold ownership over the assets made available for the venture. As a result, by holding ownership, it is logical that what is brought into the venture is only the right of using such assets, their actual possession by the members of the venture and for the purposes of the venture and, potentially, their fruits, which, as a principle, should also go to the venture. Let us take an example. A real estate is brought into a joint venture as contribution by a natural person. The partners to the venture may use such property to carry out the lucrative operations being the object pf such venture without bearing on the partner's ownership rights, who will stay the sole owner of such property. Should such property bear profit, (rents, for example), as a result of the operations performed by the venture, they will go to the partners.

The first derogation applies when the assets contributed to the venture are under partners' *joint ownership*. In such case, the partner shall not assign only the right of using such assets, but the right of exclusive ownership itself, which will be deleted from his patrimony and registered in the name of *all* the partners; in other words, the partner holding exclusive ownership rights for such assets shall become a co-owner, along with the other partners as a result of the contribution. Furthermore, in this case, not only the assets come under the partners' ownership, but also the produces or fruits obtained from using them. However, this exception occurs only when the parties have *expressly* stipulated it in the joint venture agreement; in absence thereof the rule mentioned above shall apply, namely the assets shall come under the use of the venture. It is also worth mentioning that, should such a clause be stipulated in the joint venture contract, the parties shall observe the publicity conditions and requirement set by the law for the assignment of ownership; by way of example, if the contributed asset is a property, the joint venture agreement shall be concluded in an authenticated form (art. 1.883 par. 2 NCC), otherwise it shall be subject to absolute nullity, and the co-owning partners shall be registered in the land register (art. 1.883 par. 3 NCC). Such legal duties evidently involve significant expenses related to the authentication of the deed by a Notary Public, the public registration taxes etc. However, we emphasize that such formalities are not necessary if only the use of the property is contributed. This emphasis is needed because art. 1.883 par. (2) is quite ambiguous and, unfortunately, subject to interpretation and may lead to disagreements. As far as we are concerned, we have reservations with regard to the need and appropriateness of assigning the assets to the partners' joint patrimony, as, in such case, the parties may choose to enter an ordinary partnership. As far as joint ventures are concerned, the practice shows that most of the time, the parties do not assign the assets to joint use and even less to joint ownership, for what is often relevant is only the financial contribution of a partner. No judicious person would expose their own properties to business- or dispute-related risks,

which may arise when the venture is liquidated; in addition, as shown before, contributing the actual right of ownership requires high expenses.

Finally, the second exception and the third potential case as far as the legal contribution regime is concerned, is the assignment of *ownership* of the assets as contribution by a partner to another partner, which applies only if the signing parties to a joint venture agreement have *expressly* stipulated so. According to art. 1.952 par. (3) NCC, the ownership of the assets made available for the venture may be assigned in full or in part to one of the partners in order to achieve the objective of the venture, under the terms of the contract and observing the publicity requirements provided by law. Definitely, when the joint venture agreement is no longer effective, the partners may recover such assets in kind, provided that the contract has so stipulated. We also have reservations concerning the implementation of such case in practice. As the assignment of the ownership of assets to all the partners is quite unlikely, then what is the practicality of assigning the ownership of the contributed assets by a partner to another? Why would a partner transfer the ownership of an asset to another partner as long as such asset (which is probably the most important element to achieve the objective of the venture) could bring the same profits without being assigned?

5.4. The effects of the joint venture contract on partners. As stated before, a joint venture, irrespective whether we call it that or a joint company, is based on an agreement, namely the joint venture agreement or, in order to be consistent with the alternative (but wrong terminology), the company contract. As a result, just as any other contract, such agreement stands for the law of the parties and may be changed only following their consent (by means of an addendum) or under circumstances laid out by law (for instance, in case of hardship), thus the general principle of the contract binding force applies by virtue of art. 1.270 NCC. In case of doubt raising contract clauses, the general rules of contract interpretation shall apply, as set by the provisions of art. 1.266 – 1.269 NCC.

In order to better understand the successive effects of a joint venture agreement, we have to take a concrete example. Thus, in a joint venture with two partners (both being companies), of whom one is a main partner (and also a director) and the other is a secondary partner, each has a contribution share of 50 %, which includes also the losses/ costs. The secondary partner will make some investment to achieve the objective of the venture, which shall be submitted to the other partner (the main partner and director of the venture) as a statement of reimbursement accompanied by justifying documents and the latter shall return his share of expenses in accordance with the 50% contribution share.

It is worth emphasizing again the defining and essential element of a joint venture agreement, as it is specified by the doctrine and case-law as well, namely a clear and unquestionable clause that communicates each partner’s share to the profits obtained from the operations performed to achieve the objective of the venture. Such contract clause shall

determine such share unequivocally and, in addition, shall set a payment deadline, taking into consideration that one of the two partners shall actually cash in the revenues. In case the other partner fails to receive his share of due payment, such clause may provide that if the partner cashing in the revenues of the venture fails to pay such amounts, he shall be subject to penalties[12] and the amount of such penalties shall be stated clearly.

The judicial practice has found that the profits shall be shared among the partners based on the revenues actually obtained even if it is subsequently found that the asset contribution of one of the partners has been less than that set in the agreement. For this purpose, let us quote a very interesting resolution of the supreme court: ” *Should the payment obligations of a partner to a joint venture contract whose objective is the building and use of a petrol station network located on several plots of land – which the other partner has undertaken to bring into the venture – as well as the joint performance of profit-making operations be determined based on the revenue obtained from the carried out activities and not based on the surfaces of the contributed plots of land, the amount owed may not be reduced according to the surface of the contributed plot of land unless it is proven that, as a result of the diminishing surfaces, the revenues obtained have decreased* ” [13].

Accordingly, there is not much to say about the effects of a joint venture agreement on its signing parties (partners), as they are generated *de plano*, as a result of their consent and in compliance with the clauses actually stipulated by the contracting parties.

However, in order to prevent some circumstances that would lead to unfair effects among the partners, the law expressly excludes certain hypothetical consequences that could arise during the performance of a joint venture contract.

5.5. Prohibition of the leonine convention. With regard to its terminology (its name itself), the leonine convention has been a creation of the doctrine and case-law, as no legal text uses expressly such concept. Furthermore, although the judicial practice has constantly banned such clause in the agreements that had been concluded before the new Civil Code became effective, our law did not expressly stipulate any sanction in all companies and the case-law resolutions were passed based on the principle that a leonine convention would bear on the essence of a company or partnership agreement itself. On the contrary, the new Civil Code expressly rules on this circumstance and even if such clause is not referred to as the ”leonine convention”, it lays out its limits clearly and accurately. In addition, Law no. 31/990 has no deliberate prohibition for this purpose (of a leonine convention) and, consequently, no sanction thereto (for instance, as an unwritten clause).

The former Civil code regulated the leonine convention by means of art. 1.513[14], however, according to such article, the sanction thereto was very harsh, namely the contract *nullity*.

[12] SCJ., Comm. Dept., Decision no. 4337 / 2003. The supreme court stated that such clause if legal provided that there is a fixed amount, a condition the is fulfilled in our opinion when a joint venture contract sets the exact percentage of profit share.

[13] HCCJ, Comm. Dept., Decision no. 1849 / 2013, www.scj.ro.

[14] ” *A contract whereby a partner stipulates that all profits shall be his is null. Likewise, an agreement whereby it has been set that one or more partners be exempted from their contribution to losses is null.*” (art. 1.513 Civil Code of 1864).

Obviously, the legal courts tended to salvage the company contracts in such circumstances and ordered nullity only for the clause and not for the entire contract.

Nevertheless, this matter has been completely clarified by the new legal provisions, taking into consideration that the law expressly provides for nullity only with regard to the leonine convention, as it considers it *de plano* as an unwritten clause in a joint venture agreement. Therefore, the Civil Code in force institutes for joint ventures too (along with ordinary partnerships) the prohibition of stipulating a leonine convention in a joint venture agreement; moreover, even if such clause has been uttered, it will be deemed as an unwritten clause, which means it will not be binding and that the general legal provisions on profit and loss share shall apply (according to the contribution share). By virtue of art. 1.953 par. (5) NCC, any clauses determining a minimum guaranteed level of profits for one or some of the partners are deemed as unwritten clauses. Even if such clause is phrased differently from a leonine convention in an ordinary partnership agreement (art. 1.902 par. 5 NCC), the circumstances in which such clause is considered an unwritten clause are roughly similar.

The supreme court has constantly sanctioned the leonine convention, ordering that " it is prohibited to use *the so-called leonine conventions, which benefit some partners over the others, as this would violate the fundamental principal regarding the parties' equality when dealing with business operations* "[15] or that " *a covenant whereby it is stipulated that one or more partners be exempted from their contribution to losses is null* "[16]. On the other hand, "*the clause inserted in a joint venture agreement whereby a party is entitled to a fixed minimum share of the profit, regardless of such profit, is not a leonine convention".*

Certainly the parties may establish that the partners' share to profits and losses shall not be according to each partner's contribution or that the losses shall be borne in another manner than based on the share to profit allocation. Such a clause regarding the share to profits or, where applicable, to losses, is not a leonine convention as long as it does not do away with one partner's obligation of sharing the losses. The law generally allows for such derogations when it comes to partnerships, provided that they are expressly mentioned by the venture agreements. For this purpose, the supreme court has had consistent and unequivocal resolutions ordering that" *as far as joint ventures are concerned, which are effected by means of joint venture agreements, no legal provisions require the equal share of profits or of losses, as so the parties' free will would be violated and the discretionary nature of the norms regulating this contract form would not be observed* "[17]. Consequently, we cannot accept the incoherent wording of the Fiscal Code, which requires that a joint venture agreement set each partner's share to the revenues and losses of the venture, *in accordance with* their contribution (art. 125 par. 2, letter d of the Fiscal Code).

5.6. The effects of a joint venture agreement on third parties. A joint venture in itself will not be binding for third parties, as such venture is not a distinct subject with regard to rights and obligations or as a civil law subject. As a consequence, a joint venture cannot enter into agreements with third parties and no legal effects can bind such third parties.

[15]SCJ., Comm. Dept., Decision no. 2894 / 2003, on www.scj.ro.
[16] SCJ., Comm. Dept., Decision no. 4100 / 2006, idem.
[17] JSC., Comm. Dept., Decision no. 1851 / 2003, idem.

On the other hand, the partners may develop legal rapports to third parties. The provisions of art. 1.953 par. (1) of the Civil Code are very clear in this respect, namely, it states that, even if the partners act on behalf of their venture, they enter into agreements with and are bound to third parties in their own name. In order to clarify this matter, one should make a necessary distinction: if, for instance, there are two partners in a joint venture (let us say, two companies with legal personality, established in accordance to Law no. 31/1990), they keep their legal personality and may carry out operations and conclude agreements either to achieve the objective of the venture or in their own name to perform their own business.

In the first case, that is if one of the partners acts on behalf of the venture, although the contract with a third party is concluded only in such partner's name, the latter will bound the other partners *jointly* to such third party; at the same time, the documents signed by any other parties shall bound all the others partners to the venture. We may note that things here are clearer than with an ordinary partnership, for there is no mentioning of liability to the partnership (a legislative error and inconsistency with ordinary partnerships). In the second case, each partner minds his own business which has no connection to the venture and, therefore, the contracts concluded as such will not bind the other partners in any manner. In addition, even what results from such partnership is kept under separate accounting by each partner. For this purpose, the Fiscal code has clear provisions that in a partnership without legal personality that was entered into between two or more legal entities, the recorded revenues and expenses shall be allocated to each partner, in accordance with the stipulations of the joint venture contract (art. 34 par. 1 of the Fiscal Code).

Therefore, the rule is that, following the conclusion of a contract by one of the partners, such contract shall be binding for all partners, on the one hand (even for those who have not entered into such agreement) and the contracting third party, on the other hand. As a result, the partners shall be entitled to exercise all the rights arising from all the contracts concluded by the other partners with third parties, whereas, the third party, in his, turn, shall be bound to all the partners with regard to the performance of the agreement. However, if one partner entered into a contract with a third party without communicating the latter that such party acts on behalf of the venture, then the third party shall be bound to performing such contract only to such partner (the contracting partner), and not to all the other partners.

Any clauses of a joint venture agreement restricting the partners' liability to third parties is not opposable to the latter. We may note that such clauses are neither null nor unwritten, which means that they are binding for the partners, but cannot be opposed to third parties.