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FROM OBSHCHINA TO PARTNERSHIP

Dormiunt aliquando leges, numquam moriuntur

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Abstract

A Partnership Agreement hasn't been regulated yet in the Code of Obligations of the Republic of Serbia, nor of the Republic of Srpska. The decisions of the judicial practice are based on the provisions of the Civil Code for the Kingdom of Serbia, and they use them as legal rules. In the Pre-Draft of the new Civil Code of the Republic of Serbia this Agreement is regulated by the provisions of Articles 835-869. In this document, through a historical overview of the Partnership Agreement, with particular reference to its regulation in the Zakonopravilo (Nomokanon) of St. Sava, the author points out to the need to restore the original title of this Agreement. In its Code of Obligations, truly in the brackets, Macedonia also put the original title for this Partnership Agreement, calling it a *договор за заедница*. Returning to the resources can lead to better and more applicable regulations in court practice. And the other two great writers, Mihailo Konstantinović in the Drawings for the Code of Obligations and Contracts and Valtazar Bogišić in the General Property Law for Principality Montenegro, gave up from the name of the Partnership *(Ortakluk*) as the primary one. In terms of the form of this Agreement, the ZOO of Macedonia prescribes a written form, and the author criticizes that, starting from the general principle of the obligation right that the Agreements are not subject to any form, unless it is specified by law.

Keywords*: obshchina, partnership, society, association, simple association, community.*

INTRODUCTION

Societas, an institution of classical Roman law, which was studied in later centuries, after the collapse of the Western Roman Empire precisely thanks to Justinian's codex, for which was said to be one of the most important works in the history of European civilization and the most read, cited and commented book in the history of science. So far, in our legal science, the Zakonopravilo (Nomokaon) of St. Sava was poorly studied, it contained a part of this Justinian's codex, and the institution *Societas* of the Roman law itself, within the Civil Code, was incorporated into the Zakonopravilo under the name *obshchina (obščina).*

The first known definition of the partnership (ortakluk), today this institution also known by this name, can be found in the Hamurabi Code. This Code defined the term in the following provision: „If a man gives money to another man in the name of a joint venture, the two of them will divide the profits or losses into equal parts before God.“[1]

Under that title the Partnership Agreement also contained the Serbian Civil Code and the General Property Code for the Principality of Montenegro. The General Property Code in section 14 speaks about a *free association*, citing the name of the *partnership* (*ortakluk)* for *association*. In the Draft for the Code of Obligations and Contracts, Mihailo Konstantinović gave up from the name of the *partnership (ortakluk)* and in the section 9, under the name *economic association of citizens,* foresaw the regulation of the formation and cessation of the association, as well as the mutual relations of the *associates*. In the pre-draft of the Civil Code of the Republic of Serbia, in the second book entitled Obligatory Relations, in the chapter number thirty, a Partnership Agreement was regulated by the provisions of Articles 835-863. In the Code of Obligations of Macedonia, the title of Chapter 16 is an agreement for the partnership (ortakluk), but in the brackets it is stated *договор за заедница*,[2] which is the closest to the original name of this type of Agreement, as it is named in the Zakonopravilo.

By analyzing the provisions of the above mentioned codes and laws, we will point out the correctness of the solutions contained in the Zakonopravilo, as well as the convenience of using the solutions contained in it today. Precisely the saying of Roman lawyers *Dormiunt aliquando leges, numquam moriuntur* (Law sometimes sleeps, but never dies), is confirmed in this case.

OBSHCHINA IN THE ZAKONOPRAVILO OF ST. SAVA

Zakonopravilo of St. Sava is a collection of canonical and civil codes. St. Sava selected from the Byzantine collections what was the best for the state and the church, and with this legal transplant he created this extraordinary legal and ecclesiastical work. Thus, he became the originator of a unique codification of ecclesiastical and civil law, not only of the Serbian people, but also for other Slavic people. When in 1219, St. Sava brought the Zakonopravilo into the Serbian state; he left the original in the Archbishop's seat in Žiča monastery. Other copies were given in nine newly founded bishoprics: Ras, Hvosno, Toplica, Moravica, Dabar, Zeta, Hum, Budimlje and Prizren. Already during 1226, the Bulgarian Church and the state took over the Zakonopravilo and they were governed by it, and in 1262, the Bulgarian prince Svetislav sent the Zakonopravilo to the Russian metropolitan Cyril II to be governed by it, emphasizing that every empire should be governed by that book. At the Russian Parliament in Vladimir, in 1274, the Zakonopravilo was approved and since then it has become the Church and Civil Code in Russia, where it was named the *Kormčaja* book. As the church was equated with the boat, and the boat is controlled by the rudder, that's why this collection has got such a name.[3]

[1]M. Višić, *The codes of ancient Mesopotamia*, Svjetlost Sarajevo, 1989, page 234.
[2]Code of Obligations, Official Gazette of the Republic of Macedonia, No. 18/2001, 4/2002, 5/2003, 84/2008, 81/2009, 161/2009.
[3]*Sarajevo transcript of Zakonopravilo of St. Sava- Phototypes*, editors: Stanka Stjepanovic and Serafim Gligic, Dabar Dobrun, 2014, page XIX.

In the Zakonopravilo, St. Sava also introduced Prohiron uder the name of City Law and in the 19th chapter, under the name of *obiščina* it is regulated the relationship between the *associates* in the association, and in the 20t chapter it is regulated the way of termination of the association.

It is envisaged that the association can be based for a certain period of time, from a certain period of time, due to gain, as well as living those who associate.[4] In the agreement for the establishment of a society, it was not necessary to discuss anything about the withdrawal of a particular *associate* from the society, but depending on the nature of the association, a guilty was considered the one who gave up inappropriately.[5] If at the time of establishment of the association it was known that in addition to the property belonging to the association there is something inherited or donated, the gain from it was also given for association necessities. If they have agreed to belong to the association, and even what someone receives as a fair inheritance it is not considered as belonging according to the legacy, but according to the law.[6] An association could be established to acquire any property or just for the purpose of buying, or for one thing or more, and even among those who have different characteristics. It could be established by work, verbally or in writing.[7] If the association is regular and in its name doesn't have goal, than it is considered that it was established due to the rich wealth and profit from the sale and purchase, renting and gentility. Profit is defined as the benefit that someone achieves.[8] The association could cease by leaving the member, death of a member, impoverishment, and even if it was agreed that the association does not cease until the expiration of a certain period of time.[9] It is interesting that in the provision of item eight questions are asked about what to do if the goal for which the association is founded is not realized, or if the *associate*[10] is a violent, pest, or if there is no increase in property, and the association was established for the benefit. The next point does not immediately provide answer on that question, but the answer can be found in the following points. An associate who, because of his negligence cause something harmful to happen to the association, is being punished regardless the fact that his previous actions brought benefit to the association.[11]

The possibility of separation from a member of the association is also foreseen, and if someone decides to use this right, then the amount that is acquired before the other associate is notified, is considered to belong to the association, while the eventual personal injury is suffered only by the associate who has left the association. In that case, all the gain belongs to that single (remaining) member of the association, as well as the general damage of the association. Debts arising during the duration of the association are settled from the property of the association. If before the payment of the debt one associate has already separated itself, than the common property should be divided, and regarding the payments they decide together. When the gold is brought into the property of association and the gold fails, it is considered

[4]Chapter 19, point 1., *Sarajevo transcript of Zakonopravilo of St. Sava- Phototypes*, Dabar Dobrun, 2014, 274б.
[5]Ibid., point 2.
[6]Ibid., point 4.
[7]Ibid., point 5.
[8]Ibid., point 7.
[9]Ibid., point 8.
[10]According to the free translation of the author, the original is *обшчник*
[11]Ibid., point 10.

that a loss has occurred in the property of the association, and not in the property of the person who originally brought the gold into the association. If the associate separates his own gold before he re-adds it to the association, and that gold fails, then only he suffers damage.[12] The Associate is responsible for the property of the association, regular expenses (public and other) and it is not allowed that one associate take away other associates' property.[13]

His own saying, "The case hurts the one whom hits", Valtazar Bogišić took as a model from the Zakonopravilo of St. Sava[14]. This influence is also visible from the liability for the case[15]. The Associate is not responsible for the case. As an example is the case when money is paid for the purchase of sheep, and the sheep is taken from a truncheon bandit, which represent a general damage. The difference is, if it is stolen from someone individually, then the damage is not borne only by the one from whom it was stolen. That associate, who has voluntarily agreed to keep the money, is obliged to keep it with increased attention. It is justified that the entire association bear the damage if the sheep were sent to graze by the decision of the association when the harmful event has occurred. The next case is also regulated, when the associate goes shopping exclusively for the purpose of association and the bandits who intercepted him take away his own gold or some other thing that he did not take for the purpose of specific purchase, in that case the part of the damage should be compensated to the associate, as well as the costs of treatment from the injuries sustained on that occasion. When it was not possible to transport the goods to a certain location other than by sea, and if the ship's sinking occurs and together with it the deterioration of the purchased goods, the situation will be treated in the same way as in the previous case[16]. Otherwise, the expenses that the associate has in connection with the purchase for the association, all should be borne by the association.[17]

If an associate sells its silver to association, then profit from sales enter into his personal property, because he does not do it on behalf of the company, but in his personal name from his personal property. [18]

If the brothers do not want to divide themselves after the death of their parents because they want to remain in the successor community, then the property of such an association does not include what is acquired beyond it.[19]

The rights of the associate who invested in the association more than others, if he does the reconstruction of the home of association, has the right to choose as follows: to take as much as he has spent, within four months from the completion of the reconstruction, or to have control over the income of the home, or to take over the home management after the expiration

[12]Ibid., point 12.
[13]Ibid., point13.
[14]While Valtazar Bogišić was in Vienna, in 1862, Vatroslav Jagić transcribed the Ilovic transcript of the Zakonopravilo of St. Sava, which in that period was preserved at the JAZU (Yugoslav Academy of Science and Art), and sent him to Vienna.
[15]Ibid., point14.
[16]Ibid., тачка 15.
[17]Ibid., тачка 18.
[18]Ibid., тачка 16.
[19]Ibid., тачка 17.

of four months since the completion of the reconstruction of the home is finished, and if he does not want to take over the home, to take some other income from the association. This right must be used within four months, and if after four months the choice is not made, then, according to the law itself, managing is given to the one who renewed it.[20]

Particularly in the Chapter twenty it is discussed about the termination of the association. Association ceases in case of disappearance of person, property. Also, the consensual termination of the association was envisaged, with the will of the associates themselves. It is considered that a person is missing when it is sentenced to death, or when it is detained, and consequently the association is degraded. It is considered that the person is gone, also when everyone dies with common death (Comorians). The property of the association is gone if nothing of it is hasn't left, or if its purpose (goal) has been changed because it was given to the Church. If the property is abducted, it implies that it has disappeared. The cessation of the association by the will of the members itself occurs when they leave it or when each person begins to trade separately. Joint work (goal) can be changed by the court decision at the request of an individual or association. The termination of the association is possible even when a particular associate, by giving a statement before a court, gives up from his membership. If the association is established for the purpose of sale or for rent, after the death of an associate, the profits and damages belong to the association.

From the provisions on the establishment and the termination of the association could be seen the extent to which this agreement has been regulated in detail, with many elements of the Roman *societas*. Today, the provisions on liability for damages caused to a member of the association and to the association could be incorporated into our law.

PARTNERSHIP AGREEMENT **IN THE SERBIAN CIVIL LAW**

In the Civil Code of the Kingdom of Serbia, in paragraph 723, a Partnership Agreement has been defined, and it occurs when two or more persons agree to invest their efforts and things in order to share the obtained benefits. [21] It is determined that the Agreement may refer to a particular matter or to a defined amount, or to a whole line of things, to all goods without difference, and that is precisely the basis for reasoning about the rights of the partners. It is also specified how one individual and insufficiently clear provision of the Agreement should be interpreted. Example, if it is stated that all the property of a particular partner should be entered, it refers to a present property, not the future. The exception would be if the Agreement explicitly states that it would be the future property, and even in that case it would not be possible to include what the individual partner inherits, but only what he obtains in another way. If a partner invests only his work in the partnership, based on the law he has right only to profit, not the main one.[22]

[20]Ibid., тачка 18.
[21]*Civil Code for the Kingdom of Serbia - Explained by the decisions of the Court of Cassation in Belgrade,* Belgrade, 1939., 288.
[22]Ibid., paragraph 728.

Compulsory written form of the Agreement is not provided. [23]

Partner is responsible for the damage he might cause with his guilt and cannot be replaced with the benefits he has earned for the partnership. [24]

Representation of the partnership can be determined in the Agreement itself, and when the Agreement does not indicate who will represent the partnership *(ortakluk)*, then it can be validly represented by each of the partners.[25]

The Law also prescribes the way of sharing "benefits". Firstly, the invested stake are reject, then the costs and the damage suffered, and what is left is considered to be a gain. The gain is shared in proportion to the stakes, and "the main one" belongs to each person their own. The work is taken into the "consideration" for the partner who only gives work instead of the stake. If the partners cannot agree what would be the part of the one who invested only the work, if it was not already arranged in the Partnership Agreement, then the court shall decide regarding that. To each partner was allowed to check the accounts at any time.[26]

The termination of a partnership may also be the case when it is contracted only for a particular job, and the job is terminated, then when all " partner's principal " have failed or the time period for which such a company was founded has expired. If the partnership *(ortakluk*) has only two people then it stops when one of them dies.[27]

In addition to the withdrawal of the partners from the partnership, the possibility of excluding the partners from the partnership was also envisaged.[28]

Courts in the Republic of Serbia today still judge according to the provisions of the Civil Code, since the RS Civil Code is still in the pre-draft form. [29] From the judgment of the Supreme Cassation Court of the Republic of Serbia, no. Rev 1039/2017 of 14 December 2017, it can be seen that it explicitly refers to the provisions of paragraphs 727, 736, and 739 of the Civil Code for the Kingdom of Serbia.[30]

[23]From the explanation of the judgment of the Supreme Court of Serbia, no. pRev.241 / 97, it appears that this court considers that the Partnership Agreement is not a formal contract, or that a written form is not required for its conclusion and validity. "General provisions of the Code of Obligations shall also apply to those contracts that are not regulated in this law, and therefore these provisions also apply to the Partnership Agreement. Accordingly, between the litigious parties, and considering the present situation in the first instance proceedings, a concluded Partnership Agreement is related to the joint management of catering shop, and if the loss of the catering shop was realized, then this loss has to be divided into all partners, and in proportion to each partner's contributions.

[24]Decision of the court no. 3210 of April 1, 1924. States that a partner cannot be responsible for evasion until he the private legal relations between the partners are "clean". *Civil Code for the Kingdom of Serbia - Explained by the decisions of the Court of Cassation in Belgrade*, Belgrade, 1939,290

[25]Decision of the Court of Cassation in Belgrade no. Rev 2205/37, of 1 March 1937, ibid., 290.

[26]Ibid., paragraph 746, 291.

[27]Decision of the Court of Cassation in Belgrade no. Rev 2033/37, of 16 February 1937., ibid, 293.

[28]Ibid., Paragraph 755.

[29]*Pre-draft of the Civil Code of the Republic of Serbia, second book, Obligational relations, Belgrade A*2009.

[30]It follows from the reasoning of the judgment: “It is therefore unfounded to invoke the revident to the provisions of Article 727 of the SGZ, which stipulates that what is invested in a joint venture constitutes the principal of the partnership (ortakluk) and belongs to all of them together. Referring to the provisions of Article 736

BUSINESS ASSOCIATION OF THE CITIZENS IN THE DRAWINGS FOR THE CODE OF OBLIGATIONS AND AGREEMENTS

In the drawings for the Code of Obligations and Contracts, Mihailo Konstantinović did not adopt the title *Partnership (ortakluk)* for this Agreement as the word of non-Slavic origin, but he rather took the word *association of the citizens*, by which he basically accepted the term from the General Property Code for Principality of Montenegro, in which the title *association* was used.[31]

For persons who have joined assets or work, it was used the term *associates.* In order to form an association, it was possible to contractually commit two or more persons to join certain funds or their work.

Article 595 foresees responsibility for legal and material defects of things that Associates have been transferred to the Association as their stake, according to the rules of responsibility of the seller, and if he handed over the thing to the association only for the use or enjoyment, then he will be responsible under the Lender's liability rules

Role model of M. Konstantinović for making the Drawing was the General Property Code and hence the simplicity of the expression in Drawings, and to Valtazar Bogišić the role model was the Zakonopravilo of St. Sava. In addition, the Drawing was influenced by *Code Civil*, as it could be seen in provision 598 which provides the nullity of *the lion's association..*[32]

PARTNERSHIP AGREEMENT IN THE PRE-DRAFT OF THE CIVIL CODE OF SERBIA

The pre-draft of the Civil Code for the Republic of Serbia calls this community partnership (ortakluk). As Valtazar Bogišić himself, in explaining the terms used in the General Property Code, has noted that in a foreign language this type of association is called partnership (ortakluk), and in domestic society or association (društvo ili družina), we think it would be more convenient for the Civil Code of Serbia to use the term Association, as Mihailo Konstantinovic did in his Drawings. In paragraph 2 of the envisaged Article 835, it is evident that the partnership (ortakluk) is defined as a community of persons and goods, without the status of a legal entity, which indicates that the name of the association would correspond

and 739 of the same law governing the distribution of profit are also unfounded, and the termination of the partnership is regulated by Article 756, and that all the elements envisaged by the partnership agreement are contained in a partnership relation that existed among the litigious parties"

[31]In Article 885 of the General Property Code, Valtazar Bogišić himself says that: "An association is the same thing what people usually call in a foreign language a partnership (ortakluk) or what people call in domestic language society or association. B. Bogišić, *General Property Code for Principality Montenegro*, CID Podgorica, 2004, 187.

[32]An association agreement, by which to some associate it was taken the right to participate in the distribution of winnings, is invalidated. The same applies to the agreement by which an associate, whose stake is not exclusively in work, is free to take part in the loss reduction. M. Konstaninović, *Obligations and Contracts-Draft for the Code of Obligations and Contracts*, Belgrade, 2006, 214.

more, not only to the spirit of our nation and language, but also to the very concept of this agreement.

Basically, this contract, in the way it is regulated in the Pre-Draft, is very similar to the solutions envisaged by the Drawings.

Although Section 10 carries the title *division of joint property*, indicating that these are an undetermined stakes, however, Article 863 states that the provisions on the separation of the co-ownership community are applied accordingly to the sharing of common property. If the title of this section was a *community division*, then it could be considered that provisions on separation of the co-ownership community are applied to that community. Community and common property are not the same terms. What characterizes common property is the unspecified stake of the titular, in the co-ownership community the stakes are known and determined. If by the Agreement on the foundation of a partnership (associations, communities, societies, and companies) stakes are not defined, the valid assumption is that they are equal.

Speaking about the cessation of the partnership, in the provision of Article 858 of the Pre-Draft, item 3 foresees a cessation due to the cessation of joint property, which again indicates that the terms of common property and co-ownership property do not match, and that it is necessary harmonization, which nature based on the Pre-Draft of the Civil Code of Serbia has that property.

CONCLUSION

When two or more persons join in investing funds, either monetary or non-monetary, for the purpose of gaining profit, in a written or unwritten form, still in the Hamurby Code it was considered to be type of contract. Justinian's legislation took over from Roman law the regulation of this Agreement, and later on the Byzantine law regulated it in Prohiron. In the Zakonopravilo, under the name of Urban Law, St. Sava introduced Prohiron's provisions regulating this area. For this type of association, he used the term *obshchina* meaning an association. As a model for the compilation of his code, Valtazar Bogišići used the Zakonopravilo of St. Sava, which he studied in Vienna. He said that the *partnership (ortakluk)* is an foreign word, and that the *society or association (društvo ili družina)* is a local word, and therefore he used the term association (udruženje) in the OIZ. The Civil Code of the Kingdom of Serbia deviated from the original Slovenian name for this type of contract and introduced the foreign word "*ortakluk*". The provisions of the Drawings are not included in the Code of Obligations because after the constitutional changes in the Yugoslavia, this contract was to be regulated by the republican regulations. Some Republics has regulated this agreement in their Codes of obligations, as did Macedonia, which, along with the name of the partnership (ortakluk), put the name community. In the Pre-Draft of the Civil Code of the Republic of Serbia, it was taken over again the foreign word partnership (ortakluk).

Analyzing the provisions of the aforementioned codes and laws, it can be concluded that the correct source solutions for the name of this type of relationship between two or more

persons, are the ones given in the Zakonopravilo. Returning to original solutions does not only lead to the correct present, but also the correct and better future. The fact that a lot of time has passed since the adoption of some regulation and that it has not been applied for long period of time, does not mean that some of the good solutions contained therein should not be applied. The saying of Roman lawyer *Dormiunt aliquando leges, numquam moriuntur*, numquam moriuntur (The laws sometimes sleep, but they never die), is confirmed on this example.

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