

CLASSIFYING TURKISH AND ALBANIAN BUSINESS ENTITIES IN ACCORDANCE WITH NEW TURKISH COMMERCIAL CODE

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Abstract

On April 14 2008 the Albanian Parliament approved the Law on Entrepreneurs and Commercial Companies (9901/2008), which entered into force on May 21 2008. This Law shall regulate the status of entrepreneurs, the founding and managing of companies, the rights and obligations of founders, partners, members, and shareholders, companies' reorganization and liquidation. According to this Law companies are shoqëritë kolektive (Art.22), shoqëritë komandite (Art.56), Shoqëria me përgjegjësi të kufizuar (Art.68) or Shoqëri aksionare (Art.105). The equivalents of these companies in Turkish Law are general partnerships (Kollektif Şirket) for shoqëritë kolektive (Art.22), limited partnerships (Komandit Şirket) for shoqëritë komandite (Art.56), limited liability companies (Limited Şirket) for Shoqëria me përgjegjësi të kufizuar (Art.68) and joint-stock companies (Anonim Şirket) for Shoqëri aksionare (Art. 105). In the present study we are going to classify the companies for the respect of whether they own legal personality, whether shareholders are responsible for company's commitments and especially if they are Companies of Persons and Capitals.

Keywords: *Commercial law, Albania, Turkey, 'associations of persons' and 'associations of capital'.*

Notion of company

A company is an agreement under which two or more persons agree to undertake to bring their skill or capital to attain a common object. This definition is accepted as valid for all sorts of companies and also defined as such in the Turkish Code of Obligations. (C.O., Art.620). The is the simplest form of company and called the ordinary partnership (adi şirket) ¹. It does not have a legal entity separate from the partners². A similar definition can be found in the Albanian Legal system; "Companies are founded by two or more persons, who agree on achieving joint economic objectives through contributions defined by the Statute" (Law on

1 Tuğrul Ansay, Don Allace, Jr., Introduction To Turkish Law, 2005, s. 99.

2 All partners are jointly liable against third persons because of the transactions of the partnership, and their liability is unlimited, Ansay/Allace, s. 99.

Entrepreneurs and Companies, Art.3/1)³. The new law is modelled on the commercial legislation of Germany, Italy and the United Kingdom. It constitutes the main body of law on business organizations and aims to harmonize the Albanian regime with EU law⁴.

Classification of Companies

Companies can be classified in various ways such as; Having legal entities or not, whether they are associations of persons or associations of capital, shareholders' liabilities for company's debts of the shareholders⁵.

Trading Companies

In Turkish Legal System, companies that are defined under the Turkish Commercial Code are called «Trading Company». Trading companies include; General Partnership (kollektif şirket), Limited Partnership (komandit şirket), Joint Stock Corporations (anonim şirket), Limited Liability Companies (limited şirket) and Cooperative companies (kooperatif şirket). (Turkish Commercial Code, Art. 124/1). The cooperatives are regulated by a separate law⁶ rather than the Turkish Commercial Code. However, they are still considered as trading companies.

In Albanian Legal System, trading companies are regulated in the Law on Entrepreneurs and Companies dated 14.10.2008. These are; General partnerships

3 Law no. 9901 approved by the Albanian Parliament on 14 April 2008 on "Entrepreneurs and Commercial Companies", which entered into force on 21 May 2008 and replaced the previous legislation on business organisations in Albania (Laws no. 7632/1992 and no. 7638/1992). The new law regulates individual entrepreneurs and commercial companies. In contrast to the previous company law, the 2008 law also includes the definition of branches and representative offices of foreign companies and details provisions on group of companies. Scope of the Law defined (Art.1/1); "This Law shall regulate the status of entrepreneurs, the founding and managing of companies, the rights and obligations of founders, partners, members, and shareholders, companies' reorganization and liquidation", http://www.mete.gov.al/doc/20080716095903_ligji_per_tregtare_dhe_shoqerite_tregtare_eng.pdf (1.10.2012). This law intends to create a modern commercial system providing for flexible corporate structures and facilitate the business climate in Albania, Investment in Albania, 2011, www.kpmg.al (1.10.2012).

4 Renata Leka, "Companies Regime is Revamped", <http://www.internationallawoffice.com/> (1.10.2012).

5 Mehmet Bahtiyar, Ortaklıklar Hukuku, İstanbul, 2012, s. 1; Reha Poroy (Tekinalp/Çamoğlu), Ortaklıklar ve Kooperatif Hukuku, İstanbul, 2005, s.13.

6 Law on Cooperatives, Law No. 1163, dated 24 April 1969.

(shoqëritë kolektive) ‘SH.K.’⁷, Limited partnerships (shoqëritë komandite) ‘SH.K.M.’⁸, Limited Liability Companies (Shoqëria me përgjegjësi të kufizuar) ‘SH.P.K.’⁹, Joint-Stock Companies (Shoqëri aksionare) ‘SH.A.’¹⁰ (Art. 1). A company is a general partnership if it is registered as such, conducts its business under a common name and the liability of partners towards creditors is unlimited (Art, 22). A partnership is a limited partnership, if at least one partner’s liability is limited to the amount of his interest (limited partner), while the liability of other partners is not limited (general partners). General partners have the status of partners in a general partnership. Unless this part of the law provides otherwise, provisions on general partnerships also apply to limited partnerships (Art, 56). A limited liability company is a company founded by natural or juridical persons who are not liable for the company’s commitments and which personally bear losses only to the extent of any unpaid parts of stipulated contributions. Members’ contributions constitute the company’s basic capital (Art, 68). A Joint Stock Company is a company the basic capital of which is divided into shares and subscribed by founders. Founders are natural or juridical persons, which are not liable for the company’s commitments and which personally bear losses only to the extent of any unpaid parts of the shares in the basic capital they subscribed (Art, 105).

Legal Entity of Trading Companies

In Turkish Legal System, Trading companies have legal entities (Art. 125). The legal entity is acquired upon registration in an officially kept registration book¹¹. A similar definition can be found in the Albanian Legal system; Companies acquire legal personality on the date of their registration in the National Registration Centre (Art.3/3). Companies must apply for registration in accordance with Art. 22 and subsequent articles of Law No. 9723 on National Registration Centre¹² as relevant to the form of company in question (Art.3/2). All trade companies in Albanian law and as well as Turkish Law have a legal personality which is different from those of the persons who create them.

7 The name of a general partnership shall contain the supplement ‘shoqëritë kolektive’ or the abbreviation ‘SH.K.’ (Art.4/3).

8 The name of a limited partnership shall contain the supplement ‘shoqëritë komandite’ or the abbreviation ‘SH.K.M’ (Art.4/3).

9 The name of a Limited Liability Companies shall contain the supplement ‘Shoqëria me përgjegjësi të kufizuar’ or the abbreviation ‘SH.P.K’ (Art.4/3).

10 The name of a Joint-Stock Companies shall contain the supplement ‘Shoqëri aksionare’ or the abbreviation ‘SH.A’ (Art.4/3).

11 Ansay/Allace, s. 105.

12 The present law regulates the organization, functioning and operations of the National Registration Center, maintenance of the Commercial Register, the subjects and procedures for registration (Art.1/1).

Consequences of Having a Legal Entity

These consequences are¹³: Legal entities have separate commercial titles from their shareholders constituting them. Legal entities have separate and independent assets from those of the shareholders. The creditors can claim to be paid firstly from the company's assets. They have rights and legal capacities free from their shareholders. They have a separate residence. They also have a separate citizenship. The citizenship is determined according to which country company's headquarter is located in¹⁴.

Differentiation of «Associations of Persons» and «Associations of Capital»

The numbered 6012 Turkish Commercial Code which was put into operation on 1 July 2012 agrees on the differentiation of 'associations of persons' and 'associations of capital'. Hereunder; General Partnerships and Limited Partnerships are regarded as 'associations of persons', Joint-Stock companies, Limited Liability Companies and Limited Partnerships whose capital are divided into shares are regarded as 'associations of capital'(m.124/2). Similarly, in Albanian Legal System; General partnerships and Limited Partnerships are regarded as 'associations of persons', Limited Liability Companies and Joint-Stock companies are regarded as 'associations of capital'. There is no clear distinction in the Albanian Law as in the case of Turkish Law, but we draw this conclusion from the formation of companies.

The Basic Characteristics of Associations of Persons (General Partnerships and Limited Partnerships)

In 'Associations of Persons', the identity and personality of shareholders and their relationships hold more importance than the capital. People who know and trust each other come together and establish the association. The number of shareholders is small. They are not eligible to gather big capitals. In the Turkish Commercial Law, there is no stipulation as to the minimum capital needed in order to establish an 'association of persons'¹⁵. The shareholders are expected to trust each other because they have secondary and unlimited liability for company's debts (m.236,

13 Bahtiyar, s. 3.

14 Unless the Statute otherwise provides, a company's head office is the place where the major part of its business is carried out. A company's head office of which is located in the territory of the Republic of Albania, is subject to this Law (Art. 8).

15 The general partnership of Albania is set out by at least two members who do not have to provide a minimum capital. And the limited partnership does not require a minimum capital, see: Albania Company Laws And Regulations Handbook Volume 1 Strategic Information And Basic Laws, International Business Publications, Washington DC, USA-Albania, 2012, s. 36.

317)¹⁶. The rules state that since change of shareholders or an increase in their numbers are not regarded as safe, it is quite difficult to add or remove shareholders or sell shares, and can only be done with a consensus of the shareholders (m.226/2, 253)¹⁷. The rules also state that the shareholders' agreement can only be modified by a consensus of the shareholders. Since the shareholders have secondary and unlimited liability, they each have a right to control. Since the shareholders have the utmost importance, company may come to an end in case of a shareholder's death, loss of their legal capacity or bankruptcy (m.243/1, 248-249, 253, 254).

The Basic Characteristics of Associations of Capital (Join-Stock Companies, Limited Liability Companies And Limited Partnerships Whose Capitals Are Divided Into Shares

The shareholders have limited liability for company's debts, and as the rules state, this liability is only towards the company¹⁸. It is comparatively easier to add or remove shareholders, and sell shares. A consensus of the shareholders for these operations are not demanded. It is possible to have shareholders in large numbers¹⁹. Since it is not plausible to give right to control to all the shareholders, indispensably there are managing bodies and auditors. A majority of votes is sufficient to change the shareholders' agreement. Shareholders' right to control is in direct proportion to their shares in the capital. Contrary to the 'associations of persons', a shareholder's death, bankruptcy or loss of their legal capacity do not require the closure of the company. They have such liabilities as founding a website and declaring certain company information there.

16 In Albanian Law, liability of general partnership's partners towards creditors is unlimited, severally and jointly, for the debts of the company (Art.22).

17 In Albanian Law a partner's of general partnership rights may be transferred to third parties only with the prior consent of the remaining partners (Art.34,44).

18 In Albanian law, a limited liability company is a company founded by natural or juridical persons who are not liable for the company's commitments and which personally bear losses only to the extent of any unpaid parts of stipulated contributions. Likewise a Joint Stock Company.

19 In Turkish and Albanian Law Joint Stock Companies may offer their shares to the public. The main difference is that the stocks of the public joint stock companies are registered at the stock market.

Conclusion

In conclusion, trade companies where persons are important are unable to develop further due to lack of sufficient number of partners and its unsuitability to attract large amount of capital. In June 2012, 267 joint stock companies and 2,731 limited companies were established whereas only 6 general partnerships were created²⁰. Individuals do not want to hold unlimited responsibility. Capital companies, on the other hand, are preferred because the persons on these companies have limited responsibility.

20 The Union Of Chambers And Commodity Exchanges Information Retrieval Division www.tobb.org.tr (25.07.2012). In 2011, 2,932 joint stock companies, 50,451 limited companies, 25 general partnerships, 1 limited partnership were established, see: The Union Of Chambers And Commodity Exchanges of Turkey Economic Report, 2011, s. 182.