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THE LEGAL STATUS OF LIMITED LIABILITY COMPANY IN REPUBLIC OF AUSTRIA

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The legal status of limited liability company (Gesellschaft mit beschränkter Haftung – GmbH) is regulated by the Law of Republic of Austria "On Companies with limited liability" (Gesetz über Gesellschaften mit beschränkter Haftung), dated 6th March 1906.

In Günter J. Horvath opinion, LLC is the most universal and popular type of business in Austria [1, p.15]. It may do any business activity excluding carrying on insurance business and any activity as political associations. Let's try to find its most significant peculiarities.

Articles of Association and Nominal capital

There are rather strict demands to LLC's nominal capital in Austria: 1) its amount - at least 35 000 euro, 2) at the moment of registration the founders must pay 17 500 euro, 3) initial contributions of individual shareholders - at least 70 euro, 4) at least half of the nominal capital shall be fully raised by initial contributions in cash, 5) at least one quarter of every initial contribution, but in any case an amount of 70 euro, shall be paid in cash, 6) to the extent that

less than 70 euro are to be paid on an initial contribution in cash, the cash contributions shall be fully paid in.

Once there were opinions to decrease this sums of money (according to one of draft laws). The draft law said about: 1) decreasing of the minimum required stock capital from 35.000 to 10.000 euros, 2) decreasing of the minimum required corporate tax from 1.750 to 500 euros per year, 3) decreasing of the notary and lawyer costs required for the act of foundation of about 50%, 4) the abolishment of the obligatory public announcement of company foundations in the Wiener Zeitung's official gazette. But that draft law wasn't adopted.

Corporate Bodies

The system of corporate bodies in austrian legislation is the same as in any european country. The executive body is a Management Board (Der Vorstand), the highest body – the Shareholders's Meeting (Der Generalversammlung) and, of course, some revisory (auditorial) body – the Supervisory Board (Der Aufsichtsrat).

The Management Board. As usual, it may be one or several directors, both shareholders and any other persons. What is worth noting that, in urgent cases, the court has the power to appoint the directors (if they are missing) upon the application of an involved party for the time until such lack is remedied. Except in a case of imminent danger, if several directors are appointed, no one of them may undertake any act of management alone if the articles of association do not determine otherwise. If deed provides each director to represent the company himself, an act of management doesn't take place if one of them objects to it, unless the deed determines otherwise.

There is very useful norm about impossibility of engage in uniform business. Without consent of the company, the directors shall neither do business for their own account nor for another's account in the same line of business, nor participate in a company with the same line of business as personally liable partners or hold a position in the management board or supervisory board as director (art. 24).

A director may be removed for important reason by a court decision. The court may, in order to secure the claim for removal for important reason, ban the director from the further management and representation of the company by injunction, if a probable cause for an imminent irreparable disadvantage of the company is shown.

Directors may declare their resignation, notwithstanding the indemnification claims from existing contracts of the company against them; in the event of an important reason therefor, the resignation may be declared with immediate effect, otherwise the resignation shall become effective after 14 days.

The resignation shall be declared to the shareholders' meeting, if it was announced in the agenda, or to all shareholders. The co-directors and, if a supervisory board exists, its chairman shall be informed thereof.

The respective directors and the expiration or a change of their representation power shall be filed with the Companies Register without delay. The filing shall include the evidence of the appointment or of its change in authenticated form. At the same time, new directors shall sign their names before the court or provide a signature in legalized form [2].

It is worth to mention, that if several directors are appointed, the articles of association may also provide for a representation of the company by a director together with a holder of special statutory authority ('Prokurist') who is authorized to co-sign the company's name.

The making of a declaration and the service of process and other deliveries to the company shall be made with legal effect to any person being entitled to sign or co-sign.

Concerning legal transactions which are concluded by the sole shareholder both in its own name and in the name of the company, a written deed shall be drawn up. In that respect, it shall be ensured that subsequent changes to its contents and doubts relating to the time of its conclusion are excluded; the appointment of a curator shall not be necessary.

A deed shall not be required if the transaction is part of the ordinary course of business and is concluded at arm's-length conditions.

The Supervisory Board. It is very often that limited liability company has only several shareholders. Therefore there is no need to have a supervisory board in every case. Nevertheless much attention is paid to its legal status (art. 29-34). We don't mention every of them. Only it is worth to mention the supervisory board is created if: 1) both the nominal capital exceeds 70 000 euro and the number of shareholders exceeds 50, 2) the average number of employers exceeds 300, 3) some other cases.

The supervisory board shall consist of three members. Additional members may be appointed, insofar as this does not conflict with a provision on the number of members in the articles of association.

A legal entity or a partnership (general partnership, limited partnership may not be member of a supervisory board. Furthermore, a person who already is a member of the supervisory boards of ten companies with limited liability or stock corporations shall not be a member. No one may be chairman or deputy chairman who already holds such a position in five companies with limited liability or stock corporations.

The members of the supervisory board shall be elected by shareholders' resolution. If at least three members of the supervisory board are to be elected

by the same shareholders' meeting, one third of the nominal capital represented at the shareholders' meeting may request that such election is held separately for each member to be appointed to the supervisory board. If it turns out prior to the election of the last member to be appointed, that at least one third of all votes cast at all preceding elections were cast in favour of the same person but without success, such person shall be declared to be elected for the last seat without further election. This provision shall not apply to elections of members of the supervisory board as long as the supervisory board has a member which has been elected in the above described manner by the minority.

No member of the supervisory board may be elected for a period extending beyond the shareholders' resolution which resolves on the discharge from liability for the fourth business year after the election; the business year in which the member of the supervisory board was elected shall not be counted for such purpose.

The appointment as a member of the supervisory board may be revoked by shareholders' resolution prior to the end of the term of office. The resolution shall require a majority of at least three quarters of the votes cast The articles of association may replace this majority by another and may specify further requirements.

The appointment of the first supervisory board upon the establishment of the company shall be valid until the adoption of the shareholders' resolution concerning the discharge from liability which is adopted one year after of the registration of the company in the Companies Register. It may be revoked priorily by a shareholders' resolution with a simple majority of the votes [3, p.23].

The court has power 1) to appoint and remove members of supervisory board if more than three months, the supervisory board consists of fewer members than are necessary for a quorum; 2) to remove a member of the supervisory board upon the request of a minority whose shares together equal one tenth of the nominal capital, if an important reason for doing so exists.

General meeting. As in any other legislation there are topics that may be subject exclusively of a general meeting.

The following shall be subject to a resolution of the shareholders:

1) the audit and the adoption of the annual financial statements, the distribution of the balance sheet profits, if die latter is subject to a special resolution from year to year pursuant to the articles of association, and the discharge of the directors and the supervisory board, if any, from their liabilities; these resolutions shall be adopted for the previous business year within the first eight months of each business year;

2) the call of payments on the initial contributions;

3) the repayment of additional contributions;

4) the decision whether special statutory authority («Prokura») or a general power of attorney for the entire business may be granted;

5) the rules for the examination and the supervision of the management;

6) the enforcement of indemnification claims which the company is entitled to arising from the establishment or the management against the directors, their deputies or the supervisory board, as well as the appointment of a representative for the conduct of legal proceedings if the company may neither be represented by the directors nor by the supervisory board;

7) the conclusion of contracts by which the company shall acquire equipment or intangible assets, existing or to be produced, dedicated for the permanent use in its business for a consideration exceeding an amount of one fifth of the nominal capital, as well as the modification of such contracts at the expense of the company, unless it concerns the acquisition of real estate by way of a compulsory public auction. Such a resolution may only be adopted by a majority of three quarters of the votes cast [4, p.421].

The items which are subject to the resolution of the shareholders may be increased or reduced in the articles of association. However, the items described in above mentioned paragraphs 1, 3 and 6, shall always be subject to a resolution of the shareholders; the item described in paragraph 7 shall in any case be subject to a shareholders' resolution within the first two years after the registration of the company.

It is interesting to mention that there are prescribed grounds for declaring of shareholder's resolution void. For example, by court action, such resolution may be requested to be declared void: 1) if the resolution pursuant to this Act or to the articles of association is to be considered as not having be adopted; 2) if the resolution's content violates mandatory provisions of the law, or if it is inconsistent with the articles of association and the provisions on the amendment of the articles of association have not been complied with in connection with the adoption of the resolution.

Transfer and inheritance of a share

Austrian legislation establishes rather strict demands to a transfer of a share. In any case the transfer contract must have notarial deed (except cases when transfer needs company's approving).

According to the dispositive regulative method founders may decide in the articles of association that the transfer of a share needs an approval of General meeting. But this doesn't mean that shareholder hasn't possibility to sell a share without such approval. The shareholder may appeal to the court for

approving of the transaction. A court decision about approval is possible only after fulfilling of definite conditions. They are next: 1) there are no sufficient reasons for the refusal of the approval; 2) transfer may be effected without damages to the company, other shareholders and creditors; 3) court hears the directors prior to making its decision. But the transaction is not still valid even after the court approval. The company may inform the respective shareholder by registered letter within one month after court's decision became final that it approves the transfer of the respective share under equal conditions to another acquirer, named by it. If the company doesn't do this the court approval works.

It is interesting to know that the division of a share is permissible when the articles of association allow the partial transfer of a share. It doesn't concern the inheritance of a share. But even for this case the company's approval may be also reserved for a division of the shares of deceased shareholder among his heirs.

There is a limitation for a company to buy its own share. According to the article 81 acquisition and pledging of own shares by company is prohibited and ineffective. An acquisition is permissible by way of enforcement proceedings in order to collect the company's own claims.

Defense of minority rights

The title "Minority rights" prescribes mainly about an audit and a derivative (indirect) action.

The derivative (indirect) action is a lawsuit brought by a shareholder on behalf of a corporation against a third party. Often, the third party is an insider of the corporation, such as an executive officer or director. Shareholder derivative actions are unique because under traditional corporate law, management is responsible for bringing and defending the corporation against suit. Shareholder derivative actions permit a shareholder to initiate an action when management has failed to do so.

In most jurisdictions, a shareholder must satisfy various requirements to prove that he has a valid standing before being allowed to proceed. Certainly, some specific requirements are in Astrian legislation.

The significant features of indirect action

1. The right of indirect action have shareholder, whose initial contributions amount to one tenth of the nominal capital or a nominal amount of 700 000 euro (if the smaller amount is not specified in the articles of association),
2. As long as there legal proceedings are pending, the claimant shall not sell their shares without the approval of the company,
3. The claimant shall provide security at the free discretion of the court,

4. If it becomes clear that the claimant acted with unfair intent or gross negligence, the claimant shall be liable to indemnify the defendant.

There is mentioned a statute of limitation. The action shall be filed within one year of the date that the resolution was adopted or prevented. Such legal provision is good for business activity. It prevents from some unfair plaintiff after several years past. But there is its another side. In case when shareholder doesn't know about resolution that makes a damage to his rights, it is more difficult for him to initiate proceedings from the moment when he already know about violation of his rights.

Expulsion of a shareholder

A shareholder has not only rights. But he also has duties and obligations. The shareholder may be expulsed from the company in case when 1) the shareholder fails to pay payments on the initial contribution in time or 2) he doesn't perform his duties. As usual in corporate legislations of many countries is stated that General meeting has the authority to exclude a participant. But the procedure of the expulsion is another in Austrian legislation.

Before expulsion the management board should warn the defaulting shareholder by registered letter about the intention to exclude him from the company. At first, a grace period for the payment or performing his duties is given. This grace period shall last at least one month, calculated from the receipt of the call. The exemption of individual defaulting shareholders is not permissible.

In case when grace period lapses to no effect, the shareholder shall be declared expelled. The directors of the company have the authority to make such declaration. The shareholder shall be only informed about this event by registered letter. It is necessary to write that the declaration of expulsion entails the loss of all rights deriving from the share (including all payments contributed by shareholder).

Shareholder's Responsibility

It should be noted about something not usual for the corporate legislation of East European countries – about the specific measures of shareholder's responsibility. In eastern European states there is always a typical phrase "Responsibility of shareholder's is prescribed according to the norms of national legislation" or something like that. Such construction of the legal norm directs us to another laws and codes, for example, Civil Code, Criminal Code etc. (depending of kind of responsibility – civil responsibility, criminal responsibility, administrative responsibility).

The construction of Austrian Law "About LLC" is another. There are prescribed specific legal norms of Criminal Law in its last part (Part VIII "Penal provisions, Final Provisions"). According to the article 122 a person who as

a director, member of the supervisory board, agent or liquidator 1) in reports, descriptions and overviews concerning the company or affiliated companies, which are directed to the public or to the shareholders, in particular the annual financial statements (group statements) and the annual report (group report), 2) in a public invitation to participate in the company, 3) in speeches or information in the shareholders' meeting, 4) in information which is to be given to the auditor or other examiners pursuant to art. 272 of the Commercial Code, 5) in reports, descriptions and overviews for the supervisory board or its chairman, – misstates, conceals or fails to disclose the situation of the company or of affiliated companies of material circumstances, even though they only relate to individual business cases, shall be punished with imprisonment of up to one year or with a fine of up to the statutory defined rate for 360 days.

Besides above mentioned there is criminal procedural legal norm: "The court of first instance shall be competent for the criminal proceedings".

Is it a subject to implement in Ukrainian Law? In our opinion, it shouldn't, because it causes to a dispertion of similar legal norms. As a result, in practice, Criminal Code is not a code, due to the fact that some criminal legal norms are in another kinds of Law (in our case – in Austrian Corporate Law).

Conclusion:

Austrian legislation about LLC is rather strict. Such conclusion is because: 1) nominal capital for foundation of a company is 35 000 euro (while global trend is minimization of minimal nominal capital); 2) statute of limitation for indirect action is only 1 year and is counted from the date of resolution adopting; 3) notarial form of transfer deed; 4) demand of shareholders approval of share's transfer (depending on the articles of association); 5) demand of shareholders approval of share's division (depending on the articles of association).

It is worth to mention that there is a rather big role of a court. It has power: 1) in urgent cases, to appoint the directors in case of their missing (art. 15a); 2) to remove the director (art. 16); 3) to approve the share's transaction if sufficient reasons for the refusal of the approval by shareholders do not exist (art. 77); 4) to appoint and remove members in determined cases; 5) to appoint auditors in determined cases.

In spite of this circumstances austrian company legislation is attractive for foreign investors because of its stability and high level of obeying the laws.

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2. *Gesetz uber Gesellschaften mit beschränkter Haftung. vom 6. März 1906. – https://www.ris.bka.gv.at/*

3. *Claus Schneider, Christian Temmel. Das österreichische Gmbh-Gesetz: Deutsch/Englisch. – LexisNexis, Wien, 2004. – 72 p.*
4. *Arthur Weilinger. Unternehmensrecht. – LexisNexis, Wien, 2014 – 1225 p.*

Боріч Томіслав, Ковалишин Олександр. Правовий статус товариства з обмеженою відповідальністю в Австрійській Республіці.

У статті проаналізовано правовий статус товариства з обмеженою відповідальністю відповідно до законодавства Австрійської Республіки. Розкрито повноваження органів управління товариством: ради директорів, наглядової ради, загальних зборів товариства. Особливу увагу приділено похідному (непрямому) позову міноритарних учасників та повноваженням суду в корпоративних конфліктах.

Ключові слова: товариство з обмеженою відповідальністю, учасник, непрямий позов.

Борич Томислав, Ковалишин Александр. Правовой статус общества с ограниченной ответственностью в Австрийской Республике.

В статье проанализировано правовой статус общества с ограниченной ответственностью в соответствии с законодательством Австрийской Республики. Раскрыты полномочия органов управления обществом: совета директоров, наблюдательного совета, общего собрания общества. Особое внимание уделено косвенному иску миноритарных участников и полномочиям суда в корпоративных конфликтах.

Ключевые слова: общество с ограниченной ответственностью, участник, непрямой иск.

Boric Tomislav, Kovalyshyn Oleksandr. The Legal Status of Limited Liability Company in Republic of Austria.

Company Law of Austria makes a distinction between partnerships and corporations. The latter are mainly characterized by their status as legal entity which also entails the limited liability of their members for company debts. The limited liability company is the most common type of corporation in Austria.

In the article GmbH's legal status is presented according to Austrian legislation. Short characteristic of management (executive body), supervisory board (supervisory body) and general meeting (supreme body) is described. Special attention is given to derivative action of minority shareholders and to the authorities of the court in corporate relations.

The author also draws a conclusion that Austrian legislation (concerning LLC),is rather strict because of: 1) nominal capital for foundation of a company is 35 000 euro (while global trend is minimization of minimal nominal capital); 2) statute of limitation for indirect action is only 1 year and is counted from the date of resolution adopting; 3) notarial form of transfer deed; 4) demand of shareholders approval of share's transfer (depending on the articles of association); 5) demand of shareholders approval of share's division (depending on the articles of association).

Key words: limited liability company, shareholder (participant), derivative action.