

ASPECTS REGARDING THE SHARE TRANSFER

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Abstract

Throughout its content, the memorandum of association, even in the case of a limited liability company, stipulates the contribution of each shareholder to the share capital while the share capital is divided into shares, corresponding to the contribution of each shareholder to the share capital. The limited liability company is established in consideration of the people who set it up and as such, the share transfer is subject to certain conditions provided by law. Therefore, the law sets out strict conditions for share transfer in the case the transfer is done to one or more shareholders, but especially if the transfer is done to people outside the company, or following the inheritance. If the transfer is done to a shareholder, such is possible provided that this transfer has not been prohibited by the act of incorporation itself. Instead, the transfer to people outside the company cannot be done without the consent of shareholders representing at least three quarters of the capital. In case of share transfer by succession, the law allows it provided that this transfer is permitted within the memorandum of association.

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1. Introduction

A recent commercial case-law² gives us the opportunity to make a few comments about the share transfer.

In case of companies with limited liability, the memorandum of association must provide the contribution of each associate, whether it is a contribution in kind or cash.

The share capital is divided into shares (named by law „părți sociale”) and they correspond to the participation of each shareholder in the share capital.

In some cases, the shares may be transmitted to other persons, as determined by law.

2. The share capital and shareholders' contributions

The requirements of the modern economy have led to the formation of companies with limited liability, which are a type of company that borrow features from both partnerships and companies by shares.

It is a type of company that borrows from partnerships mainly the *intuitu personae* character and as such, it is grounded on trust between shareholders.

Therefore, in this type of company, the number of shareholders is limited and the share transfer can only be done under certain conditions³.

In accordance with Articles 7 of Law no. 31/1990 on companies (hereinafter referred as the „Law”), each shareholder must contribute to the share capital and the memorandum of association must stipulate the share capital which is formed. The shareholders must fully bring their contributions to the subscribed share capital from the moment of the company incorporation.

Moreover, the memorandum of association shall provide each contribution, whether the contribution is in cash or in kind.

The contributions in work or services and receivables are forbidden.

Social capital thus constituted, will be divided into parts called shares, all of equal nominal value.

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² Braşov Tribunal, Judgment no. 284/C/12.03.2015, <http://legeaz.net/spete-drept-comercial/obligatii-asumate-prin-contract-de-284-2015>

³ See also St.D. Cărpenaru, *Tratat de drept comercial român, conform noului cod civil*, Universul Juridic Publishing House, Bucharest, 2012, p. 366.

The number and nominal value of the shares shall be stipulated in the memorandum of association, and also the shares given to each shareholder.

Obviously, this award is based on the value of each shareholder's contribution and therefore, the number of shares of each associate is directly proportional to the participation in the share capital. Consequently, according to Articles 67 of Law, the shareholders have the right to dividends *pro rata* to their contributions to the share capital.⁴

3. May the shares be transferred?

As previously said, the limited liability companies are set up in consideration of persons which have the capacity as shareholders, they are set up *intuituu personae*; then, can be the shares transferred and if positive, under what conditions?

The shares do not entail assigning securities as well, but they incorporate values, and any value can be transferred.

Due to the fact that the shares assume the capacity as shareholder, their transfer involves also the transfer of the capacity as shareholders⁵.

The shares can be transferred between shareholders - in which case there is no question about attributing the *intuituu personae* character of the company - but the transfer may be done to persons outside the company or by inheritance, in which cases the *intuituu personae* character is not affected. For this reason, the Law establishes cases and especially the conditions in which the share transfer can be performed.

In practice, the legal document used for such transfer is the assignment, an act with onerous title.

4. The conditions of share transfer

The Law stipulates the conditions, depending if the transfer is between shareholders, the transfer to persons outside the company or by inheritance.

a) Assignment between shareholders

In this case, the transfer is allowed in accordance with Articles 202 of Law, with the exception of the case the transfer is forbidden by the memorandum of association. This interdiction may be stipulated in order to prevent only one shareholder to obtain the majority of the share capital.

If it has not been expressly prohibited, the transfer does not affect the *intuituu personae* character of the company and therefore, the consent of the other shareholders is not necessary⁶.

In practice, the assignment is done through a contract between the assignor and the assignee, contract which may be signed in authentic form.

However, this assignment must be registered in the Shareholders' Registry of the company, following a request made by assignee, as a rule.

In order to protect the interests of third parties, the assignment shall be registered in the Trade Register and will take effect against third parties only starting its registered in the Trade Register, under Articles 202 of the Law.

b) Assignment to persons from outside the company

Unlike the previous, this assignment affects the *intuituu personae* character of the company and therefore, it cannot be done without the consent of shareholders representing at least three quarters of the share capital, according to Articles 202 paragraph (2) of the Law⁷.

This approval must be given in a meeting of shareholders, and this decision shall be registered in Trade Register and published in the Official Gazette.

⁴ See also I. Turcu, *Dreptul afacerilor*, Fundația „Chemarea” Publishing House, Iași, 1992, p. 157

⁵ See M Petrovici, *Discuții în legătură cu instituția transmiterii părților sociale*, in „Dreptul” no. 3/1993, p. 80

⁶ Brașov Court of Appeal, Judgement no. 298/2001, in „Curierul Judiciar” no. 8/2002, p. 43

⁷ See also E. Veress, *Discuții privind revocarea administratorilor și transmiterea părților sociale ale societății cu răspundere limitată* in „Dreptul” no. 9/2010, p. 96 and seq.

Based on the decision of the shareholders' meeting approving the assignment, the assignment contract may be then concluded, in written form.

This assignment shall be registered in the Trade Register and the Shareholders' Registry, as provided by Articles 203 of the Law.

It should be noted that against the decision approving the assignment it is possible for the creditors or any person that suffered a prejudice, to file an opposition in court in order to impose the company or the shareholders to repair the damage caused⁸.

Following the accomplishment of the assignment, the assignment contract and the new memorandum of association, which includes new shareholders, shall be submitted for registration in the Trade Register.

c) The transfer of shares by inheritance

Another way of transmission of shares is by inheritance. This case is covered by Articles 202 paragraph (3) of Law, which states that "in case of acquiring a share by inheritance, the provisions of paragraph (2) do not apply if the memorandum of association provide otherwise; in the latter case, the company must pay the share to heirs, according to the last approved balance sheet".

It is concluded, therefore, that the law allows share transfer by inheritance provided that it has been stipulated in the memorandum of association.

If in the memorandum of association of the company was mentioned the possibility continue to heirs of the shareholder, or if it was not prohibited such a possibility, the heirs of the deceased become holders of shares and shareholders in company.

If this action exceeds the maximum number of shareholders, they will be required to designate a number of owners, so this number is not exceeded - Articles 202 paragraph (4) of the Law.

As in other cases, the share transfer by inheritance must be notified to the company and must be registered in the Trade Register for effects to third parties.

Towards third parties, the share transfer has effect only upon its registration in the Trade Register.

Moreover, this transfer must be registered in the Shareholders' Registry of the company, according to Articles 203 of the Law.

It is possible, as noted, that the memorandum of association prohibits such a share transfer, in order to preserve intangible the *intuitu personae* character of society.

In this case, the law, specifically Articles 202 paragraph (3) of the Law establishes that the heirs of the deceased shareholder are entitled to the equivalent value of their shares, calculated according to the latest balance sheet.

The documents related to the share transfer, as previously noted, shall be mentioned in the commercial documents and this is the duty of the company's directors.

An issue may occur from this point of view in case the company is incorporated by a sole shareholder which is also the sole director.

In the case-law mentioned at the beginning, it is the case of a limited liability company with sole shareholder and which transfer all the shares and acquirer refused to go to the Trade Register to record the file concerning the transfer of shares, the change of the director and the registered office, as well as the addendum to the articles of association of the same company, under the assignment contract and the addendum to the memorandum of association.

According to the statements contained in the contract, the purchase price was paid in full on the date of signing the contract by the defendant and between the parties there were no monetary claims or otherwise, arising out of the assignment.

Along with the assignment, the plaintiff's capacity as shareholder and director of the company ceased, the defendant taking over all the rights and obligations of the plaintiff arising from the capacity as shareholder, and the defendant stated that it intended to acquire these capacities in full awareness of the company's economic situation.

⁸ See L.B.Săuleanu, *Opoziția la hotărârea asociațiilor privitoare la transmiterea părților sociale*, in „RDC” no. 5/2011, p. 106 and seq.

In the case-law, the plaintiff requested the defendant to fulfil a contractual obligation since the obligation to register the changes the company's articles of incorporation is legal.

The court will consider, however, the purpose of the plaintiff's claim, namely the execution, by the defendant, of the legal formalities subsequent to share transfer.

The plaintiff's interest is obvious to reconcile the actual situation of the company with the written one, given the debts accumulated by the company during the period in which has not held any capacity in the company. The indebtedness of the defendant in executing a legal obligation is not an inadmissible claim, so that the reasons of the defendant are not grounded.

The defendant made reference to procedures of registration in the Trade Register which is not a judicial one, a procedure aimed at relations of the shareholders/company with a public institution and they are distinct from the legal proceeding brought in court.

The fact that the plaintiff, in his turn, was able to apply for registration of the assignment at Braşov Trade Register could have been considered only if the defendant proved that he had all the documents necessary for registration and was also mandated to submit/fulfil these formalities by the defendant.

In addition, Articles 21 letter h of Law no. 26/1990 on trade register states that any amendment of the documents, facts and other entries in the Trade Registry must be recorded. Even if Article 22 of the same law allows any interested person to apply for registration, within maximum 30 days from the date the amendment is known, the court considers that the registration requirement is the duty of the trader. In this respect, Article 22 paragraph 4 of this law provides that the trader is not exempt from the obligation of registration due to the fact that the amendments may be registered *ex officio* or at the request of other people. As the plaintiff lost the quality of professional by the effect of the share transfer, attached to the shares, this obligation belongs to the new shareholder/director, namely the defendant, in accordance with Article 22 paragraph 1 of Law no. 26/1990 on trade register. Accordingly, the court granted the application.

5. Conclusion

Following the above, it may be concluded that under the Romanian law, the shares may be transferred, although the company is established in consideration of in the person.

For these reasons, the law establishes different conditions under which this may be performed, as it is a transfer to persons within the company - so to another shareholder, the transfer to persons outside the company and transfer of shares by way of inheritance.

If in case of transfer to persons within the company, we cannot refer to breaching the principle of *intuitu personae* character of the company, in the other two cases, the transfer shall be done only under certain conditions, which relate in particular to the agreement of the other shareholder and which represent at least three quarters of the company's share capital.

Also, in case of transfer by inheritance, the agreement of other shareholders is required, and if this agreement is not given, the transfer cannot be done, that heir shall receive the equivalent of the shares which would be theirs.

In this case-law, there is the situation of the transfer by the sole shareholder of all shares to another person, in which case, obviously, there can be no breach of the *intuitu personae* character of the company, but the debates may be over the parties' obligations on the registration in Trade Register of this operation, the court correctly establishing the right of the assignor to request the assignee the fulfillment of the obligations related to the new changes.

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