

Liability Regime of Members of Limited Liability Companies and Shareholders of Joint Stock Companies Under Vietnamese Law

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Abstract

When capital consultants invest in a business, they are likely to bear risks, especially property risks. The law has provided clear regulations on the property responsibilities of consultants, specifically members of limited liability companies and shareholders of joint stock companies. Accordingly, the property liability regime is a type of civil liability that members of a limited liability company and shareholders of a joint stock company may have to bear when contributing capital to the company. Although this is a liability regime, it is also a guarantee and a manifestation of the state's viewpoint and attitude toward investors. This liability regime includes two types: liability for the company's debts and property obligations within the scope of the capital contributed to the company, also known as the limited liability regime and the "personal" property liability regime arising in some special cases as prescribed by law.

Keywords: Capital consultants, Property risks, Property responsibilities, Shareholders, Civil liability.

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1. INTRODUCTION

Profit is undoubtedly the top priority for investors when they make an investment in a business. Nonetheless, investors are equally concerned about their accountability for the company's obligations. Normally, to encourage investment, the state guarantees that investors are limited in their risk when contributing capital to limited liability companies and joint stock companies. That is, they are only liable for the assets within the scope of the capital contributed to the company for the debts and other property obligations of the company. However, in some cases, if investors (members of limited liability companies and shareholders of joint stock companies) commit illegal acts as prescribed, such as falsely declaring charter capital, doing business under the name of a company without registration, not contributing capital as committed or taking advantage of the name of a company to commit other illegal acts, etc., they will not be protected by the State under the limited liability regime but will be transferred to the "personal liability" regime.

2. CONTENT

2.1 Concept of property liability of company members and shareholders

Vietnamese law formally regulates the idea of shareholders of a joint stock company (henceforth referred to as shareholders) and members of a limited

liability corporation with two or more members (henceforth referred to as members). Accordingly, a shareholder is a person or organization that owns at least one share of a joint stock company (Clause 3, Article 4 of the Enterprise Law 2020), and a company member is a person or organization that owns all or a portion of the charter capital of a limited liability company (Clause 29, Article 4 of the Enterprise Law 2020).

In addition, the conditions for becoming a member or shareholder of a company are also stipulated in Article 17 of the Law on Enterprises of Vietnam. Specifically, the following organizations and individuals are not allowed to establish or manage enterprises in Vietnam, that are including:

1. State agencies and units of the People's Armed Forces using state assets to establish businesses to generate profits for their own agencies and units
2. Cadres, civil servants and public employees as prescribed by the Law on Cadres, Civil Servants and the Law on Public Employees
3. Officers, non-commissioned officers, professional soldiers, workers and national defense officials in agencies and units of the Vietnam People's Army; officers, professional non-commissioned officers, and police workers in agencies and units of the Vietnam People's

Public Security, except for those appointed as authorized representatives to manage the State's capital contribution in enterprises or to manage state-owned enterprises

4. Professional leaders and managers in state-owned enterprises as prescribed in Point a, Clause 1, Article 88 of this Law, except for those appointed as authorized representatives to manage the State's capital contribution in other enterprises.
5. Children, people with diminished or lost civil act capacity, people who struggle with thought and behavior management, and organizations without legal standing.
6. Persons who are being prosecuted for criminal liability, detained, serving a prison sentence, serving an administrative measure at a compulsory drug rehabilitation facility, a compulsory education facility, or who are prohibited by the court from holding a position, practicing a profession or doing certain work; other cases as prescribed by the Bankruptcy Law and the Law on Anti-Corruption.
7. The organization is a commercial legal entity prohibited from doing business or operating in certain fields according to the provisions of the Penal Code.

In addition, in the case of capital contribution through the form of purchasing shares or capital contributions, Vietnamese law strictly prohibits the following organizations and individuals: state agencies and units of the People's Armed Forces from using state assets to contribute capital to enterprises for their own benefit; subjects not allowed to contribute capital to enterprises according to the provisions of the Law on Cadres and Civil Servants, the Law on Public Employees, and the Law on Anti-Corruption (Clause 3, Article 17 of the Law on Enterprises 2020).

The property liability regime is a legal regime that always receives the top attention from investors in general and members and shareholders of a company in particular because it answers the question, "What obligations and responsibilities will members and shareholders of a company have to shoulder when contributing capital to a company?" For the state, the issue of concern is not only to ensure the people's freedom of business but also to ensure the order and stability of the economy through clearly and transparently regulating the liability regime of investors and having a mechanism to ensure the implementation of the above liability regime. Therefore, the liability regime of members and shareholders of limited liability companies and joint stock companies is one of the key provisions of the current Vietnamese Enterprise Law. Therefore, the consideration of responsibility for each individual must come from the unity between rights and obligations: the more rights, the greater the responsibility. Based on the regulatory norms,

responsibility is divided into two basic types: legal responsibility and moral responsibility. In which, unlike moral responsibility, legal responsibility is regulated by legal norms and has the purpose of establishing specific sanctions.

In legal science, the term "responsibility" is used in two senses: in the first, positive sense, responsibility is understood as an obligation, that is, a mandatory way of behaving that a subject is obliged to perform in order to satisfy the rights of the subject with rights. In the second sense, responsibility is the adverse legal consequences that an individual or organization must bear due to committing an act that violates the law (Nguyen Xuan Doan, 2010, page 434). That is, the basis for giving rise to legal responsibility is the violation of the law.

The term "responsibility" is typically studied in its second sense. Legal responsibility in this context refers to the negative outcomes (penalty) imposed by the state on the subject of a law breach. Stated differently, "responsibility" refers to the unique relationship between the state and the subject of a law breach, whereby the subject of the violation must endure the negative repercussions and coercive measures imposed by the state (Nguyen Minh Doan, 2010, page 437). The coercion of the state forces law violators to comply with legal norms, punishes law violators, and compels the restoration of violated laws. Any act of violating the law is harmful to society because it disrupts the legal order, directly causes material and spiritual losses to people, and violates social relations protected by law. Legal responsibility is composed of the following elements: the act of violating the law, the damage caused to society, the causal relationship between the act of violating the law and the damage caused to society; the fault of the subject who violates the law. Responsibility includes the following types: criminal responsibility, administrative responsibility, civil responsibility, disciplinary responsibility and material responsibility.

In general, the Law on Enterprises of Vietnam as well as the corporate laws of countries around the world, does not define the property liability of members and shareholders of a company but only stipulates cases where members and shareholders of a company must bear property liability and the scope of liability of members and shareholders of a company. From the provisions of the law on cases where members and shareholders of a company must bear property liability and from the concept and classification of legal liability, the author can generalize the concept of property liability of members and shareholders of a company with the following characteristics:

First, the liability regime of members and shareholders of a company is only imposed on organizations and individuals who have the right to establish a company.

Second, the liability of members and shareholders is a type of legal liability, meaning the adverse legal consequences that the state expects to apply to members and shareholders of a company.

Third, the above legal consequences only lead to property damage to members and shareholders of the company and are within the scope of civil liability. This means that this is not a punishment but a measure to force the person who violates the law to compensate the person who suffered damage caused by that act. Specifically, in this case, members and shareholders of the company are likely to suffer property damage when they invest capital to establish the company or members and shareholders of the company commit illegal acts.

Fourth, in the relationship with the company's creditors, the property liability of the company's members and shareholders is only brought up when the company is unable to pay its debts or when its members and shareholders commit crimes that harm the company's creditors. If the firm is able to pay its debts, its creditors often don't care about the liability of its members and shareholders; however, if the company is unable to do so, then the liability of its members and shareholders will increase. In accordance with the bankruptcy law's requirements, they are then entitled to ask the court to begin bankruptcy proceedings against the business.

In summary, from the above characteristics, we can come to a definition: *the property liability of members and shareholders of a company is the adverse property consequences that the state plans to apply to organizations and individuals when contributing capital to establish a limited liability company or a joint stock company.*

2.2 Basis for arising property liability of company members and shareholders

The researching the basis for arising property liability of members and shareholders of a company contributes to clarifying the nature and is also the basis for classifying the liability regime of members and shareholders of a company.

Conceptually, the property liability of members and shareholders of a company is a type of legal relationship; this relationship can only arise when there is a legal event, which is the act of contributing and registering capital to establish a company. However, contributing capital and registering to establish a company are only necessary conditions for the property liability of members and shareholders of a company to arise; besides that, there must also be sufficient conditions. The sufficient condition here is the direct basis for the arising of the property liability regime of members and shareholders of a company, which is the violation of the law, the damage, the causal relationship between the violation of the law and the damage; the fault of the subject who committed the violation of the law.

According to Nguyen Minh Doan (2010), page 428, a breach of the law is generally defined as an unlawful act that is undertaken by a subject with legal capacity and that violates social connections that are protected by the law. According to the most widely used classification, there are two categories of legal infractions in the civil field: contractual and non-contractual responsibilities. The two categories of civil responsibility—contractual liability, or duty to voluntary creditors, and non-contractual liability, or liability to involuntary creditors—also correspond to the aforementioned classification.

Contractual liability arises when a contract is not performed, causing damage to the aggrieved party, and the aggrieved party demands compensation. Extra-contractual liability arises when a person is at fault and causes damage to another person, and the aggrieved party demands compensation. Contractual and extra-contractual liability are similar in that they arise from a breach of obligation but are distinguished by whether the breached obligation arises from a contract or from the law.

In addition to the significance in determining the burden of proof, the classification of contractual and non-contractual liability, in the field of corporate law, also has significance in determining the property liability regime of company members and shareholders. Company members and shareholders are only liable to a limited extent for the company's debts in the case of voluntary creditors, but in the case of company members and shareholders committing illegal acts, causing damage to others, they must bear personal responsibility. When contributing capital to establish a company, members and shareholders of the company, in addition to enjoying rights, must also shoulder obligations prescribe by law. If members and shareholders of the company do not perform or do not properly perform their obligations, that is, violate the law and cause damage to others, they will bear adverse legal consequences and coercive measures of the state, that is, they must compensate for damages to those whose rights and legitimate interests have been violated.

In terms of causality, the property liability of members and shareholders of a company is the consequence of a violation of the law. Because in this case, members and shareholders of a company have chosen to act contrary to the provisions of the law and violated the obligations prescribed by law, causing damage to others, so they must bear the legal consequences applied by the state. The adverse consequences or legal liability of members and shareholders of a company in the case of a violation of the law, therefore, are also different from the case where the company does not perform or does not properly perform its contractual obligations. The liability of members and shareholders of a company in the event of a company facing a risk that leads to insolvency is limited

by the state. However, in the event of a member or shareholder violating the law (violating obligations), the determination of liability must be based on the nature of the act, the extent of damage and the fault factor, and not limited to a certain scope as in the event of a company facing a risk.

2.3 Property responsibilities of company members and shareholders

When classifying a problem or an object or phenomenon, the researcher must rely on a specific basis or classification criteria. Based on different classification criteria, different results will be obtained. There are many different approaches to classifying the liability regime of members and shareholders of a company. However, the approach mentioned by many researchers, as well as in the scope of this article, is to classify based on the scope and basis of liability. According to this basis, the liability regime of members and shareholders of a company is divided into two types: limited liability regime and "personal liability" regime.

Firstly, the limited liability regime is considered both a legal liability regime and a protection measure prescribed by the state for members and shareholders of a company. Under this regime, the owner is only liable for assets within the scope of the capital committed to contribute to the company.

Specifically, according to the provisions of Clause 1, Article 46 and Point c, Clause 1, Article 111 of the Enterprise Law 2020, it is stipulated that "Members are responsible for the debts and other property obligations of the enterprise within the scope of the capital contributed to the enterprise," and "Shareholders are only responsible for the debts and other property obligations of the enterprise within the scope of the capital contributed to the enterprise".

A practical example of limited liability of members and shareholders of a company. Suppose members and shareholders spend 10 billion VND to contribute capital to a limited liability company or buy shares of a joint stock company (hereinafter referred to as Company A'). Company A' has been operating for 10 years. Now Company A' does not have cash to pay its debts on time, it is brought to court by creditors to request a bankruptcy declaration. and the company's assets are liquidated. At that time, the total assets of the company were 13 billion VND. The company must pay its debts to its creditors.

- If A's total debts are 12 billion VND, then after paying off all debts to creditors, members or shareholders will receive 1 billion VND back.
- If A's total debt is 13 billion VND, the members and shareholders will not receive any money back, which means the members and shareholders will lose 10 billion VND.
- But if the total debt of Company A' is 15 billion VND, then the members and shareholders will

only lose the initial 10 billion VND, the creditors will divide the remaining 13 billion VND of A'.

Thus, in all of the above cases, A does not have to take out the house money to pay the debt on behalf of Company A'.

The second is the "personal liability" regime, which is the liability for debts and other financial obligations of the company beyond the amount of capital contributed to the company, which are sanctions that the state plans to apply to members and shareholders of the company in certain cases. These are cases where members and shareholders of the company commit prohibited acts or commit other illegal acts according to the provisions of the Enterprise Law.

Members and shareholders of a company who engage in the following specific behaviors are listed in Article 16 of the 2020 Enterprise Law: conducting business as an enterprise without registering or continuing to do so after the Enterprise Registration Certificate has been revoked or the enterprise is temporarily suspended from operations; dishonestly and inaccurately declaring the contents of the enterprise registration dossier and the contents of the dossier for registration of changes to the enterprise registration contents; falsely declaring charter capital, failing to contribute the full amount of charter capital as registered; purposefully valuing contributed capital at an incorrect value; Conducting business in prohibited investment sectors and trades; conducting business in sectors and trades that have not been granted market access to foreign investors; conducting business in conditional investment sectors and trades without meeting the business conditions prescribed by law or without ensuring that investment and business conditions are maintained during operation; fraud, money laundering, and terrorist financing.

3. CONCLUSION

The liability regime of members of a limited liability company and shareholders of a joint stock company under Vietnamese law is a civil liability regime imposed on investors when they contribute capital to a company. It reflects the attitude and treatment of the state towards investors. Because investors, when contributing capital to a company, that act itself contains risks, and therefore investors are forced to consider when contributing capital to a company. To ensure that investors do not lose all their assets when contributing capital to the company, the state protects them with a limited liability regime, meaning that their risks are limited to the amount of capital contributed to the company when the company incurs debts and other financial obligations, of course only in cases where those are voluntary debts of the creditors. On the contrary, if they take advantage of the company's name to commit illegal acts prescribed by the state, that guarantee will no

longer exist, at which point the state forces them to use their own assets to take responsibility for the company's debts and other financial obligations.

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