

CONVENING THE GENERAL MEETING OF THE SHAREHOLDERS AND THE VOTING RIGHT OF THE PARTNERS IN LIMITED LIABILITY COMPANIES

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Abstract:

All along our scientific approach, we aim to analyse, from the provisions of Law no. 31/1990 perspective, the framework of exertion of the voting right, represented by the General Meeting of the Shareholders, which activity is regulated more or less detailed by the lawmaker, according to each type of company. The exertion of the voting right mainly consists of the shareholder's participation to the General Meeting. Participation to the meeting is a right itself, founded on holding the quality of shareholder of a company. Theoretically, each subscriber of a contribution to the social capital of the company has the right to vote, consequently he/she benefits implicitly from the right to participate in the General Meeting.

Given that the General Meeting cannot be convened spontaneously, since Law no. 31/1990 provides in Art. 195 the fact that the General Meeting is convened at the head office any time considered necessary, but at least once a year. The convocation of the General Meeting is accomplished under the form it is stipulated in the articles of incorporation. The invitation to the General Meeting of the Shareholders is imposed to mention: the time and place of the meeting; the particularity of the agenda.

The agenda of the meeting shall comprise all the matters submitted to discussion during the meeting. If the agenda enlists the modification of certain elements of the articles of incorporation, the law stipulates that the convocation comprises the complete text of such proposals.

The convocation of the General Meeting is to be accomplished within 10 days before the day fixed when the meeting is held.

Key words: shareholder, General Meeting of the Shareholders, correspondence, registered letter, vote

JEL classification: K12

INTRODUCTIVE CONSIDERATIONS

Unlike any other legal person, the company has not an organic existence; thus, its will is expressed by its organisms, respectively: management, execution and control organisms of the company. The will of the company is formed within the General Meeting of the Shareholders and brought into accomplishment by the executive (management) organisms represented by the manager (director) or the managers. The control of the manager's activity is realized by the shareholders (in the virtue of the rights of information, control and audit) or, in certain cases, by a specialized organism, the censors of the company.

The management of the company is realized by the shareholders within the General Meeting of the Shareholders by adopting the decisions of the regular problems for the life of the company, as well as of certain special problems, pointing fundamental elements of the company.

Starting from the specific of attributions and, in the case of the public limited liability company, we make the distinction between ordinary and extraordinary meetings, although the legislator regulates such types of general meetings exclusively in the case of joint stock companies. In principle, the ordinary General Meeting of the Shareholders takes place at least once a year, not longer than 3 months since the closure of the financial year, in the purpose of: approving the balance sheet, after consulting the report of the managers and censors, establishing the budget of incomes and expenses and, if case, the program of activity, for the next financial year; fixing the dividend due to the shareholders; designating the managers and/or the censors etc. Usually, the General Meeting of the Shareholders decides by vote representing the absolute majority of shareholders and shares (it is then required, cumulatively, the percent of 50% plus one of the

number of shareholders, as well as the condition that they represent half plus one of the total shares). Unlike that, the extraordinary General Meeting of the Shareholders adopts decisions with unanimity of votes in problems implying the adjustment of the memorandum of association, like: increase or decrease of social capital; change of object or form of company; prolongation of the company's duration, change of registered head office; withdrawal or exclusion of a shareholder or incorporation of new shareholders, merge with other companies; dissolution of the company and any other aspects concerning the alteration of the memorandum of association.

The will of any company is expressed in the general meeting, but it is put into practice by the management organisms of the company. According to Law no. 31/1990 republished, with the ulterior adjustments, the public limited liability company can be managed by one or several director, shareholders or third parts, which can action together or separately. It seems worthy to outline the fact that *mutatis mutandis* the provisions referring to the management of companies in general partnerships (para. 75, 76, 77 line 1 and 79) applies correspondently also to public limited liability companies. Managers are assigned either by memorandum of association, or ulteriorly by decision of the General Meeting of Shareholders and are invested a 4 year mandate, presumed to be of 2 years, unless stipulated differently in the appointment act. It can be appointed as manager either a natural person or a legal person who pledges. Managers can sign any legal document necessary and useful for the accomplishment of the object of activity of the company, except for those which value excels half of the financial value of the company's shares, for which it is needed the approval of the extraordinary general meeting of the shareholders. Shareholders' liability is governed by the stipulations of the contract of service from the civil law, and in case of plurality of managers, liability is solidary. [1]

Control of the management in joint stock company is ensured by censors, who survey on the good functioning of the company by developing an audit on the managers' activity. The control of the management is regularly made by the shareholders, yet, when their number exceeds 15 persons, the censors' appointment is mandatory. Exceptionally, also in the case of public limited liability company, financial statements must be submitted to financial audit. Censors' liability is regulated by the mandate stipulations, their annulment being decided by the extraordinary General Meeting of the Shareholders only.

The adjustment of the conditions in which is developed the activity of a company may determine the necessity of its modification. In such sense, the shareholders may consider useful the increase or decrease of social capital, change of object of activity or of its legal form, etc. Because the structural or identitary elements to be altered are established by the memorandum of association of the company, their alteration imposes practically the alteration of the memorandum itself. [2]

The alteration of the memorandum of association is made possible by will of shareholders, while formulated within general meetings. In the case of joint stock companies and limited partnerships the decision may belong to the Extraordinary General Meeting of the Shareholders, otherwise in the hypothesis of general partnerships and public limited liability companies, the decision must be unanimously taken by the General Meeting of the Shareholders. Such meeting takes places in order to alter the memorandum of association, which should be recorded in a certificate, representing the additional act of the memorandum. The additional act submits to the formality of registration to the Commerce Registry (Unique Bureau). In what concerns the lawfulness control of the additional act, law distinguishes between the one drafted by the authorized judges, concretized in a closure (in the case of the most important modifications: change of the main object of activity, change of social capital, fusion and division, decrease or prolongation of the duration of the company, dissolution and liquidation, change of registered head office etc) and the one issued by a resolution of the Unique Bureau which authorizes the other modifications.

CONVENING THE GENERAL MEETING OF THE SHAREHOLDERS

Convening the General Meeting of the Shareholders has the role to inform all the shareholders in due course about the assembling, thus guaranteeing them the right of participation and voting.

Yet, the convening represents a preliminary and mandatory step towards the legal constitution of the General Meeting.

Since the General Meeting is not to be held spontaneously, as the articles of incorporation does not designate any other executive but the one expressly named to convene the meeting, Law no. 31/1990 identifies, expressly and restrictively, the competent executives to convene the General Meeting.

In what concerns public limited liability company, in accordance with conform Art. 195 para. (1), the rule is that “directors are bound to convene the General Meeting of the Shareholders at the head office, at least once a year or any time considered necessary. Under the circumstances in which the director or the directors do(es) not comply with this obligation, according to Art. 195 para. (2) “one or more shareholders, representing at least $\frac{1}{4}$ of the social capital, can call the convocation of the General Meeting, outlining the purpose of this convening”.

Although Law no. 31/1990 does not make any express specification, the request is to be addressed to the director, and in the occurrence of his refusal to call the General Meeting, the shareholders may refer a submitted request to the court, claiming the director’s liability to proceed to the calling of the meeting.

An interpretation in such sense can also be perceived from a decision of the High Court, according to which: “Not only courts ignored the reasons of annulment invoked by the claimants, but they also disposed the annulment of the General Meeting decisions, according to certain legal provisions inapplicable to joint stock companies. The provisions in Art. 117 para. (3) of Law no. 31/1990 re-published, regulate the convocation of General Meetings of joint stock companies and not of public limited liability companies with reference to the provisions of Art. 193 para. (3) of the law”.[3]

In order for the shareholders to take note of the agenda of the meeting and to get informed over the matters to be discussed and voted, it is necessary a certain laps between the date of the reception of the convocation and the proper assembling. In our situation, in pursuance of Art. 195 para. (3), the convocation is to be accomplished under the form it is stipulated in the articles of incorporation and, unless other special stipulation in such sense, by means of registered letter, within at least 10 days before the fixed day of the assembling.

As we already mentioned, unless other form or means to convene provided in the articles of incorporation, the convocation is to be accomplished by means of registered letter sent to the shareholders’ addresses submitted in the register of shareholders.

Since the law is permissive, the shareholders have full liberty to set the form of convocation in the articles of incorporation, as they are also able to set another form or to add another cumulative condition next to the registered letter, such as convocation through e-mail.

In the same time, shareholders cannot provide a shorter delay than the one stipulated by means of the Art. 195 para. (3), respectively the ten days delay within the meeting is to be called. Although expressly provided by law that the above mentioned convocation is to be accomplished with at least 10 days before the due date, it cannot be understood that there must exist 10 days between the posting of the letter and the day of the meeting, or, on the contrary, the 10 days must exist between the reception day (the postmark day) of the addressee shareholder and the day of the meeting. Given that this delay is set expressly by law, with mandatory character, we consider that the latter interpretation is the correct one, as the 10 days are to be elapsed between the reception day and the day of the General Meeting of the Shareholders.[4]

According to the provisions in Art. 117 para. (6) of Law no. 31/1990, the convocation is to mention the place and time when the meeting is held, as well as the agenda of the meeting, with the explicit mention of all the matters making the object of the meeting’s debates. The information

listed on the invitation to the General Meeting refer both to the details related to the assembling and the agenda of the meeting, also the object of it.

The convocation is to comprise first of all the place and date of the meeting, as well as, for the complete information of the shareholders, the exact hour. In another manner of thinking, the convocation is to outline those specific pieces of information which allow the acknowledgement of the shareholders regarding the concrete manner of evolution of the meeting. In the same time, the convener must mention the person calling the meeting and indicating his/her authority also.

The agenda of the General Meeting represents the essential element of the convocation as it ensures the shareholders' informing regarding all the matters to be discussed and decided upon in the General Meeting.

Legal practice consequently specifies that "the publishing of the agenda is meant to offer the shareholders the possibility to prepare and document in order to consciously be aware of the matters to be discussed and so, to participate to the company's will"[5]

The role of the agenda, in the opinion of the authors J. Mestre, D. Velardocchio, C. H. Blanchard, [6] does not ensure the shareholders' briefing, but, given its content, it also achieves legal value of a document establishing the area of authority of the General Meeting.

In consequence, according to Art. 117 para. (6) of Law no. 31/1990, the convocation is to mention explicitly all the matters making the object of the meeting's debates.

For the same reasons, jurisprudence states that "simply enlisting the matters on the agenda of the meeting is not enough, it is necessary that they are detailed, in reasonable limits, so that the shareholders are efficiently informed before the General Meeting is held". [7]

Yet, jurisprudence states that "once the agenda is made public, it cannot be recalled no matter the justification"[8]. In our case, there is no procedure regulated by law by means of which shareholders request the insertion of certain new issues in the agenda of the meeting as in the case of the Art.117¹ according to which "one or more shareholders are allowed to insert new issues in the agenda of the meeting if they represent, individually or together, at least 5% of the social capital." Nevertheless, if after debates the necessity of submitting to vote another aspect than those in the agenda rises, the General Meeting may include that particular matter and submit it to vote.

Under the circumstance in which the modification of the articles of incorporation appears in the agenda of the meeting, the convocation is to comprise the text of the proposals in full. Observance of this demand must be accomplished by appropriate briefing of shareholders. [9]

If the designation of certain directors appears on the agenda, the convocation is to mention the pieces of information regarding the names, city of residence and the authority of the persons appointed for the function.

Likewise, the General Meeting may discuss and decide upon other matter different from the one already mentioned on the agenda published, with the reserve that such matters result from the development of the debates. In such hypothesis, it can be discussed over measures that the General Meeting adopts aiming to put into practice some important decisions, like, for example, the designation of the authorized person to put into practice the decision taken during the meeting, the means of putting into practice of these decisions.

Nonetheless, the exceptional situation in the law is that in which it can be decided also over certain problems not figuring on the agenda, such as the case provided by Art. 155 para. (3) of Law no. 31/1990 that is adopting a decision regarding the shareholders liability.

In order to participate to deliberation during General Meeting, the shareholder must prove this quality. Company law in all Member States, as well as those in the United States of America consecrate the principle of identity between the quality of shareholder and that of holder of the voting right. [10]

SHAREHOLDERS' VOTING RIGHT DURING GENERAL MEETINGS

As a consequence of the social capital subscription, shareholders, holders of certain fractions of capital, in our case shares, acquire pecuniary rights and the right to involve in the management of the company by vote.

From the shareholders' perspective, the vote represents a subjective right, conferred by law in the virtue of holding a participation to the social capital. Yet, from the company's point of view, the vote is in the same time the means by which shareholders adopt decisions during General Meeting.[11]

According to Art. 139 of Law no. 31/1990 "shareholders decisions are taken in the General Meeting". From the analysis of the mentioned article's content, we easily understand the fact that "affectio societatis" binding the shareholders at the incorporation of the company is active along its entire existence, in the decisions taken in the General Meetings regarding any aspect of the company's life.[12]

In our case, according to Art. 192 para. (1) of Law no. 31/1990, the decisions of the General Meeting are adopted after the vote which represents the absolute majority of the shareholders and shares, unless provided differently in the articles of incorporation. Such request is explainable through the specificity of the company, combining features of partnerships and joint stock companies.[13]

In another order of ideas, we can affirm the fact that the law provides that decisions are taken with double majority: one of the number of shareholders and one of the number of shares. It leads to the idea of absolute majority, respectively half plus one from the number of shareholders and half plus one from the number of shares.

The rule of the double majority finds its applicability only in the situation in which shareholders did not provide in the articles of incorporation a majority superior or inferior to that provided in Art. 192 para. (1), according to their own interests.[14] The risk of blocking, inherent in the situation of an even number of shareholders, usually determines the associates to convene by the articles of incorporation the elimination of the double rule of majority, since they decide more likely for a majority of shares and inclining thus the balance towards the objective element. [15]

Thus, according to Art. 76 para. (1), "if the articles of incorporation disposes that directors are to work together, the decision must be taken in unanimity; in case of conflict between directors, shareholders representing the absolute majority of the social capital are to decide".

Nevertheless, in pursuance to Art. 77 para. (1), "shareholders representing the absolute majority of the social capital can appoint one or more directors among them, setting their authority, the duration of their appointment and their eventual remuneration, unless it is provided differently in the articles of incorporation", and according to the second paragraph, "the same majority of shareholders can decide over the repeal of the directors or their powers, except for the case in which directors are appointed by the articles of incorporation".

Therefore, the vote is the specific instrument by means of which shareholders have the possibility to involve in the management of the company. Whenever, from different reasons, they are in the impossibility to present personally to the meeting in order to exert their right to vote, they can yet be present, legally, invoking a representative. Such thing is essential also from the perspective of the company, under the circumstance in which the votes of the absent who would not empower someone to represent them in the meeting, would affect the formation of the quorum and of the majority, both conditions of validity of the General Meeting.

Yet, in what concerns the limited liability company, Law no. 31/1990 restricts to providing only the right of each shareholder to express the vote during shareholders' meetings, proportional to the quota of participation to the social capital, without referring expressly to his/her possibility to exert this right by representation.

From the provisions of Art. 191 para. (2) of the law, according to which "by means of articles of incorporation it can be set that the voting is also available by correspondence", it results that the shareholders have the possibility to set in the contents of the articles of incorporation

clauses referring to the concrete means of exertion of the voting right, of representation included. Obviously, the decisions adopted on the grounds of the votes expressed by correspondence have the same value as the decisions adopted under the conditions of physical presence of the shareholders during the General Meeting.

CONCLUSIONS

The tendency towards modernization of public limited liability functioning is remarked also in what concerns the manners of convocation of General Meetings, participation of shareholders to the assembling of General Meetings and exertion of the voting right, substantially distinguished once with the time. Nowadays, shareholders can come to General Meetings in person or represented. Also, they can choose to participate to General Meetings without physical presence, or by correspondence or any other modern means of remote communication. In such sense, we conclude by underlining the fact that the essence does not reside in the physical presence of the participants convened to the meeting, but in the possibility of all shareholders to participate, by vote, simultaneously and spontaneously, even by correspondence, to the assembling.

NOTES:

- [1]C.Stoica, S.Cristea, *Drept societar*, Ed. Universitară, București, 2008, page 142
- [2]C.Stoica, S.Cristea, *op.cit.*, page 162
- [3]I.C.C.J. , S. com., dec. no. 1238 from 28th of March 2006, available on <http://www.scj.ro>
- [4] St. D. Cârpenaru, S. David, C.Predoiu, Gh. Piperea, *Legea societăților comerciale.Comentariu pe articole*, ed. 4, Ed. C.H. Beck, București, 2009, page 766
- [5]Trib.Argeș, S. com., business decision no.17 from 2nd of February 2007, final through business decision no. 95/CY/2007 of the Court of Appeal Pitești in S.M. Gavrilă, *Legea societăților comerciale nr.31/1990. Practică judiciară*, Ed. Hamangiu, București, 2009, page 233
- [6]J. Mestre, D. Velardocchio, C.H. Blanchard, *Sociétés commerciales*, Lamy, 1999, n° 1520
- [7]C.S.J., S.com., dec. no. 2685/2002, in St. D. Cârpenaru, S. David, C.Predoiu, Gh. Piperea, *op.cit.*, page 357
- [8] I. L. Georgescu, *Drept comercial român*, Vol. II Ed. All Beck, București, 2002, page 396
- [9] L. Săuleanu, *Societățile comerciale. Adunările generale ale acționarilor*, Ed. Hamangiu, București, 2008, pages 134-135
- [10]F. S. Meciejan, *Votul asociaților în societățile comerciale.Reglementare. Doctrină. Jurisprudență*, Ed. C.H. Beck, București, 2011, pages 269-278
- [11]F. S. Meciejan, *op. cit.*, page 183
- [12]C. Lefter, *Societatea cu răspundere limitată în dreptul comparat*, Ed. Didactică și Pedagogică,R.A., București, 1993, page 97
- [13]St. D. Cârpenaru, *Tratat de drept comercial român*, Ed. Universul Juridic, București, 2009, page 382
- [14] St. D. Cârpenaru, S.David, C.Predoiu, Gh. Piperea, *op. cit.*, page 751
- [15]I. Schiau, T. Prescure, *Legea societăților comerciale nr. 31/1990. Analize și comentarii pe articole*, Ed. Hamangiu, București, 2007, pages 577-578

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3. S.M. Gavrilă, *Legea societăților comerciale nr.31/1990. Practică judiciară*. Ed. Hamangiu, București, 2009
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10. C. Stoica, S. Cristea, *Drept societar*, Ed. Universitară, București, 2008