MEMBER DISPUTE AND RESPONSIBILITY FOR PAYING THE REFUND

Armando Luiz Rovai [*]

Abstract: This article analyzes issues of corporate law, in particular, situations relating to the partial dissolution of a company and the company's responsibility for paying the refund of shares to the withdrawing or excluded partner.

Key words: Ascertainment of Possessions. Member's Responsibility. Business Companies. Corporate Law. Partial Dissolution of a Company.

Introduction

This legal article is divided into five sections, in addition to this introduction. In the first, I will make a historical analysis of the emergence of the concept of society, in the second I will point out the essential concepts inherent to societies; in the third I will deal with the form of reimbursement and payments of the assets of the withdrawing partners in the case of the partial dissolution of the company; on the fourth I will address the issues inherent to the liability of Partners and the Company in cases of termination of the corporate bond; on Thursday I will conclude this study bringing, in theory, the position adopted by the Brazilian Courts of Justice. Essentially, it is understood, through common sense, that the idea of social well-being aims to encompass several areas of study and human knowledge, such as economic, political and, obviously, social; seeing the public entity as an institution obliged to guarantee all basic services to its citizens (education, health, leisure, security, basic sanitation, transport, etc.).

This analysis aligns concepts that promote and reduce imbalances and inequalities in societies, thus promoting better development for small, medium and large entrepreneurs.

It can be said that the balanced functioning of a business company is directly related to the company's internal policies, as these are measures adopted by administrators with the aim of preserving rights for the benefit of everyone.

In Brazil, the basic rights are set out and guaranteed in the 1988 Magna Carta, noting that government measures end up being mechanisms of the Executive Branch to put into practice the rights provided for in the legislation.

That said, to think about a scenario of full well-being in companies, it is necessary to start from a fundamental assumption; which is: effective and functioning public management. The Executive Branch (Municipal, State or Federal) must take the lead to maintain the population's rights and enable free enterprise and free competition.

[*] Professor of Commercial Law at PUC/SP and Universidade Presbiteriana Mackenzie. PhD from Puc/SP. Specialist in Law from the Universities of Salamanca and Bologna. Master's and Bachelor's degrees from Mackenzie. He was National Consumer Secretary – Senacon-MJ and was President of the Commercial Board of the State of São Paulo, for 4 terms. He was President of the Institute of Weights and Measures of the State of São Paulo. Currently, he is a Professor and Lawyer in São Paulo and Coordinator of the Journal of Banking Law and Capital Markets – RDB (RT).

It is true to say that good practices for encouraging business development must meet social opportunities that remain and are not changed - as they become essential to the exercise of citizenship - remaining active and productive for a long period of time.

When we deal with this issue from the perspective of the company and the Brazilian State, it appears that it does not appear to be a reference, especially when talking about public policies, but we must highlight some that have achieved exceptional success, even under the international perspective.

An example is the Unified Health System, sanctioned in the Federal Constitution of 1988, which can be seen as a successful public policy, since it is one of the very rare health systems – analyzed from a global aspect – that is completely free and guaranteed to any citizen; regardless of nationality, socioeconomic status or any other characteristic, the right to health, also provided for in CF/88.

It is therefore seen as a public policy linked to the vision of social well-being, which uses public funds to provide medical assistance to the entire population.

In addition to the Unified Health System, Brazil adopts an educational system that covers the entire population free of charge, guaranteeing schools from primary to higher education.

Having demonstrated the importance of good practices from the company and good public policies focused on social well-being, it is therefore understood that the perception of business development varies according to freedom of initiative, free competition and income earned, observing- the more opportunities available, the better and more balanced the distribution of income will be; As a result, the satisfaction of companies and their partners will be greater.

1.BRIEF HISTORY OF THE BIRTH OF THE CONCEPT OF SOCIETY

Society as we know it today has roots as old as civilization. From the origin of commerce, the first contours of commercial societies also emerged, which is why it became necessary to create rules to regulate these associations. The fact is that from the moment there was a combination of efforts with the objective of obtaining economic results, societies were born (TAVARES BORBA, 2019).

There is evidence that the origin of the concept dates back to the year 1,400 BC, in India - Code of Manu -, which established in its article 204 that, in verbis: “When several men come together to cooperate, each with his own work, in the same company, this is the way in which the shares must be distributed”.

Despite the historical and business aspect, it must be noted that uses and customs are also essential elements for the development and implementation of corporate activity. In this context, as well as the history of other legal disciplines (civil law and criminal law), the legal nuances of corporate law are based on Roman law. As recorded by Tavares Borba (2019), evident traces of Roman law can be seen in the first legislative documents and contracts of business companies.

It is a fact, however, that only in the Middle Ages did the greatest development of commercial companies occur, as it was from that moment on that the notion of separation between the company's assets and that of the partners occurred. During this period, companies constituted under the types i) in collective name and, ii) limited limited began to take shape, taking on the appearance of commercial companies, especially because they carried out business activities.

Later, at the beginning of the 17th century – with the increase in trading companies – we had the first trace of joint-stock companies, which – during the industrial revolution – became the great instrument for its realization (TAVARES BORBA, 2019).

2.CONCEPT OF SOCIETY

As is often said, the central point for the formation of a company is the desire of those interested in entering into a company contract, as it is through this reciprocal desire that a bond is established. This link arises from the moment when two or more people come together to offer goods and services with the aim of obtaining results.

Regarding this association, it is worth mentioning the importance of some legal principles of corporate law, such as freedom of association, which explains that – as long as it is lawful – the will of the parties is enough to establish the company. Based on articles 5, XVII and XX of the Federal Constitution, we have to:

> Art. 5 Everyone is equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, under the following terms: XVII - freedom of association for lawful purposes is complete, paramilitary purposes are prohibited; XX - no one may be compelled to join or remain associated;

Dogmatically, in its legislative application, we find the definition of companies stated in article 981 of the Civil Code, in verbis:

> Art. 981. Persons who reciprocally undertake to contribute, with goods or services, to the exercise of economic activity and to share, among themselves, the results, enter into a partnership agreement. Single paragraph. The activity may be restricted to carrying out one or more specific businesses.

The aforementioned legal provision states that the company is a bilateral or plurilateral contract, in which the parties – that is, the partners – decide to invest capital and resources to carry out a certain economic activity, with the results – be they profits or losses – are shared with each other. The article also highlights that the company's activity may be limited to carrying out one or more specific businesses.

Societies can then be classified according to their genre, species and corporate types. In relation to gender, a society can then be personified or non-personified. Personified companies are those that acquire legal personality with their own registration (article 985, Civil Code).

In contrast, we have non-personified companies, that is, companies that do not have legal personality.

In relation to species, as it is a personified society, we can subdivide it into two corporate types: simple (former civil society) or business (former commercial society). Regarding simple societies, Mamede (2022) says:

> "are all those whose activities, by force of law (ex vi legis, as occurs with law firms) or by virtue of the will of their partners (ex volunteer), refuse the corporate organization of their activities, opting for a personal organization, simple, outside the logic of the market."

We find its normative provision in articles 997 to 1,038 of the Civil Code. It is worth mentioning that this corporate type functions, essentially, as a general rule for the entire Brazilian corporate system. Meanwhile, in a summary view and focused on the legal nature of the simple society, it can be said that it is a model of society whose registration, strictly speaking, should be done at the Civil Registry Office of Legal Entities, or – in the case of law

firms – in the OAB, with the maximized characteristic in the sense of unlimited liability of the partners.

However, it can be safely noted that the simple society is characterized by the application of legal provisions in the form of "general provisions", for the entire corporate framework, with effectively subsidiary application for all corporate models contained in the Civil Code and even for companies outlined in the law of corporations, governed by Law 6,404/76.

In fact, it must also be noted that other corporate models are included in our legal system, including those that do not distinguish between the company and the person of its partners, as their constituent acts are not filed in the competent registry (ROVAI, 2019), do not have legal personality (joint partnership and partnership).

Differently, and more common in day-to-day business, it is important to clarify that business companies are those whose registration is carried out before the Board of Trade with the provision of corporate types provided for in articles 1,039 to 1,092, as provided for in article 983 of the Civil Code, in words:

> Art. 983. The business company must be constituted according to one of the types regulated in arts. 1,039 to 1,092; a simple society can be constituted in accordance with one of these types, and, by not doing so, it is subordinated to the norms that are specific to it.

Business companies can adopt the following types: general partnership, limited partnerships, limited partnerships (the most common), joint stock companies, limited partnerships by shares, cooperative societies and associated companies.

It should be noted that the Commercial Boards are governed by Law 8,934/1994, decree 1800/199, DREI [1] IN(s) and articles of the Civil Code, with the function of executing, registering and registering services linked to business companies in Brazil. Each unit of the federation has its respective Commercial Board, currently totaling 27 Commercial Boards. Note that to streamline their services, each Board can decentralize its services, creating posts or offices in different cities and locations.

When registering with the respective Board, the company acquires legal personality and receives a registration number called CNPJ[2] from the Federal Revenue of Brazil. It can be said that the Commercial Boards are hierarchically subordinate to the government of the respective federative entity and, technically, at the national level, to the National Department of Business Registration and Integration (DREI).

An undisputed fact, therefore, is that upon registration with the Commercial Registry, the company acquires legal personality, as provided for in article 985 of the Civil Code:

> Art. 985. The company acquires legal personality with the registration, in its own register and in accordance with the law, of its constitutive acts (arts. 45 and 1,150).

In legal terms, by registering its legal acts with the Company Registry, the company acquires patrimonial autonomy (article 49-A of the Civil Code), no longer being confused with its partners, associates, founders or administrators. The aforementioned article 49-A[3], of the Civil Code, perfectly characterizes that the company has an existence distinct from that of its

[1] Department of Business Registration and Integration.
[2] Acronym for National Register of Legal Entities.
[3] Art. 49-A. A legal entity is not to be confused with its partners, associates, founders or administrators. Single paragraph. The patrimonial autonomy of legal entities is a legal instrument for allocating and segregating risks, established by law with the purpose of stimulating enterprises, for the generation of jobs, taxes, income and innovation for the benefit of all.

members, thus considering patrimonial autonomy as a basic and essential principle of corporate law.

In this scenario, as a rule, the legal entity must have its own life and assets, distinct from the members (legal or natural persons) that comprise it. However, whenever there is abuse of legal personality or conduct that characterizes property confusion, the judge may, at the request of the interested party or the Public Prosecutor's Office, disregard the aforementioned legal personality. It is a measure that must be absolutely exceptional and requires compliance with the requirements set out in article 50 of the Civil Code.

Specifically, regarding the Disregard of Legal Personality, article 50 of the Civil Code is inferred from the Major Theory, which is currently the most used. It is also worth considering the provision for disregard in article 28[4] of the Consumer Code (CDC), which is known as the Minor Theory. In this case, the disregard provided for in the CDC is considered violent and abrupt, as it ignores the essential elements that build the principle of patrimonial autonomy.

In the same sense, in line with the principle of subsidiarity of the partners' responsibility for social obligations, it is necessary to bring to the fore the provision contained in article 1,024[5], caput of the Civil Code, where there is a delimitation in the constriction of partners' private assets, which cannot be executed for the company's debts, unless after the social assets have been executed. If there is no finding of asset confusion or misuse of purpose, after exhausting the company's assets, the partners will not be able to have their private assets affected.

Finally, in the case of unincorporated companies, after exhausting the corporate assets, private assets will be affected until the debt is satisfied.

3.DISSOLUTION OF COMPANY

As already mentioned here, the bond formalized by the contractual instrument is characterized by a document that is subsequently registered with the Commercial Board or the Civil Registry Office of Legal Entities. Legally, at this point, the principle of freedom of association applies, enshrined in section XVII of article 5 of the Federal Constitution, in verbis: freedom of association for lawful purposes is complete, paramilitary freedom is prohibited. However, still in the same article, but in section XX, we find that: no one can be compelled to join or remain associated.

Regarding the right to withdraw a member, there are some hypotheses (voluntary withdrawal of a member, right to withdraw a member, judicial or extrajudicial exclusion of a member and death of a member). The fact is that the resolution of the company in relation to a partner or partial dissolution can be carried out judicially or extrajudicially.

[4] Art. 28. The judge may disregard the legal personality of the company when, to the detriment of the consumer, there is an abuse of rights, excess of power, violation of the law, unlawful fact or act or violation of the statutes or articles of association. The disregard will also be effective when there is bankruptcy, state of insolvency, closure or inactivity of the legal entity caused by poor administration. § 1 (Vetoed). § 2 The companies that are part of the corporate groups and the controlled companies are subsidiarily responsible for the obligations arising from this code. § 3° The consortium companies are jointly responsible for the obligations arising from this code. § 4. Related companies will only be liable for fault. § 5 A legal entity may also be disregarded whenever its personality is, in some way, an obstacle to compensation for losses caused to consumers.

[5] Art. 1,024. The private assets of the partners cannot be executed for debts of the company, until after the social assets have been executed.

a.The Hypotheses of Partner Dismissal from the Company

In the respective section of the Civil Code that deals with the resolution of a company in relation to a partner, it is stated that the corporate dissolution can be total or partial, listing, as noted above, the following possibilities for terminating the relationship, let's see.

The first hypothesis of a partner's withdrawal from the company is withdrawal, which can be motivated or unmotivated. The second hypothesis is the exclusion of a partner, which may be through judicial or extrajudicial means. Finally, the last possibility of termination is upon the death of the partner. The existence of a contractual provision for the succession of heirs in the company or upon acceptance by the other partners must be verified. In this condition, a contractual change is made, placing them as members of the company. However, if there is no contractual provision, a competent assessment of assets must be carried out so that the heirs receive their share.

b.Settlement of Shares

The settlement of shares implies the payment of the assets and credits of the withdrawing or deceased member in favor of him or his heirs. As a rule, settlement will take place through what was established in the articles of incorporation, and state jurisdiction or arbitration jurisdiction may be used for this purpose. In relation to intangible assets, the challenge is greater, since the difficulty of asset valuation of these assets is greater than movable and immovable assets.

The fact is that after the calculation of assets, the established amount must be paid within 90 days after the end of the settlement, unless a contractual clause provides otherwise. It is important to note at this point, obviously, the application of the principles of autonomy of the will of the parties and the pacta sunt servanda, which allow the creation of clauses that determine the form and term of payment in companies.

c.Accountability of Partners and Society

The liability of the partner and society came back to the fore during the trial of Interlocutory Appeal No. 2033338-62.2022.8.26.0000 at the TJSP.

> PARTIAL DISSOLUTION OF COMPANY - PAYMENT OF ASSETS - COMPLIANCE WITH JUDGMENT EXCEPTION OF PRE-EXECUTIVENESS PRESENTED BY THE MEMBER ILLEGATIMACY OF A PARTY Aggravated decision that rejected the exception of pre-executiveness presented by the partner Nonconformity of the excipient partner Acceptance 1. Payment of assets is the responsibility of the company, and not of the partners. In this case, the assets of the excluded partner must be paid, in principle, by the company UNEP Serviços MÉDICOS LTDA., and not by the remaining partners, since they concern the pecuniary aspect of the respective shares. Hence why art. 604, CPC, provide for the resolution date and definition of the credit for calculating the assets in view of the articles of incorporation; and art. 606, CPC, refers to “balance of determination”. 2. There is no enforceable title against the appellant MARIO SILVA, who was not, at any time, sentenced to pay the assets of the appellant (art. 515, I, CPC). 3. The partner can only be affected in the event of secondary liability, when provided for by law (art. 790, II, CPC), which is not the case under debate, or in the event of an Incident of Disregard of a Legal Entity, in the event of abuse of personality or confusion of assets (art. 50, CC), which was not even introduced to discuss possible fraud. 4. The issue relating to the illegitimacy of a party, until it has been decided, can be raised and heard ex officio at any time and level of jurisdiction, without there being any need to talk about “preclusion” (art. 485, § 3, CPC) – RESOURCE PROVIDED.

It turns out that in cases of partner withdrawal, whether voluntarily or due to death, there is residual responsibility for social obligations, in accordance with the provisions of article 1,032 of the Civil Code, ipsis litteris:

> Art. 1,032. The withdrawal, exclusion or death of a partner does not exempt him, or his heirs, from responsibility for previous social obligations, up to two years after the company's resolution is registered; nor in the first two cases, in subsequent cases and within the same period, until registration is requested.

The responsibility of the withdrawing partner will continue for a period of two years after leaving (art. 1,003, sole paragraph), jointly and severally with the partner who joined.

> Art. 1,003. The total or partial assignment of shares, without the corresponding modification of the articles of incorporation with the consent of the other partners, will not be effective in relation to them and the company.
>
> Single paragraph. Up to two years after the modification of the contract is registered, the assignor is jointly and severally liable with the assignee, before the company and third parties, for the obligations he had as a partner.

Decided by the TJSP, the payment of assets - as a rule - is the responsibility of the company and not the partners, since the payment of the established value is reduced from the share capital and only in exceptional cases is there the possibility for the partners to cover the value of the share. or in the case of secondary liability and in the event of an incident of disregard of a legal entity, in the event of abuse of personality and confusion of assets.

CONCLUSION

After making these considerations, based on the jurisprudential position on the responsibility for paying the amounts to the withdrawing partner, it can be concluded.

In line with the position adopted by the 2nd Reserved Chamber of Business Law of the Court of Justice of the State of São Paulo, the payment of assets is the responsibility of the company, and not of the partners, that is, the assets of the excluded or withdrawing partner must be paid, in principle, by the company, and not by the remaining partners, as they concern the pecuniary rights of the respective shares.

Furthermore, the aforementioned decision guaranteed the company's patrimonial autonomy by outlining that the partner can only be affected in the event of secondary liability, when provided for by law (art. 790, II, CPC), or in the event of an incident of disregard of a legal entity, when personality abuse or property confusion occurs (art. 50, CC), with full support in the Declaration of Rights to Economic Freedom, Law 13,874/2019.

In the same vein as the jurisprudential understanding, the position of Renato Vilela[6] is presented, which expresses that the amount to be disbursed by the company to the withdrawing or excluded partner must be determined fairly and in accordance with a determination balance drawn up on the date of the disruption of the corporate bond.

Having said this, it appears that the position of the Courts and the doctrine is unanimous in establishing that the value of the refund of quotas to the withdrawing or excluded partner must be calculated based on a fair value defined through a Determination Balance and the responsibility The compensation, in theory, belongs exclusively to society, except in cases where abuse of power, confusion of assets or misuse of purpose is found.

[6] VILELA, Renato, Valuation for the purpose of determining assets in limited companies - appreciation of intangible assets. Ed. Dialética, São Paulo, 2023, p. 199

REFERENCES

BRASIL. Lei nº 10.406, de 10 de janeiro de 2002. Disponível em: <http://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm>. Acesso em: 18 de setembro de 2022.

CAMPINHO, Sérgio. **Curso de Direito Comercial**: Direito de Empresa. 18. ed. São Paulo: SaraivaJur, 2022. 180 p.

MAMEDE, Gladston. Direito Empresarial Brasileiro: direito societário. 14. São Paulo: Atlas, 2022. 1 recurso online. ISBN 9786559772582

ROVAI, Armando Luiz. **Atualidades do Direito Empresarial Brasileiro**. 1. ed. Belo Horizonte: D'Plácido, 2019. 246 p.

TAVARES BORBA, José Edwaldo. **Direito Societário**. 17. ed. rev. atual. e aum. São Paulo: Atlas, 2019. 577 p.

VILELA, Renato, Avaliação para fins de Apuração de Haveres nas Sociedades Limitadas - apreciação de ativos intangíveis. Ed. Dialética, São Paulo, 2023. P 199