

ARTICLES AND MEMORANDUM OF ASSOCIATION OF THE LIMITED LIABILITY COMPANY

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Abstract:

The memorandum of association is, in all cases, the product of the concordant meeting of the shareholders' will to express in the field of legal relationships as a unity. The accomplishment of the memorandum of association cannot be imposed, under any circumstance, by any law or court. It is fair that, in certain situations, the law imposes the parties decided to conclude the memorandum a certain form, yet it cannot substitute for their will to conclude its generator legal instrument.

If the parties' will is sovereign in what concerns the expression of the option of association by concluding the memorandum, once manifested, it must be subordinated to the legal provisions regarding the general and special substantive and formal conditions and to the content of the agreement, as well as to the law and good practices.

Key words: memorandum of association, legal characters, signatories of the memorandum of association, affectio societatis

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INTRODUCTIVE CONSIDERATIONS

The incorporation of a limited liability company finds its reasons in the shareholders' will to associate for operating an economic enterprise and obtaining a profit to share eventually. For the same reason, it is born the single owner limited liability company, by means of which the entrepreneur may increase the efficiency of his/her efforts and maximize the profits.

The shareholder's/shareholders' agreement regarding the incorporation of a company must be materialized under the conditions imposed by the law. Pursuant to art. 5 of Law no. 31/1990 republished, the limited liability company is incorporated as a memorandum of association and statutes, concluded under the form of a single written document, also termed "articles of association". For the single owner limited liability company, only the statute is concluded. When only the statutes or the articles of association are concluded, they as well can be considered as memorandum of association. From what is mentioned so far, it outcomes that, according to the Law no. 31/1990 republished, the term of memorandum of association has a generic character, as it layouts both the articles of association and/or the statutes and the single written document.

The articles of association, understood both as a negotium juris and an instrumentum, carries multiple functions, such as: to express the author's/authors' will to incorporate a company, to regulate this particular will in accordance to the imperative legal provisions, to make proof of the conditions and the limits of the associations, since it is necessary for the accomplishment of the formalities of registration at the Trade Register Office, of publication in the Official Gazette of Romania and of the company's operating permit (Schiau I., 2009, 121).

LEGAL CHARACTERISTICS OF THE MEMORANDUM OF ASSOCIATION

We mention again that, according to art.1881 Civil code in principle, the company represents the agreement by means of which two or more individuals, also called shareholders, bind each other to cooperate for conducting an activity and contributing to it with submissions of money, goods, know-how or labour conscriptions, with the purpose of sharing the benefits or using the resulting economy. Likewise, each shareholder contributes to bearing the losses proportionally with the participation to the benefit's distribution, if not stipulated differently in the agreement.

We betake to the definition of the memorandum of association in the Civil Code because of two reasons: on one hand, because the special legal order, and we have in view the company law, stipulates a definition of the company; on the other hand, because the new civil code continues having valences in matter of common law.

In another train of thoughts, regarding the single owner limited liability company, without any association relationship, the special law imposes only the conclusion of the statutes. It is underlined in the special literature that the disregarded entity has a nature and finality distinct from those of a statute drafted for stock companies, as it is essentially a veritable unilateral memorandum of association and the sole unhappily chosen definition generates confusions (Căpățină O., 1996, 148). As an effect of this memorandum, the disregarded entity appears as an expression of the unilateral expressed agreement to operate an economic enterprise in the purpose of obtaining a profit or to benefit from the economy, in this manner.

All of the above leads us to outlining the legal characteristics of a memorandum of association of a limited liability company.

First of all, the memorandum of association is essentially a non-gratuitous legal document, in as much as the shareholders (or the shareholder) pursue to obtain a patrimonial advantage be it under the form of the profit, or the form of an economy. The way it is underline by doctrine, within a memorandum of association, the non-gratuitous character presents a certain particularity, according to which the shareholder is bound to the other shareholders to bring his/her social contribution, he/she does not receive an equivalent in exchange from those to whom he/she is bound, but he/she will benefit from the accomplished advantages together with them (Deak Fr., 2001, 423).

Second of all, the memorandum of association is commutative, while the shareholders acknowledge, from the moment of its conclusion, the extent of their liabilities, irrespective of any future and uncertain events. The circumstance under which the company, all along its operation, could register losses also does not transform the memorandum of association into a random instrument (Căpățină O., 1996, 83).

As a general rule, the memorandum of association is authenticated by means of a private deed of all the shareholders. Regarding the request of the written form, there has been contoured a polemic in doctrine, by supporting both the *ad validitatem* and the *ad probationem nature* (Schiau I., 2009, 123). The majority's opinion, founded on the provisions of art.56 Company Law, the form of the memorandum of association must be *ad validitatem* by law, the absence of it attracting the invalidity of the company. To continue with, the memorandum of association must be submitted to certain formalities of disclosure, it must be brought to the third parties' attention, for the opposability of its effect as against them.

In the hypothesis in which the limited liability company with multiple shareholders, the memorandum of association has a versatile character as well, two or more individuals participate to its conclusion. Consequently, the memorandum of association with a synallagmatic character determines reciprocal liabilities to submit the contribution (Militaru I.N., 2013, 130-134), as well as to cooperate to the accomplishment of the objective for which the limited liability company is incorporated. Unlike other synallagmatic legal instruments, the memorandum of association gives birth to identical liabilities for the parties (not necessarily in what concerns their length) and to

convergences, having in view the common purpose which stays at the grounds of the agreement. For this reason, the concluding parties bear the generic name of shareholders and not debtors or creditors (Deak Fr., 2001, 423).

Finally, the memorandum of association is a legal instrument with successive foreclosure, the shareholders being liable one to another all along the existence of the limited liability company. Taking into consideration the particularities of the type of company above mentioned, its hybrid nature, which combines some of the stock companies' features and those of non-stock professional corporations, the memorandum of association of limited liability companies is concluded *intuitu personae*, within which the reciprocal confidence has an important role, so that none of the shareholders can wave his/her rights within the company nor can substitute for another entity.

For its valid conclusion, the memorandum of association must comply, on its turn, with the minimum exigencies stipulated by art.1179 Civil code for the validity of any agreement: the capacity to contract, the agreement of the parties, a licit objective determined, a licit moral cause, to which it is added, to the extent to which the law stipulates expressly, a certain form of the bilateral legal instrument. To all these are added some particular conditions specific to the memorandum of association: the intention to contribute together in order to obtain and distribute the profit gained in the company all along its economic activity (Cărpenu St.D., 2009, 146).

The non-observance of the substantive conditions of the memorandum triggers its annulment or invalidity, as the case may be.

SIGNATORIES OF THE MEMORANDUM OF ASSOCIATION

According to art. 6 of Law no. 31/1990 republished, the signatories of the memorandum of association, no matter they are natural persons or legal entities, have the quality of founders, as well as the individuals who have a significant role in the company's incorporation. For a valid incorporation, the founders must submit the statement at the Sole Office, at their own risk, according to which they comply with the legal stipulations.

A company may be founded by natural persons, legal entities as well as by natural and legal persons, irrespective of the fact that they are or aren't retailers. This quality can only be detained by the constituting company (Lefter C., 1993, 27). Finally, these natural persons or legal entities may be Romanian or citizens of other countries.

The essential condition for a natural person or legal entity to acquire the quality of founder of a limited liability company is that he/she has the capacity to contract.

For the conclusion of the memorandum of association, the natural person must have full capacity of exercise, the capacity of drafting disposal instruments, bearing in mind the obligation of submission which he/she assumes by concluding the memorandum.

One amply analysed problem for the special literature was that of the minor's participation to the incorporation of a limited liability company (Lefter C., 1993, 28-29). If before the entrance into force of the new civil code, the opinion of the majority expressed on the basis of the provisions in the marriage act was pronounced in favour of the minor's incapacity to sign the memorandum of association, pursuant to the provisions of the art.40 Civil code, which regulates the anticipated capacity of exercise, we consider that the minor, aged 16 and to whom the guardianship authority recognized the full capacity of exercise can acquire also the quality of shareholder of a limited liability company. Obviously, we inquire whether he/she can be sole shareholder in such a company. We cannot pronounce as long as the law does not discern in such sense.

The limitations brought to the freedom of association must be established by the legal provisions and are of strict interpretation, such as art.6 para.(2) Company Law providing that the entities who, according to the law, are incapable or who had been convicted for fraudulent management, misuse of confidence, forgery, use of forgery, fraud, peculation, perjury, corrupt

payment, as well as other crimes stipulated by the law, cannot be founders and implicitly cannot conclude the memorandum of association (Ignătescu C., 2013, 15).

In what concerns the shareholders who are also husbands, it is shown in doctrine that they can participate to the incorporation of a limited liability company together or separately, as long as there is no legal interdiction in this sense (Lefter C., 1993, 30).

The conclusion of the memorandum implies the parties' expression of the agreement in this sense. In order to produce legal effects, the agreement of the parties must be expressed with the intention to produce legal effects and not be altered by vices (Cărpenaru St.D., 2009, 164). According to art.1206 Civil code the consent is vicious when it is given by error, surprised by means of dol by violence, or the intervention of a case of lesion.

In the case of the memorandum of association of the limited liability company, the error over the person of any of the shareholders can be considered essential, in the perspective of the art. 1207 Civil code. which triggers its annulment, taking into consideration the fact that, at the incorporation of the company, personal qualities of the shareholders are being taken into account (Lefter C., 1993, 37).

In exchange, the dol viciates a shareholder's consent only if the fraudulent acts are committed by all the shareholders or by persons who validly represent the shareholder's legal entity and which have a certain gravity, for instance, using a fraudulent balance sheet in order to determine the subscription of the shares in a company (Căpăţină O., 1996, 164).

Although completely atypical for the incorporation of a limited liability company, violence may vitiate the consent of any shareholder and can constitute reason of annulment of the memorandum of association, as well as injury. In the case of occurrence of such situations, it is appreciated in doctrine that there will be applied the common law principles (art. 1216-1224 Civil code) (Cărpenaru St.D., 2009, 165).

In the case of the memorandum of association the parties' consent has a particularity consisting in the intention of commonly conducting a specific activity. Such defining subjective element for the memorandum, named *affectio societatis*, designates the shareholders' will to participate to the incorporation of the limited liability company, from equal positions, to collaborate to the accomplishment of the common purpose and to assume the inherent risks of the exploitation of the company, bearing the eventual losses (Lefter C., 1993,35).

Within the limited liability company, the binding element is transferred to its *intuitu personae* character, the shareholders cooperating in a complete confidence for the accomplishment of the purpose they proposed, which characterises the entire existence of the company, not only its beginning moments (Ignătescu C., 1998, 47).

In what concerns the memorandum of association of the single owner limited liability, the expressed consent for its constitution presents atypical notes, as it is in the presence of a unilateral agreement. In such case, as it is shown in doctrine, the single shareholder's will is that of affecting certain goods for the exploitation of an economic enterprise, which he/she detaches from the rest of his/her personal patrimony, by transferring it to the newly created company (Lefter C., 1993, 38).

CONCLUSION

As we could ascertain all along our research, the constitution of the limited liability company has its reason in the shareholders' will to associate in the purpose of exploiting an economic enterprise and obtaining distributable profit. The qualification of the company as a "deed", resulted from the shareholders' will, has been amply analysed in the Romanian and foreign legal literatures. As it is natural, this contractual vision presents certain limits since it cannot explain either the constitution of a legal subject distinct from the signatory parties of the memorandum of association or the manner of manifestation of the social will by applying the majority rule or by means of the

operations undertaken by social authorities, with competence of representation and responsibilities pronounced upon by the law, which exceed the narrow framework of a simple mandate.

REFERENCES

1. Căpățînă, O., (1996), *Societățile comerciale*, IInd edition, Lumina Lex Publishing House, Bucharest.
2. Cărpenaru, S. D., (2009), *Tratat de drept comercial român*, VIIIth edition revised and expanded, Universul Juridic Publishing House, Bucharest.
3. Deak, Fr.,(2001), *Tratat de drept civil. Contracte speciale*, ed. a-III-a, Ed. Universul Juridic, Bucharest.
4. Ignătescu, C.,(2013), *Abuzul de drept*, Lumen Publishing House, Iași.
5. Ignătescu, C., (1998), *Regimul juridic al grupurilor de societăți comerciale*, Simpozionul "Început de mileniu trei: Economia românească în context european", Universitatea "Ștefan cel Mare" Suceava, -aprilie 1998.
6. Lefter, C.,(1993), *Societatea cu răspundere limitată în dreptul comparat*, Ed. Didactică și pedagogică Publishing House, RA, Bucharest.
7. Militaru I.N.,(2013), *Dreptul afacerilor. Introducere în dreptul afacerilor. Raportul juridic de afaceri. Contractul*, Universul Juridic Publishing House, Bucharest.
8. Schiau, I.,(2009,) *Drept comercial*, Hamangiu Publishing House, Bucharest.

BIBLIOGRAPHY

1. Angheni, S., Volonciu, M., Stoica C., *Drept comercial*, CH Beck Publishing House, Bucharest, 2008.
2. Căpățînă, O., *Societățile comerciale*, IInd edition, Lumina Lex Publishing House, Bucharest, 1996.
3. Cărpenaru, S. D., *Tratat de drept comercial român*, VIIIth edition revised and expanded, Universul Juridic Publishing House, Bucharest, 2009.
4. Deak, Fr., *Tratat de drept civil. Contracte speciale*, ed. a-III-a, Ed. Universul Juridic, Bucharest, 2001.
5. Ignătescu, C., *Abuzul de drept*, Lumen Publishing House, Iași, 2013.
6. Ignătescu, C., *Regimul juridic al grupurilor de societăți comerciale*, Simpozionul "Început de mileniu trei: Economia românească în context european", Universitatea "Ștefan cel Mare" Suceava, -aprilie 1998.
7. Lefter, C., *Societatea cu răspundere limitată în dreptul comparat*, Ed. Didactică și pedagogică Publishing House, RA, Bucharest, 1993
8. Militaru I.N., *Dreptul afacerilor. Introducere în dreptul afacerilor. Raportul juridic de afaceri. Contractul*, Universul Juridic Publishing House, Bucharest, 2013.
9. Schiau, I., *Drept comercial*, Hamangiu Publishing House, Bucharest, 2009.
10. Stoica, C., Cristea, S., *Drept societar pentru învățământ economic*, Ed. Universitară Publishing House, Bucharest, 2008.