THE ACT OF FOUNDATION OF THE LIMITED LIABILITY COMPANY

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Setting up a company, regardless of organizational form, it involvs analysis of legal phenomens and judicial procedures that relate specifically to the founders, the articles of foundation, the formation of social capital and the way in what it is recorded.

In this study we intend to increase the attention on conceptual approaches reffering to the articles of incorporation of limited liability company, with a focus on the problems of defining the concept, analysis of legal features and on the conditions of validity and legal force of its.

According to the definition, the company is itself the act (contract)of setting up, which the state registration gives the legal personality and afectio societatis - life.

Notwithstanding the provisions of Article. 62 Civil Code of the Republic of Moldova (hereinafter C. C. of R. M.), the company is founded by a single act of incorporation (Article. 107 C. C. of R. M.). The legislature used the phrase „act of foundation", desirous to include both single-acts (declarations of incorporation), as well as the pluripersonale (contracts). By using the term „act of incorporation" the legislature, also seeks to avoid the multiplicity of the constituent documents (contract and status, declaration and status statement) and to allow formation the company by a single act of incorporation, including all necessary documents.

The limited liability company is established, in principle, according to general rules applicable to the company (Article. 106-116, 146, C. C. of R. M) and according to the Law on limited liability company, no. 135/2007, which in Article. 1 states that this law regulates the constitution of the collective entity, too.

According to the Art. 12 of Law No. 135/2007, the act of incorporation of the company is the contract of incorporation or status statement, but for setting up of the company there must be met the formalities prescribed by law.

Moreover, the act of incorporation, the document drafted and signed by all founders, reflects their intention to establish a limited liability company. After the state registration, the act of setting is that which determines the legal status of the company, establishing organizational structure, functions of organs and officials with responsabilities, capital structure, rights and obligations of members and other issues related to its formation.

From the content of the Art 12 of 1 al. of Law No. 135/2007, rezults that the term „act of incorporation" is a generic for the ***contract of association****, when it is constituted by two or more persons for a* ***status****, where the company is established by one founder, or a legal person or individual. This does not prevent the limited liability company with two or more members, in drafting a statute, in addition to the contract of association. This conclusion applies with regard to the principle of freedom of conventions, under which contracting parties are free to conclude any legal act, provided that it does not affect the mandatory provisions of law. The status of a company is also, lato sensu, a legal*

document, a product of members by which they will grow up rules for the functioning of society. Therefore, the law does not require mandatory the status for the validity of formation the limited company pluripersonal, but does not prevent the members that if they want to draw it. In such a case could apear the problem of the legal force of such a status. We believe that in this situation the status of the company remains in its essence a convention related to the contract of formation, which it completes in the sense that it complements it, or in the sense that it explain it. So if the provisions of the statute will be contradictory to those of contract formation in some aspects, the contract stipulations will always prevail because the law requires for establishing a limited liability company pluripersonal, only the contract of formation not and the status statement. Any discrepancy between the stipulations of the contractual and statutory provisions can not legitimize the conclusion that these would modify the former, because the statute can not be viewed in any way as a legal act of changing the contract of foundation.

Keywords: *company, incorporation, association, society, founders.*

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The analysis distinguishes the act of establishing more legal character of it's and to say that it is solemn, plurilateral, for consideration, consensual, commutative, commercial (profit) and translative of ownership.

Like any legal act and the act of incorporation of limited liability company is subject to mandatory hardship on the conditions of validity. The conditions of validity means the legal requirements for that that a such an act takes effect to people who have signed or acceded to it later. Incorporation of the limited liability company is subject to the same conditions as any other legal act and shall consist of the same elements as all legal documents.

The conditions of validity are classified under the substantive and formal requirements of which non-fulfillment lead to invalidity. Articles of incorporation of limited liability company, as with any company is subjected to specific conditions, such as contribution, intention to collaborate as well as the goal to obtain and to distribute benefits.

The substantive conditions of the act of constitution of Limited Liability Company are: civil capacity, consent, object and cause.

The consent, as an element of contract of formation, involves any type of company, the specified will of two or more persons to conduct in joint business activities agreed. The intention of the parties, naturally, implies affectio societatis. The establishment of a company with limited liability, the consent of the Contracting Parties may be vitiated by error, fraud, violence or injury. In this connection details are needed.

According to article 108 C. C., the company is obliged to indicate in its constitutive act the object of its activity. Moreover, express provisions including objects of its activity in the act of foundation, are included in the Law nr. 135/2007, in Art. 13/1, point. c. If its statute does not indicate the type of activity, this does not forbid the company to practice it. This statement is based on the article. 60/ 2 C. C., according to which, for-profit legal person, including Limited Liability Company may conduct any activity not forbidden by law, even if not provided in the act of incorporation. As far as we are concerned, we adhere to the position of authors who are in favor of the second sense of the object of the contract company, which is the subject of the company's activity, which delimits the company by civil society.

The object of the Limited liability Company's activity must be lawful. Not only by statute, but rather the actual practices must meet this condition. No such requirement is considered satisfied if the act of incorporation with a lawful activity was supplemented by an internal regulation that requires acts of unfair competition. Illicit activities are considered contrary to public order and morality, such as: prostitution, illegal gambling and property transactions that are not in the civil circuit, for example, the human body organs or graves. Third person may not prohibit the limited liability company to practice an activity under the pretext that does not appear explicitly in the articles of incorporation, if the activity is not subject to the prior authorization, for example to obtain a license, not legally prohibited, or contrary to public order or morality. Likewise, it is forbidden to bring in business of the limited liability company to all the activities that constitute crimes, as well as activities which constitute the state monopoly.

Formal requirements. The Contract of foundation of Limited Liability Company is written in the state language (Moldavian language) and is signed by all members of society (art. 62 par.1 conjunction with art. Al.4 108 CC, and with provisions of the art. 12 al.3 Law nr. 135/2007).

The act of incorporation of the limited liability company must meet both the general conditions of validity as well as those specific conditions that customize to other contracts.

Under the Civil Code, the company is founded by notarized act of incorporation (Art. 107). The authentic form of the act of foundation is required ad validitatem. Failure of the requisite quality of association rule acquiring person, and lead to rejection of application for registration of the company by the State Registration Chamber.

Specific conditions of validity. In the legal literature have been outlined three conditions for the validity of the act of foundation: the contribution of founders, intends to work together to conduct commercial activity (affectio societatis), obtaining and sharing the benefits [8, pg. 152]. In the Civil Code, all three conditions are expressly indicated (the contribution and distribution of benefits), whether it is presumed (affectio societatis).

The contribution of founders. The contribution means a contribution of a person in an activity [14, pg. 15]. Contribution is required for civil society (Article. 1342 C. C.), and the company (article. 112 C. C.) and for limited liability company (article. 21. Law No. 1. 135/2007). In juridical point of view, the contribution means the obligation which is assumed by every associated, to bring in some good company, a patrimonial value. In terms of language, the term means the good brought by the associated to company. The contribution assures the link between associated and company. [13, pg. 186].

Affectio societatis. Being an intention of those who unite, affectio societatis represents the psychological element which is showing in what consists the common collaboration.

The joint collaboration of the partners, differ from one society to another, but in any company, including the limited liability company, the participation of members in its life, manifests itself through the exercise of the law, the right to participate in decisions and exercise control over the company's business. Collaboration between members assumes their legal equality, and therefore the lack of any subordination. [9, pg. 159].

Participation in profits and losses. The main goal of the founders of a company is, of course, sharing of benefits derived from its activities. If this task proves to be ineffective, not only associations can claim some benefits, but will support the expense of the inefficiencies. The benefit means the financial profit of the commercial or industrial activity, representing the difference between investment and income [10, p. 134].

Essential for Limited Liability Company is an activity that brings material gain to enhance heritage society, implicitly, the shareholdings (of shares). The doctrine suggests that it represents a benefit not only material gain, but also cost savings for members, such as services or goods purchased by the company on terms more favorable than would be obtained individually [9, p. 160]. Benefit or business income is calculated, usually as the difference between the actual size of assets and the social capital.

The consequences of failure of the conditions of validity of the act of foundation. Failure of the conditions of validity of the act of foundation, have as the result the nullity of the company just in the cases set in the art. 110, par.2 C.C.

The nullity of the company attracted by the background conditions of the act of foundation produce different specific effects from those of the invalidity of legal acts of the common law. Nullity of the company contract, and thereby the company, only occurs when all the founders are unable (art. 110, 2 point. e, C. C.), the term "incapable" means, as the legislature is meant to keep not only unable declared, but also the minors without the capacity, minors who have limited capacity and legal persons prohibited by law or the articles of incorporation. If one or a few members do not have the capacity, the company must be as if they do not. Only if their exclusion leads to other grounds for invalidity, the company may be dissolved. As an example can be the fact that the ignored contribution of an unable partner which have as affect reducing the capital below the minimum established by law or reducing the minimum number of associates.

Signing up the act of foundation by a person who do not have the necessary capacity lead to the partial nullity, producing effects only to this person. The consent affected of the partner's vices, also can not lead to permanent invalidity of the contract, the company will be there and with the remaining people, whose will was not altered. In literature we find expressed the idea that, where consent is vitiated by fraud, to those who is affected is given an action for compensation instead of action for invalidity.

Legal provisions provide that the company will be declared invalid if the object of the company specified in the contract of foundation is unlawful or contrary to public order (art. 110 CC par.2 b). The object of the society is illicit if the activity indicated in the contract is prohibited by law. In the absence of express provisions on prohibited activities, intended to qualify as such activities by which is established a criminal or administrative sanction. Among these, we classify such actions as: human trafficking, forced labor, slavery, the work of mercenaries, illegal money transactions and the like which are provided for criminal penalties. Another category of activities that fall within the scope of prohibited actions qualify them as they are only allowed to state enterprises. In other words, the normative act provides that certain activities are practiced exclusively by state enterprises and for companies are prohibited. In the category of prohibited activities undertaken within the base license or other authorization issued by a public authority empowered.

Nullity of the company's concept is different from the concept of invalidity of legal acts laid down in C.C, which either has retroactively character, whether ends only for the future. The specific of the company is influenced by the invalidity of the legal nature of the contract of foundation. The nullity of the company refers, less, to the relationships between founders and associates, and more to termination of a legal person and leaving her relationships with others. Therefore the invalidity not affects the acts signed by the company prior to the dissolution date and it do not end the existence legal person. It is continue to exist after dissolution to the extent necessary for the liquidation of patrimony

(art. 86 C.C al.3), the liquidator will complete transactions initiated by it, in some cases is entitled to terminate the new acts (art. 90 of 7 CC).

BIBLIOGRAPHIC SOURCES:

1. Legea RM, Codul Civil, nr. 1107-XV din 6 iunie 2002, Monitorul Oficial nr. 82-86/661 din 22 iunie 2002, pus în aplicare la 13 iunie 2003
2. Legea privind societatea cu răspundere limitată, nr.135/2007, Monitorul Oficial al RM, nr.127-130
3. Legea nr. 845, cu privire la antreprenoriat şi întreprinderi, adoptată la 3 ianuarie 1992, Monitorul Oficial nr.2/1994
4. Legea nr. 1453/2002, cu privire la notariat, Legea nr. 1453–V din 8 noiembrie 2002, Monitorul Oficial, 2002, nr. 154-157
5. Legea R.M., din 16 iunie 2000, Codul fiscal, republicat în Monitorul Oficial al R.M., nr. 102-103 din 23 august 2001
6. Legea nr. 220/2007, cu privire la înregistrarea de stat a persoanelor juridice şi a întreprinzătoriolor individuali, Monitorul Oficial al R.M., nr.184-187
7. Beleiu Gh., Drept civil român, introducere în dreptul civil şi subiectele dreptului civil, ed. „Şansa” SRL, Bucureşti, 1992, 440 p
8. Căpăţână O., Societăţile comerciale, ed. Lumina Lex, Bucureşti, 1996, 447 p.
9. Cărpenaru S. D., Drept comercial român, ediţia a III-a, ed. ALL Beck, Bucureşti, 2000, 612 p.
10. Dogaru I., Elementele dreptului civil, Bucureşti, 1993, 426 p.
11. Pătulea V., Turuianu C., Curs de drept comercial român, ediţia II, ed. ALL Beck, Bucureşti, 2000, 171 p.
12. Popescu D. A., Contractul de societate, Bucureşti, 1996, 304 p.
13. Roşca N., Baeş S., Dreptul afacerilor, vol. I, ed. FEP „Tipografia Centrală”, Chişinău, 2004.
14. Şăineanu L., Dicţionar universal al limbii române, Chişinău, 1998, 1362 p.
15. Turcu I., Teoria şi practica dreptului comercial român, vol. I, ed. Lumina Lex, Bucureşti, 1998, 503 p.
16. Baias Fl., Simulaţia în dreptul comercial, în : Revista română de drept al afacerilor, 2003, nr.2, p. 9-23
17. Tuca F., Societatea comercială fictivă, în: Revista de drept comercial, 1996, nr.10, p. 110.