

The Legal Requirements for the Modification of the Commercial Companies' Constitutive Document

Professor Stanciu D. CĂRPENARU, PhD.
"Nicolae Titulescu" University of Bucharest

The paper analyses the general conditions stipulated by the Law no. 31/1990 regarding the modification of a company constitutive document.

Usually the constitutive document modification is decided in a general meeting of the stakeholders. The law states that the modification of a constitutive document can be done by the administration board decision or by the board of directors, and by the court of law decision.

The modifying act of the constitutive document must be in a written form as the law requires, to be recorded in the Register of Commerce and published in the Official Gazette.

The modification of the company constitutive document may harm the interests of the company creditors, of the third parties and of the partners. For the protection of those interests, the law stipulates the right of caveat and the right to withdrawal from the company.

1.Preparatory/introduction

The realities of trading can determine the necessity of the commercial company change, in order to be adapted to new requirements.

Because of the elements that need to be changed were stipulated in the constitutive document of the company, the modification of the company imposes the change of the constitutive document.

The modification of the constitutive document represents, however, only the juridical mean through which the modification of the company is done in regards to its the initial set-up.

To be noted, the modification of the constitutive document does not have as consequence the setting-up of a new juridical entity. The modification of only few clauses of the constitutive document (equity, object of activity, duration of the company), does not affect the company as a juridical entity.

In regards to the condition of the company's constitutive document modification, the 31/1990 Law stipulations have known a certain evolution.

In its initial form, the law stipulated modification terms of the constitutive document, by enouncing the symmetry principle: "The incorporation contract or the legal status can be modified by the shareholders, in accordance with the terms of the here by mentioned law and the conditions concerning the form and publication stipulated for their subscription." (art.153)

In accordance with the law stipulations, the judiciary doctrine and practice constitute the terms for the modification of the commercial company constitutive document.

161/2003 law, amending the 31/1990 law, stipulates exactly/clearly the legal terms of how the modification of the constitutive document is to be done. They refer to the modification act of the constitutive document, to its form, to the recording in the Register of Commerce and to its publishement.

This conditions with some amendements brought by 441/2006 Law, are also stipulated in the present 31/1990 Law.

2. The company's modifying act of the constitutive document. In accordance with the 204 art. In 31/1990 law, the constitutive document can be modified through the general meeting decision or the administration council , therefore by the board of directors, if made consequently to art.114, paragraph 1, or through court of law decision in accordance with the provisions of art.223, paragraph 3 and of art 226 paragraph 2.

Consequently, in the present legal stipulations, the modification of the constitutive document is decided by the general meeting, by the administration council, or the board of directors and by court of law decision.

2.1 The general meeting decision. The partners through their will, signed the constitutive document, are right to modify it. The will of the partners to modify the constitutive document is expressed by general meeting.

The decision regarding the modification of the constitutive document is taken by the associates in the law stipulated terms.

For the join-stock company and the limited partnership by share the decision to modify the constitutive document is taken in an extraordinary general meeting of the shareholders. (31/1990 law, paragraph 113)

For the general meeting decision to be valid, at first assembly it is required the attendance of shareholders owning at least one quarter of the total number of vote right, and for the next assemblies, it is required the attendance of at least one fifth of the total number of vote right. The decision is taken by the vote of the majority of the attending or represented shareholders (31/1990 law, paragraph 115).

To lay special emphasis, the decision to modify the constitutive document which refers to change of the company's activity, to increase or decrease of the capital, to change of the company juridical form, to merge with other companies, to split or to dissolution of the company is taken in quorum conditions as provided by the 115 art with a majority of at list two thirds of voting right hold by the present shareholders or legally represented ones (115 art, paragraph 2 of 31/1990 law). The increase want regarding the necessity of the majority vote when adopting the decisions to modify the constitutive document prove the legislative concern for the shareholders protection.

Through the constitutive document the law leaves even greater demands of quorum and majority concerning at the modification of the constitutive document.

With regards to limited liability company the decision for the modification of the constitutive document is taken by shareholders meeting with absolute majority, if not provided otherwise by law or by the constitutive document..

To be noticed, with regards to limited liability company, the law do not peculiarly stipulate the conditions under the constitutive document can be modified, in case that at first reunion the legal conditions for the passing of the decisions are not fulfill, the shareholders meeting will be convene for the second time.

If the general meeting cannot proceed because the conditions provided for under law 31/1990, 193 art, paragraph 3 are not met, the majority of the shareholders of the meeting which will convene following a second notice, can make decisions on the problems included

on the agenda of the first meeting, whatever the number of the attending shareholders or of the registered capital represented.

In our opinion this solution is not to be accepted. Even from the mentioned provisions we can draw the conclusion that they refer at decision made by the general meeting as stipulated by law as 192 art paragraph 1 regarding the attributes of the shareholders meeting as stipulated by 194 art paragraph 1-3. Moreover, it is inconceivable that a constitutive document of a limited liability company, as an *intuitu personae* set up company, to be modified otherwise but through the majority vote of the associates.

2.2. The administration board decision, therefore by the board of directors. The modification of the constitutive document can be deputed to the administration council, therefore by the board of directors by the constitutive document or by extraordinary general meeting of the shareholders decision. (31/1990 law, 114 art)

The decision has an extraordinary character as it refers only to change of headquarter location, to change of the object of the company excepting the change of the company form of doing business and the main activities and the increase of the capital.

In case of changing the headquarter location and the object of the company, the decisions of the administrative council, therefore by the board of directors, comply within the bounds of the law concerning the decisions of the general meeting of the shareholders adequate applied. Appealed to provisions of 131 art, paragraph 4 and 5, of 132 art, excepting paragraph 6 and 7 and of 133 art of 31/1990 law.

In case of the capital increase, the decisions of the administrative meeting, therefore by the board of directors, comply within the bounds of 31/1990 law, 220 art regarding the stipulations of the registered capital.

2.3. The court of law decision. The court of law decision concerning the change of the constitutive document set an exception as imposed by practice ratio. It refers to issue of excluding and withdrawal of an associate according to the provision of 223 art, paragraph 3 and of 226 art, paragraph 2 of 31/1990 law.

In both cases of excluding or withdrawal of an associate by court of law decision, the court will also decide in what concerns the worth of the registered capital all others associates are entitle to receive.

As a result of excluding or withdrawal of an associate, the structure of the associates participation concerning the registered capital established by the constitutive document, suffers some change which demands the modification of the constitutive document.

For efficiency and also to avoid future misunderstandings between associates concerning the decision made for excluding or withdrawal of an associate from the company, the court of law will prescribe the structure of the others associates participation of the registered capital.

3. The modifying act form of the constitutive document. 161/2003 law prescribes the terms of the modifying act of the constitutive document. The law stipules compulsory cases when the modifying act voted by the associates must take an authentic form. (204 art, paragraph 2, 31/1990 law)

As the law stipulates the modifying act must be in written form. In exceptional cases the modifying act must take an authentic form. The authentication form concerns the general

meeting and the administration meeting, therefore the board of directors decision, not the court of law decision that has the character of an authentic enrolled.

The modifying act of the constitutive document must take an authentic form when has as object: a) the registered capital increase by the registered contribution in nature of a land; b) the modification of the company legal form as a general partnership or limited partnership one; c) the increase of the registered capital by public registration.

The infringement of the authentication form draws upon the nullity of the modifying act.

4. The registration and the publication of the modifying act of the constitutive document. For the modification of the constitutive document of the company, law stipulates the recording in the Register of Commerce and the publication of the modifying act. According to the 31/1990 law after each modification of the constitutive document the administrators or the board of directors will register in the register of commerce the modifying act the actual text of the constitutive document updated with all its modifications.

As all records published in the register of commerce, the modification of the constitutive document is submitted to the legal control, which according to the latest amendments is made of a delegated judge of the register of commerce office.

The legal control of the modifying act is made by the delegated judge according to provisions of 17 art, paragraph 1 and 46 art of 31/1990 law.

The law stipulations been fulfilled, the delegated judge declare a closer by which disposes the recording in the register of commerce of the modifying act of the updated constitutive document.

If the modification of the constitutive document is made by court of law decision the basis of the recording is the irrevocable injunction of excluding or withdrawal of an associate of the company.

Once the modifying act recorded in the register of commerce together with a notification of its recording of the updated text of the constitutive document is proceed ex officio by the office of the register of commerce towards the official gazette for publication.

For the general partnership and limited partnership the law stipulates that the modifying act of the constitutive document to be registered in the register of commerce in authentic form. It is recorded in the register of commerce without the obligation of its publication in the official gazette.

5. The opposition to the modification of the constitutive document of the company. The modification of the constitutive document can harm the interests of the company creditors or other partners. For the protection of this interests the law stipulates the right to oppose the modification of the constitutive document.

The 61 art of 31/1990 law sets the principle by which the creditors and any other prejudice person by the associates decision to modify the constitutive document to oppose and to demand the court of law to pledge, by case, the company or the associates mend the caused prejudice.

By the associates decision to change the constitutive document must be taken under consideration the general meeting decision or, by case, the administrative council or the board of directors decisions as stipulated by 114 art of 31/1990 law.

According to the law stipulations, the right to oppose is given to creditors and any other prejudiced person by the associates' decision to modify the constitutive document. The company associates have no right to oppose. Against the decision to modify the constitutive document, the associates have the right to ask for its annulment as stipulated by Article 132 of the Law of 31/1990.

By case, the law stipulates the right to oppose to personal creditors of the associates.

By opposing the court of law is asked to oblige, by case, the company or the associates to mend the caused prejudice by the decision to modify the constitutive document.

The rightful person to oppose can not invoke the nullity of the associates' decision to modify the constitutive document, if the motive of nullity had been ousted formerly of its deposition in the court of law. According to Article 61, the solution of the opposition falls under the disposition of Article 57.

To be mentioned that by opposing sets the ground to mend a prejudice, and not to suppress or change the associates' decision regarding the modification of the constitutive document; the right to oppose is an act of responsibility and not an offensive one, as righteously the doctrine says.

The right to oppose will be exercised within 30 days of the publication of the associates' decision to modify the constitutive document, and the demand solved as provided by Article 62 of the Law of 31/1990.

The resolution pronounced on the opposition is liable only by appeal.

6. The right of the associates to withdrawal in case of the modification of the company's constitutive document. The modification of the company's constitutive document may harm the interests of the associates. To protect the associates the law stipulates the right to withdrawal from the company.

Because the withdrawal from the company is not made by free will, but determined by the modification of the constitutive document, not wanted by the associate, the law stipulates particular terms in which it can be made. Those terms differ in accordance with the legal form of the company.

6.1. Joint-stock company and limited partnership. The associates can withdraw from the company if they didn't vote in favor of the general meeting decision about: change of the main object; relocating abroad the registered office of the company; change of the legal form of the company; merging or division of the company (Article 134 of the Law of 31/1990).

By withdrawal from the company the shareholders may request their shares purchasing by the company (share redemption).

The right to withdrawal may be exercised within 30 days after the date when the decision of the general meeting was published in the official gazette, less in case of merging or division of the company, when the time limit is established up to the date the decision of the general meeting about the merging or division was made.

The shareholders will deposit at the company headquarter together with the written withdrawal statement the shares that they own, or, by case, the titles.

The shares value that must be paid by the company will be established by an independent authorized expert representing the medium value as a result of two evaluation methods acknowledged by the law stipulations.

The expert is appointed by the delegated judge at the register of commerce as provided by 38 and 39 art of 31/1990 law, if demanded by the administration council or board of directors.

6.2. Limited liability company. The associates can withdrawal from a limited liability company if they do not agree with the modification of the constitutive document under the amendments prescribed in the constitutive document (194 art, paragraph 2 of 31/1990 law).

The rights of the withdrawal associate are established by the amendments of 224 and 225 art regarding the exclusion of an associate from the company, and not by the amendments of 226 art, paragraph 3 regarding the withdrawal of an associate from the company. The reason consist in the fact that the withdrawal from the company is a result of the modification of the constitutive document and not taken by free will.

7. Specification regarding the legal condition concerning the modification of the constitutive document. The conditions concerning the modification of the constitutive document of a company are stipulated by 204 art of 31/1990 law and have general character; they must be implemented in all cases, regardless the object of modification.

By case the provisions bear some specifications.

7.1. The increase of share capital – the authorized capital. By 441/2006 law adopted to amend 31/1990 law stipulates the increase of share capital in case of an authorized capital (220 art of 31/1990 law). These provisions apply for the joint-stock companies or limited partnership by share increase of share capital

Authorized capital is a nominal value established by constitutive document or by general meeting decision up to where the share capital can increase by administration council or board of directors' decision.

By authorized capital is assured a control for the associates concerning the way the administration increases the value of share capital, and at the same time assures a greater operability.

According the law the constitutive document may authorize the council of administration or the board of directors for a time that will not exceed 5 years of the registration of the company, to increase the share capital subscribed to a given nominal value (authorized capital) by issuing new shares for contributions.

This authorization can also be provided by extraordinary meeting of shareholders by modification of the constitutive document. The decision establish the extreme limit of the authorized capital and sets the period of time the increase of the share capital can be done; that shall not exceed 5 years of the registration of the modification of the constitutive document.

The law stipulates that by the constitutive document a greater quorum majority can be established in case of such modification of the constitutive document, by the amendments of 115 art of 31/1990 law.

The value of the authorized capital can not exceed half of the subscribed share capital existent at the moment of the authorization.

By the authorization concerning the increase of the share capital within the limits of the authorized capital established by constitutive document or by decision of general meeting of

shareholders, extends the right of the administration council or board of directors to curtail or to perk the advantage of the existent shareholders.

The general shareholders meeting decision regarding the extension of the right of the administration council or board of directors to curtail or to perk the advantage of the existent shareholders shall be made in the presence of the shareholders representing one three quarters of the subscribed share capital with the majority of the attending shareholders.

The administration council or board of directors' decision regarding the right to curtail and to perk the advantage of shareholders is deposit in the register of commerce office to be registered and published in the official gazette.

7.2. Extension of the duration of the company. The company duration established by the constitutive document can be extent by modification of the constitutive document as stipulated by 204 art of 31/1990 law.

As stipulated by 227 art paragraph 1-a when the established duration of the company exhales the company dissolve *ope legis*, the conditions for the modifications of the constitutive document must be fulfilled prior the reach of the duration of the company exhaling. Therefore, the general meeting decision regarding the extension of the duration of the company must be taken and, then, registered in the register of commerce and published in the official gazette prior the reach of the duration of the company established by the constitutive document exhale. Thus, by the associates will expressed by the constitutive document, the company dissolves.

By the different amendements stipulated by 254 art regarding the modification of the constitutive document, we consider the general meeting decision concerning the extension of the duration of the company as elementary, and it has to be prior the reach of the duration of the company established by the constitutive document exhale. The recording in the register of commerce and the publication in the official gazette of the decision regarding the extension of the duration of the company could be fulfilled later on if not opposable by the third parties, up to the fulfillment of all formalities.

7.3. Mergers and divisions of commercial companies. By 239 art of 31/1990 law, merge and division of commercial company is decided by each company involved in the process, by the stipulations of law regarding the modification of the constitutive document of the company. This means that each company must fulfill the provisions of 204 art.

The merger or division of a comercial company is exclusively fulfilled by the general meeting decision by quorum and majority conditions as stipulated by 115 art paragraph 1 and 2. By exception, if the merger or division leads at responsibilities growth of the associates in one of the company involved, the decision of merger or division is taken by the associates unanimous vote.

The general meeting decision regarding the merger or division is fulfilled by merger or division project written, approved and published by provisions of 242 and 242 art of 31/1990 law.

According the law, if the shares of the companies involved in the merger or division process bears different categories, the decision of merging or division is approved by category share vote, by quorum and majority stipulations asked by the extraordinary general meeting. The law provisions refer to joint-stock companies that besides the emission of

ordinary shares have also preferred prior stocks without voting right. The solutions shall protect the shareholders that own preferred prior stocks without voting right.

Finally, in case of a newly created company as a result of merge or division must be fulfilled the provision regarding the new type of the created company.

8. Final remarks. The constitutive document is fundamental for all companies as it constitutes not only the bases for its establishment but also the basis of the company's existence.

The constitutive document is not immutable and can be modify by shareholders will under legal control in accordance with the provisions of the law and the conditions concerning the form and publication.