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Research Article

Responsibility for the Payment of Duties Is Attributed to the Member or to the Company

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Abstract

This article examines whether the obligation to pay the amount due to a withdrawing, excluded, or deceased member after the partial dissolution of a company rests with the company itself or with the remaining members. Using a doctrinal and case-law-based method, the study analyzes the Brazilian Civil Code, the Code of Civil Procedure, legislation governing legal personality and corporate registration, and recent judicial decisions concerning the valuation and enforcement of equity interests. The analysis distinguishes the company's primary obligation to reimburse the departing member from the residual or secondary liability that may exceptionally reach the personal assets of the remaining members. It also addresses the determination balance sheet, the valuation of tangible and intangible assets at exit value, the relevance of contractual provisions, and the limits of discounted cash flow methods when they incorporate future business expectations. The findings indicate that the amount determined in the valuation procedure constitutes a corporate debt because it corresponds to the pecuniary expression of the departing member's equity interest and ordinarily entails a reduction in the company's net assets or stated capital. Accordingly, enforcement should be directed against the company. Personal liability of a remaining member requires a specific legal basis, such as statutory secondary liability or a duly established disregard of legal personality based on abuse, misuse of purpose, or commingling of assets. The article concludes that preserving the separation between the company and its members promotes legal certainty, protects legitimate reliance on corporate autonomy, and remains compatible with fair valuation and effective payment of the departing member's equity interest.

Keywords

Partial Dissolution of a Company, Valuation of Equity Interests, Determination Balance Sheet, Corporate Liability, Legal Personality

1. Introduction

Therefore, this legal article is divided into five sections, in addition to this introduction. In the first, I will provide a historical analysis of the emergence of the concept of a company; in the second, I will point out the essential concepts inherent to companies; in the third, I will address the form of reimbursement and payment of the assets of withdrawing partners in the case of partial dissolution of the company; in the fourth, I will address the issues inherent to the liability of the partners

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and the company in cases of dissolution of the partnership; in the fifth, I will conclude this study, bringing, in theory, the position adopted by the Brazilian Courts of Justice. Recent studies published between 2023 and 2024 confirm that valuation methodology, procedural design, and the treatment of intangible assets remain among the most contested issues in partial dissolution proceedings [7-9].

2. 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 outlines 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 sum of efforts with the aim of obtaining economic results, societies were born [5].

There is evidence that the origin of the concept dates back to 1400 BC, in India - the Code of Manu - which established in Article 204 as follows:

"When several men come together to cooperate, each with their work, in the same enterprise, this is how the distribution of the parts should be made".

Notwithstanding the historical and business aspect, it must be observed that customs and traditions are also essential elements for the development and implementation of corporate activity. In this vein, just like the history of other legal disciplines (civil law and criminal law), the legal nuances of corporate law are based on Roman law. As noted by Tavares Borba [5], evident traces of Roman law can be seen in the first legislative documents and contracts of commercial companies.

It is a fact, however, that only in the Middle Ages did the greatest development of commercial companies occur, because it was from this moment that the notion of separation between the assets of the company and those of the partners arose. In this period, companies constituted under the types i) general partnership and ii) limited partnership began to take shape, acquiring the appearance of commercial companies, especially because they developed business activities.

Later, at the beginning of the 17th century – from the increase in trading companies – we had the first trace of joint-stock companies, which – during the industrial revolution – became the great instrument of its realization [5].

3. Concept of Society

As is well known, the crucial point for the formation of a society is the desire of those interested in entering into a partnership agreement, since it is through this mutual 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 objective of obtaining results.[1]

Regarding this association, it is important to mention the importance of some legal principles of corporate law, such as the freedom of association, which explains that – provided it is lawful – the will of the parties is sufficient for the constitution of the society [2].

Established in Article 5, XVII and XX of the Federal Constitution, we have that: [12].

"Article 5. All are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the right to life, liberty, equality, security and property, under the following terms: XVII - full freedom of association for lawful purposes is guaranteed, with paramilitary associations being prohibited; XX - no one may be compelled to associate or remain associated; "

In its statutory formulation, the definition of a company is set out in Article 981 of the Civil Code as follows:

"Article 981. A partnership agreement is entered into by persons who mutually agree to contribute, with assets or services, to the exercise of an economic activity and the sharing, among themselves, of the results.
Sole paragraph. The activity may be restricted to the performance of one or more specific businesses." [1].

The aforementioned legal provision states that a company is a bilateral or multilateral contract, in which the parties – that is, the partners – decide to invest capital and resources to carry out a certain economic activity, and the results – whether profits or losses – are shared among themselves. The article also mentions that the company's activity may be limited to carrying out one or more specific businesses. Companies can then be classified according to their genus, species, and corporate types. Regarding genus, a company can be incorporated or unincorporated. Incorporated companies are those that acquire legal personality with their own registration (article 985, Civil Code).

In contrast, we have unincorporated companies, that is, companies that do not have legal personality. Regarding species, being an incorporated company, we can subdivide it into two corporate types: simple (formerly civil society) or business (formerly commercial society). Regarding simple companies, Mamede [3] says:

"These are all those whose activities, by operation of law, as occurs with law firms, or by the partners' choice, reject a business-oriented organization and instead adopt a personal and simplified structure outside ordinary market logic."

We find its normative provision in articles 997 to 1038 of the Civil Code. It is worth noting that this type of company functions primarily as a general rule for the entire Brazilian corporate system. However, in a summary view focused on the legal nature of the simple partnership, it can be said that it

[1] "We cannot speak of profit, as it is often not the result obtained. Business activity inherently carries intrinsic risk, and therefore, profit or loss may occur."

is a type of company whose registration, strictly speaking, should be done at the Registry Office of Legal Entities, or – in the case of law firms – at the Brazilian Bar Association (OAB), with the maximized characteristic of the unlimited liability of the partners.

However, it can be safely stated that the simple partnership is characterized by the application of legal provisions in the form of "general provisions" for the entire corporate framework, with effective subsidiary application to all corporate models contained in the Civil Code and even to the companies outlined in the law of corporations, governed by Law 6.404/76. In truth, it must also be noted that other corporate models exist in our legal system, including those that do not distinguish between the company and the individuals who are its partners, as their articles of incorporation are not filed with the competent registry [4], and therefore do not possess legal personality (common partnership and joint venture).

In contrast, and more commonly used in everyday business, it is important to clarify that business corporations are those whose registration is carried out with the Commercial Registry, with the corporate types provided for in articles 1039 to 1092, as stipulated in article 983 of the Civil Code, in verbis:

"Article 983. A business corporation must be constituted according to one of the types regulated in articles 1039 to 1092; a simple partnership may be constituted in accordance with one of these types, and, if it does not, it is subject to its own rules."

Business corporations may adopt the following types: general partnership, limited partnership, limited liability company (the most common), corporations, limited partnerships by shares, cooperative societies, and affiliated companies.

It should be noted that the Commercial Registries are governed by Law 8.934/1994, Decree 1800/1996, DREI Instruction(s), and articles of the Civil Code, having as their function the execution, registration, and registration of services related to business corporations in Brazil. Each federative unit has its respective Commercial Registry, currently totaling 27 Commercial Registries. Note that to expedite its services, each Board may decentralize its services by creating branches or offices in different cities and localities. [16, 17].

Upon registering with the respective Commercial Registry, the company acquires legal personality, receiving a registration number from the Brazilian Federal Revenue Service called CNPJ. It can be said that the Commercial Registries 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).

It is therefore undeniable that, upon registration with the Commercial Registry, the company acquires legal personality, as provided in Article 985 of the Civil Code [1]:

"Article 985. A company acquires legal personality upon registration of its constitutive acts in the appropriate registry and in accordance with the law (Articles 45 and 1,150)." [1].

In legal terms, by registering its legal acts with the Registry of Companies, the company acquires patrimonial autonomy (article 49-A of the Civil Code[2]), and is no longer confused with its partners, associates, founders or administrators. The aforementioned article 49-A of the Civil Code perfectly characterizes that the company has an existence distinct from that of its members, thus considering patrimonial autonomy as a basic and essential principle of corporate law. [1, 14].

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 compose it.

However, whenever there is abuse of legal personality or conduct that characterizes asset commingling, the judge may, at the request of the interested party or the Public Prosecutor's Office, disregard said legal personality. This is a measure that should be absolutely exceptional and requires the fulfillment of the requirements set forth in Article 50 of the Civil Code.

Specifically, regarding the Disregard of Legal Personality, Article 50 of the Civil Code refers to the Major Theory, which is the most widely used today. It is also worth considering the provision for disregard in Article 28[3] of the Consumer Protection 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 disregards the essential elements that build the principle of asset autonomy. [1, 15].

In the same vein, in accordance with the principle of subsidiary liability of partners for corporate obligations, it is important to bring to light the provision contained in article 1,024[4], main provision of the Civil Code, which limits the seizure of the partners' personal assets, which cannot be seized for the company's debts, except after the company's assets have been exhausted. Unless there is evidence of asset commingling or misuse of purpose, after exhausting the company's assets, the partners' personal assets cannot be affected.

Finally, in the case of unincorporated companies, after exhausting the company's assets, the personal assets will be affected until the debt is satisfied.

[2] Article 49-A. A legal entity is not to be confused with its partners, associates, founders, or administrators. Sole paragraph. The patrimonial autonomy of legal entities is a lawful instrument for the allocation and segregation of risks, established by law for the purpose of stimulating ventures, for the generation of jobs, taxes, income, and innovation for the benefit of all.

[3] Article 28. The judge may disregard the legal personality of the company when, to the detriment of the consumer, there is abuse of rights, excess of power, violation of the law, illicit act or fact, or violation of the bylaws or articles of incorporation. Disregard will also be applied when there is bankruptcy, insolvency, closure, or inactivity of the legal entity caused by mismanagement. § 1 (Vetoed). § 2 The companies that are part of corporate groups and the controlled companies are subsidiarily liable for the obligations arising from this code. § 3 The consortium companies are jointly and severally liable for the obligations arising from this code. § 4 The affiliated companies will only be liable for fault. § 5 The legal entity may also be disregarded whenever its personality is, in any way, an obstacle to the compensation of damages caused to consumers.

[4] Article 1024. The personal assets of the partners cannot be seized to pay the debts of the company, except after the company's assets have been exhausted.

4. Dissolution of a Company

As already mentioned, the bond formalized by the contractual instrument is characterized by a document that is subsequently registered with the Commercial Registry or the Civil Registry of Legal Entities.

At this point, the constitutional principle of freedom of association applies. Article 5, item XVII, guarantees freedom of association for lawful purposes and prohibits paramilitary associations, while item XX provides that no person may be compelled to join or remain in an association [12].

Regarding the right of withdrawal of a partner, there are some hypotheses (voluntary withdrawal of a partner, right of withdrawal of a partner, judicial or extrajudicial exclusion of a partner and death of a partner). The fact is that the resolution of the company in relation to a partner or partial dissolution can be carried out in the judicial or extrajudicial sphere. The special procedure governing partial dissolution and valuation of equity interests is set out in Articles 599 to 609 of the Code of Civil Procedure [13].

a. Hypotheses for Dissolution of a Partner in a Company

In the relevant section of the Civil Code that deals with the dissolution of a company in relation to a partner, it is discussed that the dissolution of a company can be total or partial, listing, as noted above, the following possibilities for dissolving the bond, as follows:

The first hypothesis for the dissolution of a partner in 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 hypothesis for dissolution is the death of the partner. It is necessary to verify the existence of a contractual provision for the succession of heirs in the company or through the acceptance of the other partners. In this condition, the contractual amendment is made, placing them as new members of the company. However, if there is no contractual provision, the competent assessment of assets must be carried out so that the heirs receive their due share.

b. Liquidation of Shares

The liquidation of shares implies the payment of the assets and credits of the withdrawing or deceased partner in their favor or that of their heirs. As a rule, the liquidation will take place through what was established in the articles of association, and – for this purpose – state jurisdiction or arbitration jurisdiction may be used. Regarding intangible assets, the challenge is greater, since the difficulty of asset valuation is greater than that of movable and immovable property. Recent scholarship emphasizes that the treatment of intangible assets and the definition of an appropriate exit-value methodology are central to a fair valuation [6-9].

After the valuation of the equity interest, the amount determined must be paid within 90 days from the completion of the liquidation, unless the articles of association provide otherwise. This rule must be read together with party autonomy and the binding force of contracts, which permit the members to establish the method and timing of payment, provided that the contractual criterion remains fair and legally valid [1, 9].

5. Liability of Partners and the Company

The liability of the partner and the company came up again during the judgment of the Appeal No. 2033338-62.2022.8.26.0000 in the TJSP (Court of Justice of Sao Paulo). [18].

PARTIAL DISSOLUTION OF COMPANY - PAYMENT OF ASSETS - ENFORCEMENT OF JUDGMENT - PRELIMINARY OBJECTION PRESENTED BY THE PARTNER - LACK OF STANDING Appealed decision that rejected the preliminary objection presented by the partner. Appeal by the objecting partner. Acceptance. 1. The 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 the company and not by the remaining partners, since they concern the pecuniary aspect of their respective quotas. That is why article 604 of the CPC provides for the date of resolution and definition of the credit for the assessment of assets in view of the articles of association; and article 606 of the CPC refers to a "determination balance sheet". 2. There is no enforceable title against the appellant MARIO SILVA, who was not, at any time, ordered to pay the assets of the appellees (article 515, I, CPC). 3. The partner can only be affected in the case of secondary liability, when provided for by law (art. 790, II, CPC), which is not the case under discussion, or in the context of an Incident of Disregard of Legal Entity, in the case of abuse of personality or asset confusion (art. 50, CC), which was not even initiated to discuss any fraud. 4. The issue relating to the lack of standing, while it is not decided, can be argued and recognized ex officio at any time and level of jurisdiction, and there is no question of "preclusion" (art. 485, § 3, CPC) – APPEAL GRANTED. [13, 18].

It so happens that in cases of withdrawal of the partner, whether by their own will or by death, there is a residual liability for the company's obligations, in accordance with the provisions of article 1,032 of the Civil Code, verbatim: [1].

> *“Art. 1,032. The withdrawal, exclusion, or death of a partner does not exempt him or his heirs from liability for prior social obligations for up to two years after the resolution of the partnership is registered; nor, in the first two cases, for subsequent obligations within the same period, until registration is requested.”*
>
> *The liability of a withdrawing partner will remain for a period of two years after their departure (Article 1003, sole paragraph), jointly and severally with the partner who joined.*
>
> *“Article 1003. The total or partial transfer of a share, without the corresponding modification of the articles of association with the consent of the other partners, will not be effective with respect to them and the company.*
>
> *Sole paragraph. For up to two years after the amendment*

to the articles of association is registered, the transferor is jointly and severally liable with the transferee, before the company and third parties, for the obligations they had as a partner."

As decided by the TJSP (Court of Justice of Sao Paulo), 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 cases of secondary liability and in the occurrence of the incident of disregard of legal personality, upon finding abuse of legal personality and commingling of assets. [18].

Recent decisions of the Superior Court of Justice reinforce the same valuation framework. In Special Appeal No. 2,063,134/MG, the Court held that discounted cash flow is unsuitable when it incorporates future business expectations into the determination balance sheet. In Special Appeal No. 2,223,719/SP, the Court reaffirmed that, when the articles of association are silent, the determination balance sheet under Article 606 of the Code of Civil Procedure governs the valuation of the equity interest [10, 11]. These decisions address valuation rather than direct liability, but they strengthen the distinction between a corporate payment obligation and the exceptional circumstances in which liability may extend to individual members.

6. Conclusion

After these considerations, based on the jurisprudential position on the responsibility for payment of amounts to the withdrawing partner, it can be concluded that:

In accordance with the position adopted by the 2nd Reserved Chamber of Business Law of the Court of Justice of the State of Sao 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, since they concern the pecuniary right of the respective quotas.

Furthermore, the aforementioned decision guaranteed the company's patrimonial autonomy by outlining that the partner can only be affected in the case of secondary liability, when provided for by law (Article 790, II, CPC), or in the context of an incident of disregard of legal entity, when abuse of personality or asset commingling occurs (Article 50, CC), with full support in the Declaration of Economic Freedom Rights, Law 13.874/2019. [14].

Following the same line of jurisprudential understanding, we present the position of Renato Vilela, who 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 sheet drawn up on the date of the termination of the corporate relationship [6].

That being said, it is noted that the position of the Courts and legal scholars is unanimous in establishing that the value of the reimbursement of shares to the withdrawing or excluded partner must be calculated based on a fair value defined by means of a Determination Balance Sheet, and the responsibility for compensation, in theory, lies exclusively with the company, except in cases where abuse of power, commingling of assets, or misuse of purpose is found. [6, 10, 11, 18].

Abbreviations

TJSP	Court of Justice of Sao Paulo
CC	Civil Code
CPC	Civil Procedure Code
CDC	Consumer Protection Code
CNPJ	National Registry of Legal Entities
DREI	National Department of Business Registration and Integration

Author Contributions

Armando Luiz Rovai: Conceptualization, Formal Analysis, Investigation, Methodology, Resources, Supervision, Writing – original draft, Writing – review & editing

Conflicts of Interest

The author declares that there are no conflicts of interest regarding the publication of this article.

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Biography

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