CONVOCATION OF THE GENERAL ASSEMBLY OF ASSOCIATES AND VOTE OF ASSOCIATES WITHIN THE LIMITED LIABILITY COMPANY. PROCEDURAL ASPECTS AND DOCTRINATION

Assistant PhDAlina-Paula LARION
Ştefan cel Mare University, Suceava
Faculty of Economics and Public Administration

Abstract
By addressing broadly the right to vote and the framework within which it can be exercised - the general assemblies of the associates - it can be seen that the lacunae regulation cannot provide solutions to the whole set of problems that arise in the company. All the more so as under the influence of the evolution of computer technologies, the participation of the associates in the general meetings could be carried out at a distance, subject to certain well-established conditions, especially to ensure the identification of the participants with the help of video equipment (videoconferences made through web). In other ways, the social interest understood that the aggregate of the convergent interests of the different categories of participants in the life of the company becomes one of the most important criteria for evaluating the activity of the statutory bodies, especially the administration and representation operations of the limited liability company in relations with third parties.

Keywords*: Associates, administrator, censor, general assembly of shareholders, voting right*

Jel Classification: *K 12*

I. INTRODUCTORY CONSIDERATIONS

From the point of view of the authors O. Căpăţîna, I.L. Georgescu, the general assembly is qualified as the supreme governing and decision-making body.

The doctrine unanimously qualifies the general assembly of associates as the "supreme governing and decision-making body" (C. Lefter, 1996) of the limited liability company, in which the social will is formed, through the active participation of all the associates in the debates and the exercise of the right to vote (E.G. Leuciuc, 2016). Through the vote in the general assembly, the associate manifests his will as a member of the social body, collaborates in the elaboration of a joint decision in which his individual interests are metamorphosed in the general interest of the company as a reflection of *affectio societatis* (E.G. Leuciuc, 2012).

In a synthetic formulation, the assemblage meeting identifies with the company itself, it is the framework of excellence of societal democracy (I.L. Georgescu, 2015) in which the most important decisions concerning the life of the company are formed in the process of harmonizing the collective, colleagues of associates transformedintothe company itself, the exteriorization of its interest. The General Assembly has the power to designate the other organs of the company and to establish the boundaries between them, including exercising control over the entire activity of the company as a whole.

The implementation of these competences involves first of all the adoption of the decisions on the ordinary administration and operation of the company, namely the approval of the annual financial statement, the establishment of the net profit distribution, the designation, the revocation and the discharge of the activity of the directors and auditors, financial audit, including triggering procedures for tracking administrators and auditors who are guilty of damaging the company.

Secondly, the general assembly is invested with the power to make decisions on exceptional situations that concern the very existence of the company, and may require the constitutive act to be amended (E.G. Leuciuc, 2012). The decision-making power of the general assemblies is not absolute but has certain boundaries stipulated by public order provisions regarding the essential and intangible rights of the associates. Consequently, within the limits imposed by the law, the associates have the possibility to establish by the articles of association other rules applicable to general meetings, such as, for example, generalizing the application of the principle of majority in the adoption of decisions of general assemblies or inclusion in the competence of the general assembly and other operations other than those expressly provided by law, etc. (E.G. Leuciuc, A. Popescu-Cruceru, 2013).

II. II. PERSONS WHO CAN CONVENE THE GENERAL MEETING OF THE ASSOCIATES

According to art. 195 paragraph (1) of the Law no. 31/1990, the administrators are obliged to convene the general meeting at the registered office, at least once a year or whenever necessary.

The administrator must have this quality at the moment the convict communicates, otherwise the convocation of the meeting is null.

Decision of the Constanta Court of Appeal no. 478 / COM / 2004 stated the following solution: *While at the time of the convocation the persons who convened the meeting were no longer administrators, the decision by which they had been appointed being annulled by an irrevocable court decision, both the convocation and the decision adopted by the meeting thus convened.*

It is an obligation, which at the time of its non-execution entails the liability of the administrator, which cannot be eliminated by the contrary stipulations in the constitutive act.

In practice, it is necessary to clarify what is meant by the phrase "*whenever necessary*", we observe that the article in the law does not contain criteria according to which to establish the obligation of the administrators to convene the general meeting, which is difficult to identify those situations that objectively call for convening the assembly.

In the literature we have identified some opinions:

The author of I.L.Georgescu in his "Romanian Commercial Law" summarizes the following doctrinal solutions:

1. Criteria of acts endangering the life of the company and
2. The criterion of exceptional acts.

In the opinion of Professor Lucian Săuleanu in the paper "Limited Liability Company, Convocation of the General Meeting of Associates" is considered as necessary:

a. In cases where, according to the law or the articles of incorporation, that attribution is the exclusive competence of the general meeting of the associates;

b. A situation in which the attribution exceeds the limits of the manager's mandate established by the constitutive act and

c. Cases in which the administrator considers it appropriate to convoke the general meeting (L.B. Sauleanu, 2008).

In practice, the following situation was found most often when there are several associates and two directors are appointed, and by the constitutive act the associates have not established the way of their work. We ask ourselves what solution will apply in the event of a discrepancy between administrators.

Thus art. 197 paragraph 3 mentions that the provisions of art. 75, 76, 77 para. 1 and 79 shall also apply to limited liability companies.

In the light of these provisions, the following opinion has been formulated according to which it is possible to summon any of the directors, even when the condition of unanimity has been established, so the administrator who fails to comply with the law cannot be considered guilty: at least one date per year and whenever necessary.

In the literature, the way in which the associates can convene the general meeting of the associates was discussed.

In the alternative, art. 195 paragraph 2, one or more associates, representing at least one quarter of the share capital, may request the convening of the general meeting, indicating the purpose of the convocation.

The text of the law is unclear because neither the exact procedure nor the effects in the event of non-compliance are established. It is only mentioned that they will be able to request the summoning, without specifying whom and under what conditions such an application is made.

It is stated in the doctrine that the right of the associates to have the initiative to convene is the assumption that administrators do not fulfil this legal obligation, either negligently or in bad faith.

Associates cannot directly convene the general meeting, but are required to address a reasoned request to the administrators for this purpose. The law does not provide for the form that the petitioners must apply, but in practice it is considered that the application should be addressed in the form of a registered letter with acknowledgment of receipt (E.G. Leuciuc, 2016).

According to Cornelia Lefter in the paperLimited Liability Company, if the directors remain inactive and do not comply with the request of their associates, then the provisions concerning the joint stock company are to be fully applicable by analogy.

Thus, at the request of the associates, the court may authorize them to convene the general meeting, establishing by the agenda the date of the holding of the assembly and the person who will preside over it (art.119 paragraph 3).

Considering art. 199 par. 4 which stipulate that the provisions laid down for auditors of the joint stock company shall also apply to the censors of the limited liability company.

According to art. 164 para 1 and 2 if the shareholders representing individually or collectively at least 5% of the share capital complain to the censors certain facts, and the latter finds that the complaint is justified and urgent, they shall convene the general meeting to present their observations. If the assembly does not convene, the censors must question the complaint at the first meeting.

III. WAYS TO CONVENE

According to art. 195 paragraph 3 of Law no. 31/1990, the convening of the meeting shall be done in the form stipulated in the constitutive act, and in the absence of a special provision, by registered letter, at least 10 days before the day set for its maintenance, the agenda shall be presented.

The High Court of Cassation and Justice, by its decision 2250 / 02.10.2009, stated that the general meeting must be convened in the manner stated in the constitutive act or, in the absence of any conventional rule, by sending the registered letter within the legally required term, at least 10 days before the set date.

By combining the text of the law with the text of the law referred to in art. 117 paragraph 4 regarding the joint stock company: the General Assembly may also be summoned by e-mail, provided that an extended electronic signature is incorporated, attached or logically associated this method is not prohibited in the constitutive act. The convocation is sent to the addresses listed in the associate register.

If one of the addressees of the convocation changed his domicile and did not notify the company of this change, then sending the convocation to the old address is considered valid.

They have the status of recipients of the convocation, all associates, including those who cannot exercise their right to vote in the respective deliberations, the right to vote cannot be confused with the right to participate in the life of the company. If the shares are held privately, all the co-owners must be summoned.

They can participate in the general meeting, and implicitly the administrators, the censors, if any, the officers of the company, should be summoned, if their presence is necessary to circumvent the issues that are on the agenda.

IV. CONTENT OF THE CONVOCATION

From the economics of the text of the law and by analogy to art.117 para. 6 it appears that at least the following information must be specified in the convocation: the agenda and the date and place of the general meeting. The convocation must mention the person who convenes, regardless of their quality.

- ✓ Agenda: consists of all the problems to be analysed, is determined by the administrator and must be mentioned in detail in the call.

Any decision on issues that are not on the agenda is null.

The French doctrine has developed a theory of session incidents, on the basis of which it is possible to analyse in the meeting also issues that are not explicitly mentioned on the agenda, but which spontaneously emerged from the debates. It is considered valid the decision regarding the revocation of the administrators it does not appear explicitly on the agenda, but has appeared in the context of the debates. All issues included in the agenda must be explicitly stated and clarified.

In the case of a limited liability company, there is no procedure for amending the agenda after sending the convocation.

Another aspect concerns the irrevocable character of the agenda, which from the moment it was included in the convocation and communicated to the associates cannot be withdrawn or modified. It is what the French doctrine calls the principle of the fixed order of the general meeting of the associates.

If the agenda of the general meeting contains proposals for amendment of the constitutive act, the convocation must contain the full text of the proposed amendments and if the meeting is to appoint the administrators, it shall be specified in the convocation that all the information regarding the persons proposed for this function to be made available to the associates.

- ✓ The call term

Associates cannot provide for a shorter term than the one set by the mandatory rule, less than 10 days. The text is generic: the call will be made - at least 10 days before the day set. Although it is expressly stated that such convocation is made at least 10 days prior to the fixed day, it does not follow if the 10 days must exist between the date of the postal delivery by the sender and the date of the meeting. Or, on the contrary, the 10 days must exist between the date of receipt (postmark) by the associated recipient and the date of the general meeting.

Given the imperative nature, we believe that the second interpretation is the correct one, 10 days must be between the date of reception and the date set for the meeting, thus ensuring the right to information on the

general meeting and to request information on the activity of the company, additional to those included in the convocation (T. Prescure, 1990).

- ✓ Place of convocation

Administrators must convene the general meeting at the registered office at least once a year (with reference to the ordinary meeting) or whenever factual circumstances require decision-making by associates (extraordinary meetings). As a rule, meetings are organized at headquarters.

According to the HCCJ, the Communal Section Dec 966 / 9.03.2007 if the meeting does not take place at the headquarters, the administrator must accurately indemnify him in the convocation.

The French legislature, taking into account the most modern means of communication, provided the possibility of organizing the general meeting by videoconference.

In the context of the large-scale use of remote means of communication, it is necessary to regulate the possibility of organizing and conducting the GMA at a distance, by videoconferencing.

V. VOTING RIGHTS OF ASSOCIATES AT THE GENERAL MEETING OF THE LIMITED LIABILITY COMPANY

The right to vote belongs to each associate, being indissociably linked to the decision-making process of the general meetings and is exercised in correlation with the right of the associates to take part in the general meetings of the associates

Also, the voting right cannot be affected by the constitutive act, or later by the decision of the general meeting of the associates. Associates exercise their right to vote directly, participating directly and directly in general meetings.

The law of companies also regulates the status of voting by correspondence, if this was provided for in the constitutive act, but it is considered an exception, so it is left to the associates to specify the conditions for expressing the correspondence vote.

The French legislator is more specific in expression, the associates may establish in the statute that the decisions of the general meetings, or only certain decisions, may be adopted on the basis of the written consultation of the associates, with the exception of the decision of the general meeting approving the annual financial statement that cannot be adopted only through the effective participation of the associates in the debates.

The legal provisions establish a restriction on the freedom of appointing a representative, according to which the directors or officers of the company cannot represent their associates at the general meeting. Each social party gives right to a vote, the share of voting rights is directly proportional to the share of share capital held by each associate.

The law expressly establishes a limitation on the right to vote by the associate who is in a potential conflict of interest with the limited liability company.

Therefore, an associate cannot participate in the formation of social will at the general meeting which deliberates on the in-kind port with which it has contributed to the increase of the share capital, or on the acts it has concluded with the company, situations in which it prevails its own interest.

VI. CONCLUSIONS

At a first analysis of the subject from the regulatory point of view, it can be noticed the absence of classification of the general meeting of the associates in ordinary meetings and extraordinary meetings. The legislature merely limits the quorum conditions, it is necessary to vote for all the associates for the decisions regarding the amendment of the constitutive act, for all other judgments the principle of the double absolute majority of both the shareholders and the social partners with one exception regarding transmission of shares to third parties, when a 3/4 vote of the share capital is required.

The decision-making process cannot be triggered in the absence of conciliation, the convocation being a sine qua non condition, without which the decisions of the general assemblies'cannot be effective.

The legislator frequently applies rules that refer either to collective or joint stock companies, a situation that prevents or hampers the understanding and proper enforcement of the law.

VII. REFERENCES:

1.I.L.Georgescu, *Drept commercial*, vol.2;
2.C. Lefter, *Societatea cu răspundere limitată în drept comparat*, 1996;
3.E.G. Leuciuc, *Regimul juridic al societăţii cu răspundere limitată*, 2016;
4.E.G. Leuciuc, *Converting the general meeting of the shareholders and the voting right of the partners in limited liability companies*,în The USV Annals of Economic and Public Administration, vol. 12, issue 1 (15), 2012;
5.E.G. LEUCIUC ,A. Popescu-Cruceru, *Articles and memorandum of association of the limited liability company*, in The USV Annals of Economic and Public Administration, Suceava, vol 13 issue 2 (18), 2013;
6.Low no. 31/1990;
7.T. Prescure, Legea societăţilor comerciale nr.31/1990;
8.L.B. Săuleanu, *Societateacu răspundere limitată. Convocarea Adunării Generale a asociaţilor;*
9.X. Delpech, *Societe a responsabilite limitee. Creation. Gestion. Evolution*, 1998.