

DIVISIONS AND SEGREGATIONS OF THE PATRIMONY

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Abstract

For a long time, dispute resolution and alternative techniques like mediation have been dealing with a classic conception: every part involved in dispute resolution was carrying exactly one patrimony. Irrespective of physical or moral person the rule was the same: one person, one patrimony.

Alternative dispute resolution, like mediation, dealt with persons in order to reach a mutual agreement affecting their unique patrimony.

The rule is already history. Still remain the first premise: every person has a patrimony. But under present Civil code the provision is stopping here. As a result, the uniqueness of the patrimony vanished from new law.

Dealing with different patrimonies a dispute solver should be able to understand the new notion and to assist the parties to final agreements according to the rules of the divisions of the patrimony.

First at all we should observe that any division of the patrimony of a person have to have a legal basis. The "liberalisation" of the patrimony is not so advanced in order to accept any voluntary division of the patrimony of the person.

Second, the prominent creation in this field are represented by fiducia (a kind of Anglo-Saxon trust concept) and assigned patrimony. Fiducia is new for our legal system only, following in fact the Quebec civil code regulation.

The assigned patrimony was already been present in our legislation. The Ordinance no 44/2008 was dealing with this concept in commercial field.

Keywords: *patrimony, assigned patrimony, new civil code, mediation, trust.*

Introduction

Mediation is now widely accepted as an effective method of resolving disputes. Mediation has recognized advantages than ordinary court proceedings: is faster, cheaper, even more trusted and easier accepted by parties.

Mediation avoids parties' confrontation inherent in judicial proceedings and allows the parties to keep their business, professional or personal relationships beyond the dispute. Mediation also enables the parties to find their own, creative solutions to their dispute, usually not rendered by court judging strictly by law.

Mediation is well-fitted for civil and commercial law branches, (although other law branches are not excluded) in patrimonial disputes. The main premise for mediation is the economic character of the dispute, the money expressed claims parties can dispose of. The concept of patrimony, the extent of the assets parties can dispose of is very important in such settlements, mutual agreements involved by mediation process.

The concept of patrimony and its extent is changing dramatically now, according with new Civil Code. Observing this new concept is important for law scholars and practitioners in mediation (mediators) in order to understand the border of the individual patrimony which settlements can affect.

We intend to define the new concept of patrimony as the aggregate of the person's economic rights and obligations and its relation with enterprises and persons (natural and legal).

Old theory of the patrimony. Classic doctrine.

First of all we are dealing with a civil-law system concept (in common-law system the concept is related with inheritance), the total of all personal and real entitlements, including movable

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and immovable property, belonging to a natural person or a juristic (legal) person; in some respects the concept is similar to the common-law concept of a person's estate.

Old civil law doctrine follows a simple principle: every juridical person (natural or moral person) has just one patrimony. It means there aren't a patrimony without a corresponding person as well as there aren't a person without a patrimony.

The general principle of the old civil law doctrine on patrimony stated the uniqueness of the patrimony². Every person has exactly one patrimony conferred by his legal status.

Classic theory of patrimony pursues to full identification of patrimony with legal capacity (personality) claiming that nothing remains outside the patrimony. As legal capacity may remain just a latent concept till future events, the patrimony can be only an abstraction, an "empty bag" ever ready to receive further legal effects of acts and deeds.

Critique of this doctrine tempered these allegations making distinction between abstract legal personality and patrimony which must remain close to the "contingent reality". Emphasizing monetary value of the rights and obligations of a person, elements of the patrimony, the differences between this notion and legal personality are better underlined.

Uniqueness of the patrimony theory has always created difficulties in explaining practical realities. Concept such patrimony of affectation (distinct division of a patrimony reserved for a recognized purpose), tendencies of identifying a group of goods and individual rights within a patrimony, all these were struck by the uniqueness of the patrimony inflexibility and had to retreat in front of the prestige and infallibility of this theory.

At present, in the civil law approach, the patrimony of affectation is a patrimony, or legal entitlement, that can be divided for a purpose, as being distinct from the general patrimony of the person. The corresponding common law approach of the concept is trust in some aspects where property is held by an administrator for the benefit of third parties. The property remains entirely outside the patrimony of the grantor, thus if the grantor become bankrupt or has liabilities, the property remains untouchable and may continue to benefit the intended beneficiaries.

The new patrimony theory in the new Civil Code.

The new regulation of the patrimony is stepping apart from the old approach. Every person still has a patrimony. There isn't a person without a patrimony.

This notion, patrimony, as defined in Civil Code, comprises all rights and obligations of a person that can be valued in money³. Further, this legal concept evolves and allows distinct patrimony masses, separated within the general patrimony of a person and delimited by a purpose according to the law.

Civil Code imported into national law the concept of *fiducia* following the "trust" concept from common-law system. In this case, by his will, the grantor conveys a distinct mass of assets to a person (administrator, trustee) on behalf of a beneficiary (which may be the grantor itself, the trustee or a third person). The trustee holds or manages and invests assets for the benefit of another. These

² The uniqueness of the patrimony theory has a long life in juridical doctrine, starting with its founders: Charles Aubry, Charles Rau, *Cours de droit civil français* (1839-46). The core provisions of the theory are: every patrimony belong to a person; every person has a patrimony which cannot be divided in distinct groups of rights. Against this theory has raised the assigned patrimony theory which basically stated the independence between patrimony and legal personality. The division of a patrimony is built from its the goals: a person should be free to assign part of his patrimony to different activities. Accordingly, a person can possess many patrimony masses delimited by his authorized activities.

C. Bîrsan, "Drept civil. Drepturile reale principale", ALL Beck, București, 2001, p. 1-28; V. Stoica, "Noțiunea juridică de patrimoniu", "Pandectele Române", G. Luțescu, "Teoria generala a drepturilor reale", București, 1947, p. 9-80.

³ Civil Code, Art. 31 al. 1.

assets are his property till the termination of the contract (trust) but they remain distinct from his own patrimony.

Other new situation appears in the collective enterprise (simple partnership) case. Such enterprise doesn't enjoy the legal person status. It remains a partnership. But such enterprise has capital stock and an own patrimony consisting of the individual contributions of the associates.

It is generally acknowledged for a company (legal person status) that for all legal purposes the assets of the company shall constitute a separate estate from the personal assets of the founders (associates, shareholders). But a collective enterprise in the form of association (simple partnership) isn't a legal person. It remains a partnership. In such circumstances we encounter a case when a patrimony is recognised beyond the legal person status. This is an inflexion point between old and new regulation in civil and commercial matters.

The simple partnership enjoys the occurrence of a distinct patrimony⁴ which is actually difficult to understand without a legal person status. Creditors of the enterprise have to execute these assets first. Still they have a second option in case of lack of assets; they are allowed to ask the partners to indemnify them, following an ingenious rule: each partner have to indemnify creditors with its own assets "proportionally with its contribution to the patrimony of the enterprise, only if the creditor could not be satisfied with the assets of the enterprise". In this way the obligations of the partnership is guaranteed in the end with the associates' patrimonies.

Any mediation process shall observe the limits imposed by this mechanism. Personal asset are not in safe harbour for persons who establish a collective enterprise in the „simple partnership” form. The solution of the parties exposed in a mediation process, under mediator surveillance, shall observe the new concept of the patrimony of the enterprise, with its legal bounds.

Patrimony divisions.

New Civil Code innovates once again by recognition of divisions of the individual patrimony within the unique classic personal patrimony.

Assigned assets of the general patrimony are regulated as fiduciary property (trust) and assets affected to authorized profession practice; besides these situations the law allows the creation of such patrimony divisions subject to strict legal regulation ("other patrimonies determined by law"⁵). Patrimony divisions shall be strictly regulated; they are not governed by person's free will.

Fiducia is a purely civil concept, available to any person (underwriter) which transfers rights (property rights, receivable, securities or other property rights or an ensemble of such rights, present or future) to one or more person (trustee). All these transferred rights remain distinct in the trustee's patrimony; they constitute a separate division, forming an autonomous mass inside trustee's patrimony distinct from other trustee's rights and obligations.

The division of the patrimony involved in a trust (*fiducia*) scheme is reflected primarily in creditors' rights for each patrimony division. Therefore the trustee's personal creditors cannot execute assets from fiduciary patrimony; they are not reachable for these creditors. Symmetrically, creditors whose claims are derived from the exploitation of the trust can execute assets from this patrimony division only.

Patrimony divisions operate therefore as effective barriers which limit the liability of the person up to specially constituted property mass.

The question is whether such a provision acts for any patrimony division. The answer will be given after observing the situation of professionals (persons which operate enterprises).

⁴ Ibidem, Art. 1920.

⁵ Ibidem, Art. 31 al. 3.

Patrimony of affectation.

From commercial point of view the relevant concept concerning the patrimony division is assigned patrimony ('patrimony of affectation' in civil-law system). Under the Civil Code, the assigned patrimonies are represented by fiduciary property, patrimonies affected for authorized professions and other patrimonies determined by law⁶.

Patrimony divisions include those patrimony affected for authorized professions. The law stated on these professions referring to professional entities which enjoy a special regulation, including the individual forms of practicing (lawyers, notaries, bailiffs, mediators, doctors, architects, etc.) Under civil law, the formation of the assigned patrimony established in order to individually practice an authorized profession is done by the act concluded by the holder according to special law. Termination of this patrimony (liquidation of individual affected patrimony) is in line with similar provisions governing the simple partnership unless the law provides otherwise. This rule raises questions about the professionals' situation. Accordingly, if individual enterprise is involved, does it enjoy the legal status of the assets within assigned patrimony affected for authorized profession or its legal situation is different.

Finally the question is whether the professional's situation subsumes the notion of authorized profession. Does the professional pursue an authorized profession or not? In the old classic commercial doctrine the trader's situation was considered that of a person who exercises acts of trade as a profession (as a usual occupation). Trading activities used to have a broad recognition as profession irrespective the fact that "authorized professions" was concerned then as well as now with those occupations organized in the form of legal and professional bodies.

Sill, under present Civil Code the professionals, as traders' successors, are not pursuing an "authorized profession" and the rules governing the assigned patrimony affected for individual practice doesn't cover the situation of the professional, the patrimony affected for exploitation of an enterprise. The distinction conducts to different legal effects.

Rules on patrimony divisions.

Accepting patrimony divisions makes it necessary to observe the relationship between property rights and obligations derived from each patrimony divisions.

Prohibition of balancing rights ad obligations born in different patrimony divisions. Generally speaking when the quality of creditor and debtor belongs to the same person the obligation shall be extinguished by confusion. This rule ceases when different patrimony divisions are involved⁷.

The transfer between different patrimony divisions are subject to private creditors rights. The occurrence of property divisions appears with clarity when transfers of rights between these divisions are intended. The rule of law is that the transfer of rights and obligations from a patrimony division to another should not harm the creditors' rights from each patrimony division (and comply with the requirements laid down by law for such divisions).

We cannot speak of a ban, but a test. Any prejudice inflicted to creditors is a barrier for rights and obligations transfer from a patrimonial division to another⁸.

Legal protection of assets in case of trust and patrimony of affectation for authorized professions.

Civil Code has rules for possible interactions between patrimony divisions. Situation of a trust (fiduciary patrimony) and authorized professions (patrimony of affectation) is comparable.

Common rule for any obligations is that the debtor is required to cover his obligation with all his "movable and immovable, present and future"⁹ that serve as the joint guarantee of its creditors.

⁶ Ibidem, Art. 31 al. 3.

⁷ Civil Code, Art. 1624.

⁸ Ibidem, Art. 32.

Despite such general rule, the assets subject to an assigned patrimony affected for an authorized profession practice may be executed by creditors whose claims have been born about the profession only. Even more, these creditors cannot pursue other assets of the debtor¹⁰.

As stated, the assigned patrimony established due to an authorized profession practice results gives rise to a true separation of patrimonies: the „professional” creditors are not entitled to person’s personal assets and the person’s personal creditors are not entitled to any claim upon assigned patrimony for authorized profession.

Such situation must be considered a legal benefit for person who exercising authorized profession who finds a safe harbour for his personal property against any obligations arising from exercising his profession.

Assigned patrimony regarding professionals (undertaking economic activities) who operate a sole proprietorship (individual) enterprise.

According to the law this category of commercial law subjects shall not enjoy the separation of patrimonies benefit granted to persons authorized to exercise a profession.

The rule is that creditors whose claims have been born about a particular patrimony division are obliged to raise claims upon this patrimony division first. But if such assets (from the patrimony division) fail to cover all the claims the creditors will pierce through the assigned patrimony veil. They are permitted to pursue other assets of the debtor up to the value of their claims¹¹.

This is the legal position for all individual subjects of commercial law (individual economic enterprises). The assigned patrimony recognized for these professionals is clarified by other existing special rules¹². Consequently, the assigned patrimony in commercial matters is defined as "all assets, rights and obligations of an authorized individual, business owner or individual members of the family business, affected the purpose of exercising an economic activity, constituted as a distinct part of the natural person’s patrimony, separate from the general pledge recognized to their personal creditors."¹³

We find out in the end that the personal creditors and the creditors of the individual enterprise compete on the same assets. The obvious rule laid down herein is included in special regulation too, that person (professional) is responsible for his commercial obligations up to his assigned patrimony and, in addition, with all his assets¹⁴.

Conclusions

Mediation (like any alternative dispute resolution) involves a social interaction in order to reach, under mediator assistance, a mutual agreement between persons affecting their patrimonies.

Under Civil Code the provisions the old uniqueness of the patrimony theory was replaced by a more flexible approach including patrimony divisions.

Dealing with different patrimony divisions a mediator should be able to understand the new notion and to assist the parties to final agreements according to the rules of the divisions of the patrimony.

A mediator should observe that any division of the patrimony of a person have to have a legal basis and voluntary division of the patrimony are prohibited. Second, the prominent creation in this field is represented by *fiducia* (a kind of Anglo-Saxon trust concept) and patrimony of affectation.

⁹ Ibidem, Art. 2324 al. 1.

¹⁰ Ibidem, Art. 2324 al. 4.

¹¹ Civil Code, Art. 2324, al. 3.

¹² GO no 44/2008 regarding economic activities undertook by authorized individual, individual enterprise and family enterprise, with further modification.

¹³ Ibidem, Art. 2

¹⁴ Ibidem, Art. 20 (for authorized individual), Art. 26 (for individual enterprise), Art. 34 (for family enterprise).

These cases only operate a real and total division of the patrimony of a person with all the legal effects.

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