

Resolution of 12 September 2017, of the National Registers and Notaries Directorate General, in the appeal filed against the rating score issued by the Mercantile Registrar of Lugo, suspending the entry of a capital increase resolution

The National Registers and Notaries Directorate General (“DGRN”) resolves the appeal filed by the shareholders of a company in which a capital increase was sought by off-set of a credit held by one of the shareholders against the company, issuing new shares for an amount equivalent to the aforementioned credit.

As findings of fact, it is worthy to note that in November 2016 a public deed was formalised of a resolution from a shareholders’ meeting of such company to proceed to increase the share capital in an amount of €73,800, which included the corresponding directors’ report recording the existence of a credit of €73,870 in favour of one of the shareholders. The capital increase transaction had been drafted so that this credit would be off-set by means of the issue of 738 new shares. Notwithstanding the foregoing, the deed was given a negative rating by the Mercantile Register, for the failure to include the corresponding certificate from the board of management regarding the meeting held, which was later included, and which again received a negative rating for failure to meet the quorum requirements for a universal general meeting (only the two appellant shareholders were present at the meeting, representing only 66.66% of the share capital of the company).

Therefore, once the necessary documentation was submitted to the Mercantile Register, the entry of the capital increase by credit off-set was suspended by the registrar, with the understanding that the capital increase by credit off-set could not be registered because **there was no record of the consent of the shareholder whose credit was to be off-set.**

The refusal of the registrar was based on reiterated and established doctrine of the DGRN itself. Specifically, the resolution of 30 November 2012, which reasons that any legal transaction between the contributing creditor and the company itself should ensure the presence of the conditions required for any legal transaction by Article 1261 of the Spanish Civil Code, namely consent, purpose and cause. It thus concluded that consent, whether express or tacit, from the contributor is essential for its existence and that **the contribution of the credit, like any other contribution, is understood as made by the owner, on the basis of which the essential requirement for the consent of the assignor becomes necessary once again, without which there can be no transfer.**

Such resolution, which resolves a similar issue, states that “the transfer of an asset requires the intention of the shareholder or third party to make the contribution to the company, regardless of the resolution of the general meeting that operates on a totally different level since these are different intentions. In short, it is not possible to contribute an asset or right to the company without the consent of the holder of such asset or right, and much less do so against the express opposition thereof. The same rules should apply to the off-set of credits against the company, since from the legal point-of-view the transformation of a credit into capital means that the creditor of the company is going to change its legal status by becoming a shareholder of the debtor company, or by increasing its stake in the capital of the company, and discharging the liabilities of it”.

It therefore follows that, **in order to perform the contribution, the consent of the contributor must have been recorded so that, if it is not present, no legal transaction exists.** The subscription of equity shares is an individual act of the shareholder which completes the legal transaction of contribution and which requires a pay-out (Article 312 of the Spanish Capital Companies Act), so that there can be no increase if there is no act of subscription by the shareholding creditor or by the non-shareholding creditor convened to do so (Article 310 of the Spanish Capital Companies Act). It is clear that **the company cannot oblige a shareholding creditor to modify its legal status without consent** whereby, having determined the absence of this in the case at hand, it is obvious that the entry of the modification of the share capital cannot be made in the Mercantile Register.

For all of these reasons, the DGRN dismissed the appeal filed by the shareholders and confirmed the rating of the registrar, confirming that **the consent of the creditor for off-set of a credit, as in all other agreements, is necessary for validity.**