

SOME NOTES ON THE DUTY OF THE ASSOCIATES OF A LIMITED LIABILITY COMPANY TO PAY UP CONTRIBUTION TO THE REGISTERED CAPITAL

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The existence of the right of debt towards a society is conditioned by the existence of mutual obligations. The Civil Code stipulates in the same article: depending on participation in the assets of the legal entity, the founders have or have not rights of debt against it. This criterion is limited to the definition of the term "company" given in Article 106 of the Civil Code, which defines that a company is a trading organization with a capital which consists of holdings of founders. As dictated by the very essence of the company, founder's obligation is to contribute by the economic means to the capital formation and it is essential for the establishment and effective functioning of society.

The analysis of definitions referred to the concept of commercial society leads to the idea that the main goal of any company is to have a profit-making activity. Undoubtedly, the interest of every individual when starting up a business (company) is to obtain material benefits.

This criterion distinguishes them from legal persons whose main goal is not represented by the profit. The possibility of share profits from the company has its foundation in a patrimonial right of the associate toward the company. The Civil Code of the Republic of Moldova stipulates in Article 55 that legal entities whose founders claim rights to debt are the companies ... and legal entities whose founders do not have such rights are non-profit organizations.

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The obligation to participate in certain economic contribution extends to all members, no one can be released from it. Therefore, the Law of 135/2007 on limited

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liability companies is quite thorough in Article 22, which claims that associations can't be freed from the obligation to pay the contribution and can't discharge its debt contribution through compensation.

Next we give attention to some matters of patrimonial obligations of the associate in the limited liability companies. The associate's obligation to contribute to the social capital formation arises from the act of incorporation.

Consequently, he acquires a right of complex debt, which includes an asset component – the right to dividends and part of the company's assets in case of liquidation. The extent of these rights depends on the proportion (shareholding) which holds the associate out of the social capital. The amount of the capital, the manner and the terms of shedding intake are fixed in the constitution. But the law contains mandatory rules.

Civil Code – art. 113 paragr. (3) as well as the Law no. 135/2007 [art. 22 paragr. (2)] – provide that the owners must pay in cash before a company would officially register, at least 40% of the subscribed contribution. Act constitution may derogate from this provision only in order to establish a higher share. Another mandatory rule is found in art. 112 paragr. (3) of the Civil Code, which provides for full payment of social capital within 6 months from the moment of the record of the company, a rule enshrined as well in art. 22 paragr. (2) of Law no. 135/2007.

Articles of incorporation may establish a shorter period of time for the full payment of contributions. In case of single-associate company, it is required by law to pay the entire cash contribution to the company's registration.

Pecuniary obligation of the associate may concern both money and other property, including property rights. One of the major problems with the transmission of in-kind contributions is their proper evaluation. By Article 114 the Civil Code stipulates that the value of the contribution is approved by the general assembly of associates, that is supreme body of the company. Law no. 135/2007 article 23, indicates that contributions in kind are valued in money by an independent evaluator and approved by the General Assembly, but also allow them to be assessed directly by the general assembly, without involving independent evaluator, if such clause is stipulated in the articles of incorporation and whether associations agree on the amount of the assessment. When evaluating contributions in kind, there may be conflicting interests between partners, the ones who gives a good, being interested for this good to be valued at a higher price and, accordingly, to have returned a larger venture capital and to have a greater influence in society.

Yet even the independent expert assessment must be approved by the supreme body of the company, which ultimately accepts or rejects the asset of value that is transmitted. Since the value of the contribution in kind shall be stated in the act of incorporation, signed by all the founders, it must be approved by the consent of all the founders. The share capital gives credibility to the company and constitute guarantee for the creditors because it is presumed that the company has assets free of liabilities in the amount at least equal to the share capital stated in the articles of incorporation. In order to encourage fair and objective evaluation of contributions in kind, the legislature established the joint liability of the partner and the assessor for overpricing the goods that formed exaggerated capital. In this case responsibility comes not towards the society because it expressed agreement on the value of contributions in the act of incorporation, but to the company's creditors. Based on Article 23 paragr. (2) of Law no. 135/2007, the associate who contributed with goodas to the social capital and the evaluator are

severally liable to creditors in the limits of overvaluation, within 3 years from the date of valuation.

Assets are considered to be transmitted under the right of property, if the articles of incorporation does not stipulate otherwise. If the the articles of incorporation or the act of transfer does not stipulate under what right the good is transmitted, the law establishes a presumption that it is considered under the right of proprietary transmitted. As a result, the founder's asset is added to the heritage of the company. Transmission operates based on a contract that due to the expressed willingness of the founder becomes automatically an ownership transfer. Thus, after the good transmission, founder loses all rights towards it. The law stipulates that during the period of the company, associates can't claim restitution of the paid in capital contributions, neither the articles of incorporation may provide such a clause.

The associate has, however, a share that can be estranged, if he wants to withdraw from society. Theoretically, the partner may recover property conveyed if the company decides that it is not used effectively in trade and decides so, meantime reducing the social capital proportionally to the value of the property returned. In this case the social part of the associate will be reduced accordingly. Also, goods can be recovered in the event of termination of the company's business, after satisfaction of all claims. When transmitting proprietary asset, the risk of fortuitously loss passes to the society.

Articles of incorporation may include the transfer of right to use those goods. There are different legal consequences. In the social capital will be included only the value of the right to use. As a clue to assess the right to use an asset may be taken the rent that the company would pay in advance for the use of such good. This amount of a presumed usage presents the value of right to use and is included in the assets of the company as a share to the social capital. Namely, this value is taken into account in determining the amount of participation of the associate. Within this contribution the associate is granted a share, with which he will vote at the General Assembly and will claim a part of the profit distributed.

Assets transferred in use for a certain period can't be reclaimed until the deadline. In case of accidental destruction of the property conveyed which is in use, the risk will be borne by the founder who remains to be the owner. The founder remains liable to pay the amount of money to be recovered or to provide a similar good.

The rights and obligations of associates have a dual nature: a legal one, as they are prescribed by normative acts, and a contractual one, as they are born on the basis act of incorporation. Regardless of the basis of their appearance, the obligations must be properly executed, in good faith, in accordance and within the time settled in articles of incorporation. The associates do not assumes obligations to each other, but to the company and their responsibility comes towards the company as prejudiced entity.

The obligation to pay share capital is established for the benefit of the company. Thus, the company may require forced cashing from the associate who avoids the fulfillment of the obligation of funds/ goods which he had to pay to the company according to the Articles of incorporation. The member can be compelled by judicial process to perform an obligation assumed by the act of incorporation.

The administrator has the right to sue against the associate who didn't pay his contribution, or any associate, if the administrator avoids to. Reclaiming unpaid

contribution can be made within three years from the registration of the company. Recalling the obligation of the company established under the sanction of the possibility of its dissolution as provided in Art. 35 of Law no. 135/2007, to reduce the share capital if, at the expiration of six months from registration, associates have not fully paid contributions subscribed, we have to mention that forced cashing of the unpaid shares will condition the changes the act of incorporation and registration of amendments at the State Registration Chamber.

The law provides the associate's liability for belated or failure to execute the obligation to pay the contribution. The associate liability arises as a result of the belated enforcement as an effect set in art. 602 of the Civil Code. So, the associate is bound to repair the damage caused to the company even after the full paying the contribution. In determining the amount of compensation owed to the company, the lost profit due to the delay must be taken into consideration.

The law gives each associate the right to request, on behalf of the company, compensation, if the governing bodies refuse to do.

Failure to submit the contribution constitutes a ground for excluding the associate of the company, according to art. 47 of Law no. 135/2007, in conjunction with Article 113 paragr. (5)-(6), 154 and 617 of the Civil Code. The associate shall be given an additional period for performance of the obligation for at least 30 days and only if either this term does he not perform the obligation, against him may be initiated a legal action for exclusion and the court may give the judgment for exclusion. So, the associate who didn't pay his contribution within 6 months after the registration of the company, first, must be notified about his possible exclusion and must be given an additional term of at least 30 days, and only if he doesn't pay the remained contribution at the expiration of this term, he can be excluded by court decision.

The lawsuit may be initiated by the administrator on his own initiative or by the decision of the General Assembly. Application Administrator exclusion period may be submitted own initiative or judgment of the General Assembly. The law also gives each associate or group of associates who have paid their contribution the right to sue on behalf of the company.

The excluded associate loses his share, also he will not be refund the goods that filed corporate assets. This is confirmed by art. 22 of Law no. 135/2007, which says that, during the period of the company's existence, the associate may not demand the return of his contribution paid in capital. The partner is only entitled to a monetary compensation equal to the value of his share at the date of exclusion. Compensation is not the amount the associate has paid in fact, but the amount of the net assets value of the company in proportion to the share he owns. This value can be greater than the contribution paid if the company worked efficiently, or less, if incurred losses. On the right and the amount to be attributed to the associate, the law leaves the court at its discretion to dispose i.e. otherwise as provided.

The value of the share should be paid to the associate within 6 months from the date of his exclusion. He is liable for damage caused by the actions or inactions that led to exclusion, including unpaid part of the contribution subscribed. He will receive the amount owed by the company only after full compensation for the injury. From a practical standpoint, it is indicated that the damage to be repaired on account of the amount due from company and the remainder to be paid. If, however, this part will not

cover the damage, the associate will be liable to compensate the expense of personal property. Exclusion of the associate involves corresponding changes in articles of incorporation and their registration.

Associate has patrimonial rights and bear the risks until its exclusion. He bears the risk of loss and is entitled to the benefit of activity during the year, calculated up to the date of his exclusion and payable within 30 days from the date of the decision on the distribution of benefits or the deadline for the adoption of such decisions. Deadline is provided in art. 50 of Law no. 135/2007, which says that the Annual General Meeting must take place no later than 90 days of year end. The excluded associate liable to third parties for transactions made by the company until the date of exclusion, that is, until the judgment becomes final, and bears the consequences of the operations being performed at the time exclusion. He will not be able to get the value of the shareholding due to him until the end of that operations.

So if the associate does not perform the obligation to pay the entire share capital, the company has several options:

- the associate may be relieved of the obligation to pay the outstanding contribution following the capital decrease, the proportional reduction of his share;
- the company may sue against the associate for forced cashing within 3 years. In this case the company will have to comply with the formalities required by the law on capital: first to register its decrease on the expiry of six months after which to register increases when receiving performance;
- the company may bring a lawsuit on the exclusion of the associate.

The right to choose the appropriate option belongs to the company and not to the associate who failed to pay the entire contribution. In any case, since we are in the presence of private law relations, they can choose the solution by agreement of will. In these terms, we say that the obligation to transmit contribution, as well as the right of the associate debt instruments to society, is transmissible. If the associate understands that he can not fully meet the obligation to pay, that may be done by other partners, in correlation with the corresponding shares.

Associates may stipulate in the articles of incorporation other patrimonial obligations which will have the same binding force as those provided by law. For example, the articles of incorporation may provide for the submission of additional contributions (art. 37) and free remission free of goods without including them in the share capital, also may require coverage of losses by the venturers. For such additional obligations, all the members must consent to such arrangements.

Therefore, the obligation to pay contributions according to the Articles of incorporation extends to founders at the moment of setting up the company and to the associates if there was decided to increase social capital, in accordance with art. 33 of the Law. 135/2007, and operates when, by the act of incorporation, associations were obliged to pay additional contributions in accordance with art. 37 of the Law 135/2007.

It is necessary to define the meanings of the concept of "additional contribution" used in Law 135/2007 in two meanings. The first is referred to in Article 33 as a contribution to capital increase (new contributions) by members or by third parties who become associate, and quite another is regulated in art. 37 and art. 38. Thus, in article 37, the legislature refers to the additional contributions of members fixed initial wording of

the act of incorporation, the founders are required to contribute after setting up the company, through a single payment or more, with additional contributions capital increase, to increase corporate assets to cover the losses. The size of these contributions can be determined or determinable by one clause of the act of incorporation. Considering the fact that the act of incorporation clause may be fixed shedding additional contributions of great value which some partners can not cope, the law established a release mechanism for the associate obliged to pay additional contribution.

It was also established that the General Assembly decisions on the establishment and the paying additional contributions shall be adopted unanimously by the members. By this provision, the legislature limited the possibility of the associates who hold the majority of the shares to oblige the minority associates to pay additional contributions. In other words, major associations may decide three quarters of the vote the amendment of the constitution and share capital increase by new contributions the members. However, if they do not wish to participate in the capital increase, minority associates can not be forced to participate to contributions and share capital will be increased only by those who agree to make new contributions.

So statements regarding the possibility of raising capital by additional contributions of the associates only unanimously can not be accepted. Increasing social capital by additional contributions (called in the art. 33 "new contributions") of associates and third parties may be subject to conditions laid down in Article 58 paragr. (2) as amendment of the Articles of incorporation, i.e. $\frac{3}{4}$ votes of all members. If the articles of incorporation in the original wording does not provide additional contributions, such a clause could be incorporated later by completing the act of incorporation. To complete the constitutive act with such a clause the law requires that all members vote unanimously. Thus, we exclude situation in which a partner, regardless of his participation share, may be subject to additional contributions against his will.

And consequences for failure to pay further contribution to the share capital increase are different from those that arise when not paying additional contribution considered in Article 37 of Law no. 135/2007.

The member can be ruled out for not paying contribution only when setting up social capital and not when increasing it. This is explained by the provision of Article 33, which states that the contribution to the capital increase must be submitted until the registration of changes on the increase. It means, therefore, that if associate has not filed contribution to the share capital increase, the amount not paid will not be taken into account in the registration of changes. Furthermore, the same article regulates that if capital increase did not occur, the company within three months from the date of adoption by the general assembly of associates of the decision to amend the act of incorporation, refund additional contributions paid by associates, otherwise, it is liable to pay interest provided by law.

The associate who can not carry out the obligation to pay up the additional contribution is entitled to be relieved of it by making available his share. It should be noted that the associate enjoy this right only if paid into share capital. From the due date the associate will have 30 days to decide whether pay additional contribution or make his share available to the company.

The associate may be relieved of the obligation of paying additional contribution to the company by making available his share within 30 days from the date the obligation to

pay up the additional contribution. If, on the expiry of 30 days, the associate did not shed additional intake and did not make his share available to the company, he is to be notified by letter, that his share is qualified as made available to cover the damage incurred by not paying additional contribution. The Company within 30 days from the date of the shareholding at its disposal, will take steps to sell the share at public auction unless agreed with the associate on other ways to sell. If the proceeds from the sale of the shareholding covers all sell costs and the value of the additional contribution, the surplus shall be remitted to the ex-associate. If the amount obtained is not sufficient to cover the amount of the additional contribution, the company will not be entitled to pursue the associate. The sale will be organized by the manager of the company, although the ownership will pass from the associate who made his share available to the person who buys it. If it can't be sold at auction or otherwise, the share will be passed free of charge to the company, without having any right to receive other amounts from the ex associate.

In other words, this is a specific procedure for releasing from the obligation to pay additional contribution that is special measure to exclude the associate who did not respect the obligation. In any case, the association who will not pay additional contribution which he assumed, loses the capacity of associate.

From the above considerations, those who participate in founding a company and agree to introduce in the articles of incorporation a clause which sets out additional contributions, must be careful to the size of these contributions and their ability to meet such obligations.

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