

TRANSFER OF SHARES– SIGNIFICANCE, JURIDICAL BASIS, PRACTICE

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The current paperwork will submit to debate certain aspects related to the significance and the juridical basis of the transfer of shares within a limited liability company. Until recently, the transactions having as object the selling-buying of shares were structured in such a manner that they would respond, in the best way possible, to the common interests of the buyer and the seller, while the registration of the transfer of shares in the Trade Register would, in most cases, appear as a ulterior formality which would not necessarily represent an essential element in the transaction's structure for any of the parties.

Currently, by means of the recent adjustments brought to the Law no. 31/1990, are introduces new regulations of procedural and material character, which practically reconfigure the transfer of shares. In brief, according to the new legislation, the decision of the shareholders' meeting, adopted upon a qualified majority of 3/4 of the share capital is to be submitted within a 15-days term at the Trade Register's office, in order to mention it in the registrar and to publish it in the Official Gazette of Romania, IVth Part.

Creditors and any other prejudiced persons by the decision of the partners regarding the transfer of shares, may formulate an opposition by means of which the court is requested to attract the civil liability of the partner who intends to transfer his/her shares, as well as to compensate the prejudice caused as a consequence of this transfer of shares.

The transfer of shares will operate, in the absence of an opposition, at the date of termination of the opposition term, and if an opposition was formulated, at the date of communication of the decision to reject it.

Key words: partner, limited liability company, shares, transfer of share,.

JEL Classification: K12, K22

I. INTRODUCTION

It should be outlined since the beginning the fact that being in the possession of shares represents, on one hand, the *sine-qua-non* condition which must be accomplished when acquiring the status of shareholder of a limited liability company, and on another hand, a company right, which correlates with the founders' liability to submit their contribution to the share capital.

The right over the shares rejoices from a prescriptively and jurisprudentially well-determined legal regime, which harmonizes distinct interests, determined by the two-tier nature of the limited liability company, governed by the *intuitu personae* principle. (B. Petit, 2008, p.126) It can be noticed, in the first place, the partner's interest to dispose freely of his/her shares, and, in the second place, the common interest of the other partner to decide upon the persons who possess or are about to detain the status of partner in the respective company. As a consequence of this conflict of interests, the shares cannot be represented by negotiable instruments (M. Dumitru, C.Ignătescu, 2013, p.71), the partners being able to derogate from the law by stipulating, in the memorandum of association, the injunction to dispose of shares (para.2 of the art.11 Company Act).

In accordance with the art.11 of the Law no.31/1990, the shares represent "equal division of the authorized capital"(C. Lefter, 1993, p.77), which nominal value cannot be inferior to 10 lei; each share offers the right to vote within the general shareholders' meeting (art.193, para.1 of the Law no. 31/1990).

Thereby, the shares issued by the limited liability company are fractions of equal value of the authorized capital, endowing the shareholders the same prerogatives;(I. Schiau, T. Prescure, 2007, p.76) such as the fact that one share ensures the incumbent a vote within the general meetings (F. Stârc-Meclejan, 2011, p.86). However, the legal text outlines the fact that the limited liability company cannot issue shares lacking voting right, as are, for instance, the option shares of debenture stock without any right, issued by the joint stock companies, according to the art.95 of the Company Act (I. Schiau, T. Prescure, 2007, p.579).

Each share's nominal value is established by the shareholders in the articles of incorporation, mandatorily in the national currency, taking into account the minimum value, established imperatively by the law. The effective number of shares held by each shareholder is directly proportional with the value of his/her

contribution to the authorized capital, thus determining inclusively the quota under which each partner participates to the distribution of the profit and to the bearing of the losses registered by the company.

In the great majority of cases, the shares are indivisible instruments compared to the issuing company, which “acknowledges one single owner for each paid-up submitted share.” (C. Lefter, 1993, p.78)

Nevertheless, bearing in mind the fact that shares may as well be qualified as movable goods by determination of the law (C. Lefter, 1993, p.83) according to the art.542, para.(2) Civ.C., there are situations where several concurrent rights overlap certain shares, held either in common by spouses or in division by the successors of a shareholder. Under such circumstances, if the incumbents do not wish to put an end to this situation by leaving the timeshare, they would appoint a representative who would exercise on their name and behalf the rights endowed by the shares.

Under the aspect of the form, shares cannot be represented by negotiable instruments, in other words they are not transferable within a rapid operation and with a minimum of formalism, such situation being particular to the securities issued by the joint stock company (shares and debentures). In addition, the law prohibits expressly the issuance of negotiable instruments, shares or debentures, by the limited liability company under the sanction of nullity of issuance of such instruments(art.200 of the Company Act).

However, under legally well-established conditions, the disposal of shares by partners or third parties may be accomplished either by means of *inter vivos* acts, or by *mortis causa* acts, these being, at their turn, either onerous or gratuitous judicial acts. Furthermore, the transfer of all the shares held by a partner implies the loss of this statute by the incumbent of the disposed shares, which situation could be qualified as his/her withdrawal from the partnership.

II. SIGNIFICANCE AND JURIDICAL BASIS OF THE TRANSFER OF SHARES

The mechanism of the transfer of shares by means of *inter vivos* acts, summarily regulated by the Company Act, is governed by the provisions of the art.1556 and the following of the Civ.C. under the form of assignment of claims. We must distinguish between the way the assignment operates between shareholders or towards the third parties.

In the first case, the shares are assigned freely, the law does not condition the conclusion of the agreement, on which basis these are disposed to one or several copartners, upon the prerequisite approval of the transfer by the general shareholders' meeting, taking into account the fact that the transfer of shares within the company (among partners) is not detrimental to the company's *intuitu personae* character.(C. Lefter, 1993, p.161; St. D. Cârpenaru, 2012, p.786). If the transfer is onerous, the agreement appears under the form of a private deed. In the situation of the free transfer, a deed of donation of shares will be concluded, which appears under the form of an authenticated deed and is submitted to the regime pronounced upon by the art.1011 and the following of the Civ.C. In all cases, among partners the transfer produces its effects immediately, from the moment of the valid closure of the transfer agreement. For the opposition of the operation against the third parties, the act of the transfer of shares among shareholders must be registered to the Trade Register as well as in the register of the limited liability company's shareholders, pursuant to art.203, para.1 of the Company Act. Furthermore, it is specified in the doctrine that the registration of the shares in the register of shareholders represents the notification of the company as the assigned debtor of the operation which intervened in what concerns the transferred shares.(St. D. Cârpenaru, 2012, p.787)

In what regards the second case, the transfer of shares to third parties *is allowed only if it was approved by the shareholders representing three quarters from the registered capital*.(art.202, para.2 of the Law no.31/1990) Obviously, in the memorandum of association, it may be established a higher level regarding the voting conditions than the one provided by the law, it is possible even to precise the adoption of the decision taken by the general shareholders' meeting with unanimity of votes (C. Stoica, S.L, Cristea, 2008, p.123). The determination of the accomplishment of the voting condition must start with the nominal value of the registered capital while taking into account the quota allotted to each share held by the transferor, stipulated in the shareholders' register.(E. Veress, no.9/2010, p.96 and the following).

In what concerns the majority required by the law for taking the decision of the meeting regarding the approval of the transfer of shares, in the special literature, it was analyzed the situation when the transferor partner holds three quarters from the total registered capital of the limited liability company. In such case, a possible solution consists of the unanimous approval of the transfer by the other/others partners, under the conditions provided by the art.79, para.1 of the Company Act. (St. D. Cârpenaru, 2012, p.788). The situation becomes extremely delicate if the other partner/partners disapprove with the transfer of shares, hence being possible several solutions, all based on the principle of freedom of association, in accordance with which no one may be obliged to continue being a shareholder in a company if this statute fails to comply with his/her interests (C. Lefter, 1993, p.80). A possible solution may consist of undertaking the transferable shares from the partner or partners who are against the cessation, or by the third party to a registered third party, under circumstances identical to those agreed on by the assigned third party; where applicable, followed by the transition of the

company into a limited liability company with a sole trader, upon case. Another solution consists of the withdrawal of the transferor shareholder with the compliance of the requirements in the art.226 of the Law no. 31/1990; or, *in extremis*, the dissolution of the company decided on by all shareholders or by court at the request of one of the shareholders (C. Lefter, 1993, p.79). Certainly, in the silence of the law, the shareholders should provide in the articles of incorporation the manner in which the shares may be transferred to the third parties under the assumption of the misunderstandings occurred between partners. In doctrine was as well formulates a *lege ferenda* proposition to regulate an authentic “preemptive right” in the benefit of the company, (C. Lefter, 1993, p.80) which this should exercise in the situation of appearance of misunderstandings regarding the transfer of shares; thus, the chances to safeguard the company increase considerably. In what regards the shares acquired by the limited liability company, these would be applied *mutatis mutandis* the regime of shares purchased by the joint stock ventures, provided by the art.103¹ and the following of the Law no. 31/1990.

After the approval of the transfer by the general shareholders’ meeting under the conditions stipulated by the art.202, para.2 of the law, it will be drafted the transfer deed of shares between the transferor and the transferee, which will be submitted to the Trade Register together with the articles of incorporation updated with the identification data of the new associates. In this case also, the cessation will be notified to the company by the subscription form of this operation in the register of associates.(St. D. Cărpenaru, 2012, p.789)

The law provides expressly the fact that the cessation of shares to third parties produces effects only starting from the moment of its subscription in the Trade Register. (art.203, para.1, Law no. 31/1990) However, according to the art.202 para.2⁴ of the law, *the transfer of shares will operate, in the absence of an opposition, at the date of termination of the opposition submission term (...), and if an opposition was formulates, at the date of communication of the decision to reject the opposition*. A possible interpretation of the standards mentioned may be in the sense that the term of the opposition, respectively the date of communication of the decision to reject the opposition, coincides with the moment of subscription of the cessation at the Trade Register.

Moreover, from the economy of the legal text it may be outlined the idea that the opposition request governed by the art.202 para 2³ cannot be formulated in the case the shares are transferred among associates (V.Nemeş, 2011, p.244). Or, such a restrictive interpretation leads to the establishment of an unfavorable regime for the personal debtors and for any other persons prejudiced by the cessation of share among associates, a *fortiori* this legal operation may imply a change of power poles within the company, bringing an adjustment of the associates’ partnership, existent at the moment of incorporation of the company (I. Schiau, T. Prescure, 2007, p.601). Consequently, taking into account the fact that in all cases the transfer of shares demands the adjustment of the memorandum of association, in accordant with the art.203, para.3 corroborated with the provisions of the art.204, para.1 of the Law no. 31/1990, it may be concluded that in all cases an opposition may be formulated, regulated by the art. 61 and the art.62 of the law, which forms the common law in this matter.

According to these provisions, the persons entitled to formulate an opposition are those who suffered directly and unbiasedly (St. D. Cărpenaru, S. David, Gh. Piperea, 2014, p.206) a prejudice as a consequence of the transfer of assets either between associates, or to third parties, such as: personal debtors or even the associates’ debtors (I. Schiau, T. Prescure, 2007, p.214).

Although there exists no unanimous point of view, most special authors qualified the opposition by means of which the court is requested obliging the issuant company or the associates the compensation of the prejudice caused, as well as the civil penalty of the guilty transferor, also said an “authentic action of tort liability.”(St. D. Cărpenaru, S. David, Gh. Piperea, 2014, p.208)

Those interested may file an opposition at the Trade Register where the company is registered in a 30-days term since the date of publication in the Official Gazette of Romania or of the decision taken by the general shareholders’ meeting which approved the cessation, or the adjustment additional act (of the transfer of assets). Within 3 days from the filling-in, the opposition is mentioned in the Trade Register and is advanced to the authorized court for solution, more precisely is the court within which territorial radius the company has its headquarters.

The opposition will be judged in the advising chamber, after subpoenaing the parties or a representative assigned by the claimants or the summoned, respectively of a special administrator, upon case. The decision pronounced in the solution of the opposition may be contested on a second appeal.

Together with the opposition, the claimant may also formulate a suspension request of the execution of the decision contested by the opposition, respectively the additional act, in conformity with the provisions of the art.133 of the Law no. 31/1990. The injunction for the suspension of the decision execution or of the additional act may be contested within a 5-day term since the date of the resolution. In all cases, by means of the instrument of the definitive court decision, pronounced in the case, it will also be disposed the registration in the Trade Register of the solution of admission or rejection of the opposition.(I. Schiau, T. Prescure, 2007, p.218)

An opposition may as well be formulated in the situation of the transfer of assets by means of *mortis causa* acts, or by means of legacy or by transmission of property by inheritance, taking into account the fact that the successors of the deceased associate (or who ceased his/her existence, under the assumption of a legal person). From a procedural point of view, if not stipulated differently in the articles of incorporation, the transfer

of shares *mortis causa* accomplishes in similar conditions to that which occurs among associates (I. Schiau, T. Prescure, 2007, p.601), not being necessary the prior compliance of the general shareholders' meeting. In fact, in such situation, it is pursued the insurance of the company's continuity by subrogating the deceased associates by his/her successors, (C. Lefter, 1993, p. 163; St. D. Cărpenu, 2012, p. 791) thus being applicable the dispositions of the Company Act corroborated with the provisions in the Civil Code regarding the transmission of property by inheritance and/or legacy, upon case. In witness whereof the shares are acquired by the heirs by operation of law (*ope legis*), since de date of succession opening, which moment also marks the acquirement of the statute of shareholder, under the condition of the acceptance of the succession (S.L. Cristea, 2012, p.157). In virtue of respecting the freedom of association, under the assumption that one or several successors refuse/refuses becoming associate/associates, it will be necessary the transfer of assets thus acquired either by the associates or the third parties, with the observance of the requirements of the law. In order to preserve the *intuitu personae* character of the limited liability company, the law provides expressly the heirs' obligativity to assign, in the case where by their entrance into the company it is exceeded the maximum number of 50 persons, admitted by the law for this type of company, a number of representative in such a manner that they will observe this imperative condition. The heirs' representatives will be assigned either by the successors, or the other associates, who will exercise the ensemble of rights devolving from the status of shareholder both on their and on the behalf of the other successors. In the doctrine it is outlined that the assignment of certain third parties as heirs' representatives is detrimental to the provisions in the art.202 para.2 of the Company Act. (I. Schiau, T. Prescure, 2007, p.602)

We notify that, in the case where the memorandum of association prohibits the continuation of the company with the successors, the company is obliged to pay the exchange value of the shares held by their author, as determined by the last balance sheet approved. As specified in the doctrine, it may be stipulated in the articles of incorporation that the transfer of assets by successional means shall be accomplished under the same conditions as those provided for the cessation of shares to the third parties.

By all means, the transfer of shares *mortis causa* will be notified to the company once with the request for its registration in the register of associates, following that the documents certifying the administration of the estate as well as the memorandum of association updated with the identification data of the new shareholders to be filed to the Trade Register, in order to ensure the opposition operation against the third parties

Except for the situation when the transfer of shares *mortis causa* is prohibited by the memorandum of association, the law does not stipulate anything with respect to the manner of determination of the "transfer value" of the shares (C.Lefter,1993, p.159), which point has generated a series of problem in practice. Starting from the premise that the act of transfer of assets is with onerous title, it has been established in practice that their value of transfer is greater than their nominal value, subscribed in the articles of incorporation, the positive difference being determined not by negotiation (it does not represent the "price" of the shares), but by comparison to the economic situation of the company, given that it incorporates the "adding value determined by the viability of the business", to which it is added, eventually, the rate of inflation (C. Lefter, 1993, p.160) The circumstance that the shares are transferred at a value greater than the one pronounced upon in the memorandum of association does not represent an adjustment of their value compared to the other shares which are not transferred, taking into account the fact that the law provides expressly that all shares have the same value; any adjustment of their value in the sense of increasing or decreasing must concern all shares issued by a company. However, in principle, it cannot be discussed about a transfer of shares at a value smaller than the nominal if this corresponds to the minimum value provided imperatively by the law in the art.11, para.1 of the Company Act.

The sole partner may transfer all his/her shares solely to one or several third parties, in which case it is necessary the transformation of the limited liability company into a partnership with several associates.

III. TRANSFER OF PROPERTY RIGHT OVER SHARES

Among contracting partners (transferor and transferee), the moment when is accomplished the transfer of shares to persons from outside the company, it is still for the contracting parties to decide, but the possibility to exercise he rights granted by the quality of shareholder is put off. Thus, the future shareholder will be able to exercise the rights provided by the statute of associate only after the date of termination of the term for opposition or starting with the date of notification of the decision to reject the opposition (S. Angheni, M. Volonciu, C. Stoica, 2008, p.186). Within this term, the particular rights of the statute of shareholder will continue to be exercised by the transferor. In order to protect their interests, the assignee will be able to insert in the transfer agreement certain clauses in the purpose of setting a control mechanisms over the company which would ensure the protection of his/her interests.

In what concerns the recent regulation, as an effect of the transfer of shares, the patrimony of the limited liability company does not suffer from any adjustment. The transfer of shares and even the decision related to the transfer do not bring any modification and do not affect directly the general right guaranteed by a lien endowed

by the creditors over the company's patrimony. Consequently, a direct prejudice at the company's level is excluded, while a creditor's attempt to prove the existence of a prejudice is very difficult to accomplish.

Given that the opposition does not have as object the prevention to accomplish the transfer of shares, but the compensation of the prejudice resulted as an effect of the transfer, for the approval of the opposition it must be demonstrated the existence of a prejudice (M. Dumitru, 2010, p.388). Moreover, we consider that the opposition to transfer may be determined as a rule only by the prejudices at the patrimony level of the buyer and the seller, affecting only the rights of the creditors and not of the limited liability company's creditors.

IV. CONCLUSION

We conclude by qualifying that the new regulations brought to the Law 31/1990 regarding the transfer or shares are objectionable from several points of view while causing a multitude of findings, possible interpretations and questions to which the practice will have to find an answer. Thus, in the first place, it is hindered the transfer of shares of the partners within a limited liability company, which fact cannot be found in the case of share of partnerships or of joint stock ventures. The absence of a term within which the Official Gazette must publish such a decision may cause inequalities among the associates of different limited liability companies, some having the chance to publish their decision sooner, others the importunes to wait longer for the accomplishment of the planned transaction.

Moreover, it is not regulated which is the minimum content of the decision to approve the transfer of shares. Given the fact that by means of this decision is accomplished only one prior condition for the accomplishment of the transfer, but not the transfer itself, the inclusion of the details of the transaction –which concern in fact only the transferor and the transferee which may have unfortunate effect on the contracting partners. For such reason, we consider that this decision must comprise only the identification data of the transferor and the transferee, as well as the number of shares, respectively the approval of the qualified majority in the transfer. The price must not figure as a mandatory condition in this decision.

In addition, from the economy of the legal text it can be outlined the idea that the opposition, governed by the art.202 para.2³ cannot be formulated in the case when the shares are transferred among associates. Or, such a restrictive interpretation leads to the establishment of a detrimental regime for the social creditors and for any other persons prejudiced by the cessation of shares among partners, all the more as this legal operation may involve a change of the power poles within the company, resulting in a modification of the partnership, existent at the moment of incorporation of the company.

It is not clear either the fact that it is possible to sign the transfer contract before the completion of the decision taken by the general shareholders' meeting to approve the opposition. In such situation we consider, however, that it is possible but the effect of these acts cannot be produced but under the conditions of the law, while the legal provisions producing practically the effects of a condition precedent and we do not consider that we could interfere in the nullity of the agreement.

In accordance with the French Commercial code, the transfer of shares in a limited liability company to persons outside the company must be approved by the shareholders representing at least half of the authorized capital. The transfer of shares among associates is free, not being necessary the accomplishment of any condition. Thus, the transfer of the property right operates under the conditions stipulated in the agreement, the submission of the contract at the company's premises as well as at the Trade Register and of the companies, all this in the purpose of ensuring the opposability against the company and, respectively, the third parties.

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