THE EFFICIENCY OF THE REGULATION AND CASE LAW APPROACHES TO THE ASSIGNMENT WITHIN THE LIMITED LIABILITY COMPANY

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Abstract
The study aims to bring into public attention the issue of the assignment of debt transposed into the matter of assignment of shares within the limited liability company and its consequences, through a dual theoretical – regulatory approach, from the perspective of common law regulations on the one hand, and from the perspective of reglementation through the special regulation in the matter, on the other hand, complemented by the case law perspective on the assignment of shares within the limited liability company, but also a brief reflection of the procedural remedy of opposition in case law

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1. The assignment of debt in the common law regime

According to the regulations of the Civil Code, republished in 2011, consolidated version of 19.10.2014, hereinafter called Civil Code, the assignment contract is regulated for two cases: *the assignment of debt,* whose legal regime is established in Book V "About obligations", Title VI "Transfer and transformation of obligations", Chapter I "Assignment of debts" – Section 1 "Assignment of debts in general" (art. 1566 – art. 1586) and respectively *the assignment of debts constituted through registered shares, promissory notes or bearer shares" (art. 1587 – art. 1592).*

The legal provisions on assignment of debts in general are not applicable in the cases mentioned by art. 1566, para. 2, namely a] the transfer of debt within a universal transfer or with universal title (art. 1566, para. 2, letter a); b] transfer of securities and other financial instruments, excepting the provisions in section 2 on the assignment of debts constituted through registered shares, promissory notes or bearer shares such as stipulated in art. 1566, para. 2 letter b) of the Code.

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Law no. 71/2011 for the implementation of the Civil Code republished in 2011, contains transitional provisions in this matter and establishes in the case of debts transferred through assignment or subrogation, carried out after the date when the code entered in force, that the respective transfer shall remain under the regime established through the regulations in force at the date the debt was claimed (art. 117, para. 1, provides: "(1) The debt transferred through assignment or subrogation, carried out after the date when the Civil Code entered in force, remains under the regime established through the regulations in force at the date the debt was claimed").

From the structure of the legal regulations it results that the object of the assignment is a debt in the form of money or other services, such as it derives from art. 1566, para. 1 correlated with art. 1569, para. 2 of the Civil Code, consolidated version. The assignment of debts whose object is another service, different than the payment of an amount of money, is conditioned by maintaining a balance between the services, being possible and in conformity with the legal requirements only if it does not determine the substantially onerous character of the obligation.

The assignment of debts is defined by art. 1566, para. 1 of the Code as being the convention through which the creditor assignee transfers to the assignor a debt claimed against a third party.

In other words, the assignment of claims is the judicial operation by which the assignor transfers to the assignee the debts owed to him by a third person – the assignor's debtor.

In principle, there can be assigned, in full or partially, all debts, regardless of their object or nature, disputed in court or not (Turcu, p. 663).

The cases of unassignable debts are provided in the law or can be established in a conventional way (art. 1566, para. 2 in correlation with art. 1569, para. 1 and combined with art. 1570 of the Civil Code, consolidated version).

Art. 1569, para. 1 of the code stipulates that it cannot make the object of an assignment the debts that are declared untransferable by the law, and art. 1566, para. 2 stipulates as exceptions from the application of the provisions on assignment of debts: the transfer of debts within a universal transfer or a transfer bearing universal title (a) and the transfer of securities and other financial instruments (b), that fall under the regime of special regulations in the field. In the case of transfer of securities and other financial instruments are applicable the provisions from section 2 on the assignment of debts constituted by registered shares, promissory notes or bearer shares, from Book V, title VI, chapter I of the Civil Code, consolidated version.

The debts which has as effect a service other that the payment of money can be assigned only under certain conditions, respectively if the assignment does not determine the obligation to become substantially more onerous, this requirement being stipulated by art. 1569, para. 2 of the code.

For the case in which the assignment is forbidden or restricted in a conventional way between the assignor and the assignor's debtor, art. 1570, para. 1 of the Civil Code, consolidated version, mentions the effects of the inalienability clause. In accordance with this legal text, in the case of an inalienability clause in the contract

concluded between the assignor and the assignor's debtor, the assignment is forbidden or restricted through the agreement concluded between the assignor and the assignor's debtor and does not produce effects in what concerns the debtor, except for the cases and conditions stipulated by the invoked legal text, which is if:

- the debtor has agreed the assignment;
- the interdiction is not mentioned expressly in the document ascertaining the debt, and the assignee did not have to become aware of the interdiction at the moment of assignment;
- the assignment regards a debt whose object is an amount of money.

The solution provided by the legal text does not limit the assignor's liability towards his debtor for breaching the interdiction of assigning the debts.

The assignment of debts cannot have an onerous character or be allocated on a free basis, but in the case of assignment on a free basis there must be done in compliance with requirements of the donation contract. If the assignment has an onerous character, the legal regime governing it shall be complemented – if appropriate – with the regulations on the sales purchase agreement, or if applicable, with the provisions that regulate another judicial operation within which the parties agree to perform the service which is the transfer of the debt (art. 1567 of the Civil Code, consolidated version).

Finally, from the structure of the regulations on the assignment of debts there can be disbranched rules on partial assignment (art. 1571, para. 1, and art. 1584 of the Civil Code, consolidated version), the assignment of future debts (art. 1572 of the Civil Code, consolidated version), the assignment of a universality of debts – current or future (art. 1579 of the Civil Code, consolidated version) and consecutive assignments (art. 1583 of the Civil Code, consolidated version).

The assignment has as effect the transfer to the asignee of the debt together with the rights, guarantees and attachments of the assigned debt. The assignor is responsible for sending the asignee the document proving of debt as well as any other documents demonstrating the transferred right. In the case of a partial assignment, the assignor is obliged to give the assignee a legalized copy of the proof of debt and mention the assignment on the original document that shall be signed by the parties (art. 1568 combined with art. 1574 of the Civil Code, consolidated version). In the case of assignment for consideration, the assignor has de jure the obligation to guarantee the assignee for the existence of the debt in relation to the date of the assignment, but without being liable for the solvability of the debtor, except for the case in which the assignor has expressly taken upon him to guarantee for the solvability of the assigned debtor. In the case of assignment on a free basis the assignor does not guarantee – except for the contrary stipulation – the existence of the debt at the date of the assignment. At the same time, the assignor can be held liable in all cases, for eviction, for its own deed or for a deed carried out together with other persons, if the assignee does not acquire the debt in its own patrimony or if it cannot render it opposable to third parties.

The assignment of claims produces effects between the assignor and the assignee even if the assignment has not been opposed to the debtor, being recognized the assignee's prerogative to claim everything that the assignor obtains from the debtor and to carry out acts of conservation of the assigned right. The effects of assignment before the notification are established by art. 1575 of the Civil Code, consolidated version. As of the date of the assignment, the interests and any other revenues resulting from the debt, fallen due but outstanding, are entitled to the assignee, if not otherwise agreed.

In what concerns the effects of the assignment for the debtor, the latter has the right to be compensated by the assignor and by the assignee for any additional expenses incurred by the assignment and has the obligation to pay the assignee its debt. In accordance with art. 1578, para. 1 of the code, the debtor has the obligation to pay the assignee starting from the date on which the assignment is accepted by means of a deed bearing a certified date (a), respectively from the date when the debtor receives a written notice of the assignment (b).

Before accepting the assignment by means of an act bearing a certified date of by receiving a written notice of the assignment, the debtor can clear its debt only by paying the assignor. However, the written notice of the assignment sent to the debtor does not produce effects unless it is communicated to the debtor the written proof of the assignment. When the assignor proceeds to the communication of the assignment, the debtor is entitled to ask for the written proof of the assignment, with the consequence that until the receipt of the proof, the debtor has the right to suspend the payment. In the relations with the assignee, the debtor may oppose the assignee all the means of defense that might have been invoked against the assignor, but if the assignment became opposable by acceptance, the assigned debtor can no longer oppose the assignee the compensation (as means of clearing the debt), which otherwise could have invoked in the relations with the assignor.

From the point of view of formal requirements, the debt is assigned through the simple convention between the assignor and the assignee, without normally being required the notification of the assigned debtor. Anyhow, the assigned debtor's consent is necessary when the debt is essentially linked to the debtor (art. 1573 of the Civil Code, consolidated version).

As the general provisions in the matter of assignment of debt are not applicable in the case of assignment of securities and other financial instruments, except for those mentioned in art. 1587-art. 1592 of the code, we consider that it would be relevant to present them.

2. The assignment of debts constituted by registered shares, promissory notes or bearer shares

The assignment of debts constituted by registered shares, promissory notes or bearer shares as well as the assignment of other securities makes the object of a very complex regulatory framework consisting of special provisions comprised in the

special laws that establish the legal regime of these securities and, subsequently are corroborated with the provisions in the field of common law under art. 1587- art. 1592 from section 2 "The assignment of debts constituted by means of registered shares, promissory notes or bearer shares", chapter I., title VI, Book V of the Civil Code, consolidated version.

From the regulations under the Civil Code, consolidated version, we can detach a number of rules bearing the value of principles, which govern in this matter. In reference to the *means of assigning* the right, the debts incorporated in registered shares, promissory notes or bearer shares *cannot be assigned through the simple agreement of the parties* (art. 1587, para. 1 of the code), as an exception from the rule of consensus according to which the majority of contracts are consensual. In other words, in order to acquire the validity of the assignment of the right offered by these registered shares, there must be fulfilled the requirements and formalities provided by the special law in the matter.

This way the transfer of *registered shares* is mentioned on the shares as well as in the ledger where these are kept in evidence, in compliance with art. 1588, para. 1 of the code. In the case of assignment of debts incorporated in *bearer shares* it is also necessary to hand in the actual bearer shares, beside the express of the parties free agreement, *any stipulation to the contrary being considered as not existing*, in accordance with art. 1588, para. 3 of the code.

For the case of the assignment of bearer shares, the provisions under art. 1590- art. 1592 of the Civil Code, consolidated version, establish a few specific rules:

- the debtor who issued the bearer share has the obligation to pay the debts constituted by the respective share to whatever owner who is in possession of the share and presents it to the debtor, except for the case where the debtor was communicated a court judgement compelling him to refuse the payment;
- the debtor who issued the bearer share shall remain bound to any owner of good will, even when he proves that the share was transferred against his will;
- the person which was illegitimately dispossessed of a bearer share cannot impede the debtor to pay the debt to the person possessing the bearer share, unless by means of court judgement; in such case, the court issues the judgement based on a presidential ordinance.

In the situation of the assignment of *promissory notes* it is necessary the endorsement, which is applied in accordance with the provisions applicable to bills of exchange, such as provided by art. 1588, para. 2 of the code.

Regarding the *means of defence*, the rule instituted by art. 1589, para. 1 of the Civil Code, consolidated version, provides that the debtor cannot oppose the owner of the promissory note other exceptions than those regarding the voidness of the promissory note, such as based on the absence of a special mention (Turcu, p. 674), those which result undoubtfully from the content of the promissory note. By derogation from the invoked rule, the person who came in possession of the promissory note to the fraud of the debtor, shall not be able to make use of the mentioned means of defence.

In what concerns the *formal requirements*, in the field of assignment of rights over debts constituted by registered shares, promissory notes or bearer shares, shall be applicable the regulations provided by the *special law (specialia generalibus derogant),* but also with the remark on the absence of a specific regulation through common law provisions of the code.

However, the common law provisions that institute formal requirements, in certain matters, such as for example, the acknowledgement by a public notary of the authentic form a donation contract, become applicable in the case of transfer through *assignment on a free basis* of the shares of a limited liability company, given the fact that the special law in the matter does not provide explicitly formal constraints; therefore, in order to complement the special law and as far as the compatibility allows, here become applicable the common law regulations of the Civil Code, republished in 2011. Hence, the assignment on a free basis of the shares shall be carried out by means of authentic document, as an exception to the rule on transfer of shares by means of legal document under private signature.

3. The assignment of shares under the regime of Law no. 31/1990, republished, as subsequently amended and supplemented

The company shares are ***participatory securities*** that reflect the contributions brought and undertaken by the associates of the limited liability companies, in order to build the share capital when they set-up the company.

The rights gained through the company shares can be considered as being ***corporate rights*** if we accept that they incurred by the capacity of associate in the company, that their owner has and by the fact the associate "....is commited to its will" (Georgescu, 2002, p.487, cited by Duţescu, 2006, p. 52). Indeed, the company has legal personality as it is regarded by the law as a legal entity distinct from the the associates, and consequently has its own will power – social will power that is expressed through the decisions adopted by the associates' general assembly.

The legal regime of company shares is confined by a minimum set of rules concentrated in a number of legal provisions of art. 11, art. 198, art. 202, art. 203 and art. 204 of Company Law no. 31/1990, amended and supplemented, consolidated version of 16.07.2015, hereinafter called Company Law, consolidated version.

Thereby, company shares represent fractions, equal in value, of the share capital of the limited liability companies and ***cannot be represented by negociable securities,*** as stipulated by art. 11, para. 2 of the Company Law, consolidated version.

By principle, the company shares ***cannot be transferred on a free basis.*** Nevertheless, the transfer of company shares is possible and allowed by the law under certain conditions, which result from the ***specific rules on the transfer of company shares,*** stipulated in art. 202 corroborated with art. 203 and art. 204, para. 4 of the Company Law, consolidated version.

The text of the law makes the distinction between transfer of company shares ***from one associate to another*** and the transfer of company shares ***to persons outside the company.***

In both cases mentioned above, the operation of transfer of company shares is subject to the approval of associates through the decision adopted while complying with the conditions established by the Articles of Association and by the law. Since the transfer of company shares from one shareholder to another or to persons outside the company, imply for the Articles of Association to be amended, it is also necessary to comply with the requirements and formalities imposed by Company Law consolidated version, and by the Law on the Trade Registry no. 26/1990, amended and supplemented, consolidated version of 11.10.2015, hereinafter called the Trade Registry Law, consolidated version.

The associates' decisions are adopted in the general assembly, through the vote of the absolute majority of associates and company shares (double the majority of the number of associates and company shares), if the articles of association do not provide otherwise (art. 191, para. 2 of Company Law, consolidated version, provides the possibility that through the articles of association of a limited liability company, it can be established the vote by correspondence). If the assembly legitimately constituted cannot adopt a valid decision because not all requirements on majority are met, then the assembly is called again and can decide upon the the matters on the agenda, irrespective of the number of associates or of the part of the company shares represented by the present associates (art. 192 corroborated with art. 193, para. 3 of Company Law, consolidated version).

Except for the case where the law or the articles of association provide other requirements, the decisions regarding the amendment of the articles of association must be taken unanimously by all associates. The requirement of unanimity of the associates' votes in this last case, derives from applying the *rule of symmetry of legal documents* according to which the amending of a legal document, here the articles of association of a company, shall meet the requirements for a valid conclusion of the document in question – the articles of association of the company being concluded by the unanimity of the associates. Or, the transfer of company shares is a legal operation that necessarily implies amending the articles of association of the company.

Otherwise, the mandatory formalities to be carried out following the transfer of company shares and following the modification of the articles of association of the company are determined in art. 203 and art. 204 para. 4 of the Company Law, consolidated version. On that account, the transfer of company shares shall be registered in the trade registry and in the registry of associates of the company. The transfer of company shares and the updated articles of association containing the personal data of the new associates shall be submitted to the Trade Registry Office in order for them to be registered in the Trade Registry and be published in the Official Gazette, Part IV, as stipulated by art. 203 para. 3 making reference to art. 204 para. 4 of the law.

We notice that in the content of art. 204 para. 4 of the law, the regulation requires that after each amendment brought to the articles of association, the administrators – the director, shall submit before the Trade Registry Office, the amending document and the full text of the articles of association, updated with all amendments, in this way being fulfilled the publicity prerogative of the trade registry.

Apparently there is no equivalence between the legal texts of art. 203 para. 3 and art. 204 para. 4, which refer to the "transfer of company shares" and respectively "the document amending" the articles of association, which are documents that must be attached to the updated articles of association, art. 203 para. 3, containing a stipulation that makes reference to the provisions of art. 204, para. 4, that act as *general provision* applicable in all cases of modification of articles of association of the companies regulated by the Company Law, consolidated version. Therefore, the legal provision in art. 203 para. 3 of the law – integrated in the section on the regulation of the aspects specific to the limited liability company, which provides the prescript of submitting to the trade registry *the act of transfer of company shares* attached to the updated articles of association, represents a ***specific provision*** for the limited liability companies within which the transfer of shares takes place. But in substance, both legal texts provide for the ***essential obligation incumbent on companies*** to request the ***registration in the trade registry of the new entries corresponding*** to the amendments arisen in the structure or functioning of the company, in order to ensure updated information concerning the companies registered in the trade registry.

However, the legal texts previously invoked make the distinction between "the act of transfer of company shares", indicated explicitly by art. 203 para. 3 of the law, as *specific provision for the segment of the limited liability companies*, on the one hand, and the "amending act" of the articles of association, mentioned as having a rather general character in art. 204 para. 4 of the law.

A possible interpretation of the legal text in art. 203, para. 3 would lead us to consider" the act of transfer of company shares" as being the shares assignment agreement or the decision of the general assembly of associates approving the assignment.

However, identifying the act of transfer of company shares, in the case mentioned by the law, with the ***decision of the general assembly of associates,*** we believe is the interpretation that prevails, at least based on the grounds we are to expose as follows.

It is true that the decision of the associates' general assembly represents the act which expresses the company's will, on which depends the approval of the transfer of company shares to third parties, in compliance with the condition of majority to be met for the adoption of valid decisions. From the structure of provisions under art. 202 and art. 203 of the law, it unquestionably results that the *decision of the associates general assembly,* adopted while complying with the condition of majority provided by the law in the case of transfer of company shares to persons outside the company, is the act that is to be submitted to the trade registry in order to fulfill the

publicity requirements through this registry and by means of the Official Gazette of Romania, Part IV, and serves also for the immediate, electronic, transmission to the fiscal administration authority at national and county level. Art. 202 para. 2 of the law provides: "The decision of the associates's assembly adopted in accordance with para. 2 shall be submitted within 15 days for registration to the trade registry and for publication in the Official Gazette of Romania, Part IV".

The decision of the associates' general assembly performs the function of the act of transfer of company shares, also in the case of ***transfer of company shares from one associate to another*** for the same reason – because it expresses the will of the associates gathered in general assembly (including the assignor and the assignee), hence the company's will, formally fundamented in the document that ascertains the associates' general assembly regarding the approval of the transfer of company shares. This document ascertaining the company's will with regard to the new structure of the participation to the share capital, accompanies the updated articles of association, with or without distinct addendum, and the application for new entries in the trade registry, submitted by the company. The resolution is based on the provisions of art. 202, para. 1 corroborated with art. 203 para. 1 and art. 204 para. 4 of the Company Law, consolidated version.

In the case of transfer of company shares by means of inheritance, if the articles of association do not stipulate the clause for the continuation of the company with the inheritors, then the company is obliged to pay the shares to the inheritors, in accordance with their value from the last approved balance sheet. On the other hand, the significance of the "amending act" as mentioned in art. 204, para. 4 of the Company Law, as amended by Law no. 441/2006 is not clear enough.

In the meaning of art. 204, para. 1 of the Company Law, consolidated version, the *articles of association may be amended* through the decision of the general assembly or the decision of the Administrative Board, respectively the directors' decision, adopted under the condition of the associates' extraordinary general assembly or by the judgement of the court, in accordance with art. 223, para. 3 and art. 226, para. 2 that provides the case of exclusion of withdrawal of associates.

The act amending the articles of association normally takes the form of the *addendum* which is fundamented either on the decision of the associates' general assembly approving the clauses for the modification of the articles of association, or on the judgement on the court, in the specific cases mentioned by the law (exclusion or withdrawal of associates).

But the corroborated interpretation of the legal texts invoked previously, allows the conclusion stating that the *amending act* referred in art. 204, para. 4, is the *decision of the general assembly*, or depending on the case, the judgement of the court, not being further required the addendum to the articles of association which used to be the practice before the amendments brought by Law no. 441/2006. Consequently, the addendum is no longer a compulsory condition since after each modification of the articles of incorporation it is now provided ***the obligation to submit to the trade registry the updated articles of association together with***

amending act which, in the meaning of para. 1, is represented by the decision of the general assembly or, depending on the case, the judgement of the court, in the cases stipulated by the law.

The amending act and the full text of the updated articles of association submitted to the trade registry are registered based on the resolution of the delegated judge, except for the cases when the registration is made based on the court's final decision on the exclusion or withdrawal of the associate. In accordance with art. 223, para. 1 of the Company Law, consolidated version, the exclusion is enforced through a court judgement, on the company's or any associate's request; para. 3 states that following the exclusion, the court shall order, through the same judgement, also in relation to the structure of the participation to the share capital of the other associates, and in accordance with art. 226, para. 2 corroborated with para. 1, letter c) from the Company Law, consolidated version, in the case where it is established the absence of certain provisions from the articles of association, or where the unanimous agreement is not reached, the associate may withdraw on reasonable grounds, on the basis of a court decision (subject only to appeal), in which case the court orders – through the same judgement – also on the structure of the participation of the other associates to the share capital.

The trade registry forwards, by default, to the administration of the Official Gazette, the registered amending act and a notification on the submission of the updated text of the articles of association, in order for them to be published in the Official Gazette of Romania, Part IV, at the company's expense.

Therefore, in the case of transfer of company shares within the limited liability company, the associates or the designated person, or depending on the case the administrators, have the obligation to submit to the trade registry the *act of transfer of company shares and the updated articles of association.*

Although the judicial operation of transfer to company shares by means of assignment should be formally acknowledged though an assignment agreement – as *judicial instrument and means of evidence to prove the transfer of company shares was carried out in this manner,* a judicial act which – together with the amending act and the updated articles of association – would be the fundaments of the documents submitted to the trade registry for the registration of new corresponding entries in this registry, in relation to the legal provision previously mentioned and in accordance with the *principle of the prevalence of the regulations in the special law in the matter,* to which make reference the common law regulations in art. 1587, para. 1 and 2 of the Civil Code, consolidated version, it should be considered that the amending act is in all cases of transfer of company shares, the decision of the associates' general assembly adopted in compliance with the law and with the articles of association.

The case law interpretation of the provisions of art. 204 para. 4 combined with art. 303 para. 3 of the Company Law no. 31/1990, republished in 2004, given for example in **Decision no. 344 C of 28.05.2012 delivered by the Court of Appeal in Oradea, section II on civil, contentious administrative and fiscal matters,** reveals the judicial construction of the assignment agreement applied to the assignment of

company shares that "involve the parties of the convention (the assignor and the assignee), as well as the assigned debtor, in the position of whom is found the company that issued the shares and which is bound to respect the rights deriving from the capacity of associate. The court being trusted with awarding a solution in the appeal declared against the first judgement delivered in the action for annulment of the assignment of company shares only between the disputing natural persons, without being called in trial also the companies in which were registered the associates with assigned shares. Starting from the interpretation according to which "the assignment of company shares is regulated as being an amendment of the articles of association of a company, and is subject to the legal obligation on publicity, the non-performance of which leads to voidness in relation to third parties", the Court of Appeal admitted the appeal and overturned the judgement that sent the case for retrial before the same first instance court, considering that "the action for the annulment of the assignment agreements of the company shares issued by the two companies and the return to the prior situation involves the amending of the articles of association of the two companies, subject the publicity obligation, under the aspect of identification of associates and the registration in the associates' registry of the shares owned by them, operation which calls for the trial of the case against the companies that issued the shares that make the object of the assignment and the action for annulment" (source Indaco Lege 4 Professional, Jurisprudenţă, which cites as source portal.just.ro).

The transfer of company shares from one associate to another is carried out under the conditions stipulated in the articles of association, in compliance with the requirements for majority, quorum and voting procedure.

But in the case of transfer of company shares to ***persons outside of the company,*** it is necessary in accordance with the provision of art. 202 para. 2 of the Company Law, the approval of the ***associates representing for at least ¾ of the share capital.*** Consequently, the transfer of company shares is conditional on the associates' consent representing for at least ¾ of the share capital.

The legal provision that established a *minimum limit of ¾* of the share capital in what concerns the adoption of associates' decisions, in the case presented, this provision has an imperative character and consequently the clause in the articles of association regarding the adoption of decisions cannot be derogated by establishing through the will of the associates a majority ratio lower than the limit established imperatively through the law (Angheni, 2013, p. 220). *Per a contrario*, there is no impediment for the associates to agree, through the corresponding clause in the articles of association, upon the unanimous adoption of the decision.

In other words, even if the associates have the prerogative to stipulate in the company's articles of association a clause providing the unanimous adoption of decisions, in the case where the company shares are transferred to persons outside the company, the prerogative of the associates to establish the majority condition with regard to the adoption of the transfer decision, does not eliminate the obligation to respect the *minimum limit* imposed through the legal text previously invoked, which

stipulates the *adoption of the associates' decisions through the votes representing for at least ¾ of the share capital.*

Case law reflects the distinction expressed by the legal cases depicted in art. 202 para. 2 and art. 3 of the Company Law, stating for example in **Decision no. 374R of 04.03.2010 delivered by the Bucharest Court of Appeal**, in the meaning that if para. 2 regulates the means of transfer of company shares to third parties "transfer that involves the compulsory agreement of the other associates, who shall decide with a majority of at least ¾ of the share capital", para. 3 of the legal text provides that "in case the company shares are inherited, the associates do not have the right of agreement on the issue of the inheritor, except when the articles of association explicitly provide for this right. While in the present case, as shown above, the articles of association does not contain the explicit provision in this regard, namely that for the continuation of the company with the inheritors of the deceased associate it is required the agreement of the other associate, hence it was correctly entered into the trade registry the mention regarding the transfer of the 9 company shares to the associate M.R. on the basis of the inheritance certificate" (source Indaco Lege 4 Professional, Jurisprudență, which cites as source portal.just.ro).

The decision of the associates' general assembly to approve the transfer of company shares to persons outside the company, adopted in compliance with the law and with the articles of association, shall be presented within 15 days to the Trade Registry Office in order to be registered and then published in the Official Gazette of Romania, Part IV. The Trade Registry Office has the ***obligation to immediately transmit the decision – by electronic means – to the National Agency for Fiscal Administration and to the General County Directorate for Public Finance,*** in Bucharest in this case, such as stipulated in art. 202, para. 2 of the Company Law, consolidated version (para. 2 of art. 202 of the law was introduced through point 2 of the Government Emergency Ordinance no. 54/2010, beginning with 23.06.2010).

The obligation to be fulfilled by the trade registry, instituted by the legal provision of art. 202, para. 2 of the Company Law, consolidated version, determines a ***great impact in the practice of the business environment***, given the fact that in this way, the fiscal administration bodies are informed in due time about the modifications that are to be operated in the structure of the share capital of these companies, and thus have the chance to make use of the procedural means of the application for objection, under the conditions of art. 202, para. 2, corroborated with art. 62 of the Company Law, consolidated version, in the case where the company has outstanding debts to the general consolidated budget.

So as to illustrate case law resolutions, we call upon civil **Sentence no. 38CC of 13.02.2012 delivered by the County Court of Brasov**, through which it was admitted the opposition submitted by the Administration of Public Finance of Fagaras, on the grounds that at the date of the agreement of assignment of company shares by the sole associate assignor to the third parties assignees, the defendant party was found with unpaid debts to the state consolidated budget, and was obliged the defendant whose civil liability was attached for the default on payment of the

outstanding debts of the defendant company to the state consolidated budget (source Indaco Lege 4 Professional, Jurisprudenţă, which cites as source portal.just.ro).

The prerogative to use the procedural means of the application for objection, under the legal conditions of art. 202, para. 2, is to be used by both the creditors of the company and by any persons suffering loss through the associates' decision regarding the transfer of company shares.

In accordance with the invoked provisions, the creditors or the affected persons have the possibility to obtain compensation for the prejudice resulted from the assignment of company shares and deriving from the respective operation of transfer of company shares, prejudice which.... "must be proved before the court of law trusted with trial of the opposition submitted". But, as stated by the Oradea Court of Appeal, **section II on civil, contentious administrative and fiscal matters, through Decision no. 558C of 24.09.2012,** "the plain existence of a claim against the company under trial, that was subject to assignment of shares, irrrespective of its character, does not represent a prejudice produced as a result of the assignment of company shares, in order to be invoked the applicability of the above mentioned legal provisions.

The company's creditor or other persons affected must provide the proof that following the respective assignment they have suffered a prejudice that is to be compensated, by illustrating in concrete the prejudice, what it is composed of and how it is produced following the modification of the holders of the company shares, which in this case cannot be determined" (source Indaco Lege 4 Professional, Jurisprudenţă, which cites as source portal.just.ro). The same meaning was pointed out by the Oradea Court of Appeal, **section II on civil, contentious administrative and fiscal matters, through Decision no. 29 of 12.01.2012,** stating that "the plain existence of a claim against the company under trial, that was subject to assignment of shares, irrespective of its character, does not represent a prejudice produced as a result of the assignment of company shares...." as the appealing creditor "did not prove to the first court and neither to the court of appeal the prejudice produced by decision no. 52/20.12.2010 through which associate S.Z. assigned his/her company shares to A.M. who came in possession of 9 shares representing 45 % of the share capital of SC S. P. SRL" (source Indaco Lege 4 Professional, Jurisprudenţă, which cites as source portal.just.ro).

In the spirit of the same approach we invoke also the civil **Decision no. 1919 of 01.11.2012 issued by the Court of Appeal in Bucharest, civil section V**, of great relevance in what concerns the stress put on the effectiveness requirements of the use of the procedural means of opposition in the analyzed context, decision which stated that "the existence of the debt is a necessary requirement for initiating opposition, being necessary to prove also the existence of the prejudice reflected in the creditor's patrimony. For the opposition to be admitted and for the rejection of the application for registration in the trade registry of the decision regarding the assignment of company shares, it is required not only to have the capacity of company creditor but also to be able to prove the prejudice suffered following the assignment. Or in this

case it is determined that the appelant creditor was not able to prove the existence of a prejudice resulted from the assignment, moreover the appelant did not prove what the prejudice was composed of (the debt that is pretended to result from a fiscal enforceable title not being eliminated, even given the rejection of the opposition).

In the above mentioned context, the Court of Appeal determined that "the mere existence of the debt owed to the company whose shares were assigned by the will of the associates is not equivalent to the existence of a prejudice, because the assignment does not represent an impediment to proceed to forced execution of the company, by the budgetary creditor in relation with the company" (source Indaco Lege 4 Professional, Jurisprudenţă, which cites as source portal.just.ro).

In this case, the court judging on the matter (the county court) rejected as groundless the application submitted by the appellant the General Directorate of Public Finance, for the opposition against the decision assigning the company shares of the defendant limited liability company, determining amongst other things, that for the opposition to be admitted it was necessary that the appellant to prove the existence of the prejudice resulted from the assignment of shares, because..." the mere capacity of creditor of the company is not sufficient to initiate opposition to the transfer of company shares, but it must be proved, in accordance to art. 1169 of the Civil Code, by the initiator of the opposition, the prejudice produced and that it was caused by the associates' decision." With regard to the circumstances in which the appellant GDPF did not prove the existence of a prejudice produced following the decision of the associates' general assembly within the defendant limited liability company regarding the assignment of shares, the court of first instance rejected the opposition as being groundless, this ruling being maintained also by the court of appeal through the decision above mentioned, and the appeal was rejected as groundless.

The causality relation between the decision adopted by the associates' assembly regarding the approval of the transfer of company shares by one or several assigning associates to assigned third parties, the prejudice resulted from the conclusion of the assignment agreement and the fault of the assigning associate in the case where the latter's intention is to fraud the best interests of the company, the conditions under which the legal liability can be attached to assigning associate and not lastly the use of the mechanism of opposition to the assignment of company shares are all aspects illustrated in civil **Decision no. 549 of 10.10.2011 delivered by the Oradea Court of Appeal, section II, civil, administrative contentious and fiscal matters,** the court of appeal stated that on the grounds of art. 202, para. 2 corroborated with art. 62 of Law no. 31/1990, amended through GEO no. 54/2010, in the meaning that "...it is necessary to determine the fault of the associates who intend to assign their company shares, before attaching liability to them."

Moreover, it must be proved the prejudice produced exclusively by the conclusion of the agreement for the assignment of company shares, and which cannot be proved by invoking the outstanding obligations of the company towards the state budget. The Code of Fiscal Procedure regulates the measures of forced execution of

receivables, by the fiscal authorities, or in this care the appellant has not even proved having taken such type of measures." Having in consideration the circumstances of this case, the first instance court determined that in accordance with the records of the fiscal authority, the limited liability company had outstanding obligations towards the state budget, the submission of an "application of a creditor for opposition to the operation of assignment of company shares, implies besides the existence of a debt also proving the prejudice as well as determining, in accordance with the law, the legal liability of the responsible persons". While in this case the "... creditor declared claiming 16.637 lei from the debtor, without determining whether this fact produced any prejudice, without determining the extent of the prejudice and the manner in which it can be quantified of justified. The hypothesis of equating the prejudice with the amount of the outstanding debt requires the submission of evidence that would prove the involved persons' incriminatory behaviour. In the present case, the creditor did not present any evidence that would prove that the initiation of legal measures in view of recovering the debt and in view of the possible liability of the defendants" (source Indaco Lege 4 Professional, Jurisprudenţă, which cites as source portal.just.ro).

Therefore, in full agreement with the case law statements, we consider that the ***application for opposition*** – enshrined in the matter, as ***procedural remedy*** available to the company's creditors, either fiscal creditor or non-fiscal, as well as to any persons prejudiced from the assignment of company shares, within the limited liability companies – should not have to represent a procedural means used only formally or for purposes misapplied in comparison with the output envisaged by the law which is to *restore balance in the judicial situation of the company, and generate positive effects in relation with creditors and third parties.* All in all, the transfer of company shares can be carried out by means of acts concluded between living persons ***(inter vivos)*** or for cause of death ***(mortis causa)***. From another perspective, the transfer of company shares may be carried out through ***acts for consideration*** or through ***acts of assignment on a free basis.*** In the case of assignment of shares through act on a free basis it must be fulfilled the requirement of the authenticity of the legal document.

The transfer of company shares produces ***effects in relation to third parties*** from the moment the transfer is registered as entry in the trade registry, an aspect clarified by art. 203, para. 2 of the Company Law no. 31/1990, consolidated version. *De jure* and *de facto* it is registered as entry of mention, the decision of the associates' general assembly being submitted to the trade registry within 15 days from the date it is adopted, as previously mentioned. Although the text of the law does not define the notion of third party, the doctrine pointed out that in this context, third parties are any persons who are not associates in the respective company "... including the administrators who aren't associates and the company's employees" (Angheni, Volonciu, Stoica, 2002, pp. 282-283).

4. Conclusions

The assignment of company shares within the limited liability company and the actual manner in which this legal operation is carried out reveal a *complex judicial framework where can be found the associate assignor, the assignee who becomes associate by subrogating to the rights and responsibilities of the assignor, but also the assigned debtor which is the company complex judicial framework where can be found the associate assignor, the assignee who becomes associate by subrogating to the rights and responsibilities of the assignor, but also the assigned debtor which is the company* that issued the shares and which is responsible for respecting the rights of the assignee resulting from his capacity of associate.

Therefore, we consider that the assignment of company shares within the limited liability company should be carried out in all cases, by means of an assignment agreement as distinct act that respects the substance and formal requirements provided by the law, even if, as illustrated above, from the formal point of view, the act amending the company's articles of association, that is to be submitted to the trade registry, is the decision of the associates' general assembly, which shall be attached to the updated articles of association.

In order to avoid any unfavourable consequences and eliminate the possibility of fraud, it is necessary for the document ascertaining the assignment to be corroborated with a document (report of receipt of the company's assets and liabilities) that acknowledges the situation of the company's assets and liabilities at the date of the assignment. The reason behind the conclusion of an agreement of assignment of company shares after the assignment is approved by the associates' general assembly has in view also the fiscal aspects regarding the income resulted from the assignment in the case where the value of the assigned shares is not their nominal value. The agreement of assignment concluded in this way, as legal and fiscal instrument and also acting as evidence that would prove the transfer in this manner of the company shares, submitted together with the amending addendum and the updated articles of association, should represent the fundamental documents to be submitted to the trade registry with the purpose of registering new corresponding entries in the registry.

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