

Исследования зарубежных ученых

Доктор Франсиско Хавьер Гонсалес Перес Серрабона,
Профессор коммерческого права, кафедра
«Коммерческое право», юридический факультет
Университета Гранады, Испания
(E-mail: jpsgonzalez@ugr)

РАЗМЫШЛЕНИЯ ОБ ОТВЕТСТВЕННОСТИ НОВОГО ИНДИВИДУАЛЬНОГО ИСПАНСКОГО ПРЕДПРИНИМАТЕЛЯ: ЕЩЕ ОДИН СПОСОБ ИНВЕСТИЦИЙ В ИСПАНИИ

Аннотация: Испанская экономика восстанавливается и в тоже время укрепляет свой экономический рост в результате структурных реформ, проведенных в последние годы. Последние законодательные реформы опирались исключительно на возможности физического лица-индивидуального предпринимателя или иностранного инвестора: Не смотря на риск предпринимательской неудачи (краха), у них будет возможность реанимировать свою деятельность и даже быть готовым к новым инициативам и не переживать по поводу отсутствия возможности погашения долга что делает данную ситуацию все более реальной. С нынешнем исследованием мы намерены соединить Индивидуального предпринимателя с ограниченной ответственностью, который возник в следствие недавно принятого закона о господдержке предпринимательства с его интернационализацией и разнообразить(специализировать) его спорный режим ответственности, который исключает специфические элементы личных активов предпринимателей пока все юридические вопросы(в том числе вопросы, касающиеся реквизитов) не будут улажены. Это будет предметом отражения, анализа и критика в данной статье. Таким образом, новая правовая форма бизнеса рождается, где законодатель намерен развивать и продвигать предпринимательскую деятельность, создавая эту особую организацию, которая частично предотвращает физическое лицо предприниматель - или вкладчиками, чтобы ответить за результаты своей деятельности со всеми их активы (Стандартные активы и пассивы, как это было раньше). Данный аспект рассматривается как объект размышлений, анализа и критики. Таким образом, рождение новой правовой формы бизнеса, где Государство и закон намерены содействовать и поощрять предпринимательскую деятельность, создавая при этом механизм(институт),который будет предотвращать ситуации в которых физическое лицо – индивидуальный предприниматель или инвестор расплачиваются за свои результаты своими собственными активами. Ключевые слова: предприниматель, общество с ограниченной ответственностью, деловая активность. В данном случае, я думаю под личными активами тут имеются в виду недвижимость предпринимателя, его машины, здания и прочее. Вообще сразу видно, что человек, писавший эту аннотацию чужд к английскому языку поскольку в тексте очень много ошибок и я сделал все возможное чтобы понять смысл написанного. Основная идея: Сотрудничество и содействие государства малому бизнесу, чтобы при возникновении ситуации когда ИП становится банкротом, он не расплачивался своими персональными активами. Для этого автор предлагает и представляет формы сотрудничества государства и малого

бизнеса. Еще смысл: Автор предлагает различать понятия стандартных активов и личных активов, чтобы личные активы ИП были сохранены в процессе банкротства.

Ключевые слова: предприниматель, общество с ограниченной ответственностью, деловая активность.

Studies of foreign scientists

DR. FRANCISCO JAVIER PÉREZ-SERRABONA GONZÁLEZ,

Profesor de Derecho Mercantil, Departamento de
Derecho Mercantil, Facultad de Derecho de la
Universidad de Granada, Spain,
Granada (Email: jpsgonzalez@ugr)

REFLECTIONS ABOUT THE LIABILITY OF THE NEW INDIVIDUAL SPANISH ENTREPRENEUR: ANOTHER WAY TO INVEST IN SPAIN¹

Abstract: The Spanish economy is recovering and at the same time consolidating an economic growth due to the structural reforms carried out in the last years. A recent legislative reform based on the possibility for a natural person –individual entrepreneur or foreign investor– in spite of their possible economical entrepreneurial failure, to have the option to put their life back again in the road and even to risk to new initiatives, without having to indefinitely bear a debt that will never be able to pay back, is nowadays a reality. With the current study, we intend to contract this new figure of the Individual Entrepreneur of Limited Liability –consequence of the recent Law on Support of the Entrepreneurship and its Internationalization- and specially its controversial regime of liability, which excludes specific elements of the personal assets of the entrepreneur, as long as the requisites and other legally foreseen conditions are fulfilled. This will be the object of reflection, analysis and critic in the current article. Thus, a *new* legal form of business is born, where the legislator intends to foster and promote the entrepreneurial activity, creating this singular institution that partially prevents a natural person entrepreneur -or investor- to have to respond for the results of their activity with all their assets (Universal Asset Liability, as was the general rule so far).

Keywords. - Entrepreneur, limited liability, business activity.

Summary. Introduction. I. – Precedents and historic evolution of the figure of the individual entrepreneur. II. – The figure of the entrepreneurial of limited liability (ERL). III. – Previous requisites for investors that want to become entrepreneurs in Spain: The residence visa for Entrepreneurs and Business Activity. IV. – “Limited Liability” of the individual entrepreneur. A). – Legal effects of the entrepreneur of limited liability. B). – Requisites for the limitation

¹ Author: Dr. Francisco Javier Pérez-Serrabona González. Professor of Mercantile Law. Faculty of Law. University of Granada (Spain). Official Master in Business Law (University of Granada). Master in Legal Consultancy for Enterprises (Ilustre Colegio de Abogados and University of Granada). Permanent researcher of the research group of the University of Granada: "El Derecho Mercantil y su proceso de reforma. Nuevas tecnologías y Derecho Mercantil" ["Mercantile Law and its Reform Process. New Technologies and Mercantile Law"].

of liability. C). – The registrations of the entrepreneur of limited liability. D). – Extinction of the regime of limitation of liability. V. – Argumentation of the future of the Law and final reflections. Bibliography.

INTRODUCTION

The economic format of the current enterprise does not contain the same structural elements of those existing some decades ago; it has changed and it has not been casual. It finds reasons for its justification in the intense technological advance, in the pyramidal growth of the accumulation of information (due to a “revolutionary” take-off in the industry of telecommunications, where there are physical frontiers no more), in the super-specialization in certain areas of knowledge, in the new models of already-consolidated enterprises and, over all, in the creation of new legal institutions capable to limit the liability of the entrepreneurs –both individual and social- because of the possible debts raised after their business activity, among many others.

All this important movement impacts on the legal sciences, which must pay attention in order to rapidly incorporate norms, rules and principles that tend to contemplate –in a reasonable and finished way– the new situations that may arise in the entrepreneurial organizations and in their relations with third parties. It is obvious that the Spanish economy and society (and the European one in general) are going through a big and deep crisis since 2008, which has provoked the breakdown of thousands of enterprises and millions of jobs. In order to mitigate this situation, it is necessary to undertake legal reforms which are favourable to the economic growth and reactivation, but a change in the mentality of the society is also necessary, in such a way that the entrepreneurial activity is more valued, as well as the assumption of risks, so strengthening the Spanish entrepreneurial tissue¹.

After passing the *new* Law 14/2013 of 27th of September on Support of the Entrepreneurship and its Internationalization², this new normative precept appears in order to try to reduce and reverse the aforementioned situation, proposing –among other initiatives- the

¹ Nowadays, the European Union is specially focused on the development of the “youth employment” (highest concern of the current society) in the frame of the *European Cooperation*, “European Cooperation in the Youth Field 2010-2018”, creating initiatives of youth in action and youth guarantee, fostering numerous legislative entrepreneurial initiatives in order to facilitate the creation of enterprises.

² Published on the Spanish Government Official Gazette [BOE], N° 233 of 28th of September 2013, valid from 29th of September 2013 (Reference in the Gazette: 13/10074).

fostering and creation of enterprises with more agile, rapid and economic procedures, with less bureaucratic and fiscal liens, and, in the event of failed attempt, having the possibility of obtaining an invoice that is not too difficult to sort out¹. In its Exposition of Reasons, we understand its main objective (“to create a favourable environment for the entrepreneurial initiative and the internationalization of the entrepreneurial projects”) and its directional scope, addressed to entrepreneurs, investors, professionals, researchers and workers –both Spanish and foreigner- that will carry out “intra-enterprise movements²”.

I. - PRECEDENTS AND HISTORIC EVOLUTION OF THE FIGURE OF THE INDIVIDUAL ENTREPRENEUR

It is obvious that the traditional European doctrine was –for grammatical, legal and moral reasons- against the general recognition of the called “sole proprietorship” –both in their original mode as in the modified one- and against the specific establishment of the individual entrepreneur with limitation of their liability; little by little this existing reluctances were overcome³.

¹ Although it has not been the last legal initiative in this non-stopping period of structural reforms aiming at favouring the creation of enterprises, since the new *Royal Decree-Law 1/2015, 27th February on Second Chance Mechanism, Reduction of Financial Burden and Other Social Measures*, the so-called legislation about “second opportunity”, has implemented another legal norm with a great aim –similar to the study object-, which is not but to allow and favour an entrepreneurial culture that will always positively affect to employment and will turn in as more and more *unincentivising* of the underground economy. This Royal Decree-Law establishes –among many other novelties- to allow controls and guarantees necessary to avoid strategic insolvencies or to facilitate selective non-recourse debts, trying to allow the releasing of most part of the pending debts after the aforementioned expenditure for those ones who have lost everything because of their total spending of their asset in benefit of their creditors –both in the entrepreneurial field and in the personal one.

² In the same sense, it is important to highlight another legal precept, *Law 20/2013 of 9th December on Market Unity Guarantee*, which contributes to foster the entrepreneurial activity. Its general aim is to establish the required dispositions in order to become effective within the principle of “market unity within the national territory”; it particularly aims at “guaranteeing the integrity of the economic order, facilitating the use of economies of scale and the reach of the free market access, by means of the exercise and the expansion of the economic activities in all the national territory, guaranteeing its appropriate supervision” (according to the principles contained in article 139 of the Spanish Constitution).

³ Except for the precedent of Liechtenstein (first trace of the existence of sole proprietorship in Europe in its *Persons and Companies Code* of 1926, later on incorporated to the Civil Code), this type of sole proprietorship obtained its legal recognition in different European countries after the decade of the 80s. It was the *Twelfth Council Directive of 21st December 1989 on a Single-member Private Limited Liability Companies*, which recognised the “sole proprietorship” (more specifically in its articles 2 to 8) and in its Consideration 5 stating that “it is convenient to foresee the creation of a

In the Spanish Law, the RDGRN (which stands for the Spanish “Resolution of the General Direction of Register and Notary”) of 21st June 1990¹ was an important advance in the recognition of this figure, overcoming the restrictive legal doctrine and highlighting that –unlike the partnership- the important thing in the corporation was the “organizational aspect”, and this organization “was so strongly objectified and independent that could linger even if the plurality of its members disappeared”; nonetheless, in any case “it would remain the objective situation of the shares and the legal personality of the corporation”². Next, *Law 2/1995 of 23rd March of Societies with Limited Liability* –Chapter XI, articles 125 to 129- regulated for this social form the “sole proprietorship” and likewise, in its Additional Provision 2.23 introduced a new Chapter XI, integrated by the article 311, in the text of the *Spanish Limited Company Law*. It read that “what is established about sole proprietorships in the Spanish Limited Liability Company Law is also applicable to the Limited Companies”. Back again in our days, the “sole proprietorship” was regulated (and it still is) in the *Royal Legislative Decree 1/2010, of 2nd July, Approving the Consolidated Text of the Spanish Corporate Enterprises Act in the Act 7/2003 of 1st April on the “New Enterprise” Limited Company* and in the one we will analyse in the current article, which is *Law 14/2013 of 27th of September on Support of the Entrepreneurship and*

legal instrument that allows the limitation of the liability of the individual entrepreneur in all the Community, without affecting the legislations of the State Members that, exceptionally, impose a liability to such an entrepreneur with respect to the obligations of the enterprises.”

¹ *Resolution of the General Direction of Register and Notary (hereinafter RDGRN, by its Spanish initials) of 21st June 1990 (RJ/1990/5366)*, which encompassed a number of arguments by which the sole proprietorships should be admitted. Thus, it was said that the “unipersonality was not incompatible with the concept of company”, at least within the frame of the corporations, which could linger no matter the number of members they had. It was considered that the legal personality was independent of the number of members, so rejecting the position of those authors that denied the possibility of the existence of sole proprietorships considering that unipersonality led to the loss of the legal personality and, thus, to the disappearance of the society. This was concluded stating that “the recognition of the sole proprietorship did not imply a breach with the principle of Universal Asset Liability sacred in article 1911 CC”, because such a limitation of liability referred to society and not to a single member, in a way that it did not imply but keeping the same regime that was already recognized and accepted respect to corporations.

² *Vid. FUGARDO ESTIVILL, J.M^a, Jornadas académicas con motivo del 150 aniversario de la Ley del Notariado*, Bilbao, 2012. This same doctrine is reflected in the RDGRN of 13th and 14th November 1985, adopting again a more favourable position mentioned in the Resolutions of the same organism, of 11th April 1945, 22nd November 1957, 18th June 1979 and 7th July 1980.

its Internationalization, with a controversial legal figure –at least in what refers to its peculiar regime of liability. It constitutes the new legal form, not as a Social Entrepreneur but as an Individual Entrepreneur– denominated of Limited Liability (hereinafter EIRL, by its initials in Spanish), which idiosyncrasy consists on the conservation of the condition of the entrepreneur as an owner, but raising special assets aimed at the exercise of the entrepreneurial activity with the assets liability separated to a certain extent for the personal debts and the business debts.

The doctrinal precedents about the admission of the figure of the EIRL are found in the work of the Austrian lawyer OSKAR PISKO¹, work that inspired the legal regulation of the limited liability. However, in our Spanish Law there have been different proposals to introduce the figure of the “Individual Limited Liability Company”², and it has been highlighted that this is not but the last stage of the legal evolution of the notion of liability, evolution that begins in the times where the debtor first paid with their life, then with their freedom, later on with all their assets, and to finish with, in modern times, they paid only with the loss of the shares of a Limited Company or with the shares of a Limited Liability Company. The Individual Commercial Company of Limited Liability does not make but finishing this evolution in a logical and normal way³.

¹ PISKO, O., “Die beschränkte Haftung des Einzelkaufmannes, eine legislatorische Studie”, *en Zeit-schrift für das private und öffentliche Recht der Gegenwart*, Vol. XXXVII, 1910, p. 609 y ss. (Quoted text in *Archiv für die civilistische Praxis*, Vol. 173, J.C.B. Mohr, Tübingen, 1973, p. 279).

² *Cfr.*, among others, GARCÍA ÁLVAREZ, S., (1944); TRÍAS DE BES, F., (1946) o DE CAÑIZARES, S., (1957); it was also presented a legislative proposal dated on the 23rd of November 1984, by the Grupo Popular (Popular Group) in the Spanish Senate, with the objective of “placing the individual enterprise in the same conditions as the corporations, which, almost all of them, limit their liability to the amount paid by the mebers” and which focused on particular aspects of the problems derived from the admission of this model; in the Exposition of Reasons of the proposal it was stated that in the development of the Law it was kept “the structure of the Law that regulates the Limited Liability Companies, and in fact, the current legal text is an adaptation of that one, to the characteristics which apply to an individual Enterprise”. Besides this law draft, in the year 2008 another Law Draft was prepared, in order to regulate the figure of the individual entrepreneur of limited liability, initiative set by the Spanish Parliamentary Group Esquerra Republicana-Izquierda Unida-Iniciativa per Catalunya Verds (*Official Gazette of the Spanish General Courts of 23rd May 2008*).

³ *Vid.* CALVO SORIANO, A., *Consideraciones a la empresa mercantil individual de responsabilidad limitada*,: 161-188, en *Homenaje a Juan Berchmans Vallet de Goytisolo*, Vol. III, Consejo General del Notariado, Madrid, 1988.

II. - THE FIGURE OF THE ENTREPRENEURIAL OF LIMITED LIABILITY (ERL)¹

This new figure gives to a natural person that decides to initiate a new entrepreneurial activity on their own, as a freelance, the opportunity to have available an adequate means for it, avoiding somehow one of the risks that suffers every individual entrepreneur: that of the Universal Asset Liability, established in article 1911 of the Spanish Civil Code². Nonetheless, the legislator has considered as appropriate giving a new possibility to the individual entrepreneur, what even “with bare advantages and excessive obligations”³ may lead to certain entrepreneurs to choose this way to begin their activity.

The constitution of an ERL is a possibility based on the autonomy of willingness, which intends to place in equal conditions the individual entrepreneur and the corporations that limit their asset liability to their own funds, without having their leaders prosecuted after their assets in case of bankruptcy. However, it is easy to observe⁴ that in spite of the individual entrepreneur finding themselves in similar conditions, they suffer the not-at-all-desirable consequences in the familiar assets, which is why we need to look beyond and see this new legal institution⁵ as another contribution to the so-desired

¹ “El empresario de responsabilidad limitada” (ERL), hereinafter “ERL”, by its initials in Spanish.

² *Article 1911 of the Spanish Civil Code* points: “Of the fulfillment of the obligations is liable the entrepreneur with all their assets, both present and future”. After coming into effect of the Law of Entrepreneurs, the new legal figure of the Entrepreneur of Limited Liability will achieve that its liability and the action of the creditor, having origin in the entrepreneurial of professional debts, do not reach to the subject asset, by exception as disposed in *article 1911 of the Spanish Civil Code and in article 6 of the Spanish Code of Commerce*, paying attention to section 2 of article 8 of the *Law 14/2013 of 27th September Law on Support of the Entrepreneurship and its Internationalization*, as long as such not relation is published in the form established by the Law.

³ GARCÍA-VALDECASAS, J.A y MERINO ESCARTÍN, J.F., “El emprendedor de responsabilidad limitada”, Granada, 2013.

⁴ *Vid.* last epigraph of the article, “Argumentation of the future of the law and final reflections”.

⁵ Already implemented in other countries, as an example we can point out by closeness to our legal system the French case, *Law 2010-658, 15th June 2010; Vid. TERRÉ, F., “EIRL. L’entrepreneur à responsabilité limitée”, Edit. Lexis Nexis Litec, Paris, 2011, pp.1-9*; indicating that the condition of “Individual Entrepreneur of Limited Liability” can be nominated to any physical person that performs an entrepreneurial or professional activity, expressly excluding legal personalities (art. 526.6 of the French Code de Commerce). However, the French legislator has developed in this point a more extended regulation than that of the Spanish legislator, when making reference to the possibility that “underage people are constituted individual entrepreneurs of limited liability”. Thus, the French Law foresees that “an underage person can be authorized by their parents or, when applicable, by their legal guardian, to carry out the

“creation of employment”; it will allow individual entrepreneurs (who do not want or can begin their entrepreneurial activity under the “social” legal form, already consolidated) to opt for exercising their entrepreneurial activity in a much safer –or protected- way in relation to how it was previously developed.

The ERL, in its last term, is not but an individual entrepreneur qualified by the fact that, under certain conditions, they enjoy a partially limited regime of liability by the debts derived from the exercise of their entrepreneurial activity¹; the limitation of liability requires though the delimitation of the origin of their acquired debts², and this will be the result of the origin of their entrepreneurial or professional activity. Their possible controversies of origin are solved out thanks to the mechanisms of public registry, given that in the first registration of the individual entrepreneur in the Spanish Mercantile Register (hereinafter RM, by its Spanish initials) the following information must be made explicit: the objective of their enterprise and the indication of the economic activity code that best describes it; the publicity of the condition of entrepreneur through their registration in the RM³ and in the Spanish Land Registry (hereinafter RP, by its Spanish initials); its publication in the Official Gazette of the Spanish

administrative acts required for the creation and management of an individual enterprise of limited liability, not being able to carry out disposition acts, since these can only be carried out by their parents or legal guardians”. The Portuguese case, with the implementation of the *Decree-Law of 25th August 1986*, on “Establecimiento individual de responsabilidad limitada”; this country also incorporated the “Sociedad Unipessoal por quotas” (SUQ) in their *Código de Sociedades Comerciales de 1996* (both modalities are still on force). And far from our frontiers, to an international level, we could refer other legal precedents referring the figure of the EIRL, as the Chilean case, and more specifically in the *Chilean Law N° 19.857, promulgated on the 24th January 2003*, which in its article 2 establishes that “the individual enterprise of limited liability is a legal personality with own assets different to that one of its ownership, it is always commercial and subdues to the Code of Commerce no matter what its objective is”, and it can carry out any type of civil and commercial operations, except for those reserved by law to the limited companies, although after this Law, the Chilean legislator admitted the constitution of “sole proprietorships” by modifying the article 424 of the Code of Commerce (*Law n° 20190, D.O. 5th June 2007*). Same applies in Costa Rica (more specifically in articles 9 up to 16 of the Code of Commerce, First Book, First Title, Chapter II, referring to the “Individual Enterprise of Limited Liability”, written according to *Law of 30th April 1964*.

¹ Article 12 of the Spanish Constitution; art. 4 of the Spanish Code of Commerce and art. 7 of the aforementioned law 14/2013 of Entrepreneurs.

² *Mercantile Register Regulations* (hereinafter RRM, by its initials in Spanish) art.90.4 and art.20 of the Law 14/2013.

³ Art.9.1 of the *Law 14/2013*: “established by affidavit or the application by using the electronic signature of the entrepreneur or application signed by the entrepreneur, with the signature certified by a notary or extended or ratified in front of the registrar.”

Mercantile Register (in Spanish, BORME); its indication in all the documentation; the presentation and audit of their annual accounts and the important requisite *sine qua non* of pointing out and valuing the primary residence –as to limiting liabilities. One of the more important novelties on the side of the legislator is that the norm will preserve the primary residence of the debtor in front of possible claims of creditors due to debts generated after the entrepreneurial or professional activity, with the exception of the cases of fraud or gross negligence¹. This novelty minimizes the risks (and we shall also include here the word “fears”) that rise up among all the entrepreneurs in general so that is why we must favour them an incentive and a motivation so they do not give up in their ambitions, entrepreneurial projects and willingness to formalize and create a new type of entrepreneurship backed up and more protected than the existing ones, to a personal level.

III. - PREVIOUS REQUISITES FOR INVESTORS THAT WANT TO BECOME ENTREPRENEURS IN SPAIN: THE RESIDENCE VISA FOR ENTREPRENEURS AND BUSINESS ACTIVITY

Under this case can be grouped up both the investors that present an entrepreneurial project that is going to be developed in Spain and that is considered and credited as of general interest, and those ones who would like to enter in Spain and settle there for a period of one year with the only or main aim of arranging the required papers to be able to develop an entrepreneurial activity. In its articles, the Law contemplates an speeding-up of this process, establishing with a general character a resolution period of 10 days for all the Visas included in it², being the Residence Visa issued under the current Law enough title to dwell in Spain for one year needless to process the identity card for foreigners; it consequently offers the possibility of initiating an entrepreneurial activity, which also means that the renovation of the residence will be possible even if there are absences of over six months per year in the case of Residence Visas and authorizations for foreigners investors or foreigners workers of

¹ However, this exception will not be applicable to the debts with the public administrations (namely Spanish fiscal organism and of the Social Security) nor with the Banks.

² Stay Visas and Residence Visa will be issued by the Diplomatic Missions and Consular Offices of Spain.

enterprises that carrying out any activity abroad have their main headquarters in Spain¹.

It must be taken into account that it is likewise admissible a significant investment of capital² when the investment is carried out by a legal personality, with domicile in a territory that does not have the consideration of tax haven according to the Spanish legislation, and the foreigner must hold directly or indirectly most of the rights of vote and have the faculty to appoint or destitute most of the members of their organ of administration.

The holders of the Residence Visa can apply for an authorization of residence for investors, fulfilling the requisites dictated by article 66 of *Law 14/2013* –which initial duration will be of 2 years, with the possibility to renew it subsequently for the same period. Foreigners must go on fulfilling during the validity of the Visas and authorizations the conditions that gave them access to it, having the authorities the right to carry out the required verifications if necessary (Additional Provision 7th). They will have the possibility to apply for a Visa to enter in Spain and settle there for a period of one year with the only or main aim to arranging the required papers in order to be able to develop an entrepreneurial activity. They can likewise access to the situation of residence for entrepreneurs when they can justify that previously has occurred the effective start-up of the entrepreneurial activity for which the Visa³ was requested, being this valid in the whole national territory⁴. On the other side, the called “uniform Visa”

¹ *Law 14/2013* art.61 to 76, Additional Provision 4th and 5th; establish a number of measures through which makes easier and more agile the granting of residence Visas and authorizations, where foreigners non-Nationals of European Union countries must prove they are investors, entrepreneurs, highly-qualified professionals, researchers or workers that move themselves within the same enterprise or group of enterprises so they can be facilitated their entry and stay in the Spanish territory.

² It will be understood as “significant investment” of capital that one fulfilling some of the following conditions: a) an initial investment worthy 2 million € or above in titles of the Spanish public debt, or worthy 1 million € or above in shares of Spanish enterprises, o bank deposits in Spanish financial entities; b) the acquisition of real state in Spain with an investment worthy 500,000 € or above for each applicant; c) an entrepreneurial project to be developed in Spain and considered and credited as of general interest, paying attention to specific conditions such as working one, socioeconomic impact or innovation.

³ By “entrepreneur activity” is understood that one of innovative character with special economic interest for Spain, and to such effect it must count with a favourable report by the competent organism of the Spanish General Administration of the State.

⁴ Likewise, those professionals nominated as highly qualified will have the possibility to apply for a residence authorization for highly-qualified professionals, which will be valid in the whole national territory, the enterprises require the incorporation in Spanish

can be issued for one, two or multiple entrances and its period of validity will not be over five years.

According to the *Additional Provision 4th of Law 14/2013*, the authorizations of residence contemplated in the current norm will be treated according to what it is said in *Directive 2011/98/EU of 13th December 2011* on a Single Application Procedure for a Single Permit for Third-country Nationals to Reside and Work in the Territory of a Member State and on a Common Set of Rights for Third-country Workers Legally Residing in a Member State. The applications for issue, modification or renovation of these unique permits will be presented through a unique procedure of application. In another way, the *Additional Provision 6th* (of the same law) allows the renovation of the residence permit to be performed even when there are absences over six months a year in the case of the residence Visas and authorizations for foreigner investors or foreigner workers of enterprises that performing their activity abroad have settled their main headquarters in Spain. Of course, all of this does not affect the need to prove, according to the current legislation, the continuity of residence in Spain for the acquisition of the long-term residence or the Spanish nationality.

IV.- “LIMITED LIABILITY” OF THE INDIVIDUAL ENTREPRENEUR

In general, the liability of the entrepreneur arises from the contractual and extra-contractual sphere, either due to the breaching of the existing contracts with other people –either entrepreneurs or clients– or due to the harm caused out of that contractual sphere, according to the general norms contained in the Spanish Civil Code (specially based on article 1902) or according to the specific norms (as is the case, for example, of the area of the liability for defective products or unfair competition¹). The essential characteristic and last

territory of foreign workers for the development of a working or professional relationship included in any of the cases listed, referred to directive or highly-qualified personnel and to graduate or postgraduate people of universities and business schools of recognized prestige.

¹ *Law 22/1994 of 6th July on Civil Liability for the Damages Caused by Defective Products* (Official Spanish Gazette n. 161, 07-07-1994) modified by *Law 14/2000, of 29th December on Fiscal, Administrative and Social Order Measures* (Official Spanish Gazette n. 313, 30-12-2000, p. 46631 ss.) in its article 2 and later on derogated by the *Royal Decree Legislative 1/2007 of 16th November, by which approving the revised text of the General Law on the Protection of Consumers and Users and other supplementary*

justification of the figure of the ERL is the limitation of their liability for the debts derived from their entrepreneurial or professional activity, when applicable. Such a limitation will have a partial character, this is, it will not affect all the assets of the entrepreneur but only one asset, their primary residence and only if its value is not above a specific sum¹, and besides, whenever such link be established in the form mentioned in the Law and fulfilling all the other requisites indicated in it. According to the fiscal Spanish law, the primary residence² must not be attached to the professional activity, as in the case of the real estate being estimated in its totality to the development of the entrepreneurial activity³ could not benefit of such a limitation – not exemption of liability.

The primary residence can be property of the ERL or in the case of marriage, common to both spouses, such a circumstance not constituting an obstacle for the residence to be excluded from liability, as long as it is so indicated in the registration of the entrepreneur in the RM⁴. However, if the residence belongs to both spouses in half and joint property or to the spouse of the entrepreneur, it would indeed be necessary the permission of the other spouse –by means of stating that it is actually the primary residence of the family– for that residence to be exempt of liability, in spite of considering at the beginning that it is a beneficial act for both spouses⁵. It is necessary to leave a track that the transmission of the primary residence to a third party⁶ would extinct respect of them the benefit of the exemption of liability of the real estate, although nevertheless nothing would

laws (Official Spanish Gazette, n. 287, 30-11-2007, pp. 49181-49215) and Law 3/1991 of 10th January of Unfair Competition.

¹ Art. 8.2 of the Law 14/2013, where is indicated that the delimitation of the exclusion of the primary residence of liability for entrepreneurial debts requires its value not be above 300,000 € (in populations below 1 million inhabitants, or 450,000 € if it is placed in populations with more that 1 million inhabitants).

² That one where the contributor dwells for a continued period of 3 years, constituting so the effective use and with permanent character by the contributor himself, circumstance that is not affected by the temporal absences.

³ Art. 8.4 Law 14/2013.

⁴ In this sense, we deduce that the Law is exclusively referring to the privative residence of the entrepreneur; or to the common residence of the entrepreneur spouse married in case of community property matrimonial regime, needless in these cases the consent by the entrepreneur spouse as it is not disposition act, but simple appointment of a residence as primary of the family.

⁵ What we might think as unnecessary is the consent to obligatorily have to be granted by public deed, as it would be enough that consent to be granted in the same way and with the same requisites that the entrepreneur needs for their registration in the RM.

⁶ Art. 10.4 of the Law 14/2013.

impede the acquiring person, fulfilling every requisite required for this case, to be constituted in ERL with the aim to translating the no affection to the acquired asset.

The aforementioned limitation of liability of the ERL, besides of being partial as for its object –primary residence- is subject to other limits. So are excluded from the benefit of the limitation of liability both certain social debts –for not having their origin as a consequence of their professional or entrepreneurial activity- which origin was previous to the inscription as ERL in the RM¹, and also will be excluded the debts contracted in the Public Law (such as the fiscal ones or those ones contracted with the Social Security)². In this last case though, its execution would be possible if there were no other known assets of the debtor with enough total value liable of immediate realization in the process of appraisal; between the notification of the first attachment order of the asset and the material realization of the procedure of alienation there must be a period of at least two years, period that will not be interrupted nor suspended in the cases of extension of original seizure or in the cases of postponement of the annotation in the registry.

A) Legal effects of the entrepreneur of limited liability

The partial limitation of the liability of the ERL, established in article 1911 of the Spanish Civil Code and in article 6 of the Spanish Commercial Code, is the fundamental legal effect of such an institution. By virtue of this, the primary residence of the ERL is freed from liability as long as its value is not over 300,000 € (or 450,000 € in populations of more than one million of inhabitants)³. This may be one of the main problems that the Law⁴ poses.

¹ Art. 9.3 of the *Law 14/2013*, exception made to those debts that even before to that moment –registration in the RM- were openly accepted by the creditors of the entrepreneur.

² Additional Provision 1st of the *Law 14/2013*: “it will not be applicable the limited liability for the individual entrepreneur respect of the debts of Public Law of which is holder the entrepreneur of limited liability for which collecting management is applicable what establishes the *Law 58/2003 of 17th December on General Taxpayers*, in *Law 47/2003 of 26th November, General Budget and in the Royal Decree-Legislative 1/1994 of 20th June approving the recast General Social Security Act*.

³ The value is determined according to what establishes the tax base of the Tax for Transmission of Assets and Documented Legal Acts (ITPAJD, by its initials in Spanish) in the moment of the registration in the Mercantile Registry.

⁴ In this sense, we need to be critic and point some questions that arise such as: Who fixes the value of the primary residence, the ERL or a third party? Of those different means used to value established in art. 57 of the General Taxpayers Act, applicable by

A new limit that is observed after analysing the current Law –for this special regime of liability- is the exemption of limited liability on the side of the entrepreneur that may act with fraud or gross negligence in the fulfilment of their obligations, as long as that gross negligence or fraud is declared in final judgment or in body of creditors after having been declared guilty. In spite of the generality with which the precept is pronounced, the main non-fulfilments in front of third parties will happen in the qualification of the residence that is treated as the primary one of the family and in its valuing. It is obvious that the law cannot shelter the fake or fraud declarations that may occur at this point.

On the other side, there will be a new limit to the exemption of liability for the primary residence when it is about fiscal debts or about the Social Security. The Additional Provision 1st deals with the development of the limitation that the ERL has respect of the debts of the Public Law. In an imported norm, from Law 20/2007 on Freelance Worker Statute, it is established the subsidiary character of the primary residence with respect to these debts in a way that the seizure over the primary residence of the ERL will be only executable when there are no other assets that are enough to pay back the debt. It is also established that, between the first attachment order and the execution of the seizure, there must be a period of two years. Both requisites will have the possibility to be qualified by the Registrar. Given the subsidiary character for the execution to be established, we believe that it would have been more favourable for the ERL not being able to take the seizure over the residence appointed as primary while the debtor owns other assets enough to cover the debt. As a consequence of the limitation of the liability established, the Property Registrar will deny the seizures of the not-subject asset, unless from the ordering that results in that non-entrepreneurial debts, professional debts or ones previous to the inscription of the limitation of the liability are ensured. The effects in the RP are produced with independence of the inscription in the RM, this is –and as expressed in point 1 of article

reference to art. 46 of the ITPAJD, which one is applicable? Who will choose that means? Will it be enough the mere declaration of the ERL to fix the value of the primary residence? In this sense, we stick to the doctrine (just like GARCIA VALDECASAS states) and we also believe that maybe, “it would have been better to declare as completely exempt of liabilities the primary residence of the ERL, whatever its value”.

10- “for its possibility to oppose against third parties the non-subjection of the primary residence must be inscribed in the RP”.

Finally, we must take into account a new limit established by the Law delimited to the area of the period of time that compulsorily must pass for the presentation of the annual accounts in the RM by the EIRL, so “having passed seven months from the closing of the exercise, if the annual accounts of the EIRL have not been deposited in the RM, turns void the limitation of liability of the same respect of the contracted debts after the end of that period”. Again, the Law qualifies and exposes that after being presented, they will recover the benefit of the limitation of liability proper of these entrepreneurs. Even if we talk about “deposit”, it is clear that in order for the limitation of liability not to stop, it will be enough the presentation of the accounts in the RM, with independence of the effective moment of the deposit, as long as it is performed within the five months of validity of the annotation of presentation or within the period of validity of the same annotation if it has been postponed for negative qualification¹.

B) Requisites for the limitation of liability

We understand that there are grounded reasons –as some authors quote² - to consider that the limitation of liability is a dogma of the Private Law. In the case we are dealing with, for the entrepreneur to be able to enjoy such a limitation of liability, they must fulfil some requisites; in first place, as we have been developing:

a) The debts must bring causes of the exercise of their entrepreneurial or professional activity. From this point of view, it will be really important the fixing and public registry of the activity of the entrepreneur or as established in article 90.4° of the Mercantile Register Regulations, “the objective of their enterprise”. At this point there must be of application the same rules that apply to commercial companies, very mild (we must point out) since the publication of the model statutes of the “express companies”, established by the *Order JUS/3185/2010 of 9th December*. The activity, in spite of its obvious transcendence, will have the possibility of the amplitude allowed by

¹ This has a clear consequence in the Land Registry, since the registrar, before reject a seizure against the primary residence of the ERL, must find out whether they have any debts by certificate from the RM or by direct consultation to the database of that Register.

² LAZO GONZALEZ, P., “Limitación de la responsabilidad: bases romanas de un dogma iusprivatista”, *Revista de derecho (Valdivia)*, vol.25, nº 1, Chile, 2012, p. 10.

the aforementioned order, which will difficultly make any activity of the ERL stay out of what the Law requires, although obviously the professional activities will be only exercised by the ERL who has such a quality. To such effects, for the registration of a professional ERL or one with professional activities, they must prove such a quality, by analogy with what is established in article 7 of the *Law 2/2007 of 15th March on Professional Corporations*, with the certificate issued by the corresponding Official Professional Association, and in case of not being compulsory the membership to a member of any Official Professional Association, it will be enough to prove having obtained the required enabling title.

b) Compulsory requisite is the inscription in the Mercantile Register where must be included the real estate exemption; in this case, the competent registry will be that of the domicile of the entrepreneur, but it that does not necessarily have to coincide with the place where the exempted primary residence is located. This is, on the one hand we find the domicile of the activity or of the main establishment, as stated in the Mercantile Registry Regulations, and on the other hand we find the place of location of the primary residence that is not seen as inconvenient, even if it is placed in another province.

c) Requisite, the inscription in the Land Registry –as indicated in article 10.1- essential for the possibility to oppose to third parties.

d) The Law requires the ERL to make this quality explicit in all its documents, which will be able to make in two different ways: either adding to the inscription data in the RM that they are an “Entrepreneur of Limited Liability” or adding the letters “ERL” to their name, surname and Spanish ID number.

e) It is likewise explicit the Law in obliging the ERL to formulate and subdue to audit, in its case, the annual accounts corresponding to its entrepreneurial or professional activity–although for this, article 11.1 refers to the norms of the sole proprietorship of limited liability (that of the corporations)- and in obliging to deposit them in the RM.

f) Lastly, it is compulsory requisite for the entrepreneur that the value of the not affected residence is not over 300,000 € or 450,000 € depending on the case¹.

¹ Art. 8.2 of the *Law of 14/2013*: “the primary residence of the debtor will have the possibility to benefit from the limitation of liability as long as its value is not above

C) The registrations of the entrepreneur of limited liability

The registration of the ERL, both in the Mercantile Register and in the Land Registry, is of vital importance for the obtainment of the limitation of liability. That is why it is regulated with relative detail both in their requisites as in its form and also in its papers, whereas the registration in the RM as a general rule “will be practiced in the form and with the foreseen requisites for the individual entrepreneur”. Therefore, are applicable articles 87 to 93 of the Mercantile Register Regulations¹. It must be indicated the “asset non affected”, this is, which one is the primary residence of the entrepreneur with the value that may have been given or simply with the indication, if it so results from the title, that that residence fulfils the requisites established in article 8 sections 1 and 2². The indications for the title of the inscription are: the affidavit or the application by using a recognised electronic signature of the entrepreneur and electronically sent to the RM, or even the application signed by the entrepreneur, with the signature certified by a Notary or extended or ratified in front of the Registrar.

For the inscription in the Land Registry –equally compulsory requisite-, there is indeed only one title to practice it: the certification issued by the RM of the inscription practiced, which must be sent electronically to the RP in the same working day where it has been practiced. Equally, the Law regulates –in its article 14 within the chapter relative to the beginning of the entrepreneurial activity- the way to practice the registration of the ERL and points out the procedures of registration, both in the registration in the RM³ and in the RP.

300,000 €, valued according the tax base of the Tax for Transmissions of Assets and Documented Legal Acts in the moment of the registration in the Mercantile Register. In the case of residences located in populations of more than 1,000,000 inhabitants, a quotient of 1.5 over the value of the previous paragraph will be applied (this is, 450,000 €).

¹ The registrar tariffs for the registrations of the Entrepreneur of Limited Liability in the Mercantile Register and the Land Register will be 40 € in the Mercantile Register and 24 € in the Land Register. On the other side, the publication of the registration of the entrepreneur of Limited Liability in the Official Gazette of the Mercantile Register will be free of charge and taxes.

² *Vid.* margin note 38 of the current research.

³ Apart from the already studied, it is equally possible to register as a novelty through the CIRCE (Spanish for Centre of Information and Net of Creation of Enterprises). In this case, in the so-called PAE (Spanish for Point of Help to the Entrepreneur) created by the Law –not to be confused with the former PAIT (vid. Additional Provision 2nd of the Law)

D) Extinction of the regime of limitation of liability

The Spanish legislator has not manifested when it is the end of the separation of assets of the entrepreneur. Undoubtedly, the institution of the ERL would be extinguished with the deceasing of the entrepreneur, except in case of continuation of the activity by an underage or unable person, case in which it would be understood that it will be the underage or the unable person the one acquiring it. Likewise, and in spite of not having been foreseen in the Law the waiver and given that the ERL can freely assume such a legal statute, we deduce that they will equally waive it when they so consider it appropriate, although due to the lack of regulation in this point, it cannot be determined which one will be the form that must be adopted for the waive¹. According to the requisites for the constitution of the figure, we understand that the entrepreneur must cancel the registrations initially made in Mercantile Registry and in the Land Registry, or else indicate, next to both registrations, the formulated waiver. In the same way, if there is a total waiver to this regime, it would fit the waiver on the side of the ERL in a partial way, for example, allowing the entrepreneur any or some of their creditors holders of credits that are related to their activity to execute such rights of credit over their primary residence.

V. - ARGUMENTATION OF THE FUTURE OF THE LAW AND FINAL REFLECTIONS

The review of this legal frame that we have developed will be made annually –depending on the compromise of its promoter which is the Government-, with the aim to be adaptable to the environment and to eliminate every obstacle identified and that may endanger its future.

and where will be formulated the Unique Electronic Document with all the necessary data for the registration of the ERL. It is necessary to provide all the required documentation, which will be immediately sent to the RM, having this 6 working hours to process the registration and send the certificate to the CIRCE, which will send it to the competent fiscal authority for every use and effect.

¹ MUÑOZ GARCÍA, A., “El Emprendedor de Responsabilidad Limitada. Reflexiones sobre el ámbito de protección”, en *Diario La Ley*, nº8233, 2014; considers that “it will be enough if the entrepreneur does not fulfill their obligation of deposit of the annual accounts to make disappear their regime of limitation of liability, understanding so that this could be the way of waiver”. However, we do not believe that this is the most appropriate option, since the breaching of such an obligation leads to a fine, by which the entrepreneur must respond with all their assets for the acquired debts during the period of 7 months from the ending of the social exercise without having deposited the accounts in the Mercantile Register.

An extra mention deserve the highlighting of the fact that along the future and passing of time –and we, scholars of Law, know perfectly what we are talking about- are many the revisions, modifications and clarifications that are raised after the promulgation of a law, finally making the law to equally adapt itself to the environment where it unfolds. In this context, we conclude that the present Law, in spite of being prolific as for its measures –some of them really new- and all of them with the main objective of the continuous support to the entrepreneurs to foster the entrepreneurial culture (and about which we must recognise preoccupation and sensitiveness of the legislator with this new model of individual entrepreneur that claims)¹, we must also be critics and evidence –unless of course existing a best-fit explanation- that in relation to the assets liability, this new existing institution, so as to protect the general interests and the security of the legal traffic, we believe that all the referred to its creation of autonomous or separated assets, should be explained, manifested and clarified –maybe with a later regulation that develops them. Thus, we are convinced that the corresponding formal, constitutive, dispositive, with the capacity to oppose, of publicity and liability aspects could be compared with a greater amplitude to the legal warrants in front of the creditors that offers the already consolidated “social entrepreneur”, in comparison to this other individual –of limited liability- entrepreneur that in spite of protecting their assets, will remain limited and, therefore, minimally guarded.

It is true that it has been the very same constitutional doctrine the one that has been admitting the free configuration on the side of the legislator of the assets or rights that can be declared non apt for their seizure as for the recognition of a “vital economic minimum”, the dignity of the person and the protection and defence of other constitutional values of private or public interest, as for this measures to be balanced, limited and proportioned and without after that

¹ A lot and very new measures of different types: working type (related to Social Security, Register Book for the Work Inspection in electronic format, international mobility, lower taxes for Young entrepreneurs, capitalization for unemployment, harmonization of the economic help and registration in the RETA... among others), of fiscal type (modification of taxes, exemptions, State and autonomic reductions...); mercantile type (creation of the entrepreneur of immediate liability, liberalization of the commerce, beginning of the entrepreneur activity...), educational type and so on. This is, measures contained in the legal text that are or can be or invaluable usefulness for every individual entrepreneur that wants to access to the normative and institutional environment where the entrepreneur activities take place.

resulting breached the principles of equality and the legal guardianship effective; it is true that likewise this asset ordination and the subsequent limitation of liability of the individual entrepreneur is fundamentally recognised for the first time for the individual entrepreneur –of limited liability- and it is preserved with such an equality (at least that was their pretention) with respect to the societies of capital, favouring the creation of employment and, definitely, contributing to the economic development. To be honest, we must finish this legal and practical reflection, with a critic –in our humble opinion and in an absolutely constructive way towards the legislator- pointing out that it is still soon to determine the reach of this norm – without taking, we insist, merit out from the legislator, that has preoccupied and made aware and adapted in a certain way to the environment and popular claim, offering these and many other legal initiatives towards the fostering of the entrepreneurial activity-, but we do insist that we do not believe that this entrepreneurial model implemented for the individual entrepreneurs, in spite of the already existing one in the institution of the “sole proprietorship” offers the same regime of protection and the highest security legal intended – liability- to the individual entrepreneur that guarantees and rockets them the entrepreneurship through this way, as opposed to the settled way of the local entrepreneur. The current Spanish Companies Act undoubtedly with a more develop and deeper legislation, backs up and protects the liability and offers greater guarantees to the societies in front of their creditors in relation to possible acquired debts for compromising only what was provided to the corporation, and not all their assets with exception of one only asset, as it is the case of the individual entrepreneur –the ERL. So we consider necessary a greater regulation to develop a new regulative norm to clarify a part of its articles that sometimes tend to offer too many interpretations.

Definitely, the sole proprietorship has been the mechanism used until the moment by the individual entrepreneurs to limit the risks assumed in the development of its economic activity, and it seems likely that it is going to be so if the new alternatives that sets the legal ordering turn out to be more compromised and its results are less satisfactory (in a future we will see the result of this new initiative). The procedure of constitution of a “sole proprietorship” is currently extraordinarily agile and easy, and same can be said of its working

regime. Therefore, given its greater complexity and the countable obligations that are imposed to it, not even in this aspect the new figure of the EIRL offers greater benefits to the entrepreneur, but for the economical saving, sometimes vital, for this new individual entrepreneur that cannot face, as it is their wish, the creation of an enterprise under the shelter of another legal form –as could be the corporative one.

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