

**CONSIDERATIONS ON ARTICLE 66 FROM LAW
NO. 31/1990 REGARDING THE COMPANIES
IN THE PRESENT LAW CONTEXT**

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Abstract

The Civil Code in force and Law no. 76/2011 for the enforcement of the Civil Code generated many changes in the sphere of private law. Among these changes, the most interesting is the last mention from Law 76/2011, namely letter bb from article 230, which mentions the fact that from the entering into force of the Civil Code “any other contrary provisions, even those from special laws” are cancelled.

We are interested in finding out whether, at present, the interdiction of legal seizure of the shares, deduced from the interpretation of article 66 paragraph 1 of Law 31/1990 regarding the companies, is eliminated or not.

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Among the changes generated in the field of private law regulations, we retained the one included in article 230 letter bb of Law no. 76/2011 on the enforcement of the Civil Code,² which states that, from the entering into force of the Civil Code, “*any other contrary provisions, even those from special laws*” shall become null.

In this paper, we aim at analyzing whether and how this provision is incident to article 66 of Law no. 31/1990 regarding the companies³, article which states that “(1) *Over the entire duration of the company, shareholder’s creditors can only exercise their rights on the part of benefits belonging to the shareholder according to the balance sheet, and after the merging of the company, on the part to which he would be entitled by liquidation. (2) The creditors stipulated in paragraph (1) can nevertheless distrain, over the duration of a company, the parts which would belong to the shareholders by liquidation or they can seize and sell the shares of their debtor.*” Based on this text, one considers, previously to the entering into force of the present Civil Code, that a creditor can not valorize by judicial execution the shares - fractions of the registered capital of a limited liability company – representing the assets of the debtor if the debtor does not voluntarily perform the assumed liability.

In other words, we are interested in finding out whether at present the interdiction of the legal seizure of the shares, deduced from the interpretation of article 66 paragraph 1 of Law 31/1990 regarding the companies, is removed or not.

The specialty literature has not provided yet a point of view on the problems generated by the incidence of article 230 letter bb on article 66 of Law 31/1990 regarding the companies and the “liberalization“ of the legal seizure of the shares. Given the quite short period from the entering into force of this Civil Code, the courts of justice had no possibility to pronounce with regard to these causes. Nevertheless, the private discussions between law theoreticians and practitioners determined warm polemics on this topic, given that the unfortunate formulation of article 230 letter bb of the enforcement Law is susceptible of generating debates.

We think that there are arguments which entitle us to assess that article 66 of Law 31/1990 regarding the companies remained into force in the form and content or previous to the date of October 1, 2011. Therefore:

a. The present Civil Code does not expressly stipulate the possibility of the legal seizure of the shares, so that article 66 of Law 31/1990 – the so-called “contrary provision”- be abolished by article 230 letter bb of the enforcement law.

² Law no. 287/2009 regarding the Civil Code, republished based on article 218 of Law no. 71/2011 for the enforcement of Law no. 287/2009 regarding the Civil Code, published in the “Official Gazette of Romania”, part I, no. 409 of June 10, 2011, amended by the Government Emergency Ordinance no. 79/2011, published in the Official Gazette of Romania, part I, no. 696 of September 30, 2011.

³ Law no. 31/1990 regarding the trading companies, published in the Official Gazette of Romania, part I, no. 126 of November 17, 1990, republished in the Official Gazette of Romania, part I, no. 1066 of 17.11.2004, amended by Law no. 71/2011, published in the Official Gazette, part I no. 409 of June 10, 2011, amended by Law no. 76/2012 for the enforcement of Law no. 134/2010 regarding the Civil Procedure Code. Until the date of February 15, 2013, the companies governed by Law no. 31/1990 regarding the companies were called “trading companies” and the indicated entitling of the normative act was “Law no. 31/1990 on the Trading Companies”, the amendment being introduced by article 18 item 31 of Law no. 76/2012 for the enforcement of Law no. 134/2010 on the Civil Procedure Code.

b. Article 66 of the Companies Law does not represent a contrary provision. The text indicates in a limitative manner creditor's prerogatives on the rights which derive from the quality of shareholder of their debtor: the creditor can only exercise his right on the dividends. After the merging of the company, he can perform the receivable from the part which would belong to the debtor shareholder by liquidation, part that he can nevertheless distrain over the duration of the company.

The objective of article 66 of Law no. 31/1990 regarding the companies is exactly to detain the creditors from exercising their rights on the company rights of the shareholders and to allow them only the valorization on the receivable rights deriving from the quality of shareholder: the right to dividends, the part of the net assets of the company upon the winding-up of the company. All these grant to the shareholder the right to an amount of money that the creditor can pursue so as to perform his receivable.

c. Article 66 of Law no. 31/1990 regarding the companies has a derogatory nature and not the opposite. Article 1887 itself of the Civil Code, which stipulates in paragraph 1 that *"this chapter represents the common law with regard to companies"*, provides in paragraph 2 that *"The law can govern different types of companies, with regard to the form, nature and object of activity"*. As a consequence, the provisions of the Civil Code – common law – shall be complemented by the provisions of the special law, namely Law no. 31/1990 regarding the companies. The special law delineates the legal regimen of five types of companies, each one having its own rules concerning the transmission of the shares. One can not remove the derogatory provisions from special laws, because this would determine the unification of the legal regimen of the companies; this would lead to the existence of one type of company regulated by the provisions of the Civil Code. To give one example, if we follow this interpretation line, it means that the quorum and majority conditions for the transmission of the business titles for each type of company, stipulated by Law 31/1990 regarding the companies, would disappear. As a consequence, one could always transfer business titles in all types of company, including in joint-stock companies, only univocally, as provided in the Civil Code for the limited partnership – common law.

d. Another argument would be that in the case of the limited partnership – common law of the companies -, the use of the social rights for the guarantee of the personal liabilities or of those belonging to a third party can only be performed with the consent of all the shareholders, under the absolute nullity sanction .

e. It is important to remember that, starting with October 1, 2011 Law no. 31/1990 regarding the companies was amended 4 times, last time on February 15, 2013. By all the interventions, the legislator aimed at ensuring the concordance between the provisions of the Companies Law and the provisions of the Civil Code. None of them concerns article 66 of Law 31/1990 regarding the companies.

Even though article 66 paragraph 1 of Law no. 31/1990 regarding the companies would be considered as abolished, there are nevertheless other provisions which suggest that creditor's prerogative of legally seizing debtor's shares for the performance of the receivable contradicts the provisions concerning the limited liability companies, as we shall present in a

future study. We talk about the provisions of article 40 of the Constitution⁴ which mentions the freedom of association principle. The acquirement by a person outside the company of the shares would lead to the achievement of the *intuitu personae* nature of the limited liability company. The valorization of the shares by the creditor for the performance of his receivable would represent a type of intervention of the third parties not only on a contract in which they are not parties – memorandum of association – but in addition: an intervention of the third parties on a (legal) person, in its structure itself, which is not allowed.

In order to turn real legislator's intention of allowing the creditor to valorize debtor's shares, we think that it would be appropriate to adopt certain measures, which shall focus on two aspects. First of all, to amend the content of article 66 of Law no. 31/1990 regarding the companies, so as to clarify it in this respect. Secondly, to regulate the performance of creditor's rights on the shares, combining the aspects related to the civil law, to the civil (execution) proceedings law, but also the ones regarding the companies law. It should be nuanced so as to remove the impediments generated by the prevailing *intuitu personae* nature of the limited liability company, but at the same time it should not contradict the principles governing the acquirement of assets within a legal seizure proceeding.

Our research, which does not pretend to be complete, tried to analyze a legislative provision with influences on the legal life of the actors involved in the private law stage and to represent an invitation to a constructive dialogue on the topic of the possibility of legal seizure on the shares.

REFERENCES

The Constitution of Romania
The Romanian Civil Code
The Romanian Civil Procedure Code
Law no. 31/1990 on the trading companies
Law no. 71/2011
Law no. 76/2012
Law no. 134/2010 regarding the Civil Procedure Code.

⁴ Article 40 of the Constitution, with the marginal title "*Association Right*" provides that: "*Citizens can freely associate in political parties, in trade unions, in employer's associations and in other association forms.*"