2nd Lesson

2. Commercial Partnership Companies in Portugal

2.1 Commercial partnership companies – Private Limited Companies and Public Limited Companies – main characteristics. The Civil Law Partnership Companies in Commercial Form

We chose to use the term commercial partnership companies rather than just commercial companies because the sole trader or the individual establishment of limited liability are commercial companies but individual, not collective. So, it is important to crease this distinction between both types of companies.

Private Limited Company/*Sociedade por Quotas*

The Private Limited Company (Ltd.)/*Sociedade por quotas (Lda.)* is by far the most common type of business entity. The private limited company has the share capital divided into "quotas" of at least 1 euro each. There is no minimum share capital requirement, but it must have a minimum of 2 *quota* holders (except in the case of the sole *Unipessoal Lda.*- single-member commercial partnership company). The transfer of quotas depends on their registration in the Commercial Registry. The *Lda*. partners may at any time deliberate to "upgrade" to an SA. If an *Lda*. has a sole quota holder for more than one year, it must "downgrade" to a *Unipessoal Lda.*

The partner's liability is limited to capital that each one subscribed, but they are jointly liable for all contributions in proportion of each contribution.

Only the assets of the company are liable for the company's debts not partners own assets. But it is legal to stipulate in the articles of association that a partner can be liable by debts until a certain amount.

Public Limited Company/*Sociedade Anónima*

The Public Limited Company (PLC)/*Sociedade Anónima (SA)* is the second most popular legal format. It is a company with a minimum share capital of 50.000 euros, and at least 30% of which must be paid up on the incorporation. Share capital is represented by freely transferable shares, and, except when the founder is a non-company, there must be an initial number of partners of not less than 5. The SA is the most demanding entity in terms of regulatory obedience and its accounts have to be audited annually by a Certified Public Accountant *(Revisor Oficial de Contas*). The adoption of this format is compulsory for companies that intend to be listed on the stock exchange.

The partners liability is limited to capital subscribed, but unlike the *Lda*. they are not liable for other contributions. It´s not legal to stipulate in the articles of association that a partner can be liable for company´s debts until a certain amount so, the partners in any circumstance are liable with their own assets by the company debts.

Commercial Partnership Companies vs Civil Law Partnership Companies in Commercial Form

The majority of commercial partnership companies arises from a contract (articles of association). In these cases it will be a commercial partnership company if fulfills the elements set out in article 980 of the Civil Code (plurality of partners, contributions of partners with goods or services, exercise of economic activity and profit-making), plus the following elements: 1) commercial object - engaged in the practice of commercial acts or engage in commercial activities; 2) commercial type - adopt one of the commercial types set on Commercial Law, namely SA or *Lda*. types.

The commercial partnership companies are a specie inside the partnership gender and unlike the civil law partnership companies they have legal personality (that means to be capable of having legal rights and obligations) which is acquired since the registration of the articles of association in the Commercial Register. It is very important to notice that the trader is the company that is a legal entity, not the partners. On the other hand, the company's legal capacity comprises rights and obligations necessary or required to develop its end (profit-making). Articles of association and company deliberations which set to the company certain object or prohibit the practice of certain acts do not limit its capacity but the bodies of company have the duty of not exceed this object or do not practice these acts or else they may be liable for the losses caused to the company or the act may be invalid (if the act is contrary to the making-profit end of company).

As for civil law partnership companies, always have a contractual origin and they don´t have as object the practice of commercial acts and they are not engaged in commercial activities but could, if the partners so determine, adopt a commercial form, if they adopt one of the types listed in article 1 of the Code of Commercial Partnership Companies. The main interest of adopting commercial form is to limit the liability of the partners in respect of debts to the company's creditors.

2.2 Share capital, asset and reserves

2.2.1 Share Capital and Asset

The share capital after the completion of contribution obligation of each partner, allows the constitution of a common fund, with which the company will pursue the activity – it corresponds to the sum of the value of all partners initial contributions.

It´s a cypher expressed in currency coin and distinguishes from the asset because, the share capital, unlike the asset, is not a set of goods (money or other), but only numerical expression of the value of partners' contributions when they create the company. In this way the capital is, as a rule, stable, and asset is constantly changing. For example if some expense is realized or if some profit is obtained the value of share capital does not coincide with the value of the asset. Imagine that the partners' contributions is 50.000 euros, which constitutes the common fund, the share capital. However if they buy computers for the company for 10.000 euros the asset is now to 40,000 euros and the share capital remains in 50.000 euros.

So the share capital is a constant cypher that can only be changed under some strict legal molds.

The share capital realizes the following functions:

- Determination of the companies' economic situation, namely on the annual accounting when the values of assets and liabilities are evaluated, it allows to control the evolution of the business and make sure that the company produced profit. There will profit if the net asset (assets minus liabilities) exceeds the share capital;

- Warranty of creditors, the law seeks to ensure that the net asset does not fall below the amount of share capital - intangibility of the share capital: after the completion of the share capital, in virtue of the partners compliance of the legal contributions, the company must maintain in its asset, as far as possible, goods corresponding to the amount of the share capital and cannot be distributed profits to the partners if the net asset is inferior than the share capital. On the other hand, share capital cannot be arbitrarily changed, but only with obedience to strict legal criteria;

-Conservation of net asset corresponding to a certain value: the company must maintain an asset that covers the amount of the share capital;

-Quantification of partners' rights - is by the proportion of respective participation in the share capital that the partners see their rights quantified (right to the profits in proportion of each participation or the number of votes to express in company resolutions).

2.2.2 Increase and reduction of share capital

In some circumstances the partners may decide to increase or reduce the share capital. Both operations involve a changing of the articles of association and a deliberation at the General Assembly.

Share capital increase

This is an operation to fortify the share capital of a company, being a source of financing that allows to develop and finance new projects.

The increase of share capital has fundamentally the purpose of attracting new investors. It´s a great way to finance companies because the invested amount is not repaid to investors they only acquire the right to vote and to the profits. Unlike bank loans the amounts granted by financial institutions have to be returned along with the payment of interest.

Forms of share capital increase

1- By incorporation of reserves - The company may increase its capital by incorporation of reserves available for this purpose. This capital increase can only be done after the annual accounts approval.

The capital of the company may not be increased by incorporation of reserves until the completion of all partners' contributions, initial contributions or related with a previous capital increase.

In general, the capital increased by incorporation of reserves correspond to the increase of participation of each partner.

2 - New contributions – It cannot be deliberated a capital increase in the form of new contributions until a previous capital increase is registered or if all money contributions are not already accomplished;

Share capital reduction

It is possible to reduce the share capital to an amount less than the minimum required by law, provided that the reduction is subject to an increase for an amount higher than or equal to the minimum, within sixty days thereafter.

The capital reduction can only be deliberated if the net asset of the company after the reduction, exceeds at least 20% the new share capital.

The reduction of the share capital may have the following purposes:

1. Coverage of losses – A company has losses if the net asset (asset minus liabilities) is inferior to the share capital. If the company has losses it can reduce the share capital in order to cover them;

2. Release excess capital - The capital will be considered excessive, regarding the investment and functioning needs of the company as well as the need of protection of the company creditors.

Case Studies

1- Establish the main differences between a private limited company (Lda.) and a public limited company (SA).

The private limited company has the share capital divided into “quotas” of at least 1 euro each. There is no minimum capital requirement, but it must have a minimum of 2 *quota* holders. The partner’s liability is limited to capital subscribed, but they are jointly and severally liable for all contributions in proportion of each contribution.

Only the assets of the company responds to the company's debts not partners own assets. But it is legal to stipulate in the articles of association that a partner can respond previously to the company's creditors until a certain amount.

The public limited company must have a minimum capital of 50.000 euros. Share capital is represented by freely transferable shares, and there must be an initial number of partners of not less than 5.

The partners liability is limited to capital subscribed, but unlike the Lda. they are not liable for other contributions. It´s not legal to stipulate in the articles of association that a partner can respond previously to the company's creditors until a certain amount so, the partners in any circumstance responds with their own assets by the corporation debts.

2- Establish the differences between share capital and asset.

The share capital after completion of contribution obligation of the partners, allows the constitution of a common fund, with which the company will pursue the activity. Corresponds to a cypher expressed in currency coin and distinguishes from the asset because of the share capital unlike the asset, is not a set of goods (money or other) capable of attachment, but only numerical expression of the value of partners' contributions when they create the company. In this way the capital is, as a rule, stable, and asset is constantly changing. For example if some expense is realized or if some profit is obtained the value of share capital does not coincide with the value of the asset. Imagine that the partners' contributions is 50.000 euros, which constitutes the common fund, the share capital. However if they buy computers for the company for 10.000 euros the asset is now to 40,000 euros and the share capital remains in 50.000 euros.

So the share capital is a constant cypher that can only be changed under some strict legal molds.

3- What are the main functions of the share capital?

-Determining the economic situation of the company, namely the annual accountability evaluating the values of assets and liabilities, in order to control the evolution of the business and make sure that the company produced profit. There will profit if the net asset (assets minus liabilities) exceeds the share capital;

- Warranty of creditors, the law seeks to ensure that the net asset does not fall below the amount of share capital - intangibility of the share capital: after the completion of the share capital, in virtue of compliance with the partners legal contributions, the company must maintain in its asset, as far as possible, goods corresponding to the amount of the share capital and cannot be distributed to the partners dividends if the net asset is inferior than the share capital. On the other hand, social capital cannot be arbitrarily changed, but only with obedience to strict legal criteria;

-Conservation of net asset corresponding to a certain value: the company must maintain am asset that covers the amount of the share capital;

-Quantification of partners' rights - is by the proportion of respective participation in the share capital that the partners see their rights quantified (right to the profits in proportion of each contribution or the number of votes to express in company resolutions).

4- **The partners of the X, SA want to reduce the share capital to 40.000 euros to release capital excess. Can the deliberation be taken?**

It is possible to reduce the share capital to an amount less than the minimum required by law (50.000 euros because the company is an SA), provided that the reduction is subject to an increase for an amount higher than or equal to the minimum, within sixty days thereafter. So the answer is affirmative.

5- **The partners of the Y, SA want to reduce the share capital to 60.000 euros. Knowing that net asset is 52,000 euros, can the deliberation be taken? Justify your answer.**

The capital reduction can only be deliberated if the net asset of the company after the reduction, exceeds at least 20% the new share capital. The deliberation could only took place of the net asset was at least 72.000 euros (20% above the new share capital)