

Legal status of professionals and companies under the sway of The New Romanian Civil Code

The Specifics of Obligations Assumed by Professionals Under the Provisions of the New Civil Code

Entry into force on October 1st, 2011, of Law no. 287/2009 on the Civil Code has brought up again into attention the problem of the commercial law autonomy¹, in fact an old topic in legal literature². An analysis of the points of view stated lately in various studies or public conferences leads to the observation that the dominant note is the scepticism to the new configuration of the commercial matter.

We have not the aim to identify the advantages or disadvantages of one system or another, although I fundamentally join the opinions stated³ in the sense of recognising the commercial law as a distinct branch of private law, despite the unity achieved by the New Civil Code. Regarding the autonomy of the commercial law, we must distinguish between the legislative autonomy and scientific autonomy. Even if a unit of private law has been normatively done, the science of commercial law is required, having reasons of own existence.

Conversely, by regulating in the New Civil Code some profoundly commercial legal

¹ To develop the topic of the commercial law autonomy versus the unity of private law, see: St. D. Cărpenaru, *Tratat de drept comercial*, Ed. Universul Juridic, Bucharest, 2009, p. 15-18; Gh. Buta, *Noul Cod civil și unitatea dreptului privat*, in the paper *Noul Cod civil. Comentarii*, Ed. Universul Juridic, Bucharest, 2010, pages 15-39; Smaranda Angheni, *Dreptul comercial – între dualism și monism*, in the paper *Noul Cod civil. Comentarii*, Ed. Universul Juridic, Bucharest, 2010, p. 40-57.

² In this regard, see I.L. Georgescu, *Drept comercial român*, vol. I, Ed. C.H. Beck, Bucharest, 2002, p. 64-79.

³ See St. D. Cărpenaru, *Dreptul comercial în condițiile Noului Cod civil*, in *Curierul judiciar* no. 10/2010, p. 544-546; S. Angheni, *Dreptul comercial – între tradiționalism și modernism-*, in *Curierul judiciar* no. 9/2010, page 485

institutions, we may state a commercialisation of civil law has occurred⁴. Such a remark is valid both statistically, the number of legal relations wherein the parties are professionals being much higher than that where we find only non-professionals, and on the other hand, by many regulated legal institutions.

Thus, the commercial provisions that justified their specificity compared to the civil ones precisely because of the nature of commercial relations, not only they disappeared, but they have been extended to all private law relations. This conclusion may be easily observed from the way in which the derogatory rules of commercial obligations have been taken by the new Civil Code from the Commercial Code in 1887.

Among the institutions taken into the New Civil Code, we list as example: the professionals and the enterprise (art. 3), joint venture (art. 1.949-1954), the commission contract (art. 2.043-2.053), the consignment contract (art. 2.054-2.063), the shipment contract (art. 2.064-2.071), the agency contract (art. 2.072-2.095), the intermediation contract (art. 2.096-2.102), banking contracts⁵ of the current account type (art. 2.171-2.183), the current bank account (art. 2.184-2.190), the bank deposit (art. 2.191-2.192), credit facility (art. 2.193-2.195), rental of safe deposit boxes (2.196-2.198), autonomous guarantees such as the letter of guarantee and letter of comfort (art. 2321-2322), securities (art. 2630-2631).

In matters relating to obligations, the provisions of the New Civil Code outline many and substantial changes. In this context, we aim to determine to what extent the rules derogatory in this matter, as they were governed by the Commercial Code (art. 40/-45, art. 59) have been taken into the new regulation. We take into account those rules that determine the derogatory nature of commercial obligations against civil obligations, namely: solidarity of co-debtors; the actual flow of interests, interdiction to grant the grace period, the court not allowing the disputed withdrawal, place of performance of commercial obligations, determining the price.

Solidarity of Co-debtors

Art. 1.446 of the New Civil Code maintains the presumption of solidarity for the obligations contracted during the activity of an enterprise, if the law does not provide otherwise.

Maintaining the special commercial law directly results in maintaining the cases where the legal (or absolute) passive solidarity cannot be removed, taking into account the cases provided by Law no. 31/1990.

By comparing the text of art. 1.446 of the New Civil Code with the art. 42 Commercial Code, we observe a difference in the sense that in this latter case, the presumption is a relative

⁴ To the same effect, see I. Schiau, *Drept comercial*, Ed. Hamangiu, Bucharest, 2009, p. 15.

⁵ By regulating the banking contracts, the existence of a new category of contracts that had the status of unnamed contracts; in this regards, Lucian Bercea, *Contractele bancare în noul Cod civil sau despre codificarea prin traducere selectivă*, within the International Conference Business Law, 2010: Integrating the Commercial Law into the Civil Code, organised by the Faculty of Law of the University of Bucharest, 16-17 April 2010.

one, the parties being able to establish the contrary (“in commercial bonds, co-debtors are held jointly, except the contrary stipulation”). Or, in the New Civil Code, the presumption applied in all these relations, except when the law stipulates otherwise.

The conclusion is that the co-debtors’ joint responsibility presumption is no longer a relative one, but an absolute one. The parties can no longer rebut this presumption.

It is also required to determine the scope of individuals covered by the incidence of joint responsibility presumption, established by art. 1446. From the contents of this text of the law, the express reference to "obligations contracted in the performance of an enterprise activity" results, so that it could be supported that this presumption applies only to debtors who are professionals and that the regulation does not differ from that of art. 42 par. 1 of the Commercial Code.⁶ We cannot agree with this opinion and we consider that basically the two provisions do not differ.

Thus, first of all, the scope of individuals was expanded once under the rule of the Commercial Code of 1887, the presumption concerned only the traders, while the current Civil Code applies to all professionals, a notion that includes the categories of trader, entrepreneur, economic operator, as well as any other certified individual performing economic or professional activities.

Second of all, as we shall further argue, the phrasing of art. 1446 is confusing⁷, not limiting the application of the presumption only to the legal relations where the debtors assume their obligation in the exercise of an enterprise. We believe that the joint responsibility of co-debtor was established in terms of the legal relations where one of the parties is a professional.

The premise we want to start from in supporting our view is the finality of joint responsibility between debtors; this derogatory rule on the matter of commercial obligations has been an edict to encourage the credit and was a guarantee for the creditor.

In order to draw a fair conclusion, we believe that it is required to first establish the effects regarding the non-professionals, respectively to observe to what extent the provisions of art. 42, par. 2 and 3 of the Commercial Code have been taken into the Civil Code.

First of all, the presumption of joint responsibility is applied according to art. 42, par. 2 and to even the non-trader surety who guarantees a commercial obligation. This provision is no longer in the new Civil Code so that, by observing the provisions governing the surety (art. 2.279-2.320), the surety’s liability is no longer differentiated according to the quality of surety⁸) and nor to the nature of the obligation assumed (meaning specific to the enterprise activity).

The joint surety is expressly regulated by art. 2.300 of the New Civil Code and it exists

⁶ In this regard, see Ion Turcu, the New Civil Code. Law no. 287/2009. Cartea a V-a Despre obligații (art. 1164-1649), Ed. C.H. Beck, Bucharest, 2011, p. 570; Cristian Gheorghe, *Reguli speciale privind contractele profesioniștilor*, R.D.C. 11/2011 p. 105.

⁷ Idem

⁸ We believe the use of the term “non-professional” instead of “unprofessional” is more useful, taking into account the latter also means dilettante, amateur.

“when they are committed along with the main debtor with the status of surety or joint co-debtor”, in which case they shall no longer invoke the benefit of discussion or division.

Although the surety can be imposed by law (art. 2281), we observe that art. 1446 makes no reference to sureties. Thus, whether the surety is a professional or a non-professional, the presumption of joint responsibility does not operate (it has legal feature only for the obligations contracted in the exercise of the enterprise’s activity), but it should expressly result from that document (art. 2282).

Second of all, if art. 42, par. 3 of the Commercial Code expressly stipulated that the joint responsibility presumption does not apply to non-traders for operations that are not trading deeds in respect thereof, we observe that such a statement is no longer present in the New Civil Code.

There are two possible interpretations:

- Either the presumption applies to all co-debtors, including debtors who assume their responsibility outside the performance of an enterprise’s activity
- Or the presumption applies only to professionals (a notion where not just the “traders” are included) and only if that obligation is assumed in the exercise of its enterprise.

We believe that the first interpretation corresponds both to a grammatical and teleological interpretation, respectively in agreement with the intent of unifying the private law and implicitly the of unitary dealing with such legal relations.

Not taking the text of law from the Commercial Code of 1887 can be observed, which removes the joint responsibility in the case of non-traders and we cannot consider that the current form of art. 1.446 of the New Civil Code is random, so that this text must be interpreted in the sense of applying the presumption of joint responsibility and in the case of non-professional co-debtors. We cannot interpret that the nature of the enterprise activity refers even to co-debtors, meaning that when it would fall within the scope of such activities for them. From the grammatical interpretation, it results that this nature can also be just for the creditor. Perhaps precisely for removing the interpretations, when drafting the Commercial Code, the legislator has reinforced the presumption for non-traders, using an unequivocal phrasing. In the case of the New Civil Code, the legislator could have also been precise in drafting the text, taking the formula from art. 42, par. (“...for operations which, concerning them, these are not trading deeds”), so that the text could have had a simple and clear content: The joint responsibility between the debtors for the obligations assumed by them as professionals is presumed. The reference to professionals once the entire structure of the New Civil Code revolves around the dichotomy professional / non-professional was welcomed. By using the phrase "exercise of an enterprise’s activity", we find the interpretability of the text, as well as an inconsistency of the legislator, which, instead of constantly relating to the professional individual, it swivels in determining the legal effect by the enterprise activity. As long as the difference between the two systems (that of the unity of private law, namely of the commercial law autonomy) is based on the subjective theory (the entrepreneur individual), respectively the objective theory (which focuses on the trading deeds) implicitly the remaining provisions should have also been in

accordance with the system variant adopted.

Another argument to substantiate the first interpretation is also drawn from the unit of generally applying the Civil Code, a principle stipulated in art. 3, par. 1, so that a general application on the entire relation would also correspond to this concept; applying the rules distinctly for each part of the rules is not possible once the purpose was to unify the private law and generally apply the provisions of the Civil Code. As art. 3, par. 1 stipulates that "the provisions of this Code shall also apply to the relations between professionals, as well as to the relations between thereof and any other civil law subjects", we believe that the text must be interpreted in the sense of the applicability of the co-debtors' joint responsibility and in the case of the relations between a professional, on the one hand, and non-professionals, on the other hand, where the latter have the quality of debtors.

Regarding the second possibility of interpretation, although we are reserved precisely for the aforementioned arguments, we however point out that also in this case the scope of the presumption applicability has been extended, if we consider that the article refers to the context of assuming such an obligation (in the performance of an enterprise's activity), and, from the definition provided by art. 3, par. 3, we observe that the applicability of the co-debtors joint responsibility presumption concerns any activity in the scope of production, management or alienation of goods or provision of services, whether it has or not a lucrative purpose. The argument to consider the formulation of art. 1446 sufficient, without requiring any explanation or reinforcement thereof in the sense that the presumption of co-debtors exercising the enterprise's activity is applied, precisely because by unifying the legal relations of private law the emphasis is no longer on differentiating the nature of this relation (we do not have commercial/non-commercial relations nor relations between professionals/non-professionals); this differentiation has disappeared having civil legal relations. It is true that the legislator could not have been constant in this process of treatment unity and has set exceptions regarding an enterprise's activity, but the context in which we admit that maintaining a difference between the obligations assumed by professionals and those who do not have this quality, we question ourselves about the effectiveness of the monistic concept and that only the professional and enterprise names have actually been implemented, without any other modification. However, even in presenting reasons to the Civil Code, it results a unitary approach of the enforcing relations has been desired.

Yet, if this second thesis is embraced, we must also admit another hypothesis, namely that the presumption only applies when the debtor has assumed their obligation in the enterprise's activity, excluding the situations where the very professionals assume their obligation outside the enterprise's activity.

We do not claim that such an interpretation of art. 1446 is not logical, but that it does not get through from the economy of the text. This second variant of interpretation is nothing but the reiteration of the principles set forth by the Commercial Code of 1887 regarding the regime of unilateral trading deeds, the merchantability presumption of art. 4, art. 56 of the Commercial Code, etc. all being the fundamentals of the dualism concept

Therefore, the conclusion that emerges regarding the comparison of the scope of applicability of the joint responsibility presumption according to the New Civil Code compared to the Commercial Code of 1887, we observe an expansion of the scope of the application thereof also in other legal entities and natural persons than those that could have been qualified as traders, under the Commercial Code.

Another example supporting the thesis of establishing a stricter regime on the joint responsibility is that of the provisions of art. 1886, par. 1 governing the joint liability of associates and first administrators appointed by contract for the damage caused by failing to comply with a formal requirement of the company contract or a formality required to establish a company or, if applicable, to acquire the legal entity by it⁹; the liability established by art. 1886, par. 1 applies to all associates, regardless of the company's form, including those from simple companies. This provision establishes a stricter regime than that regulated by the Civil Code of 1864, which in art. 1520 established that the associates in civil companies, compared to the associates from trading companies are not jointly liable to third parties; this differentiation was no longer maintained by the New Civil Code in the sense of a different liability between professionals and non-professionals.

The Lawful Flow of Interests

Concerning the rule established by art. 43 of the Commercial Code on the lawful flow of interests¹⁰, in the New Civil Code we observe this rule is maintained by art. 1.535, par. 1 according to which if an amount of money is not paid on the due date, the creditor is entitled to deferred interests, from the due date until payment is made, in the amount agreed by the parties or, in absence, within the deadline provided by law, without needing to prove any damage.

By not specifying the nature of the obligation assumed (respectively a professional or a non-professional), we also observe in this case that the deferred interests are due from the due date, regardless of the specificity of the requirement (meaning assumed during the enterprise's activity or not), so that we point out once again the broadening of the scope of applicability of the rule of art. 43 of the Commercial Code to all money obligations assumed after the entry into force of the New Civil Code¹¹.

The current regime of the legal interest is provided by the Government Ordinance no.

⁹ This way of joint liability of founder associates and first administrator may also be found in art. 36, par. 1, art. 49, art. 53, par. 1 of Law no. 31/1990.

¹⁰ "Liquid commercial debts and paid in cash generate lawful interest as of the day when they become due"

¹¹ Under this aspect, it is worth noting that by art. 197 of the Law for applying the Law no. 287/2009 regarding the Civil Code has been appropriately amended and the G.D. no. 9/2000 regarding the level of the legal interest for money obligations in the sense that after art. 10, art. 10¹ has been inserted, with the following content "The provisions of art. 1535 and of art. 1.538 - 1.543 from the Civil Code are applicable to the penalty interest".

13/2011 regarding the legal remunerative and penalty interest for monetary obligations, as well as for regulating such financial-fiscal measures in the banking field¹² which approved the G.D. no. 9/2000 regarding the level of the legal interest for monetary obligations.

The parties are free to establish, in conventions, the interest rate both for repaying a loan of an amount of money, and for the late payment of a monetary obligation (art. 1); establishing the interest is done only in writing, otherwise only the legal interest is due (art. 6).

Distinction is to be made between the remunerative interest (art. 1 par. 2) and the penalty interest (art. 1 par. 3).

The rate of the penalty interest is set at the level of the reference interest rate of the National Bank of Romania, plus 4 percentage points (art. 3 par. 2) which is published in the Official Journal of Romania, Part I or any time the level of the interest rate of monetary policy shall change (art. 3 par. 4).

The legal relationships not arising from the operation of an enterprise with lucrative purpose, the interest cannot exceed the legal interest by more than 50% per year (art. 5 par. 1).

Regarding the regime of interests, the following clarifications are required:

- as the contract is subject to the law in force when it is concluded, concerning its conclusion, interpretation, effects, execution and termination, so that the penal clauses are to be subject to this rule

- The penal clause agreed after the entry into force of the Civil Code causes the effects it stipulates, regardless of the date when the main obligation arises (art. 115 of the Law for applying the Law no. 287/2009 concerning the Civil Code).

Concerning the **notice of default to the debtor**, art. 1.523 par. 1 stipulates that the debtor is rightfully in delay when it has been stipulated that the mere fulfilment of the deadline set forth for the execution generates such an effect (therefore, without making a distinction between professionals and non-professionals) and par. 2 states the cases where the debtor is rightfully in delay, among which at letter d): “if the obligation to pay an amount of money, assumed in the exercise of an enterprise has not been performed”.

An application of the rightful notice of default may also be found on the matter of sale in art. 1.725:

“In the case of selling movable goods, the purchaser is rightfully in delay regarding the fulfilment of their obligations if, upon the due date, they did not even the price nor did they take the goods”.

¹² Published in The Official Journal of Romania, Part I, no. 607, of 30.08.11.

Regarding the **accumulation of the penalty with the execution in nature**, art. 1.539 establishes that a creditor cannot request both the execution in nature and the payment of the penalty, unless the penalty has been stipulated for the non-execution of the obligations in due time or at the established place. In this case, the creditor can request both the execution of the contract and of the penalty, if they do not waive this right or if they do not accept the execution of the obligations, without reservations.

As for the place of payment¹³,

Art. 1.494 of the New Civil Code establishes that, in the absence of a contrary provision or if the place of payment cannot be established according to the nature of the service or under the contract, practices set forth between the parties or usages:

a) the monetary obligations must be performed at home or, as applicable, the headquarter of the creditor, on the date of payment;

b) The obligation to submit a determined individual item must be executed at the location where the item is on the date of concluding the contract;

c) the other obligations are performed at the home or, as applicable, the headquarter of the debtor, on the date of concluding the contract.

By comparing art. 1.494 of the New Civil Code with the art. 59 of the Commercial Code, we note that the texts are similar, the only difference brought by the new Civil Code on the execution of the monetary obligations, a difference that is in favour of the creditor, reversing the presumption established by art. 1104 par. 3 of the Civil Code of 1864 which stipulated that the payment would be made at the debtor's headquarter (not portable); therefore, this change is in the creditor's advantage.

In return, the institution of the **grace period** and that of the **disputed withdrawal** are no longer taken into account by legislator in the New Civil Code. However, when implementing the notice of default to the debtor is regulated (art. 1522) the debtor's possibility to execute their obligation within a reasonable time, given the nature of the obligation and the circumstances.

¹³ **According to art. 1469 par. (2) of the new Civil Code: "The payment consists in the remission of an amount of money or, as applicable, in the execution of any other service that is itself the object of the obligation"**.

One reference may be identified on the grace period in art. 1.619 “The grace period granted to pay one of the debts does not prevent the achievement of the compensation”.

Art. 1101 par. 1 of the Civil Code of 1864 which governed the grace period was no longer taken into the New Civil Code (although par. 1 of art. 1101 on the partial payment has been taken into art. 1.490 of the New Civil Code). On the contrary, art. 1.495 of the New Civil Code establishes that, in the absence of a deadline stipulated by the parties or determined under the contract, of the practices established between them or of the usages, the obligation must be immediately executed. Exceptionally, par. 2 provides that the court may set a deadline when the nature of the service or the place where the payment is to be made so requires; to be noted that this text does not refer to granting a payment deadline according to certain circumstances ("in considering the position of the debtor" - art . 1101 of the Civil Code.), but to establishing it when such a deadline was not provided, nor does it result from the established practices or from the usages; therefore this art. 1.495 par. 2 does not govern the grace period.

However, granting a grace period had lost its effectiveness as derogatory rule of commercial obligations, an evidence in this sense being the provisions of art. 6 par. 3 of the G.O. 5/2001 on the procedure of payment summons, which establishes that if the judge finds that the creditor’s claims are unjustified, they shall issue the ordinance containing the payment summons and the payment deadline, which shall not be less than 10 days and not more than 30 days.

Determining the price between professionals is governed by art. 1.233:

“If a contract concluded between professionals does not set the price nor does it indicate a way to determine it, it is assumed that the parties took into account the price commonly practiced in that field for the same services achieved in comparable conditions or, in the absence of such a price, a reasonable price”.

In conclusion, the special nature of the legal relations arising from the trade activity, compared to the civil legal relations is undeniable, and this remains a constant element regardless of their normative source.

Undoubtedly, through many stipulations, the New Civil Code brings a plus of efficiency in legal relations which partly are professionals. We observed that the problem of interpreting the unit of private law in many aspects is just terminological.

That the unification of the two areas is formal or not does not prevent us from observing the evolution of legal institutions (by comparison) and extract the benefits of the changes made.

The specificity of commercial law cannot be impaired, and the evidence of its vitality is the very experience of the states that formally achieved the unification of private law¹⁴.

As stated, regarding the autonomy of the commercial law, we must distinguish between the legislative autonomy and scientific autonomy. The science of commercial law is necessary for reasons of own existence.

Moreover, the commercial law as law branch and as study subject in universities continues to exist in those countries that adopted a unique code, such as Italy, despite adopting the Civil Code of 1942¹⁵. We must not forget that many of the legal institutions related to the science of commercial law shall continue to be governed by the special legislation.

Even if in the new regulation it has been given up on the original fundamentals of commercial law, the pillars of this structures, namely the trading deeds and the trader, as it has also been noted in the doctrine¹⁶, remain defining elements providing specificity to the commercial law, respectively: the diminished role of the traders' entity; the celerity of commercial operations; the institution of appearance; the importance and security of the credit.

The pragmatism of commercial law, compared to the civil law is observed in the absence of concern for outlining a general theory¹⁷, prevailing the interest for providing the traders with some flexible, rapid, efficient and also safe techniques.

As also noted in the doctrine, the specificity of the trade law in general and also the specificity of commercial obligations, in particular, can result from the following aspects:

a) The diminished role of the contractors' entity in the commercial law relations.

Outlining such an attitude is the consequence of the contractual dirigisme as a tool of limitation. Limiting the principle of contractual freedom has been determined by the existence of a crisis of the contract due mainly to the state's intervention in the economic life, a limitation that was mainly manifested by the development of adhesion contracts at the expense of traditional contracts, by the increased intervention in order to control it, by the adoption of a legislation on state's monetary policy and control of prices, by establishing by law the clauses to be inserted should certain contracts be concluded, etc.

b) the celerity of commercial operations has imprinted to many institutions of commercial

¹⁴ I.L. Georgescu, *op. cit.*, p. 73

¹⁵ Moreover, even the legislator can no longer get rid of the word "commercial"; for example, art. 945 par. 2 wherein reference is made to the "goods of commercial value".

¹⁶ Y. Guyon, *Droits des affaires*, Ed. Economica, Paris, 1998, p. 4-5.

¹⁷ *Idem*

law a distinctive character, adapted to this need. It is the reason why a flexible regime has been established, precisely for the conclusion of such contracts is often verbal; other relevant examples may also be found in: the procedure by which the creditor comes into the possession of the pledged item, the transfer of shares, commercial arbitration, etc. Celerity has required the use of new techniques, such as using the computer in order to conclude the contracts, make payments, etc. Lately, there has been a significant increase of formalism¹⁸ (standardisation of contracts), as a corollary of diminishing the role the contractors entity and resulted in the use of standard contracts, which often have abusive terms.

c) the importance of appearance in commercial law

The celerity of legal operations make it impossible to constantly, correctly and completely verify the data necessary for the conclusion of a commercial operation (e.g. checking the existence of the other contractor, its reliability, etc.), which is why the legislator has given the consistency to the appearance institution in commercial law, precisely for protecting those involved. It is the case of commercial securities, the case of notes written in the trade register, etc.. Article 51 of Law no. 31/1990 stipulates that third parties may invoke the acts or deeds which publicity was not achieved for, which means they can even ignore them, as the text is not imperative, and art. 54 provides that the company or the third parties cannot invoke an irregularity in appointing the administrators, when this appointment has been done publicly, according to the law.

d) the importance of the credit in commercial law, corroborated with the security of commercial operations. The motor of trading is the credit, which is why, in this area, the legislator also needed to adapt the rules of civil law; this justifies the existence in commercial law of some exceptions or new rules: the joint responsibility of co-debtors is presumed that, which in civil law is an exception; the interests rightfully flow, not needing the notice of default to the debtor for the performance of an obligation to pay an amount of money; it is prohibited to grant a grace period etc. All these have their logic in providing the credit flow, and in the requirement to ensure a system that would provide security to operations. The examples given above also provide support for explaining the security of commercial operations.

Observing these last details, we have to emphasise that the existence of specificity is the natural consequence of the evolution of trade, that regardless of the name given or the terms used or the theories adopted, their essence cannot be removed and that the requirements of this activity were over time transposed in legislation, including the new regulations.

¹⁸ Nathalie Moraldo, Eva Mouial Bassilana, Irina Parachkevova, *Droit des affaires et droit commercial*, Gualino, Paris, pag. 43-49.

Considerations on the Legal Status of Contracts concluded by Professionals under the Sway of the New Civil Code

The legislator's new vision to unify the private law and lose the autonomy of commercial law only through the legislative perspective has naturally led to waiving the objective theory focused on trading deeds in favour of the subjective theory having as reference point the individual, meaning the professional.

In this context, a number of provisions of the New Civil Code regulate distinct hypotheses for the situations where we also find professionals in the legal relations.

A separate chapter has not been reserved for outlining the rules applicable to professionals, but references to professionals were done within the different institutions.

Except for the art. 1 and 3 of Chapter I “General Provisions” of the Preliminary Title where we find reference to the professional usages and the definition of professionals, the remaining provisions govern the various hypotheses of different legal institutions, where the specificity has required the establishment of some exceptions or a different regime regarding the professionals.

Such provisions on professionals and enterprise may also be found, *exempli gratia* in the following texts of the Civil Code: art. 31 (patrimony of affectation), art. 1. 233 (price establishment among professionals), art. 1.297 (not showing the quality of representative), art. 1358 (assessing the guilt), art. 1.523 (notice of default to the debtor), art. 2.097, par. 2 (remuneration of the intermediary), art. 2106 (remuneration of the intermediary), art. **2017 (diligence of the depositary), art. 2368 (mortgage on an array of assets), art. 2389 par. 1 letters j and k (object of mortgage), art. 2.393 (alienation of the mortgaged property), art. 2.468 (receiving the mortgaged property for administration purposes).**

In this material I decided to just make an inventory of the most important provisions concerning the contracts and obligations from the perspective of the professionals', and the presentation in this format preserves the structure specific to a public conference, without claiming to consider it an actual study.

For the pre-contractual phase, we observe the legislator's concern to regulate some specific aspects of this phase, which, in the absence of some express regulations, have previously led to doctrinal disputes or jurisprudential solutions which were not under the shelter of critics.

Thus, although in art. 14 the principle good faith was established, and in art. 1.170 good faith was established, the contracting parties' liability to act in good faith, however it was needed to emphasise it also for the case of negotiations in art. 1.183, the good faith in negotiations being regulated:

It is true that "The parties have the freedom of initiating, conducting and breaking the negotiations and cannot be held liable for their failure", but in par. 3, it is stated that "it is contrary to the requirements of good faith, inter alia, the behaviour of party initiating or continuing the negotiations without the intention to conclude the contract" and party initiating, continuing or breaking the negotiations contrary to good faith is liable for the damage caused to the other party.

The confidentiality obligation in pre-contractual negotiations has been also established (art. 1.184) . When confidential information is communicated by one party during the negotiations, the other party must not disclose and use it for their own interest, regardless whether the contract is or is not concluded; the violation of this obligation involves the liability of the culpable party.

The convention by means of which it is bound to negotiate in order to conclude or amend a contract is not a promise to contract (art. 1.279 par. 4)

The pact of option has been regulated (art. 1278) as an irrevocable offer, generating the effects of art. 1.191, the parties being able to agree that one of them would remain bound to their own declaration of will, and the other can accept or refuse

The pact of option must include all elements of the contract which the parties aim to conclude, so that it can be concluded by the beneficiary simply accepting the option.

Distinctly, the legislator has understood to regulate the promise to contract (art. 1.279) that must include all those clauses (elements) of the promised contract.

In case of failure to perform the promise, the beneficiary is entitled to damages. In case of refusal to conclude the promised contract, upon the request of the party who met all their obligations (therefore, it is not just ready to meet them), the court may deliver a legal decision which would be instead of a contract, when the nature of the contract allows this, and the

requirements for its validity are met (this situation is excluded when the actual contracts – art. 1.174)

The legislator has regulated the pact of option regarding the sales contract as particular cases when selling-purchasing (art. 1.668) and in art. 1.669 the promise of selling and the promise of purchasing.

Regarding the achievement of the agreement of will, the principle of the freedom to contract has been maintained (art. 1.669) **establishing in art. 1.182** it is sufficient that the parties agree on the essential elements of the contract, and, if the parties do not reach an agreement on the secondary elements or the person it was entrusted to did not make a decision, upon the request of any party, the court may order the completion of the contract, taking into account its nature and parties' intention, according to the circumstances.

Greater importance was given to the usages, meaning to the professional custom and uses, which are to apply only to the extent where the law expressly refers to them (art. 1 par. 3). **This solution to reinforce the value of professional uses is justified by the overall concept regarding professionals.**

Concerning the obligations assumed by professionals, art. 1.446 of the New Civil Code maintains the presumption of solidarity for the obligations contracted during the activity of an enterprise, if the law does not provide otherwise.

Regarding the **notice of default to the debtor**, art. 1.523 par. 1 stipulates that the debtor is rightfully in delay when it has been stipulated that the mere fulfilment of the deadline set forth for the execution generates such an effect (therefore, without making a distinction between professionals and non-professionals) and par. 2 states the cases where the debtor is rightfully in delay, among which at letter d): “if the obligation to pay an amount of money, assumed in the exercise of an enterprise has not been performed”.

The express regulation in art. 15 of the abuse of law; “No right may be exercised in order to injure or harm another excessively and unreasonably contrary to good faith”

Also, art. 1.553 of the New Civil Code, in the list of liability exemption causes stipulates that “that who causes an injury by exercising their rights is not bound to repair, unless the right is exercise abusively”

The previous legislation did not include an express regulation of the abuse of law, but only indirectly by art. 57 of the Constitution of Romania and art. 3 of the Decree no. 31/1954.

Regarding the trading companies, Law no. 31/1990, in Art. 136¹ has stipulated, by the amendment made by Law no. 441/2006 the compulsoriness of exercising the rights by shareholders in good faith, by complying with the legitimate rights and interests of the company and of the other shareholders.

Although the cases of abusively exercising the rights have been frequent, particularly regarding the trading companies (the abuse of majority/abuse of minority), however, in the absence of an express regulation, the courts have been reluctant in admitting certain actions that tended to involve the tort civil liability and to cover the damage cause by the abusive exercise of rights.

It remains to observe to what extent the jurisprudence and doctrine in the new legal framework shall set up the distinct legal regime of abuse of law as distinct hypothesis of civil liability, the only hypothesis that would be its full implementation.

The text of law is not sheltered from any critics, which is why we state:

- In particular, as for involving the tort civil liability, the requirements of art. 1.357 of the New Civil Code must be met (art. 998-999 of the Civil Code.), it may be observed that in certain situations, the abusive exercise of some rights does not directly lead to a prejudice.

- to observe that the text of law expressly establishes this legal institution, but the actions that may be ordered against that who abusively exercises the rights are not indicated (obligation of damages, restoring the previous situation, etc.).

- the use of the word "purpose" inevitably leads to noting that this liability may arise only when the doer acted with direct intention (the subjective theory of abuse of law), a solution that is not to lead to a full efficiency of the institution once the doer's guilt would not make any difference (therefore, an objective liability is required); in other words, not being able to prove the doer's intention, such a request to involve civil liability could not be accepted. For example, the failure to prove the guilt in the case of legal entities is obvious, in which case, the exercise of those rights is not accompanied by an external volitional process of mental nature or the difficulty to establish the guilt of the associates who vote based on its shares only against the will of the other associates.

We observe the legislator's tendency to broaden the scope of the situations where third parties or the court may intervene in the parties' agreement of will or in the execution of contracts, provisions that are not exclusively related to professionals.

Exempli gratia, we list cases where the court may intervene:

- art. 1278 (the pact of option), by way of presidential ordinance by citing the parties, the court may set the deadline for acceptance, if such a deadline has not been agreed by the parties

- the promise to contract (art. 1.279); in case of refusal to conclude the promised contract, upon the request of the party who met all their obligations, the court may deliver a legal decision which would be instead of a contract, when the nature of the contract allows this, and the requirements for its validity are met

- it is sufficient that the parties agree on the essential elements of the contract, and, if the parties do not reach an agreement on the secondary elements or the person it was entrusted to did not make a decision, upon the request of any party, the court may order the completion of the contract, taking into account its nature and parties' intention, according to the circumstances. (art. 1.182)

- legally establishing the deadline (art. 1.415) where the parties agree to postpone establishing the deadline or give to one of them the task to determine it, and when after a reasonable period of time the deadline has not been established, at the request of one of the parties, the court may set the deadline taking into account the nature of the obligation, the situation of the parties and any other circumstances.

- the regulation in art. 1271 of court's unpredictability and possibility in certain conditions set forth by this text of law to adapt the contract.

It is very important to assess the culpability in a different level where the damage is caused by a professional when exploiting an enterprise.

Thus, art. 1358 states that "to assess the culpability, the circumstances in which the damage was caused shall be taken into account, which are foreign to the doer, as well as whether it is the case that the damage may have been caused by a professional when exploiting an enterprise"

Regarding the content of the capacity of use (art. 206 of the New Civil Code)

„The legal entity can have those civil rights and obligations, except for those which by their nature or according to the law can belong only to the natural person.

“The legal entities without lucrative purpose can only have those civil rights and obligations necessary to achieve the purpose set forth by law, the articles of incorporation and those of association”.

This provision has changed the vision of the principle of speciality regulated by art. 34 of the Decree 31/1954; the documents concluded by a legal entity that are not consistent with the object of activity are no longer null and void, except for the legal entities without lucrative purpose. Therefore, only the latter are subject to this conditioning, meaning the legal documents they conclude must be fully consistent with the intended purpose, so that we consider that based on this text of law the associations and foundations can no longer carry out activities specific to trade. By the entry into force of the New Civil Code, it was believed that associations and foundations could also carry out commercial activities (certainly, being subject to the tax legislation specific traders regarding the incomes from these activities), but needed be intended for their members, to have an insignificant feature and serve the main purpose (e.g. performing a bar and restaurant activity only for the association's members or printing and selling books related to supporting the purpose, etc.). Against the new regulation, we believe that such activities can no longer be performed by these legal entities as long as such activities have a lucrative purpose.

Purchase and sale agreement between professionals

On October 1st 2011 a new Civil Code (Law no. 287/2009) came into force, and the new vision of the lawmaker to unify private law and the loss of autonomy of commercial law , resulted, naturally, in the waiver to the objective theory, centred on trade facts, in favour of the subjective theory, that has as a reference point the person, that is the professional.

In this context, a series of provisions in the New Civil Code regulate distinct hypotheses for situations where we also find professionals within legal relations.

A separate chapter was not reserved for outlining the rules applicable to professionals, but within different institutions references were made to professionals.

Related to the subject of the present study we indicate that there are no special provisions to govern the sale and purchase occurred between traders.

Except for art. 1 and 3 of Chapter I „General Provisions” of the preliminary Title where we find reference to the professional usages and the professionals` definition, the remaining provisions govern various hypotheses of various legal institutions where specific issues imposed the establishment of certain exceptions or of an exception or different regime regarding professionals.

Such provisions regarding professionals and the enterprise can be found *exempli gratia* in the following texts of the Civil Code: art. 31 (dedicated assets), art. 1. 233 (price determination between professionals), art. 1.297 (not showing the quality of representative), art. 1358 (assessing guilt), art. 1.523 (formal notice to the debtor), art.

2.097 paragraph 2 (payment to the intermediary) , art. 2106 (depository remuneration), art. 2017 (depository diligence), art. 2368 (mortgage on universality of assets), art. 2389 paragraph 1 letter j and k (the object of security mortgage), art. 2.393 (disposal of mortgaged property), art. 2.468 (taking over the mortgaged asset for administration).

For the pre-contractual phase we notice the lawmaker`s care to regulate some specific aspects of this phase, which, previously, in the absence of express provisions led to doctrinal disputes or jurisprudential solutions which were not sheltered by critics.

Thus, although in art. 14 settles the principle of good faith, and in art. 1.170 the good faith was established as the obligation of the contracting parties to act in good faith, however it was felt the need to emphasize it also in case of negotiations in art. 1.183 being regulated the good faith in negotiations.

It is true that „The Parties are free to initiate, conduct and break negotiations and cannot be held responsible for their failure”, but in paragraph 3 it is stated that „it is contrary to the requirements of good faith, among other things, the conduct of the party who initiates or continues negotiations with no intention to conclude the contract”, and the party who initiates, continues or breaks negotiations contrary to good faith is liable for damage caused to the other party.

At the same time, it was established the confidentiality obligation in pre-contractual negotiations (art. 1.184) . When a piece of confidential information is communicated by one party during negotiations, the other party must not disclose it nor use it in own interest, whether or not the contract is concluded; breach of that duty attracts liability of the party at fault.

The agreement whereby the parties undertake to negotiate on the conclusion or modification of a contract, does not represent a promise to contract (art. 1.279 paragraph 4)

It was regulated the option pact (art. 1278) as an irrevocable offer producing the effects of art. 1.191 , the parties can agree that one of them will remain bound by her own declaration of will, and the other can accept or decline.

The option pact must contain all elements of the contract which the parties seek to conclude, so that it can be done by the simple acceptance of the option by the beneficiary.

Distinctly, the lawmaker understood to regulate the promise to contract (art. 1.279) which must contain all those terms (elements) of the promised contract.

In case of breach of promise, the beneficiary is entitled to damages. In case of refusal to conclude the contract promised, the court, at the request of the party who has fulfilled all obligations (so it is not only ready to perform) may deliver a court judgement

which takes place of the contract, when the nature of the contract allows it, and its validity requirements are fulfilled (this situation is excluded in case of real contracts– art. 1.174)

The lawmaker regulated as particular cases of sale and purchase the option pact regarding the sale and purchase contract (art. 1.668) and in art. 1.669 the promise to sell and the promise to purchase.

Regarding **the implementation of the will agreement, the principle of freedom to contract** was maintained (**art. 1169**), settled in art. 1.1.82, and it is sufficient that the parties agree on the essential elements of the contract, and, if the parties do not reach an agreement on secondary elements or if the person entrusted does not decide, the court can rule, at the request of any party, on **the contract completion**, by taking into account its nature and circumstances and the parties' intention

Greater prominence was given to **usage**, namely to the custom and professional wear, which shall apply only to the extent that the law expressly refer to it (art. 1 par. 3). This solution for strengthening the professional wear value is justified by the general concept on professionals.

Regarding the obligations assumed by professionals, art. 1446 of the New Civil Code maintains the **presumption of solidarity** for obligations incurred in the course of a business, where otherwise provided by law.

Regarding the **delayed commissioning of the debtor**, article 1.523, par. 1 provides that the debtor is in default as when it was stated that the mere fulfilment of the deadline for execution produces such an effect (i.e. without making distinction between professionals and non-professionals) and par. 2 mentions the cases where the debtor is in default, including letter d): "if the obligation to pay a sum of money was not executed, obligation assumed within a business exercise".

The express regulation in article 15 on **abuse of rights**: "No rights may be exercised in order to injure or defraud another person or in an excessive and unreasonable manner, contrary to good faith".

Also, article 1553 NCC, on the list of exempting causes, provides that "one who causes injury through the exercise of his rights is not bound to repair it, unless the right is exercised abusively".

Previous legislation did not contain an express provision on the abuse of rights, but only indirectly, through article 57 of the Romanian Constitution and article 3 of decree no. 31/1954. In the field of companies, Law 31/1990, in article 1361, has provided, by the amendments

brought to Law 441/2006, the mandatory exercise of rights by shareholders, in good faith, by respecting the rights and legitimate interests of the company and of the other shareholders.

Although cases of abusive exercise of rights were common especially in relation to companies (majority abuse / minority abuse), however, in the absence of express provisions, the courts have been reluctant in admitting actions that tended to engage tort liability and cover the damage caused by abusive exercise of rights. It remains to be seen to what extent the jurisprudence and doctrine, in the new legal framework, will configure the separate legal regime of abuse of rights, and, as distinct theory of liability, the only theory that would constitute its full application.

We observe the legislature's tendency to broaden **the scope of situations in which third parties or the court may intervene in the will agreement of the parties or in the execution of contracts**, provisions that are not focused on professionals.

Exempli gratia, we mention cases where the court can intervene:

- **article 1278** (the pact of choice); the court, by summoning the parties, may set a deadline for acceptance, if such a term was not agreed by the parties, within the presidential ordinance procedure.

- the promise to contract (article 1279); in case of refusal to conclude the contract promised, the court, at the request of the party that has fulfilled all its obligations, can rule a judgment which takes place as the contract, when the nature of the contract allows it and when its validity requirements are met.

- it is enough that the parties agree on the essential elements of the contract, and if the parties do not reach an agreement on secondary elements or if the person entrusted does not decide, the court, on the request of any party, the contract completion, by taking into account its nature and the circumstances and the parties' intention. (**Article 1.182**)

- **the** judicial establishment of the term (article 1415); when the parties agree to postpone the term or gives the task of establishing it to one of them and when, after a reasonable time period the term has not been established, the court, at the request of a party, may set the term by taking into account the nature of the obligation, the situation of the parties and any other circumstances.

- regulation in article 1271 of unpredictability and the possibility of the court under certain circumstances determined by this text of law to adapt the contract.

Of great importance is **the assessment of guilt** in a different degree if the damage is caused by a professional under business operation.

Therefore, article 1358 states that "in assessing guilt we shall take account of the circumstances in which the damage occurred, beyond the offender's person, as well as, where applicable, if that damage was caused by a professional under business operation".

The legal status of companies under the new Civil Code

On October 1st, 2011, Law no. 287/2009 on the Civil Code came into effect, by means of which the dualist theory of private law (civil law – commercial law) was abandoned, and the new vision of private law unification implicitly led to losing the autonomy of commercial law.

From a normative point of view, the unification of private law has brought again into attention the problem of the commercial law autonomy¹⁹, an old topic in legal literature²⁰.

In this context, the objective theory focused on trading deeds was abandoned (art. 3 of the Commercial Code of 1887) for the subjective theory that has the person as reference point, meaning the professional, so that the provisions of the new Civil Code also apply to the relations between professionals, as well as to the relations between them and any other topics of civil law (art. 3).

The legislator went even further in the attempt to unify the private law and formally remove the traces of the commercial law, setting by art. 18 position 31 of Law no. 76/2012 (for implementing the Civil Procedure Code) the replacement of the phrase “trading companies” with that of “companies”, following that all companies registered with the Trade Register to conduct the steps necessary to the replacement within 2 years after the law comes into effect²¹.

In relation to the companies, the normative sources are two, as follows: the new Civil Code and Law no. 31/1990 regarding the companies.

In this study, we aim not only to identify some of the most important provisions of the new Civil Code (which is the common law regarding the companies), but also to outline the status of the companies in terms of Law no. 31/1990 (special law).

To be noted that Law no. 31/1990 thoroughly regulates in the 294 articles the status of the 5 types of companies (unlimited company, joint stock company, limited liability company, simple limited partnership and partnership limited by shares), as well as the European company (art. 270^{2a}-270^{2c}).

19 To develop the topic of the commercial law autonomy versus the unity of private law, see: St. D. Cărpănu, *Tratat de drept comercial*, Ed. Universul Juridic, Bucharest, 2009, p. 15-18; Gh. Buta, *Noul Cod civil și unitatea dreptului privat*, in the paper *Noul Cod civil. Comentarii*, Ed. Universul Juridic, Bucharest, 2010, pages 15-39; Smaranda Angheni, *Dreptul comercial – între dualism și monism*, in the paper *Noul Cod civil. Comentarii*, Ed. Universul Juridic, Bucharest, 2010, p. 40-57.

20 In this regard, see I.L. Georgescu, *Drept comercial român*, vol. I, Ed. C.H. Beck, Bucharest, 2002, p. 64-79.

21 The law came into force on February 15th, 2013

In the Civil Code, we may find provisions concerning:

- The legal entity (art. 197-251)
- The association contract (art. 1881-1954), a chapter where the simple company and partnership are regulated *in extenso*

I. The legal entity (Book I, Title IV, art. 197-251)

Liabilities of the Associates

Art. 193 – “The effects of the legal entity” – on the one hand, the article regulates the own legal liability of the legal entity, and on the other hand, the unenforceability of the legal entity.

Art. 193, par. 1 stipulates that the legal entity “is liable for the obligations assumed with their own property, unless the law stipulates otherwise”, a provision that is also found in Law no. 31/1990, in art. 3, par. 1: social obligations are guaranteed by social patrimony.

Art. 193, par. 2 sets forth the unenforceability of the legal personality, respectively that “no person may invoke to a bona-fide person the quality of legal subject of a legal entity, if it is thus aimed to hide a fraud, an abuse of law or a detriment to the public order”.

In other words, a direct liability is established, that of the legal entity’s associates who committed a fraud or an abuse of law or prejudiced the public order in relation to a good-faith individual, without being able to use the distinct quality of legal subject of the legal entity and its own liability.

One may find this provision in art. 237¹ par. 3 and 4 of Law no. 31/1990 setting forth that the associate who, in the fraud of creditors, abuses the limited nature of their liability and the distinct legal entity of the company is unlimitedly responsible for the unpaid and liquidated obligations of the dissolved company.

Regarding the **anticipated capacity of use**, the legislator has extended its scope meaning that besides the situation of acquiring rights and assuming obligations to the extent where they are needed for the legal entity to validly emerge (regulated by art. 205, par. 3) the capacity of any legal entity has also been regulated, to receive liberalities since the date of the establishment document, even if they are not required for the legal entity to legally exist.

Regarding the operation of the legal entities

To be noted that by art. 213, **the obligations of the administration bodies members** have been set, establishing that “they must operate in its interest, with the prudence and diligence

required from a good owner”. A similar provision may be found in Law no. 31/1990, but art. 144¹ being applicable only to the administrators from the joint stock companies, and not to the limited liability companies, according to art. 197, par. 4; in the context where the Civil Code establishes this obligation for members of the administration bodies of the legal entity in general, we believe that it also applies to limited liability trading companies.

Art. 214 regulates the **separation of patrimonies**, imperatively establishing that “the members of the administration bodies have the obligation to ensure and maintain the separation between the patrimony of the legal entity and their own patrimony.

They cannot use for their interest or for the interest of third parties, as applicable, the assets of the legal entity or the information they acquire by virtue of their office, unless they have been authorised for this purpose by those who appointed them.

These obligations may be found in Law no. 31/1990, in art. 237¹ par. 3 (unlimited liability of the associate) and art. 272 position 2 which incriminates the deed of the associate, administrator, manager who “uses in bad faith the assets or credit the company enjoys, for a purpose that is contrary to its interests or their own benefit or to favour another company where they are directly or indirectly interested in”.

Regarding the annulment of the documents issued by the bodies of the legal entity (art. 216)

Art. 216 stipulates that the decisions and resolutions contrary with the law, Articles of Incorporation or Articles of Association may be appealed by any of the members of the management or administration bodies who have not taken part in the assemblies or who have voted against and requested to insert this matter in the meeting minutes, within 15 days since the date when they were submitted the copy of that decision or resolution

This regulation is largely similar to that in art. 132 of Law no. 31/1990 regarding the companies, but this time, the legislator stipulated in par. 7 that this art. 216 applies to the extent where it is not otherwise provided by other laws.

In this respect, the Companies Law also expressly stipulates in relation to the text of the Civil Code that

- a) The administrators cannot appeal against the decisions by means of which they were dismissed
- b) The action for annulment on the grounds of relative nullity is formulated within 15 days since publishing the decision of assembly in the Official Gazette and regarding the reasons of absolute nullity, the right to action is imprescriptible

The presumption of relative nullity (art. 1252), so that it intervenes in the cases where the nature of the nullity is not determined or does not undoubtedly result from the law.

This provision is important in relation to the nullity of the decisions of the General Assembly of Shareholders, taking into account that most of the provisions of Law no. 31/1990 does not expressly include the sanction that intervenes

- Positive effect: Restricting the litigations where absolute nullity is invoked, therefore the safety of the civil circuit, no longer being able to appeal against the decisions of the General Assembly of Shareholders after long periods of time.
- Negative effect: The means of defence of the minority shareholders requiring their greater vigilance in relation to the deadline of 15 days to promote the action.

Art. 231 provides **the mandatory mentions that all documents must contain**, regardless of the form emanating from the legal entity, an obligation also established by Law no. 31/1990, in Art. 74, the difference being that it is stipulated in the Civil Code that prejudiced individuals have the possibility to request damages if the mentions are missing

II. The association contract (Book V, Title IX, Chapter VII; art. 1881 - art. 1954) structured in three sections:

- A first section called “general provisions”
- The second section on “simple companies”
- The third and last section called “partnership”

A) In the first section – “General provisions”, in the 9 articles, the legislator outlines a few rules applicable both to the companies having legal personality and to those without legal personality.

Thus, just as with the variant of the Civil Code of 1864, the legislator has understood to provide **a definition even from a beginning**, art. 1,881 establishing that “by the association contract, two or more individuals mutually undertake to cooperate in order to perform an activity and contribute to it by money contributions, assets, specific knowledge and services, with the purpose to share the benefits or use the economy that could result”.

The **principle of freedom of association** is established ²², art. 1882 establishing that any natural person or legal entity can be an associate, unless the law stipulates otherwise, and in art.

²² The right of natural persons and legal entities to associate and establish companies is expressly established in art. 1 of Law no. 31/1990 and is the expression of the principle of associating liberty, also regulated in the Constitution of Romania, in art. 40, par. (1). Art. 1, par. 1 of Law no. 31/1990 stipulates that “in order to perform trading actions,

1889, par. 1 it is stated that associates may agree upon the constitution of a company with legal personality, by complying with the requirements provided by law.

Exercising this right to the establishment of companies is done only within the limits set forth by law, so that the natural persons and legal entities can associate only in one of the company forms listed in the law²³.

Although it is expressly stated in art. 1887 that this chapter is the **common law** regarding the companies, yet no other types of companies have been expressly regulated (except for those two forms of company: simple company and partnership).

Furthermore, par. 2 of art. 1887 stipulates that the law can cover different types of companies when considering the form, nature or object of activity.

The forms of companies. The dichotomy of the old Civil Code (1864) was given up, namely the universal companies²⁴ and private companies (art. 1493), the New Civil Code making a classification according to the form criterion.

Thus, art. 1888 expressly establishes that, according to their form, companies can be

- a) Simple
- b) In partnership
- c) Unlimited
- d) Simple limited partnership
- e) With limited liability
- f) joint stock
- g) Partnership limited by shares
- h) Cooperatives
- i) Other type of company particularly governed by law

The first two types of companies, namely the simple and partnership ones have no legal personality, art. 1892, par. 1²⁵ and art. 1951 being explicit in this regard.

the natural persons and legal entities can associate and establish companies, by complying with the provisions of this law”.

23 Provided that Law no. 31/1990 is to be the special environment for establishment, operation and termination of companies, we cannot deem that the company forms are the limiting ones provided in art. 1,888 of the New Civil Code as reference is also made to other types of companies even in its very content (letter i).

24 Which however did not find their applicability in practice (F. Deak, *Contracte speciale* (Special contracts), vol. III; Ed. Universul Juridic, p. 124)

25 However, according to art. 1892, par. 2, if the associates want the simple company to acquire the legal personality by the document of amending the association contract, they shall expressly indicate its legal form and shall bring into agreement all its clauses with the legal provisions applicable to the newly established company.

Although an inventory of the corporate forms is desired (it is true by the form criterion) and the very companies with small practical amplitude (limited partnership) are repeated in the listing, however, not all companies are mentioned, such as the European companies expressly regulated by art. 270^{2a}-270^{2e} of Law no. 31/1990, it is however true that the listing is declarative once letter i) is a reference also to other types regulated by special laws.

We deem that mentioning the simple companies and partnership companies among the forms of companies (art. 1888 letters a) and b) is not an appropriate one, increasing the confusion once they have no legal personality, so that we cannot find the justification for their annexation to the other forms in relation to which the use of the concept of corporate forms is appropriate; the simple company and partnership are and remain contracts (art. 1,892, par. 1 and art. 1,951), moreover, regarding the partnership, by reading art. 1,888 one may understand that the name of partnership company is correct, although the third section regulates the partnership. We deem that it was required to mention these forms right in art. 1881, par. 3 where it is stipulated that the companies may be established with or without legal personality, structuring the listing based on this criterion.

Generally, the manner of structuring this chapter is not likely to clarify the matter, as although its name is “The association contract”, besides the institution configured *in extensor*, that of simple company, it has also been tried to establish the status of companies, so that it would have been appropriate that the title of the chapter would refer to companies (“About companies”) and avoid the unjustified mixture between the association contract and company; for example, art. 1930 establishes the cases where “the contract terminates and the company dissolves”, art. 1,931 having the marginal name “tacit renewal of the association contract” states that the “company is tacitly extended”, etc.

The regulation in the first section “of the general provision” would have been useful only regarding the companies (general aspects of their configuration, classifications, manner of acquiring the personality, the principle responsibility, etc.) and separately the simple company (as it actually realised it) and the partnership.

The status of contributions. In the case of a company with legal personality, the contributions enter the company’s patrimony, and in the case of a company without a legal personality, the contributions become the co-property of the associates, except for the case where they have expressly agreed they shall be transferred into their joint use (art. 1883).

As a novelty, the status of spouses’ contributions has been clarified, art. 1,882 establishing that a spouse can become an associate by contributing with movable assets only based on the consent of the other spouse.

The status of the contributions of joint assets has been expressly regulated in art. 349 NCC, stipulating under the sanction of relative nullity that none of the spouses can make use of the joint assets by themselves as contribution to a company or for acquiring shares or stock, as applicable, without the other spouse's consent. In case of companies whose shares are traded on a regulated market, the spouse who did not consent on the use of joint assets can only claim damages from the other spouse without affecting the rights acquired by third parties. As applicable, in all cases, the shares or stock are joint assets. However, that spouse who has become an associate exercises by themselves all the rights resulting thereof.

B) Regarding the second Section – “Simple company”, we note that in art. 1890-1,948, the New Civil Code broadly regulates the status of the simple company corresponding to the civil association contract in regulating the Civil Code of 1864.

As novelties in the vision of the new legislator, we mention the regulation of the legal status of the **actual companies**, thus removing the various doctrinal opinions that only recognised the legally or regularly established companies and those illegally established or unregulated²⁶.

Regarding the **duration of the company** as novelty in relation to the current Civil Code, we mention the tacit renewal: “the company is tacitly extended when, although its duration has expired, it continues to perform its operations, and the associates continue to initiate operations falling within its object and act as associates. The extension operates for one year, continuing from one year to another, from the date of expiration, if the same requirements are met” (art. 1931).

The concepts of **apparent associates** (art. 1921) and **occult associates** (art. 1922) are defined so that any individual pretending to be an associate or deliberately creates for third parties a convincing appearance in this regard is liable to good faith third parties, just like an associate. However, the company shall not be liable to the mislead third party, unless it has given sufficient reasons to be considered as associate, or, if knowing the manoeuvres of the alleged associate, it does not take the reasonable steps to prevent the misguidance of that third party.

By art. 1910-1912, the legislator has understood to regulate the **associates' assemblies**, establishing the associates' right to participate in making collective decisions based on the principle of majority of associates' votes, if it is not otherwise stated by contract or law. An exception from the principle of majority is the decisions having as object the amendment of the association contract or appointment of a sole administrator when the vote of all associates is required (art. 1900 stipulates that the equity shares paid or transferred provide full voting rights). The parties have full freedom on how to call and conduct the associates' assembly.

26 I.L. Georgescu, Drept comercial român, vol. II, Ed. All Beck, Bucharest, 2002, p. 102

The decisions taken may be appealed within 15 days, a period which begins on the date when the decision was taken, if present or on the date of communication, if absent. If the decision was not communicated to them, the period begins on the date when they acknowledged it, but not later than one year as of the date when the decision was taken (1912).

The loss of the quality of associate occurs according to art. 1925 (general cases) by transfer of the shares, enforcement, death, bankruptcy, forced execution, withdrawal and exclusion of associates from the company.

We deem that a objectionable aspect would be the provisions of art. 1925 regarding the loss of the quality of associate following the **enforcement on the equity shares**. We believe that as long as the basis of the simple company is the mutual trust, by fully recognising their *intuitu personae* feature, implicitly the shares cannot be subject to an enforcement. Moreover, on this subject regarding the companies, with reference to art. 66 of Law no. 31/1990 regarding the companies, there are discussions on the different status of the shares/equity shares/stock. It results from art. 66 that the personal debtors of the associate debtor can seize the rights related to the shares held and only the stocks of the shareholders can be sequestrated and sold. The difference of legal status starts from the classification of the companies into partnerships *versus* capital companies, so that from this perspective, we believe that the phrasing of art. 1925 is inappropriate, in this case the creditor's rights needing to be related to the associate's benefits, particularly since the simple company is not a legal entity.

C) Regarding the third section – “Partnership”

The new Civil Code defines the Partnership contract as that agreement in which a certain person grants one or many other persons a certain share of the benefits and loses of one or many operations it is undergoing.

From the very beginning, a first remark concerns the legislator's lack of a major interest regarding this contract, the latter benefiting from only 6 articles. One may say that the situation is directed towards “improvement”, if we take into account that this contract had 5 articles reserved in the Commercial Code of 1887.

The legislator's uncertainty is maintained regarding the nature and legal status of this contract, a conclusion that is drawn from the global mode of regulation. For this reason, the partnership was considered to be an improper form of trading company²⁷. We do not agree with this point of view²⁸. Obviously, the best approach of the partnership is of contractual aspect, as it

27 Dumitru A.P. Florescu, Roxana Popa, Theodor Mrejeru, Contractul de asociere în participație, Ed. Universul Juridic, Bucharest, 2009, p. 8; I. Schiaua, Drept comercial, Ed. Hamangiu, Bucharest, 2009, p. 488.

28 For details, see L. Săuleanu, Contractul de asociere în participație, Ed. Hamangiu, Bucharest, 2009, p. 8. and following.

is content to be just a association contract. The partnership does not tend to exceed the contractual stage in order to become an institution. Moreover, the use of the term “association” betrays the legislator’s original intention to distinguish them from companies.

The existence or inexistence of the legal personality was done by the legislator and by assigning a different name. As by association we now understand the legal entities without patrimonial purpose, it has been suggested to change the name so there is no confusion between them, following that the partnerships would be called “venture companies”²⁹. Once the new legislators establishes in art. 1951 that the partnership has no legal personality, such doctrinal opinions are not justified anymore.

Art. 1952 regulates the legal status of the assets brought as contribution, establishing as a principle that the associates remain the owners of the assets made available to it; they may agree that the assets brought or those acquired would become joint property. The associates may establish to fully or partly pass the assets into the property of one of them and to also reacquire them upon the cessation of the association.

Regarding the associates’ liability, it has been expressly stipulated they are liable in their own name in relation to third parties, and the associates operating as such are held severally liable.

A new aspect resulted from the jurisprudence of recent years regarding the interpretation of the association contracts simulated by art. 1953, par. 5, any clause establishing a minimum guaranteed level of benefits is considered to be unwritten. Regarding the sanction (of considering the clauses unwritten), we observe a constancy of the new legislator in embracing the theory of inexistent documents, once this reference is done in several situations: as an example, art. 1910, par. 5, 1918 par. 4, art. 1932, par. 2, etc.

29 M. A. Dumitrescu, *Asociațiunea în participațiune*, Revista societăților și a dreptului comercial, nr. 2/1924, page 166

**Legal valences of the share-holders' will within the context of the general assemblies.
Applicability of the civil right principles**

Introductory considerations. The general assembly of the share-holders' is the society's leading and decisional body, by means of which it is assured every share-holder's participation to the social life. The general assembly was defined³⁰ as the reunion of all the share-holders at a specific date, in a determined place, in order to take decisions concerning the progress of the society.

The possibility of the share-holders to participate in the social life was specifically regularized by the legislator, so that the right of a share-holder to participate in the assemblies was qualified as an intangible right. On these grounds, that is the share-holders' protection, but also for the expressed vote to be a free one, the dispositions of the Law no. 31/1990³¹ concerning the general assembly are imperious, being expressly foreseen those specific cases when the share-holders can derogate.

Molding the social will. As we have previously mentioned, the supreme leading and decisional body of the share-holder society is the general assembly of the share-holders, where they express the society's will in base of their vote.

The free expression of the share-holders' will aims the formation of the society's will, so that the latter is the result of the individual will of the share-holders. As we are going to demonstrate, it is true that, in certain cases, the share-holders could derogate or add some additional requests, by virtue of the contractual freedom principle.

In the juridical literature³², the will is considered to be a distinct psychological category that is in an interdependent report with other psychological categories, on which there is built the human psychic system. It is recognized the applications in the theoretical and practical field, an exclusively human capacity, whose premises are found in the specific human psychic potential – result of the biological and social development – which implies the decision of some feasible purposes, as well as the will itself, by means of its willful activity; the completion of the decided purposes and thus of the will, implies the use of all the psycho-moral and intellectual resources, deliberation, human's capacity to plan, organize, achieve and control the activity that he deploys, the strength to overcome the obstacles, the persistence and mobilization concordant with the solicitations imposed by himself or from outside.

³⁰ I.N. Fiñescu, Course of Commercial Right, vol. I Th. Doicescu Printing House, Bucharest, 1929, pp. 256.

³¹ In order to avoid the inutile repetitions, any reference to an article without indicating the law must be understood as part of the Law no. 31/990 concerning the corporations, thus any time we have quoted or sent to references in articles from other laws it has also been specified the respective law.

³² Ion Dogaru, Legal Valences of the Will, Științifică și Enciclopedică Printing House, Bucharest, 1986, pp. 17-18

Majority principle. Molding the society's will is the result of applying the majority principle in the general assembly, so that, at a certain moment, the society's will is determined by the share-holders that holds the majority capital at that moment; therefore, the majority's will represent the society's will, even if there are share-holders that do not agree the voted ones in the A.G.A. (General Assembly of the Share-holders), the latter being able to counter-attack the decisions that oppose to the law and to the constitutive act.

The need of the majority principle results on the one hand from the state of passivity of certain share-holders, who do not participate in the general assemblies, and, on the other hand, taking decisions unanimously is not possible, either for the above mentioned reason, or for the opposed interests that may exist among the share-holders at a certain time.

We cannot only remember that the society's will is exclusively the sum of the individual wills, but that there is another will, resulted out of the majority principle that "being so fertile in results, is the result of the necessity"³³.

The will externalization manner differs from the will declamations of the common right, so that, if we look at the co-holders, we observe that each of them has a personal, individual will that is based only on their interest and the realization of a disposition act can be made only with the unanimous approval of co-holders.

If we compare the decision of the share-holders general assembly with a contract, we observe the fact that the first legal act lacks the interests contrariety: in the case of the commercial contracts, the parties have opposite interests and the mediated and immediate purpose differs; for example, in the case of a sale-purchase contract, the seller is interested in selling the goods with the higher price possible, and the buyer is interested in getting the lower price and better payment conditions.

On the contrary, in the case of the decision of the general assembly of the share-holders, the parties have concordant interests, as the purpose followed is unique: the share-holders participation in a share-holder society both at the time of the association and subsequently, when a decision is being adopted in the general assembly. In this sense, article 136¹ of the Law no. 31/1990 foresees that the share-holders must willingly pursue their rights, respecting the society's and the other share-holder's legal rights and interests.

Analyzing the positions the parties are in, the principles that dominate each category of documents are being devolved: in the case of the contracts, the unanimous principle, the contract being completed the moment the parties' will agreement is final. It is not possible that, after completing it, it would produce effects against the person that do not show his approval with regard to its completion. By the contrary, in the case of the complex legal act the majority principle functions, affecting including those that oppose

³³ I.L. Georgescu, Romanian Commercial Right, vol. II, C.H. Beck Printing House, Bucharest, 2002, pp. 293

To conclude, we consider that, just as it was interpreted in the interwar doctrine³⁴, the fact that the decision of the general assembly is a complex legal act represents an obligations source, specific for the commercial right, whose legal nature cannot be assimilated to the contracts.

The majority is capital, and not persons The decisions are taken with the majority of votes detained by the share-holders present and represented (art. 115 paragraph 2), but the majority is not in persons, but a capital majority. That is it about a capital majority results partly of the dispositions of art. 115 paragraph 2 and art. 101 paragraph 1 (any share gives the right to voting in the general assembly), and on the other hand when the legislator desired another form of constituting the majority, he foreseen specifically, as in the case of the limited liability societies, where the general assembly decides, by means of voting, representing the absolute majority of the associates and legal parties (art. 192).

In the share-holder societies there is also just one exception: the constitutive assembly, in which case the decision is made by the present majority; in this sense, art. 25 paragraph 1, related to the specific formalities for constituting the share-holder society by means of public subscription, foresees that the constitutive assembly, each accepted person has the right to one vote, regardless of the subscribed shares, and in paragraph 4 it is mentioned the fact that the constitutive assembly is legal if half plus one of the share-holders number is present and makes decisions with the simple majority vote of the present ones.

Absolute presumptions. The application of the majority principle determined the appearance of the absolute presumptions (called principles by some authors³⁵), respectively:

- The general assembly has an absolute competence, the attributes of the ordinary and extraordinary general assemblies, the way they are foreseen in art. 111 and 113, concerning all the society's activity aspects or the modifications of the constitutive act; the general assembly competence is limited by the legal dispositions and by the dispositions of the constitutive act;
- The general assembly's will is the society's will;
- The general assembly's decisions are obligatory even for the share-holders that have not participated at the meeting or who have votes against (the conventions need to be respected) mentioned in art.1270 paragraph 1 Civil Code "the legal conventions made have the power of a law between the contracting parties ".

Violation of the Civil Right Principles. The outlining these three presumptions, otherwise necessary for the good functioning of the society, determined, in the juridical specialized literature, discussions concerning the obviousness of the will autonomy principle and of the parties' real will.

Essentially, it was emphasized the fact that the majority principle clearly violates the two

³⁴ I.L. Georgescu, Romanian Commercial Right. General Theory of the Commercial Commitments. Probes. Commercial Sale and Purchase Contract, Lumina Lex Printing House, Bucharest, 1994, pp. 17.

³⁵ Cristian Duțescu, The share-holders Rights, Lumina Lex Printing House, Bucharest, 2006, pp. 35-36

principles, forming an “over-will”, that of a legal person, will that become an obligation³⁶. Doubtlessly, the defeat of the civil right principle on this ground is the consequence of the majority principle application, the latter being unable of making peace with the total protection offered for example by the contractual freedom principle.

From enumerating the consequences that come out of the deliberative character of A.G.A., we can observe derogation from the civil right principles, derogation which is justified on the bases of „well functioning” of the corporations.

The Consequences of the Deliberative Character of A.G.A. From the deliberative nature of the general assembly results the following³⁷:

1. the social will is being formed as a result of the debates that take place, with the observance of the conditions of convocation and deployment settled by law or by constitutive act

2. the approval vice of a share-holder’s will, basically, does not lead to the cancellation or nullity of the decision; except the situation in which, without the share-holder’s vote, whose will has been vitiated, it would not be possible to get the requested majority

3. the general assembly can, in a subsequent meeting, get back on the settled decisions, in a general meeting; however, in this respect the objective of the decision that is being revoked must be analyzed; thus, if a principle decision about the society’s rights and obligations is revised, such as the decision to hire an immovable or to obtain a credit, we consider the cancellation to be possible; still, exception of the rule are the decisions which, in order to be executed and opposable to the third parties, have been published in the Official Monitor, or the decisions by means of which certain rights and obligations of the share-holders have been settled and it preceded to their execution.

4. they need not to be identified by the quorum and by the persons for whom the prior decisions are being modified, although, through them, the constitutive acts have been modified; In the general assembly, the share-holders are allowed, respecting the minimum presence quorum and deliberation, to modify the constitutive act, even though, at the moment of signing it, there was a unanimous vote; also starting from this principle, it is not required that, in order to get back over the prior discussed or to modify the constitutive act, the quorum or the persons were the same.

Limiting the Freedom Principle. The share-holders general assembly may decide over any issue on the agenda, but respecting the constitutive act (if not modifying it accordingly), the law and the share-holder’s intangible rights.

³⁶ Cristian Duțescu, op. cit., pp. 34.

³⁷ Sorin David in St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, The Corporations Law. Coment on the Articles, Edition a III-a, C.H. Beck Printing House, Bucharest, 2006, pp. 322-333.

Under this aspect, we are interested in highlighting the demarcation line between the quality of decisional body of A.G.A. and the share-holder's intangible rights that is the measure in which the share-holder's rights are affected as a result of applying the majority principle. The rights of a share-holder are also limited by the society's interest, a share-holder not being allowed to vote or deploy an activity that opposes the society's interests, and also by the other share-holder's interests. Art. 136 foresees that the share-holders must exercise their rights willingly, respecting the legitimate rights and interests of the society and of the other share-holders.

Moreover, we observe two distinct aspects: the interaction

Between the individual will and the collective one and the sacrifice of the first for the benefit of the latter, and secondly the identification of the share-holder's intangible rights, which, expressed differently, cannot be violated by the general assembly of the share holders, despite the majority principle existence.

Returning to the subject:

a) Analyzing the dispositions of art. 155 - which foreseen that, when the general assembly does not introduce the action according to art. 155³⁸ and do not give rein to one or more share-holders' suggestion to initiate such an action, the share-holders represent, individually or together, at least 5% of the registered capital, they have the right to introduce an action in compensations, but in the name of the society, against any person foreseen in art. 155 paragraph1 - we are able to formulate o few ideas:

- the share-holder cannot inform the court directly with such an action, even if he has proof in this respect, so that the individual will is being scarified for the sake of the majority

- still, the force of the majority principle was diminished so that, if the general assembly do not introduce the action or do not give rein to the share-holders to initiate such an action, they have the right, respecting the conditions that come out of the law's context, to promote the action in compensations.

Therefore, we sense that the interaction between the individual will and the majority one do not automatically lead to the defeat of the first one, it means that the force of the majority right is not absolute.

The introduction of this article through Law no. 441/1996 is welcome, the purpose being to eliminate the abuses of the administrators, being sustained by most of the share-holders and to correlate these dispositions to those from the Penal Civil Code; until this modification, regardless

³⁸ Art. 155 regularizes the action in liability against the founders, administrators, managers, respectively, the members of the directorate and the surveillance council, as well as the censors and the financial auditors

the arguments of the share-holders pertaining to a minority, the absolute force of the majority is unbreakable.

Related to this subject, we consider interesting the decision formulated by the Cassation Court³⁹ concerning art. 154 and 155 from the Commercial Code⁴⁰ (which essentially correspond to art. 155 from the Law no. 31/1990) by means of which it decides that, the impossibility of the party, prejudiced as a result of a felony committed by administrators, to solicit the compensation of the prejudicial, does not constitute a violation of the property right or of the equity principle, the only regulated being the right exercise.

Moreover,

„Considering that, by art. 154 and 155 of the Commercial Code, the legislator, derogating from the general principle, included in art. 3, 5, 6 of the old Penal Code according to which, any person prejudiced by a penal act, may, parallel to the public action, demand the compensation for the caused prejudice, foresees that the action against an anonymous society’s administrators for deeds that concern their responsibility as a fact, belongs to the general assembly, that exercises it by the censors, the associates not being allowed, in this simple quality, in case they represent 1/10 of the capital, but to tell the censors the facts or – if they represent 1/8 of the capital – to address a reclamation to the court.

This derogation, which is dictated by the considerations of the well-functioning and of strengthening the anonymous society’s credibility, cannot be considered as a prejudice to the constitutional principal of equity, as the recurrent sustained, due to the fact that this principle has been dedicated by the Constitution as a guarantee of the equal application of the law, towards all Romanian, regardless of their origin, language or religion, and not as a prohibition to the legislator’s address to do, in the laws that he edicts, the distinctions or the derogations imposed by the considerations of the high social or economic level, suzerain, dictated by his accordingly; that, especially the dispositions of the derogation from the art. 154 and 155 of the Commercial Code, applicable to all of the anonymous society’s share-holders, under the conditions settled by the law, were, not in the least, imposed to the recurrent against his will, but freely accepted by him, by the fact of his participation to the society and thus, of his adhesion to the legal dispositions that govern it.

It cannot be about prejudicing the property right, granted by the Constitution, as the instituting legal proceedings against it, do not represent the right itself, but the right exercise, that do not enter the constitutional guarantee sphere, that is regularized, conditioned and restricted by the ordinary legislator.

³⁹ The Cassation Court, Unified Sections, decision from 13th October 1938, R.D.C. 1939, pp. 37.

⁴⁰ On October 1st, 2011, Law no. 287/2009 the new Civil Code came into effect and repealed the Commercial Code (1887)

Indeed, the fact that guarantees the Constitution by art. 16 is the intangibility of the right fund itself, and not of its bringing into effect manner, that it cannot be affirmed that the legislator abolished the share-holders' legal possibilities to pursuit their rights in court of justice against the abusive administrators, which would have represented the prejudice of the right fund itself, but regulated, conditioned and restricted, for the above mentioned reasons, their exercise, handing this exercise to the general assembly of the society, and giving to the share-holders individually, but fulfilling certain conditions, enough possibilities for putting this action into practice”.

Reported to the general question that determines our study, respectively the limitation of the civil right application to the decisions of the general assembly, we emphasize some of the main ideas:

1. the derogations are dictated by considerations of well-functioning in the corporations section

2. the effects of applying the majority principle bring no prejudice to the property right over the shares, it is only that the exercise of this right is regularized differently

3. the derogations that come out of applying the majority principle are not imposed to the share-holders against their will, but, by means of the cession of actions and by getting the quality of share-holders, they have also accepted the effects of the principles applied to the share-holder societies

- b) We observed that, when applying the majority principle, certain corrections have been made, even if, the above mentioned example (the case of the art. 155) is related to a limited situation specifically regulated by the legislator.

We are concerned in presenting the share-holders' rights that are intangible. They cannot be violated by the share-holders general assembly, regardless of the motive or the purpose settled, not being able to be prevailed of the majority principle force.

Without making the object of our study, we will just enumerate these rights classified according to the nature of the content: patrimony rights (property right over the shares, the dividend right, the right to a quota of the gross active, in case of liquidation, preference right, equal price right) and non-patrimony rights (the right to participate in the general assembly, vote right, the right to be informed, control right).

Some of these rights, depending on the oppositeness, are absolute rights (property right over the shares, the right to participate in the general assembly, vote right) and relative rights (the dividend right, the right to a quota of the gross active, in case of liquidation, preference right, the right to be informed, control right), and, depending on the level of certainty given to the titular, are simply rights (property right, vote right, the right to be informed, control right, the right to participate in the general assembly) and rights affected by the modalities (the dividend right, the

right to a quota of the gross active, in case of liquidation, preference right)⁴¹.

Abusing of the right. Besides the limitation analyzed (art. 155 and the intangible rights), the supremacy of the majority principle is being diminished by the abusing of the right institution.

Abusing of the right is nothing else but the consequence of braking the principle in the civil right of combining the individual interests with the common ones. As predicted before, this principle of the civil right has a consecration exposed in the corporations' material, art. 136 foresees that the share-holders must exercise their rights willingly, respecting the legal rights and interests of the society and of the other share-holders.

As it appears in the doctrine⁴², the exact determination of the frontier between the attributes included in the subjective right gave way to numberless difficulties in interpretations, to whom resolution" was introduced the expression abusing of the right, which has no other meaning but overcoming the borders of the subjective right"⁴³.

Therefore, within a corporation there will be an abuse of the right any time the exercise of the subjective rights by any share-holder does not concord either with the social interest or brake another subjective right of a co-owner.

The additional part brought by Ulpian *neminem laedit qui suo iure utitur* (none is harmed by the one that make a use of his right)⁴⁴ remain valid in the present right too, in the sense that, if the subjective right is exercised according to certain principled established by law and ethic, then the exercise does not harm anybody. As one could easily observe, it is only about exercising the subjective right and not about the subjective right itself, which cannot be susceptible of producing a prejudice in itself.

The subjective right must be exercised according to its economic and social purpose. In addition to that, the exercise of the subjective right must be in perfect harmony with the law and ethic (art. 14 of the Civil Code) and well-intentioned. The principle of well-intentioned exercising the subjective rights comes out of the logic interpretation of the art. 57 from the Constitution: "The Romanian citizens, the foreign citizens and the homeless persons must exercise the constitutional rights and liberties with well intentions, without violating the others' rights and liberties." Moreover, the subjective right must be exercise within his limits.

The additional part has no importance at all unless these principles of exercising the subjective civil rights are respected. Any violation of them represents an abuse of right that may harm the others. The abuse of right is sanctioned either in a passive way, by refusing the state force competition, or actively, by performing an action with civil liability against the titular of the right abusively exercised by the prejudiced person.

⁴¹ See Cristian Duțescu about the classification of these rights, op. cit., pp. 26-30 and I.L. Georgescu, Romanian Civil Right, vol. II, C.H. Beck Printing House, Bucharest, 2002, pp. 299 and the following-

⁴² Ion Dogaru, Sevastian Cercel, Civil Right. General Sectio, C.H. Beck Printing House, Bucharest, 2007, pp. 19.

⁴³ M. Cantacuzino, Elementele dreptului civil, 1921, pag. 145.

⁴⁴ Lucian Săuleanu, Sebastian Rădulețu, Dictionary of Latin Legal Expressions, C.H. Beck, Bucharest, 2007

The abuse of the right brings along in the foreground the malicious use of the right⁴⁵ (*malitiis non est indulgentum*) and intervenes whenever the titular of the right acts, having in mind more the „offences and the damages” that it produces than the advantages that his right could bring to him⁴⁶

The majority abuse and the minority abuse. In the corporations right material, the institution abuse of the right outlined the principle of the investors’ protection⁴⁷ that has as its purpose protecting the rights of the minority part of the share-holders by admitting the legality of certain special rights.

It is obvious that the institution abuse of the right has certain specificity in this matter that results of the implied persons positions. If in the civil right the limit where these subjective rights must be exercised is perceived and, very easy, “the one that exercises the rights cautiously, without committing imprudence or negligence, will not respond for the damages”⁴⁸, with regard to the corporations, the exercise of the right by a share-holder must co-habit with the legitimate rights of the other share-holders, regardless of the first’s position.

It is the dominant position of some share-holders that detain the majority that creates difficulties of interpretation about the existence of an abuse of right; for example, we can consider as abusive a decision of A.G.A. by which the dividends were not settled and distributed, though there is profit, being decided its re-investment; we could affirm that such a decision is abusive because the use of the profit for the society’s interest cannot be denied; seemingly, it can be affirmed the fact that obtaining the dividends is one of the share-holders’ right so that, if during two or three consecutive years, the dividends are not distributed, although there is profit, we will consider such a decision as abusive.

On the other hand we must not consider that the simple dominant position is capable to justify the presence of an abuse of right. We must not forget the fact that it is normal that in a society with many share-holders there exist o permanent fight for a better protection of the personal interests. From the same perspective, some share-holders will tend to detain the majority, even by minimizing the others’ rights. But it is precisely because the corporations will need minor share-holders too, that it was outlined the principle of the investors’ protection. By means of legislative measures it is tried to balance the exercise of the „majority” and “minority” rights, the permission of the minor share-holders to the economic and social life (corporate governance).

⁴⁵ Ion Dogaru, Sevastian Cercel, op. cit., pp. 20.

⁴⁶ P. Roubier, *Droits subjectifs et situation juridiques*, Dalloz, Paris, 2005, pp. 335.

⁴⁷ Cristian Duțescu, op. cit., pag. 35 și 37.

⁴⁸ C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Treaty of Civil Right*, vol. II, pp. 469.

In this context, it was outlined the majority abuse⁴⁹ and the minority abuse. Without developing these two themes⁵⁰, still related to our study's subject, we must emphasize a few aspects. Although the Law no. 31/1990 foresees a series of possibilities concerning the minor share-holders protection, all of them being included in the category of the legal protective measures, still supplementary protective measures will also be created by the share-holders, in conventional manners, by introducing certain clauses in the constitutive acts or including by means of separate conventions (extra-statutory clauses), the huge difference between the two categories being observed on the ground of the opposability towards the share-holders or the third parties.

These clauses, regardless of the formula and purpose, have as the base the contractual liberty principle, but are indissoluble related to the vote principle. In this respect, there appears a problem as the functioning of such protective clauses is bound to the vote principle. With the title of example, some protective clauses: the amusement clause, the anticipate withdraw clause, the common drag along clause (drag along), may function only if those that have initially settled them, in pre-settled conditions, and decide the production of the effects, so that they take place, in certain cases, in base o a vote in A.G.A. Or, Art. 128 foresees the fact that vote right must not be ceased, and paragraph 2 establishes the fact that any convention by which the share-holder is committing himself to exercise his vote right according to the given instructions or to the suggestions formulated by the society or by the persons with attributes is null.

Therefore we mention that, although the contractual liberty principle allows the finalization of a convention or protective clause, still, their area is restricted by the vote exercising manner, so that the formulation of such clauses have to be rigorous, and the interpretation of a decision AGA do not have to enter under the incidence of the sanctions foresees by the art. 128 paragraph 2, being imposed the interpretation from case to case. The interpretation is a natural thing once we observe that we are in the sphere of interaction between the liberty conventions principle and the other two principles, specific to the societies' right, foreseen in the art. 128: the vote freedom principle and the essential character of the vote right to which it cannot be given up.

Real will principle (intern) in the civil right. Notions. As the society's will is AGA's will that is based on the majority principle, even ignoring a few share-holders' will, we observe that the latter have a certain interest (a certain will) that differs from the society's will, as a result of quantifying all the wills. For that specific reason, we believe that a few specifications need to be made with regard to the intern will principle, specific for the civil right, which out of "well-functioning" considerations is not also applicable in the corporations' material; we say that it is not applicable in the sense that the internal will do not prevails compared to the external will and,

⁴⁹ See Radu Nicolae Catană for extensive explanations, Majority abuse, Commercial Right Magazine, no. 6/2002, pp. 93 104.

⁵⁰ See Paul I. Demetrescu in this sense, The Share-holder and the Corporation's Minorities Protection, Commercial Right Magazine, 1936, pp. 161-175.

but only to the will expressed in AGA and included in the AGA's decisions.

According to the real will principle (internal) about the juridical civil acts the internal will (real) is predominant, compared to the external one (social). From the way the principle is definite results that the juridical will is based on two elements: a) the psychological element, that is the internal will; and b) the social element, declared, that is the declared will. The rule is represented by concordance between the two elements – internal will and declared will, the exception being represented by the lack of concordance between the two elements.

Subjective Conception. In the subjective conception it is given the priority to the real will (internal), as not taking into account the objective one. This conception is consecrated in the French civil right and embraced by the French doctrine.

The subjective conception presents both the advantages and the disadvantages: a) the advantage resides in the fact that, offering entire satisfaction to the static security of the civil circuit, it admits the bringing into discussion of the translative act validity of rights due to the eventual lack of concordance between the internal element (psychological) and the external one (social or declared); b) has the disadvantage that it does not take into account the necessity of the civil circuit stability under the aspect of the acquirer interests protection aspect.

This conception is encountered in the French right system and in many other right systems of French inspiration, in their private component.

Objective conception. Contrary to the subjective conception, the objective conception grants priorities to the external will, declared (the social element) compared to the internal one. Under the aspect of the will verification, the objective conception seems to be able to facilitate the task of the civil right interpreter and of the civil legal act, in order that the will of the party or parties, depending on the case, does not resolve *ex rae*, but is specifically mentioned in the document (as a *instrumentum probationis*) that records the civil juridical act as *negotium juris*.

As in the case of the subjective conception, the objective conception presents both advantages and disadvantages: it presents the advantage of assuring the full satisfaction of the dynamic security of the civil circuit; and) it presents the disadvantage of neglecting the giver away interests.

The objective conception is consecrated in the German right system and is embraced by the German doctrine.

The Solution Adopted by the Romanian Civil Code from 1864. The Romanian Civil Code does not express a specific opinion about the preponderance of one or another of the two conceptions, that is, has no dispositions by which it would intentionally consecrate one of the two conceptions.

In our opinion, it is a way of acting that, within the plan of the legal technique, permits a

certain flexibility, announcing the possibility of a mix system where the subjective conception represent the rule and the objective one, the exception.

Our civil code being of French inspiration, adopts as a general rule the real will system (internal) and admits, only in exceptional cases, the declared will system.

The rule of the real will system (internal) is supported, in the normative plan, by the manner the approval vices are being regularized. That the real will system represents the rule also results from the dispositions of the art. 1266 of the Civil Code, related to the contracts interpretation according to which the interpretation is made following the common intention of the parties. Moreover, from the regulatory way of the simulation, results that the rule is the real will (internal) of the parties, so that, in the reports between the parties the legal but sincere act produces effect, that is the act that express the real will of the parties, and not the public but dishonest act. For us, it works the rule of the consensus of the civil juridical acts, rule according to which, in order for a civil juridical act to be valid it is enough if the will is expressed or if the will act id performed.

The principle of the consensus of the civil juridical acts is the base of the severance between the category of the effects produced by the simulation between the parties and the category of the effects produced by the simulation in the reports between parties, on the one hand and third parties on the other hand⁵¹. It strongly results that the subjective conception system represent the rule and, according to this important argument, the declared will cannot constitute more than the exception to this rule.

Another argument in favour of the consideration of the subjective conception as the rule of the domain, in our legal system, is the difference between the probation regimen in the simulation case, just as it is about the report between parties, an the one hand and, between the parties and the third parties, on the other hand. Thus, first of all, the probe hypothesis is performed according to the common probe right, and in the second situation, one can appeal to

⁵¹ "Concerning the simulation effects, we must distinguish between the reports between the parties, on the one hand, and the reports between the parties and the third parties on the other hand. In the reports between the parties it will make effect the sincere juridical act, real, but secret, of course only respecting the requirements imposed by the law and the good manners, as it includes the true will, the real will of the parties, which prevails over the declared will.

In the reports between the parties and the third parties it will make effect either the sincere, real, but secret act or the public, dishonest, lying act, depending on what is more convenient for the of course only respecting the requirements imposed by the law and the good manners

The third parties may prevail either of the secret but sincere act, or of the public, but lying one only if they are of good-will." (*Civil Right. Ideas Productive of Juridical Effects* , coordinator Ion Dogaru, All Beck Printing House, Bucharest 2002, pp. 198-199.

any probe means⁵².

The last argument that we bring in favour of the acceptance of the subjective conception as a rule, resides in the present relation between the real will principle and the liberty principle of the juridical acts: the internal will principle is, at the same time, a result and a consequence of the liberty principle of the juridical acts.

Going to emphasizing the mix system of the will consideration to which the internal will (real) represent the rule, and the declared will (the social element) represent the exception, we highlight a few situations, which, in an exceptional way, are subjected to the objective conception.

Finally, the last argument brought in favour of the real will admittance as a rule and of the declared will as an exception, is the argument, already mentioned above, that, in the simulation matter, in relation to the third parties, it produces effects either the public but dishonest (liar) act or the secret but sincere act, depending on which of them is more. Both the first category arguments and those in the second category are enumerated *exempli gratia*

⁵² "The simulation probe is performed differently, related to the fact if it concerns the reports between parties or between parties and third parties. In the reports between parties, the simulation probe is performed according to the rules in the probe common right... In the reports between parties and third parties of good-will (*bona fides presumitur*), the probe is performed with any proving means, as, compared to this situation, it is considered to be a legal act that, regardless of its value, can be proved with any proving means, including with " (Idem, *op. cit.*, p. 199).

Legal regime of companies under romanian law

Definition of company

Neither the Law 31/1990 on trading companies, nor any other special law do not contain a definition of the company, which is why we refer to the provisions of Article 1881 of the Civil Code.

Article 1881 paragraph 1 of the Civil Code provides that by a company contract two or more persons agree to cooperate in performing an activity and to contribute in money, assets, specific knowledge or services in order to share the benefits or to use the revenues which might be obtained.⁵³

The legal text reveals the three aspects of partners' agreement to the effect that by the respective contract they agree to join several assets, to set up an economic activity and to mutually share the results.

The company shall be defined⁵⁴ as a group of people formed based on the articles of association, as a legal entity, where the shareholders agree to join several assets in order to perform trade activities, resulting in obtaining and sharing the profit.⁵⁵

Regulatory Sources

The companies benefit from a complex regulatory attention according to the importance.

Civil Code - common law for the companies

Article 1887 paragraph 1 of the Civil Code states that the provisions of Article 1881-1954 represent common law for the companies.

However, as shown in paragraph 2 of the same article, the law may regulate different types of companies by their form, nature or scope of business.

Thus, Article 1888 expressly establishes that by their form, the companies may be

⁵³ Compared to the definition provided by Article 1864 of the Civil Code we see an extension of the definition of company contract, Article 1491 stating that "the company is a contract by which two or more people convene to join something in order to share the benefits that may derive from it".

⁵⁴ Radu I. Motica, Lucian Bercea, *Drept comercial român*, Ed. Lumina Lex, Bucharest, 2005, page 90.

⁵⁵ M. Toma, Al. Țiclea, *Cu privire la noțiunea, natura juridică și funcțiile societății comerciale*, in *Dreptul*, n. 6/1992, page 20 and subsequent; Nicoleta Țăndăreanu, *Aspecte teoretice și practice privind definiția și caracteristicile societății comerciale*, R.D.C. nr. 4/2003, page 75 and subsequent.

- a) simple
- b) joint venture
- c) collective
- d) partnership
- e) limited
- f) joint stock
- g) limited by shares
- h) cooperative
- i) other particular company governed by law

The first two types of companies (namely simple and ventures) do not present as legal entities, Article 1892 paragraph 1 and Article 1951 being explicit in this regard.

Although this should be an inventory of corporate forms (it is true by the form criterion) and in the enumeration the companies with small practice amplitude (partnership) are set out, though not all companies are mentioned, such as, for example, European companies expressly regulated by Article 2702^{2a} – 2702^{2e} of Law 31/1990, but it is true that the enumeration is enunciating since the letter i) refers to other types regulated by special laws.

Special Legislation

- Law 31/1990 on trading companies represents the general regulatory framework of the companies, regardless of the scope of business
- Law 1/2005 on the organization and functioning of the company represents the common regulatory framework for cooperative companies
- Law 161/2003 in Article 118-238 governs the economic interest group (EIG)
- Law 297/2004 on the capital market contains provisions on joint stock companies admitted to trading
- G.E.O. 99/2006 on credit institutions and capital adequacy includes provisions regarding the establishment and functioning of credit institutions (these are established as joint stock companies, except the credit cooperative organizations)
- Law 32/2000 on insurance companies and insurances supervision

Legal nature of the trading company⁵⁶

On the legal nature the doctrine formulated several concepts.

Thus, the **contractual theory** emphasizes the contractual nature of the company; the company is set out following the will of the shareholders reflected in the constitutive act; shareholders are those deciding to establish the company, choosing its legal form and scope of business, and all other aspects of the company's activity. Based on the theory of autonomy of will, initially the contractual idea allowed the explanation and application of the rules in terms of obligations and contracts related to the organization and functioning of the companies, but later this was not sufficient to explain the legal nature, direct effect of the companies' development and acquisition of legal personality.

According to the collective act theory, the company is not based on a contract, but on a complex (collective) act. The complex legal act is a source of obligations which legal nature could not be treated as contracts.⁵⁷ What distinguishes the complex legal act from contracts is the lack of contrary interests; thus, in the case of contracts, the parties have contrary interests and the immediate purpose differs; for example, in the case of the sale contract, the seller's interest is to sell the good at the highest price, and the buyer's interest is to obtain the lowest price in the best payment terms.

Contrary, in the case of complex legal act, the parties have similar interests, since they have one aim; for example, participation of shareholders in a company both at the time of the association and subsequently, when adopting a decision at the General Meeting is based on *affectio societatis*, that is their intention to join together to perform a trading activity in order to obtain benefits and share them.

The doctrinal vision supporting the **institutional theory** the shareholders' will is limited to choosing the company's form, all the other terms being set within the limits imposed by the legislator to the legal forms. The company acquires the legal personality by law as a result of a legal control which aims to protect the shareholders and third parties' interests. This theory establishes the legislator's intervention by mandatory rules within the establishment, organization and functioning of companies.⁵⁸

⁵⁶ I. Bălan, *Natura juridică a societății comerciale*, în Dreptul, nr. 11/2000, page 35 and subsequent.

⁵⁷ French ideologists, under the influence of L. Duguit, who uses the notion of "unions" and Hauriou, recognize the collective act as a separate category, considering it as a prototype of the company agreement and, in particular, the contract of the joint stock company set up by public subscription (G. Ripert, R. Roblot, quoted work, vol. I, 670 și 721.)

⁵⁸ Ioan Schiau, *Drept comercial*, Ed. Hamangiu, Bucharest, 2009, p. 90.

Although in doctrine, new trends in defining the company are found in order to recognize its dual legal nature (contractual and institutional), and the role of legal form of organization of the company, however it is considered that these trends are arguable and the traditional definition of the company is the key to understand the principles of establishment, organization and functioning of the companies.⁵⁹

LEGAL FORM OF COMPANIES (Law no. 31/1990)

Classification. According to Article 2 of Law 31/1990 unless the law provides otherwise, the companies with legal personality consist in the following forms:

- a) general partnership;
- b) limited partnership;
- c) joint-stock company;
- d) limited partnership by shares;
- e) limited liability company

Although the doctrine⁶⁰ appreciated that each of these forms of companies corresponds to a particular economic function and that they are not the fruit of the imagination of some law technicians, but are the result of a lengthy commercial practice, however bear in mind that some of them, such as limited partnerships and limited by shares have become obsolete, no longer embraced by retailers and others too little, such as general partnerships.

The essential criterion differentiating the legal form is according to Article 3 paragraph 2 the extent of shareholders' liability for the social obligations:

- a) in the general partnership (GP) the shareholders have unlimited and joint liability. It is the prototype of partnerships being formed from a small number of people on the basis of knowledge and mutual trust; usually, the shareholders know each other, being friends or relatives. Law 31/1990 does not establish a minimum threshold of capital for this type of company; the capital is divided into shares of interest.
- b) in the limited partnership (LP) the active partners have unlimited and joint liability for the social obligations and the passive partners are liable only to the extent of invested capital.

⁵⁹ For details please consult Stanciu D. Cărpenaru, quoted work, p. 123-125.

⁶⁰ I.L. Georgescu, quoted work, vol. II, p. 10

This form of company is part of the company of partnerships companies characterized by the existence of two categories of partners, active partners and passive partners; the office of administrator may be held only by active partners.

- c) in a joint-stock company (JSC) the shareholders are liable only to the extent of the subscribed capital.

Joint-stock company is the prototype of companies in which important is the share of capital invested and not the personal qualities of the shareholders. The capital cannot be less than LEI 90,000, being represented by shares issued by the company with nominal value that can not be less than LEI 0,1. The shareholders' number cannot be less than 2.

- d) in the company limited by shares (LS) the active shareholders have unlimited and joint liability for the social obligations and the passive shareholders are liable only to the extent of the invested capital.

This form of society is similar, on the one hand to the limited partnerships, as there are two categories of shareholders (active and passive), but on the other hand, to the joint-stock company as determined by Article 187 as to the company limited by shares the provisions on joint stock companies apply, except those on dual management system. The capital cannot be less than LEI 90,000 lei and is divided into shares.

- e) in the limited liability company (LLC) the shareholders are liable only to the extent of the subscribed capital.

The limited liability company has a mixed nature, its *inutuitu personae* character bringing it closer to partnerships, while limiting the liability of shareholders only on the extent of the subscribed capital is typical to capital companies. Being built on the personal relationship between shareholders, *inuitu personae* character can be identified in several legal provisions regarding: vote requirements (unanimity and dual majority - shareholders and shares), special conditions in which shares can be transmitted (Article 202), prohibition of issuing bonds (Article 200), etc.. The company has a small number of shareholders, most of which consist of 2-4 shareholders, although Article 12 provides a maximum of 50 shareholders. The capital cannot be less than LEI 200 and is divided into equal shares which cannot be less than LEI 10. Therefore, we can say that the limited liability company benefits from the advantages of both types of companies: namely its functional and simple management and control structure specific to the general partnerships and the limited liability specific to joint-stock companies. The limited liability company is the form most widespread in the country according to the statistics presented by the National Trade Register.

Note that the law regulates also the **limited liability company with one shareholder** on which the doctrine discussed in terms of its legal nature if it is another form of company or only

a variety of the limited liability company.⁶¹ Some authors⁶² believe that this is not a simple variant/version of the limited liability company, but it has by content and form its own profile that distinguishes it from other types of companies. From our point of view, the limited liability company with sole shareholder is not a new form of society, or a variety of limited liability company⁶³ since the forms that the companies exhaustively can take are those set in Article 2.

The **European society** is added to the types of company listed in Article 2, being introduced in 2008 by amending Law 31/1990⁶⁴ (Article 270^{2a} – 270^{2e}) where also the provisions of Council Regulation (EC) no. 2157 of 8 October 2001 on the Statute for a European company, and those relating to joint stock companies as far as their compatibility with Community rules apply.

Exhaustive nature of the classification. The classification of legal forms of companies of article 2 has an exhaustive character, the legislator imperatively setting up a number of companies with legal personality.

This enumeration from the Companies Law 31/1990 does not mean that companies cannot be constituted under other forms regulated by special laws corresponding to certain activities or interests of future shareholders, such as cooperative companies (Law 1/2005) or agricultural companies (Law 36/1991).

Shareholders' option. Shareholders are only able to choose between one of the types listed in Article 2 so that the future society's elements will comply completely. Legal form is a pattern predetermined of the law to which also has been awarded a proper legal regime; choosing the form, the shareholders choose also the appropriate legal regime that will govern all existence of that company since the setting up, continuing with the operation and until the dissolution and liquidation.

⁶¹ Radu Economu, *Societatea comercială cu răspundere limitată cu un singur asociat*, Revista de Drept Comercial 4/1994, p. 52-59; Gh. Piperea, *Natura juridică a societății comerciale unipersonale*, Revista de Drept Comercial n. 4/2000, p. 74-79; C.L. Popescu, *Situații excepționale de societăți comerciale cu asociat unic*, Revista de Drept Comercial nr. 10/1997, p. 111 and subsequent; C.L. Popescu, *Posibilitatea de multiplicare în fapt a numărului de societăți cu răspundere limitată constituite de o singură persoană*, Revista de Drept Comercial n. 11/1997, p. 86; D. Ciobanu, *Societatea comercială cu asociat unic*, Dreptul, n. 9/1993, p. 14.

⁶² R. Economu, quoted work, p. 59.

⁶³ In the sense that it is representing a variety see Gh. Piperea, quoted work, p. 75.

⁶⁴ Article I point. 12 of GEO 52/2008.

The shareholders cannot add another form or reconfigure their content; There shall be no setting up of a company by combining (mixing) specific features of many types of companies.⁶⁵ Nor the version where the terms of the constitutive act only alter certain essential elements, such as changes in the liability limit, which was imperatively regulated for every company form, is not possible.

The shareholders' freedom to change or add certain elements according to their interests is limited, the legislator allowing with some limitations that the shareholders should provide voluntary clauses; they can within the law optimize their performance by identifying flexible solutions that meet their interests.

On the other hand, in certain activities, the shareholders' option is annihilated by the legislator's will requiring certain types of companies, such as credit institutions that can be established only in the form of joint stock companies (Article 287 of the G.E.O. 99/2006), insurance and reinsurance companies (Article 11 of Law 32/2000), investment companies, securities brokerage companies, etc.

Situation in which the form is not specified. The mention of the form in the company's constitutive act is mandatory (article 7 paragraph 1 (b) and Article 8 paragraph 1 (b), so if the shareholders failed to establish its form, its form is to be established. It was considered⁶⁶ that in such a situation, unless the impossibility of parties' will interpretation in relation to the terms of the constitutive act, given that in this matter the purpose of the law is to protect the third parties, the company ensuring the most liability of the shareholders, respectively the collective company should be considered. The interwar case-law retained this solution, estimating that "it is a principle that where the facts leave doubt on the character of a company, it can only be a partnership, which is a trading company of common law".⁶⁷ Moreover, Law 31/1990 took into account the protection of third parties in this respect, establishing an unlimited and joint liability for the shareholders of companies established in an irregular manner. (Article 49). So, in the case the company's form is not mentioned, the establishment of a certain form does not matter, but the establishment of shareholders' liability that now we can see that Law 31/1990 establishes imperatively.

CLASSIFICATION OF TRADING COMPANIES

⁶⁵ Stanciu D. Cărpenaru, quoted work, p. 141.

⁶⁶ Octavian Căpățână, quoted work, p. 67.

⁶⁷ Court of Ilfov, Section II commercial, sentence n. 22 of 15 January 1938 in Jurisprudența Generală, 1938, p. 760

Related to the **importance of the personal criterion (intuitu personae)**: partnerships and capital companies.

Partnerships are established based on mutual trust between the shareholders in a small number of people; general partnerships and limited partnerships fall into this category.

Capital companies shall consist of a large number of partners and shareholders and the shareholders' qualities are not relevant, but the capital invested is; limited partnership and limited partnership by shares fall into this category.

The limited liability company does not fall into any of these two categories, being estimated that it has a mixed nature, since it borrows characters from both categories, its establishment being based on mutual trust between the shareholders (*intuitu personae*); however, the shareholders' liability is only to the extent of the invested capital.

In relation to the **shareholders' liability** for the social obligations:

- companies where the shareholders have an unlimited and joint liability, such as the general partnership;
- companies are liable only to the extent of the subscribed capital, such as joint stock companies and limited liability companies;
- companies where the shareholders' liability is different, such as limited partnerships and limited partnerships by shares: active partners have unlimited and joint liability and passive partners are liable only to the extent of the invested capital.

According to the **social capital structure and ways of division**: companies in which the capital is divided into shares of interest (general partnerships and limited partnerships) and companies in which the capital is divided into shares (joint-stock company and limited partnership by shares). In the limited liability company, the capital is divided into social shares.

Depending on the possibility of issuing or not the securities: companies which are allowed to issue securities (joint-stock companies and limited partnership by shares) and companies which are not allowed to issue securities (general partnerships, limited liability companies and limited partnerships).

COMPANY'S LEGAL PERSONALITY

General

The legal entity may be, as well as individuals, part in legal relations (Article 25 paragraph 1 of the Civil Code), separate legal entities, with no material existence, being the creation of individuals or other legal entities' will.⁶⁸ Therefore, certain pre-existing legal entities may, by their will and subject to certain conditions imposed by the legislation to create certain entities who acquire a special legal quality designed to allow the expression as distinct legal entities; this special quality is called *legal personality*, defined as the ability recognized by the law to have rights and undertake obligations.⁶⁹

A legal entity is any form of organization which, complying with the terms required by the law, is the holder of civil rights and obligations (Article 25 paragraph 3 of the Civil Code.).

Note that the legal regime applicable to all legal entities is governed by the Civil Code in Article 187-251, but they constitute the common law, so that legal entities shall be subject to applicable provisions of the category to which they belong and only in their absence the Civil Code (Article 192 of the Civil Code) applies.

Companies established under Law 31/1990

Law 31/1990 establishes from the Article 1 that companies are legal entities, but only if they are constituted in compliance with the provisions of the law;⁷⁰ therefore, a prerequisite for the acquisition of legal personality is that it should be constituted only under the terms set by law for that company; on the other hand, the law should recognize the quality of legal entity of the companies as not all companies are legal entities: for example, joint venture companies⁷¹, simple companies⁷², *de facto* companies (Article 1893 of the Civil Code), all of these being simple contracts.

⁶⁸ Natural and legal persons may shareholder and establish trading companies with legal personality (Article 1 paragraph 1 of the Law 31/1990)

⁶⁹ Titus Prescure, Roxana Matefi, *Drept civil. Partea generală. Persoanele*, Ed. Hamangiu, Bucharesti, 2012, p. 332.

⁷⁰ See also Article 1889 paragraph 1 of the Civil Code with a similar content: by contract or by a separate act, the shareholders may agree for the setting-up of a company with legal personality under the conditions provided by law.

⁷¹ According to Article 1951 of the Civil Code joint venture can not have legal personality.

⁷² According to Article 1892 of the Civil Code, limited partnership does not have legal personality, but if the shareholders desire to acquire the legal personality, by the articles of association of amending the company contract, they will expressly specify its legal form and will agree upon all its provisions with the legal provisions applicable for the new-founded company.

The acquisition by the company of the legal personality confers to it the status of legal entity, distinct from the shareholders' individuality; Article 78 of the Commercial Code of 1887 stipulated in Article 78 that the companies "are in relation to the third, a legal entity distinct from that of the shareholders", text on which Professor D.D. Gerota asserts as being "the keystone of the entire legal technical foundation of the trading company".⁷³ The company has a life of its own, self-contained, different from the shareholders' one; the shareholders are holders of ownership on shares of social shares or interest, without having a right to the goods of society.⁷⁴

The company is a holder of rights and obligations, it participates on its own in the legal relationships and is liable for its obligations.

The company acquires legal personality on the date of its registration in the trade register (Article 41 paragraph 1).

Effects of the legal personality

The Article 193 paragraph 1 of the Civil Code which states that "the legal entity participates on its own in the civil circuit and it is liable for its obligations assumed by own goods, unless the law would otherwise dispose" reflects also the main effects of the legal personality:

a) Company's participation on its own in the legal relations

Acquiring the quality of legal entity entitles the company to participate on its own in the legal relations, being able to acquire rights and assume obligations.

The company has a will of its own, distinct from the sum of shareholders' individual wills. Not only we retain that the social will is only the sum of individual wills, but also that it is another will, the result of the principle of majority, which "so fertile in results, is the result of the necessity"⁷⁵. On the other hand, even if the General Meeting of shareholders is by excellence the body training the company's will, we don't have to recognize its exclusivity in this purpose; it is true that the General Meeting is the supreme governing and decision body, but also administrators and auditors express, under certain conditions established by law, the company's will.

⁷³ D.D.Gerota, quoted work, p. 19

⁷⁴ However, this difference between the company and shareholders is limited, French case law refusing to shareholders the quality of third party in the relations with the company (Paul Le Canu, quoted work, p. 176)

⁷⁵ I.L. Georgescu, *Drept comercial român*, vol. II, Ed. C.H. Beck., Bucharest, 2002

Attaining the shareholders' goal to gain profit requires certain activities of production, trade or services, according to the purpose of business established by the articles of association. Achieving the purpose of business of a company involves shaping and outsourcing a social will, achievable only through company's bodies.

The participation of companies in legal relations is achieved through its bodies; the administration and the management of the company are done by its administrators, Law 31/1990 containing various provisions in this regard based on the form of company.

In general, administrators can do all the operations required for the fulfilment of the purpose of business of the company, apart from the restrictions referred to in the articles constitutive act (Article 70 paragraph 1). Although the scope of legal relations involving the company is determined by the need to achieve the purpose of business⁷⁶, though Article 55 paragraph 1 states that *"in relations with third parties, the company becomes liable for the acts concluded by its management bodies, even if these acts exceed the object of activity, except for the case where it proves that the third parties knew it or, in the given circumstances, had to know about the excess or these exceed the powers stipulated by law for such bodies"*.

b) Company's liability for social obligations

The company participates on its own name in the civil circuit and is responsible for the infringements of the obligations which it has assumed through its representatives. Quality of legal entity of the companies means that they are holders of rights and obligations in all branches of law, so that we identify their liability in the field of civil, fiscal, administrative law, etc, including criminal law.⁷⁷

Article 3 paragraph 1 states that social obligations are secured by the social heritage, so that a creditor of the company shall be entitled to pursue just the heritage assets of the company, without being able to pursue the assets owned by the shareholders. Therefore, the rule is that the company is liable for its obligations, but, exceptionally, in certain cases and subject to certain conditions, shareholders are also liable for the social obligations.

The legislator has limited the company' liability only to its social obligations, those assumed only by its representatives in the performance of certain production, trading or services activities according to the purpose of business established by the articles of association.

⁷⁶ Stanciu D. Cărpenu, quoted work, p. 186

⁷⁷ According to Article 19¹ of the Criminal Code introduced by the Law 278/2006 the legal entities, except the State, public authorities and public institutions engaged in an activity that may not be the private domain, are criminally responsible. With regard to the criminal liability of legal entities see Anca Jurma, *Persoana juridică-subiect al răspunderii penale*, Ed. C.H. Beck, București, 2010.

There are two aspects that are to be clarified in this regard: first, the liability for term limits exceeded by the company's representatives and second, the situation of acts exceeding the purpose of business of the company. Both issues are answered to in Article 55 stating that:

In relations with third parties, the company the company becomes liable for the acts concluded by its management bodies, even if these acts exceed the object of activity, except for the case where it proves that the third parties knew it or, in the given circumstances, had to know about the excess or these exceed the powers stipulated by law for such bodies. The publication of the articles of association by it alone cannot be taken as proof for its knowledge.

The clauses of the articles of association or the decisions taken by the management bodies of the company as listed in the previous paragraph, which limit the powers conferred by law to such bodies are not opposable to third parties, even if they were published.

Therefore, as a general rule, the administrator of a limited liability company may alienate the assets without the need for an approval from GA, and the acts of alienation concluded by him are opposable to the company even if they exceed the purpose or limitations in the constitutive act or statutory decisions of the company. The liability for exceeding the mandate is only of the company's manager.

In applying these provisions, the High Court of Cassation and Justice⁷⁸ held that GA's decision by which it authorized only one of the two administrators of the company to sell a building is a limitation of the powers conferred by law to the other administrator, that cannot be opposable to third parties. Accordingly, the sale contract of the building concluded by the purchasing company with the administrator of selling company whose rights have been limited by GA's decision is fully true regarding the consent of the seller, as emanating from the legal representative of the seller, invested with the right to legally represent the company. Regarding the relations between administrators and company, the infringement of restrictions imposed by the general meeting's decision can produce legal consequences, to the extent that the transaction in question caused damage to the company.

However, in some cases even the legislator has set limits on the powers of the administrators, as in the case of joint stock companies for which Article 153²² provides: the Board of Directors, namely the Executive Board will be able to conclude legal acts in the name and on behalf of the company, by which to acquire goods or dispose, lease, exchange or guarantee the company's assets which value exceeds half of the book value of assets of the company at the conclusion of the legal act only with the approval of the General Meeting of shareholders given in terms of Article 115.

⁷⁸ [Decision n. 2656 of 30 October 2009 rendered in appeal by the Commercial section of the High Court of Cassation and Justice](#)

Shareholders' liability

Limits of shareholders' liability - legal criterion for the classification of companies. From the provisions of Article 3 of Law 31/1990 we deduct the legislator's intention to provide from the very beginning a differentiation of shareholders' liability according to different forms of company; thus, the quality of shareholder in a particular form of company is directly related to a degree of liability appropriate for that company. However, the shareholders may derogate from these legal provisions and take by the constitutive act a liability of a different degree than the one that law requires for that form of company and without affecting its specific structural elements?

Under this doctrine⁷⁹ it is estimated that the list of legal forms of companies of Article 2 is exhaustive and the shareholders have only the right to choose one of these forms, so that all elements of the future company will comply with it; therefore, the establishment of a company by combining specific elements of several forms of companies⁸⁰ is not possible, the shareholders' freedom to change or add certain elements according to the limitation of their interests.

Liability of shareholders according to Article 3 of Law 31/1990. The legislator has determined the extent of shareholders' liability depending on the form of the company:

1. "The shareholders in a general partnerships as well as the active partners in a limited partnership or in a limited partnership by shares shall have an unlimited and joint liability for the company's obligations. The creditors of the company shall first go against the company to fulfil its obligations and will go against the shareholders only if it does not meet the payments in 15 days from the date of receiving notice". (paragraph 2).
2. "The shareholders, the passive partners as well as the shareholders in the limited liability company may be kept liable only up to the value of their subscribed registered capital" (paragraph 3).

c) Company's right to stand in court as plaintiff or defendant

The company being a separate legal entity from the shareholders may have active or passive standing in a dispute being represented by the administrator or other person empowered to do so.

⁷⁹ Stanciu D. Cărpănu, quoted work, p. 141.

⁸⁰ I.L. Georgescu, quoted work, vol. II, p. 19.

Contrarily, a company removed from the trade register as a result of dissolution and liquidation does not have legal personality anymore and no use of procedural rights in order to be part of a process.⁸¹

Article 155 paragraph 1 point 3 of the Civil Procedure Code provides that legal entities of private law are summoned by their representatives at headquarters or, where appropriate, at their dissolution premises.

If the company is the plaintiff, all the particulars of the company are given, including the name and surname of the legal representative, without mentioning the shareholders, and if the company is the defendant, the company is to be summoned through its representatives and not shareholders who do not have the legal passive quality.

Constitutive elements

Enumeration. Acquiring the quality of legal person is subject to the accumulation of three constitutive elements. Thus, any legal entity should have a stand-alone organization and its own patrimony assigned to achieve a particular lawful purpose, in accordance with the general interest (Article 187 of the Civil Code).

a) Stand-alone organization. Company's will

The company has a stand-alone, which will not be identified with members and shareholders' will nor is the sum of their wills.

Even if the will is formed due to the expression of the shareholders' vote in the General Meeting (organ of deliberation and decision) and on the basis of majority, the will of the company is a new will, different from that of the shareholders.

According to Article 132, the General Meeting's decision taken within the law and the articles of association are required even for members that voted against or did not participate in that meeting.

The company is represented by the administrator or the Board (the governing body) and the management control is achieved by financial auditors (where appointment is required).

b) Own patrimony

⁸¹ H.C.C.J com. section., dec. n. 1677/2003, in R.D.C. n. 12/2004, p. 244

Any individual or legal entity holds a patrimony that includes all rights and liabilities that can be monetised and belong to it (Article 31 paragraph 1 of the Civil Code.)

Therefore, the company's assets consist of all rights and liabilities that can be monetised and that belong to the society.

The patrimony includes the company's assets (patrimonial, real or personal rights), that is the assets contributed or acquired during the operation, and retained earnings, and in the company's liabilities are summarized the financial obligations of the company.

Note that the shareholders by acquiring this quality do not become co-owners of the company's patrimony.

The company's patrimony is autonomous, being distinct from shareholders' patrimonies.

The consequences of company's patrimony autonomy are:

- the assets brought by the shareholders are removed from the shareholders' patrimony and enter into company's patrimony (Article 65)
- the assets brought by the shareholders form the general pledge of social creditors.
- the company's obligations to third parties may be offset by third parties' obligations to the shareholders
- the insolvency procedure against the company implies only the company's patrimony

c) Scope

The company must have a legal and moral scope.

The shareholders set up the company in order to conduct business activities that are identified in the constitutive act under NACE Code.

LEGAL PERSONALITY OF THE COMPANY

Identification elements

Nationality

The company has its own nationality, sometimes different from the shareholders' citizenship.

Nationality is understood in this matter from a technical perspective as a legal status, ie in terms of the law applicable to the setting up, functioning, dissolution and liquidation of the company.

In order to determine the nationality of the company, Law 31/1990 mentions as a criterion the headquarters, where Article 1 paragraph 2 states that companies established in Romania are Romanian legal entities.

Denomination (commercial name)

In order to identify it, the company must have a name, which is called commercial name.

According to Article 30 of Law 26/1990 the commercial name is the name or, if applicable, the name under which a trader operates and under which he signs.

The commercial name must be mentioned in the constitutive act (Articles 7 and 8 of Law 31/1990) and should be distinguished from other existing companies.

The shareholders must establish a name that differs according to the legal form of the company: in case of partnerships, the commercial denomination consists of a name, and in the case of capital companies consists of a denomination.

The verification of complying with the legal requirements is done by the trade registry, so if it considers that there is a possibility of confusion, the entry in the register is refused.

Logo

It is an identifier of the company and consists of a sign or name meant to distinguish it from other companies performing the same kind of activity.

Legal seat

It is an identifier that aims to position the company in the space, the shareholders having full freedom to establish it.

Once established by articles of association, it is possible to change it by an addendum.

The rule is that the legal seat is determined where the company's management centre is, or where the governing bodies operate; since sometimes it is different from the registered office

the term *real office* is also used as the place where the main management and statutory management centre⁸² is.

The importance of the legal seat is resulting from:

- reported to the legal seat, the company's nationality is determined
- at the legal seat the competent court is determined and pleadings are communicated

The legal seat may be *collective*, that is in the same building to function more companies, but only under the conditions imposed by Article 17 paragraph 4 and the building by structure and useful surface to allow the operation of several companies in different or in a shared distinctive rooms, and the number of companies operating in a building does not exceed the number of rooms or distinct spaces obtained by sharing.

The legal seat may be *temporary* in the sense that the seat can be set at the lawyer's professional office for a period of one year and for the limited scope of the legal setting up and authorization of the company's operation, or, where appropriate, for relocation or for setting up of a secondary office of the company concerned (Article 104-107 of the Statute of the legal profession.)

Sole registration code

The company is identified also by its sole registration code (CUI) that is assigned by the Ministry of Finance and stated on the certificate of registration issued by the Trade Register.

Abuse of legal personality

Western doctrine and jurisprudence approach in the late nineteenth and early twentieth century was to avoid liability *in infinitum* (liability governed by the Article 2324 paragraph 1 of the Civil Code⁸³), so we tried to identify a crack in patrimony's theory by testing its division and shaping a commercial patrimony (affectation patrimony's theory) and later the consecration of the limited liability company.

⁸² For example, a legal definition we found in Article 14 paragraph 1 of GEO 99/2006 on credit institutions: the real seat represents the place where the core management and business management are taken place, if it is not located at headquarters.

⁸³ "Who is personally liable answers with all his movable and immovable, present and future assets. They serve as joint guarantee of its creditors".

Now, limited liability has a different meaning than the existing and desired upon its creation; diluting the original purpose is nothing but the result of structural change of trading relations and new legal institutions or specific to company law or other fields of law outlines another aspect of this limited liability, can say in a pun that we assist at a limitation of shareholders' limited liability.

Shareholders' liability. Rules

- the shareholders in general partnerships and active partners in limited partnerships or limited partnership have unlimited and joint liability for social obligations to the extent that the company does not pay within 15 days from the date of receiving notice (Article 3 paragraph 2);
- “the shareholders, the passive partners as well as the shareholders in the limited liability company may be kept liable only up to the value of their subscribed registered capital” (paragraph 3).
- The shareholders remain liable for social obligations until they are covered in case of nullity of the company (Article 58 paragraph 4);

Exceptions to Limited Liability

Piercing the Corporate Veil

Institution of Anglo-Saxon origin, piercing the corporate veil sums all assumptions where legal personality of the companies is laid aside to see beyond the corporate veil.

This flexible concept needed to achieve the justice was enacted into domestic law through Article 237¹ and then extended to any legal entity by its express regulation in Article 139 paragraph 2 of the Civil Code.

- The shareholder, who, in fraud of creditors, abuses the limited nature of its liability and of the distinct legal personality of the company, has an unlimited liability for the unpaid obligations of the dissolved, respectively liquidated company (Article 237¹ paragraph 3);
- Social creditors and any other persons aggrieved by the decision of the shareholders on transmission of shares may submit a request for opposition requiring to the court to order, as appropriate, to the company or shareholders damages, and, where appropriate, the liability of the shareholder intending to sell his shares (Article 202 paragraph 23);
- In the insolvency proceedings the bankruptcy judge may, on judicial administrator or liquidator's request that a part of the liabilities of the debtor company to be borne by the

shareholders to the extent that they have caused the insolvency in one of the facts listed by the law (Article 138 paragraph 1 of Law 85/2006 on insolvency proceedings)

• For the outstanding payment obligations of the debtor declared insolvent under Article 27 paragraph 2 of the Tax Procedure Code (G.O 92/2003) are jointly liable the following persons:

- Individuals or legal entities who, prior to the declaration of insolvency, in bad faith, acquired assets in any way from debtors who have caused such insolvency;
- Administrators, shareholders, shareholders and any other person who caused the insolvency of the debtor legal entity by disposing of or hiding, in bad faith, in any form, the debtor's assets;
- Administrators who during their exercise, in bad faith had not fulfilled their legal obligation to request to the competent court the opening of the insolvency procedure for tax obligations relating to that period and remaining unpaid at the date of the declaration of insolvency;
- Administrators or any other person who, in bad faith, determined withholding and/or non-payment at maturity, in bad faith, of tax obligations;
- Administrators or any other person who, in bad faith, determined the restitution or repayment of some amounts from the consolidated general budget without such amounts being owed to the debtor.

COMPANY'S CONTRACT

SPECIFIC TERMS OF THE COMPANY'S CONTRACT

The company's contract must contain in its structure, in addition to common conditions of any agreement provided by Article 1179 paragraph (1) of the Civil Code (the ability to contract, consent of the parties, a lawful object and determined, and a legal and moral question), three other specific elements: namely the shareholders' intake, *affectio societatis*, and the implementation and sharing of benefit.

It is estimated⁸⁴ that these three elements define the legal physiognomy specific to the company contract but also distinguishing it from the other contracts.

Article 1884 paragraph (2) sets under the penalty of absolute nullity that a contract which establishes a company with legal personality must be concluded in writing and must provide the shareholders, the contribution, the legal form, the purpose of business, the name and the legal seat.

Contribution of shareholders

Definition

The contribution represents the net asset value with which the shareholder contribute to the capital when the company is established or later to increase the capital.

The shareholders' contribution is of particular importance as it can be said that without contribution there is no company, and by assuming the contribution, the shareholders do nothing but to show from the beginning the intention to associate and jointly pursue an activity (*affectio societatis*).

According to Article 1882 paragraph (3) each shareholder must contribute to the establishment of the company through cash contributions, goods, benefits or specific knowledge.

⁸⁴ I.L.Georgescu, quoted work, vol. II, p. 24.

From a structural point of view, the contribution involves two moments⁸⁵: on one hand, the manifestation of shareholder's will, undertaking to contribute to the formation or increase of the capital reflected by signing the articles of association (subscription)⁸⁶, and on the other hand, before the effective date of the contribution (payment)⁸⁷ and taking-over of the goods, money deposits to the account, performance of services.

In exchange for the contribution, the shareholder shall be entitled to fractions of capital (shares, equities, interest parties).⁸⁸

Note:

- The contribution is mandatory;

The contribution is a prerequisite to acquire the quality of shareholder, Law 31/1990 expressly providing for each form of company the obligation to mention the contribution of each shareholder: Article 7 paragraph 1 point d) for general partnerships, limited partnerships or limited liability companies, and Article 8 paragraph 1 point e) for joint stock companies and limited partnerships by shares.

The shareholders' contributions may differ in value or object, of importance, however, being that all shareholders must pay a contribution.

Also, in terms of company, the indication of the contribution in the articles of association is mandatory since, according to Article 56 paragraph (1) point f) the nullity of a company registered in the trade register can be declared by the court if the articles of association do not provide the shareholders' contribution.

- The asset brought as contribution must be owned by the subscriber

Since by bringing the contribution the ownership is transmitted by default to the company, the shareholder must own the assets; Article 36 paragraph (1) point f) provides that the application for registration must be accompanied in case of contributions in kind by ownership documents, and if one of them contains also buildings, the clearance certificate.

- The contribution must be real

In other words, the contribution must be of a certain economic value; it must not be fictional, nor underrated. The importance to verify the contribution's reality is seen from the

⁸⁵ Maria Dumitru, quoted work, p. 44; Octavian Căpățână, quoted work, p. 174.

⁸⁶ The subscription of the contribution is made by maintaining a provision in this sense in the constitutive act, exception being the case of joint-stock companies subscriptions of shares shall be made on one or more copies of the founders' issue prospectus (Article 19 paragraph 1 of Law 31/1990)

⁸⁷ In the case of limited liability companies or general partnerships, the subscription and full payment take place along with the incorporation of the company, and by exception, the ration between the value of the subscribed capital and the value of the paid capital is expressly regulated for the joint-stock companies where it is constituted by full and simultaneous subscription of the registered capital, when the capital paid upon the incorporation could not be less than 30% of the subscribed capital, the difference will be paid for the shares issued for a cash contribution within 12 months as from the incorporation and for shares issued for contribution in kind in at least 2 years as from the date of the incorporation (Article 9)

⁸⁸ In the law literature the operation of bringing the contribution is analyzed as translational and onerous contract to be concluded between shareholders and the company, the shareholders becoming debtors of the company at the extent of its contribution, the shareholders gaining fractions of the capital that result in a property right against it.

perspective of the company's liability to third parties, so if for cash contribution, there are no issues, for the contributions in kind checking this condition is necessary, because to be considered in capital formation the contribution must be of a definite value, represent an advantage for the company and which also can be used in the business of the future company.

To this regard, the legislator in Article 16 paragraph 2 established that contributions in kind should be valued in economic terms, and on the other hand, in order to prevent their fictitious or overstatement, for certain types of companies, for example, joint stock companies, if any consideration in kind, advantages reserved to any person who participated in the formation of the company, the delegated judge designates one or more certified experts who will prepare a report describing and evaluating each asset of the contribution and highlighting if its value corresponds to the number and value of shares granted in exchange (Article 26, Article 38 paragraph 1).

In order not to identify the shareholders' contribution with the registered capital, as the latter is to quantify the currency of all contributions (for example, in the case of a limited liability company by contribution in kind and cash).

Subject of the contribution

Cash contribution is required at the company's establishment of the regardless of its form (Article 16); the law does not impose a minimum. The cash contribution is in LEI or foreign currency for non-residents.

The shareholders' contribution does not bear interest (Article 68).

Contribution in kind has as an object the immovable property and tangible or intangible assets (claims, patents, trademarks, goodwill) property of the shareholder to be proved (Article 36).

The contribution must be assessed in cash to determine the value of such shares, interest or shares to which the shareholders are entitled, the assessment being made either by the shareholders or by experts (Article 37 paragraph 3 and Article 38 paragraph 1).

The contribution in kind is admitted to all forms of society and is paid by the transfer of the ownership of the good or the right to use it; in the absence of contrary stipulation, the goods become the property of the company (Article 65).

The transfer of ownership occurs at the time of registration of the company.

For contributions in claims, the shareholder is released only after the company has obtained the payment of money which is the subject of the claim (Article 84).

Contribution of industry (services or specific knowledge) consists of work or services that the shareholder promises to perform, so it is allowed only in general partnerships and for active shareholders in the limited partnerships.

Shareholder's liability for failure to deliver the contribution (payment of contribution)

According to Article 65 paragraph 2, the shareholder in delay to pay the social contribution is liable for the damages caused. If contribution has been stipulated in cash, the shareholder is liable to pay statutory interest from the day he had to make the payment.

For example, in the case of a contribution in kind, the default of contribution entitles the company to force the shareholder to deliver the good which is the subject of the contribution.

Failure on delivering the contribution may lead to the exclusion of the shareholder (Article 222 paragraph 1 point a).

Afectio societatis

Afectio societatis is the intention to associate and jointly pursue a business in compliance with legal requirements and in accordance with the terms of the articles of association.

As content *affectio societatis* does not mean an economic equality to the shareholders, but only one of legal order. Structurally, *affectio societatis* is the psychological element and we can say that it is the essence of the company contract.

Afectio societatis as a specific element of the company contract is closely related to some specific legal institutions such as exclusion, withdrawal, dissolution etc. in fact, it is the barometer indicating the satisfaction degree of the shareholders regarding the activity.

As outward *affectio societatis* is not just about the simple relation between the shareholders, but having a complex content, it involves a permanent attitude of understanding and cooperation of the shareholders (in case of partnerships) or of membership in a joint-stock company generated by the capital investment and of participation in the company' activities by exercising basic rights (capital companies).

Achievement and distribution of profit is the aim of establishing the trading company and of performing a trading activity.

Under the provisions of Article 67 paragraph 1 of Law 31/1990, the share of the profits to be paid to each shareholder represents a dividend. G.O. 26/1995 on tax on dividend⁸⁹, provides that the dividend is any distribution in cash or in kind in favour of the shareholders of the profits based on the annual balance sheet and profit and loss account.

Regarding the criteria for allocating and sharing the profits, the general rules apply (see also Article 67 of Law 31/1990).

The approval of the balance sheet and profit and loss account and setting up the dividends is for the competence of the ordinary general meeting of shareholders (Article 111 paragraph 2 point a) of Law 31/1990), which is convened at least once a year, within five months from the end of the financial year.

If by the time the ordinary general meeting of shareholders sets up the dividends, they have the nature of social rights, after approving the decision, the dividends become a right of claim of each shareholder against the company.

Dividends are paid within the period set by the general meeting of shareholders or, where applicable, set by special laws, but no later than six months from the date of the annual financial statement approval for the ended year. Otherwise, the company will pay damages for the delay, at the statutory interest rate if by the constitutive act or by the decision of the general meeting of shareholders approved the financial statement for the financial year ended a higher interest rate is not set.

⁸⁹ Published in OG. N. 210/1995 and was approved with amendments by Law 101/1995 published in OG n. 270/1995

The importance of maturity is given by the fact that at this time, on the one hand, the shareholder may, under the general limitation period of three years, submit action claims against the company, and on the other hand, from that date the company owes interests.⁹⁰

ESTABLISHMENT OF TRADING COMPANIES

Articles of association of the trading company

The general partnerships or the limited partnerships shall be set up by a company contract while the joint-stock company, the limited partnerships by shares or the limited liability companies shall be set up by company contract and its articles of association. The company contract and the articles of associations may be completed as a single document called constitutive act.

The limited liability company may be set up by the act of will of a single person. In this case only the articles of association shall be drawn up.

Organization, operation and development of the company

The articles of association are completed under private signature, signed by all shareholders or, in case of a public subscription, by the founders. The authentic form of the articles of association is mandatory when:

- a) a general partnership or limited partnership is set out;
- c) a joint-stock company is set up by public subscription.

The articles of association of the general partnerships, of the limited partnerships and of the limited liability company shall contain:

⁹⁰ It is criticized in this respect a decision rendered by the Court of Appeal Timisoara- commercial section which has partially admitted the appeal filed by SC U.M.T. S. A. Timisoara maintaining only partially the sentence by which SIF Banat Crişana has requested for the company to pay dividends and default interest at an average of 67% charged by the Banca Agricola where it had opened the account. The Court of Appeal ordered the company to pay the damages, retaining that dividends are not generating interests, the provisions of art . 43 Commercial Code not being applicable, as the Article 68 of Law 31/1990 provides that shareholder's contributions to the capital does not bear interests. The decision quoted is objectionable because it is true that the contribution of shareholders is not bearing interest, but in this case the dividends do not constitute contribution to the registered capital, but there are a part of the benefits of society; because the two concepts are distinct, the provisions of Article 43 of the Commercial Code apply fully . There is one exception where the dividends instead of being paid to shareholders, the Extraordinary General Meeting decides to increase the capital with these amounts as cash contributions (Court of Appeal Timisoara, Commercial Section, Civil Decision no. 809/A/1998 published in Revista de drept comercial n. 4/2000 p 134).

- a) the name and first name, personal number, place and date of birth, residence and citizenship of individuals shareholders; the denomination, the registered office and nationality of the shareholders when they are legal entities; the trade register number or sole registration code, according to national law; in case of a limited partnership the active partners, as well as passive partners and the fiscal representative, if any, shall be clearly identify;
- b) the form, denomination, headquarters and, if applicable, the emblem of the company;
- c) the company's object of activity, specifying the scope and the main activity;
- d) the subscribed and the deposited registered capital, specifying the contribution of each shareholder, whether in cash or in kind, the value of the assets brought as contribution in kind and the way the evaluation has been made, as well as the date when all subscribed registered capital shall be deposited. In a limited liability company, the number and the nominal value of all participating shares as well as the number of participating shares attributed to each shareholder for his contribution shall be specified;
- e) the shareholders who represent and manage the company or the independent administrators, be they natural or legal persons, the powers vested in them and whether they are going to exert the powers together or separately;
- f) each shareholder's part in profits and losses;
- g) location of subsidiaries - branches, agencies, or other offices of such kind without legal personality - when they and the company are set up at the same time, or the conditions to set them up, if such a setting up is considered;
- h) duration the company;
- i) the method of dissolution or liquidation of the company.

The articles of association of a joint-stock company shall contain:

- a) the identification of the founders;
- b) the form, the denomination and the registered office;
- c) the company's object of activity;
- d) the subscribed and deposited registered capital; to be mentioned that at the time of setting up the bank, the capital must be paid in full
- e) the number and the nominal value of the shares

f) where there are different categories of shares, the number, the nominal value and the rights conferred to each category of shares shall be specified;

g) any restriction on the transfer of shares;

h) the identification of the first members of the Board, respectively the first members of the Supervisory Board;

i) the powers conferred to the administrators and, where appropriate, to the directors, whether they are going to exert the powers together or separately;

j) the identification of the first auditors;

k) provisions regarding the management, administration and functioning of the company by the statutory bodies, the number of members of the Board or the way to set up this number;

l) the powers conferred to the administrators and, where appropriate, to the directors, directorate members, whether they are going to exert the powers together or separately

m) the duration of the company;

n) the distribution of profits and losses;

o) location of subsidiaries - branches, agencies, or other offices of such kind without legal personality - when they and the company are set up at the same time, or the conditions to set them up, if such a setting up is considered;

p) any special advantage granted, at the time of setting up of the company or until the company is authorized to commence business, to anyone who participated in the setting up of the company or in transactions leading to the grant of such authorization, and the beneficiaries of such advantages;

r) the total or at least estimate amount of all expenses for the setting up;

s) the method of dissolution or liquidation of the company.

The subscribers of the articles of association, and persons who have a role in the setting up of the company are considered founders. Law no. 31/1990 does not define what is meant by persons who have a role in the setting up of the company. The appearance is important as founders under Article 32 have certain patrimonial and non-patrimonial rights, distinct from those of other shareholders. From the text, it is noted that the founders can be people who are not subscribers of the constitutive act, ie shareholders or shareholders. It was considered⁹¹ that within this concept fall people who have contributed to the setting up of the company either economically or legally etc; but we must distinguish between a significant contribution of those

⁹¹ St. D. Cărpenu, quoted work, page 68-69

involved with the cooperation with the shareholders in the setting up and persons that provide a simple advice or are appointed to fulfil certain formalities.

The founding members may not be persons who, by law, do not have capacity to have rights or have been convicted for fraudulent management, breach of trust, forgery, use of forgery, fraud, embezzlement, perjury, giving or taking bribes and other crimes provided by law.

The joint stock company is set up by full and simultaneous subscription of the registered capital by all signers of the constitutive act or by public subscription. The registered capital is 90.000 lei. The number of shareholders in the joint-stock company may not be less than 2.

The registered capital of a limited liability company can not be less than 200 lei and it shall be divided into equal shares that can not be less than 10 lei each.

In a limited liability company, the number of shareholders can not exceed 50.

Incorporation of the company

Within 15 days as from the authentication date of the constitutive act, the founders or if appropriate, the first members of the Executive Board and the Supervisory Board or a representative of their society will request the incorporation of the company in the trade register of the area where the company will be based (Article 36).

The following documents shall be attached to the application:

- a) the articles of association of the company;
- b) the proof attesting payments made according to the articles of association;
- c) the proof attesting the registered office and the availability of the company;
- d) in the case of contributions in kind subscribed and paid upon the setting up, the ownership documents, and in case of buildings, the certificate regarding mortgages or other obligations which may be attached to them;
- e) documents attesting the operations concluded on behalf of the company and approved by the shareholders;
- f) a written statement on their responsibility signed by the founders, the managers, namely the first members of the Executive Board and the Supervisory Board and, if applicable, the auditors by which they declare to fulfil the conditions required by this present law;

g) other documents or notices provided by special laws in order to set up a company; in the case of companies of banking type, the proof of the approval issued by the NBR shall be specified.

The control over the legality of the documents and of the deeds which, according to the law, are going to be registered with the trade register is exercised by a mandatory judge who requests, on parties' account, an expert appraisal as well as presentation of other evidence.

In cases where legal requirements are fulfilled, the mandatory judge, shall authorize, by way of conclusions handed in within 5 days as from the date the said requirements have been fulfilled, the setting up of the company and will order its incorporation in the trade register according to the conditions stipulated by the law regarding that register.

Legal requirement means the substantive and formal issues so that according to Article 46 where the constitutive act does not contain the particulars provided by law or it contains provisions that violate the mandatory provision of the law, or does not to fulfil a legal requirement for the setting up of the company, the mandatory judge, ex officio or at the request of any person who makes a request for intervention, rejects the application for the incorporation; unless the shareholders are removing such irregularities.

The company is a legal entity from the date of its incorporation in the trade register which is performed within 24 hours from the date the judge concluded authorizing registration of the company.

Consequences of infringements of legal requirements at the establishment of a company

Irregularities may be detected prior to the incorporation, as well as after its incorporation.

In the first case, as we said before, the incorporation may be rejected:

- the articles of association do not contain the particulars provided by law
- the articles of association do not contain provisions that breach mandatory provisions of the law
- a legal requirement is not fulfilled for the establishment of the company

However, when the shareholders remove the irregularities, the mandatory judge shall reflect, in his decision, the achieved regularizations, and shall admit the application for the incorporation.

In case the founding members or the company's representatives did not request its incorporation within the time limit set by the law, any shareholder may request incorporation

with the trade register office after, by prior notification or registered letter, gave them formal notice and they did not comply within 8 days of received notification.

Still, if incorporation is not effected within the time limits as stipulated by the previous paragraph then the shareholders are discharged of their obligations proceeding from their subscriptions after passing a 3 months period since the constitutive act has been authenticated, except when the said act provides otherwise.

If one of the shareholders has requested the fulfilment of the incorporation requirements then the others shall not be in a position to request discharge of their obligations as they result from the subscriptions.

In case some irregularities are discovered after incorporation, the company is obliged to proceed for their removal within 8 days, at the most, since they have been ascertained. If the company does not take action then any interested person may request the court to oblige the management of the company to regularize them under penalty of payment of comminatory damages.

The right to initiate a regulatory suit shall be lost by limitation after one year as from the date the company has been incorporated.

Causes of nullity of the company

The nullity of a company incorporated with the trade register may be decided by a law court only when:

- a) the articles of association do not exist or when the said was not concluded in a duly certified form in the situations referred to in Article 5 paragraph (6);
- b) all founding members were declared incapable at the time when the company was set up;
- c) the company's object of activity is illicit or against public order;
- d) the decision of the mandatory judge for company's incorporation is missing;
- e) the administrative legal authorization of the company's setting up is missing;
- f) the articles of association do not mention the denomination of the company, its object of activity, the contributions of the shareholders and the subscribed registered capital;
- g) legal provisions regarding the minimum registered capital, subscribed and paid were not observed;
- h) the minimum number of shareholders required by the law was not observed.

The nullity cannot be declared in case its cause, invoked in the annulment suit has been removed before the closing argument in front of the court.

On the day the court decision by which the nullity was declared has become irrevocable, the company ceases to exist with no retroactive effect and enters liquidation. The legal provisions regarding liquidation of companies following their dissolution shall be applied accordingly.

By the same court decision which declared the nullity the company's liquidators shall also be appointed.

The court shall send the enacting terms of this decision to the trade register office which after taking relevant notice, shall send it, in turn, to the "Monitorul Oficial" (Official Gazette of Romania) in order to be published in Part IV as an extract. The declaration of the company's nullity has no effect on the acts concluded on its behalf.

Neither the company nor the shareholders can oppose the nullity of the company to good faith third parties.

Specific formalities for the establishment joint-stock companies

Simulated establishment or by way of public subscription

According to Article 9 of Law no. 31/1990 the joint-stock company may be established only by full and simultaneous subscription of the registered capital by all signers of the articles of association or by public subscription.

Simultaneous establishment is achieved when capital's establishment is done simultaneously with the incorporation, that there are two shareholders who subscribe through their contributions the entire capital, perform payments of at least 30 % of the share capital and fulfil the formalities provided by law 31/1990 (compilation of constitutive act, incorporation of the company).

The establishment by public subscription is achieved if the shareholders do not have the amounts required to subscribe and to pay the capital so that they call for a subscription offer addressed to the public.

Establishment by public subscription by the founding members of the company involves making the following formalities:

- Issue of a prospectus; the prospectus must contain under penalty of nullity the following data: the form, the denomination, the headquarters and emblem of the society, the object of activity, the subscribed and paid up share capital, the number and value of shares, the duration of the company, the benefits reserved to founders, the method of dissolution or liquidation of the company etc. The prospectus is signed by the founding members.
- the authorization of the prospectus by the mandatory judge with the Trade Register in the county where the company will be based.
- the publication of the prospectus in the Official Gazette and/or in the newspapers;
- the subscription of shares consists in the manifestation of the will of a person who wanting to become a shareholder subscribes and pays the contribution in exchange for a certain number of shares.

The subscriptions of shares shall be made on one or more copies of the founders' issue prospect approved by mandatory judge and will contain: the name and first name or denomination, domicile, or registered office of the subscriber; number of subscribed shares, given in letters, subscription date and an express statement that the subscriber knows and accepts the issue prospectus.

The subscriber must be, pursuant to Law 31/1990, make a cash payment consisting of at least half of the subscribed shares, the difference is to be paid within 12 months as from the incorporation date for the shares issued for a contribution in cash or shares more than 2 years issued for a contribution in kind (Article 9 paragraph 2).

- The validation of the subscription and the approval of constitutive documents by the constituent meeting.

After closing the subscription, the constituent meeting of subscribers is convened aiming to approve the constitutive acts. The meeting shall be published at least 15 days prior the day established in the Official Gazette and in two newspapers stating the place, date and a detailed list of the problems subject to discussion.

The meeting is legal if half plus one of the number of subscribers are present and the decisions are taken by simple majority vote of those present.

Managers of joint-stock companies

Unitary system

Managers' appointment. The joint-stock company is administered by one or several managers, their number always being odd. In case there are several managers, they form a Managing Board.

Joint stock companies whose financial statements are subject to a legal obligation audit are administered by minimum 3 managers.

The managers' designation or appointment⁹² is done differently depending on how this operation takes place upon the setting up of the company or subsequently during the functioning of the company.

The manager's appointment is done by the general meeting of shareholders (Article 137¹ of the Law 31/1990).⁹³

Special incompatibilities regarding the managers' appointment. Law 31/1990, in the Article 142 paragraph 5, states that the members of the Board of Directors and the directors of a joint-stock company can neither be managers, members of the Board of Directors, auditors or shareholders with unlimited liability, without the authorization of the Managing Board, in other competing companies or having the same object, nor exercise the same trade or another competing one, on his own account or on others', under the penalty of being dismissed and held liable for damages.

Also, according to the Law 31/1990 Article 144³, the manager who, in a certain operation, has, directly or indirectly, interests opposed to those of the company, must inform the other managers and the auditors about this matter and must not take part in any proceeding concerning the respective operation. The manager has the same obligation, in case he knows that, in a certain operation, his wife, relatives and kindred up to the fourth degree included take an interest. The manager who didn't observe these provisions would be liable for the damages resulting for the company.

Non-executive managers and directors of the company. Where in a limited company, it occurs the delegation of duties between executives, according to Article 143, the majority of the Board of Directors will be composed of non-executive managers. According to Law 31/1990, non-executive members of the Board are the ones who have not been appointed managers pursuant to Article 143.

The Board of Directors may delegate the management of the company to one or more managers, appointing one as their CEO; the directors may be appointed from the managers or the Board of Directors; the director of a joint stock company is only the person to whom management powers have been delegated to and any other person, regardless of the technical

⁹² Some authors use the term "managers' appointment" ; see in this sense I.L.Georgescu , quoted work, vol.II, page465-469, iar alți autori folosesc noțiunea de "desemnarea administratorilor"; see in this sense St.D.Cârpenaru, quoted work,Ed.1995, page 27-28 și Ed.1998, page 212-213.

⁹³ See in this sense: I.L.Georgescu, quoted work, vol.II, page 465 and more recent, St. D.Cârpenaru, quoted work, Ed.1995, pag 206 and Ed.1998, page 212.

name of the position occupied in the company, is excluded from the rules of Law 31/1990 regarding the joint-stock company's directors.

In the case of joint stock companies whose financial statements are subject to a legal obligation to financial auditing, delegating the company's management in accordance with Article 143 paragraph 1 is compulsory.

The directors are responsible for taking all measures related to the company's management within the scope of the company and with the exclusive powers reserved by law or by the constitutive act of the Board of Directors and general meeting of shareholders. The organization of the directors' activity may be fixed by the constitutive act or by committee's decision.

The committee is responsible for the supervision of the directors and any manager can request information on directors' management of the company.

The directors will inform the committee regularly and comprehensively on the operations undertaken and those involved.

The directors may be removed at any time by the committee. If revocation occurs unjustly the concerned director is entitled to payment of damages.

Independent managers. The constitutive act or the general meeting's decision may provide that one or more members of the committee should be independent.

A manager is not considered independent in particular if:

a) is a director of the company or of a company controlled by him or has fulfilled such a position in the last five years;

b) is an employee of the company or of a company controlled by him or had such a working relation in the last five years;

c) receives or has received from the company or from a company controlled by him an additional remuneration or other benefits, other than those corresponding to his status as non-executive director;

d) is or represents a significant shareholder of the company;

e) has or has had in the last year business relationship with the company or with a company controlled by him, either personally or as a partner, shareholder, director or employee of a company that has such a relationship with the company;

f) is or was in the last three years shareholder or employee of the current auditor of the company or of a company controlled by him;

g) is a director in another company in which a director is a non-executive director;

h) has been a non-executive director of the company for more than 3 terms;

i) is the husband/wife or a relative up to the fourth degree including of an executive or a person who falls in one of the categories mentioned at points a) - h).

Manager's powers. The provisions of the Law 31/1990 reflect that the managers have very wide powers.⁹⁴ According to Article 70 paragraph 1 of the Law, the managers can carry out all the operations required for the fulfilment of company's goal, except for the restrictions mentioned by the constitutive act.

Law 31/1990 provides certain limitations on the powers of the managers, in respect of acts of disposition of a certain size in order to protect the interests of the company.

The power of representation of the manager must explicitly be expressed and should not be limited to completion of legal relations with third parties, but also implies the right to legal representation of the company by the manager to whom it was conferred.⁹⁵

As a representative of the company, the manager has the right to sit in court as complainant or defendant. The legal mandate persists even after authorizing by the manager of a lawyer for this purpose, its function has ceased.⁹⁶

The Board of Directors is responsible for the performance of all necessary and appropriate acts to achieve the company's activity objects, except those reserved by law for the general meeting of shareholders.

The Board of Directors has the following basic responsibilities that cannot be delegated to the managers:

a) determine the main directions of activity and development of the company

b) establish the accounting and financial control and approve the financial planning ;

⁹⁴ See in this sense: St.D.Cârpenaru, quoted work, Ed.1995, page211 and Ed.1998, page 218 and in R.D.C. nr.2/1993, page34-36.

⁹⁵ In the sense that the right to represent the company implies the right represent it in court, the jurisprudence has pronounced , Cas.III, dec. n. 938 of 17 February 1939, in R.D.C. , 1939, page 326

⁹⁶ The solution was established by the case law, Cas.I, dec. n. 381 of 11 February 1927, page 826, being rendered in the case of a bank whose legal responsibility is not affected by replacing the individual empowered to represent it.

- c) appoint and remove the directors and determine their remuneration;
- d) supervise the directors;
- e) prepare the annual general meetings, organize and implement its decisions;
- f) introduce the request for the opening of insolvency proceedings for the company, according to Law 85/2006 on insolvency proceedings.

But the tasks assigned by the Board of Directors from the general meeting of shareholders cannot be delegated to the managers in accordance with Article 114.

The Board of Directors represents the company in dealings with third parties and in court. In the absence of a stipulation to the contrary in the constitutive act, the Board of Directors represents the company by its president. By the constitutive act, the president and one or more managers may be authorized to represent the company acting jointly or separately. Such a provision is enforceable against third parties.

By unanimous agreement, the managers representing the company only by acting jointly can empower one of them to enter into certain operations or types of operations.

If the Board of Directors delegates the company's management powers in accordance with Article 143, the power to represent the company belongs to the CEO.

The Board of Directors records with the trade register the names of the persons authorized to represent the company, indicating whether they act jointly or separately. They submit to the trade registry a specimen signature.

Limits to the managers' powers. According to Article 150, if the constitutive act does not stipulate otherwise and subject to Article 44¹, under penalty of nullity, the manager may, on his own, dispose of, respectively, acquire, goods to or from the company, having a value exceeding 10% of the net assets of the company, only after the approval by the extraordinary general meeting, as provided in Article 115.

Also, if the constitutive act does not stipulate otherwise and subject to Article 44¹, under penalty of nullity, the manager may, on its own, dispose of, respectively, acquire, goods for himself to or from the company, only after the approval by the extraordinary general meeting, as provided in Article 115.

These two limitations do not apply to rental or leasing operations.

The value is calculated by reference to the financial statements approved for the financial year preceding the operation or, if applicable, to the amount of the subscribed capital, if such financial statement has not yet been submitted and approved.

The provisions of article 150 are applicable to operations in which one party is a spouse or close relative until the fourth degree of the manager; also, if the operation is completed with a civil or trading company to which one of the persons mentioned above is manager or director or holds, alone or together, a share of at least 20% of the subscribed capital, unless one of these companies is a subsidiary of the other.

Prohibitions. It is prohibited that the company credit its directors, through operations such as:

- a) give loans to managers;
- b) give financial incentives to managers during or after the conclusion with the company of supplies, services or execution of works operations;
- c) ensure directly or indirectly, in whole or in part, any loans granted to managers, concomitant or after the loan;
- d) ensure directly or indirectly, in whole or in part, the execution by any other manager of their personal obligations to third parties;
- e) acquire by consideration or payment, in whole or in part, a claim subject to a loan granted by a third party to managers or other personal service.

These prohibitions are applicable as well to operations where the spouse, relative or affinity to the fourth degree of the administrator are interested; also, if the operation of a civil or trading company to which one of the persons mentioned above is director or holds, alone or together with one of the persons mentioned above, a share of at least 20% of the subscribed capital.

Above prohibitions shall not apply:

- a) in the cases of operations which aggregate outstanding value is less than the equivalent in lei of EUR 5.000;
- b) if the operation is completed by the company in exercising its current activity and the transaction terms are not more favourable to the persons referred to in Article 144⁴ paragraph 1 and 2 than those which, typically, the company charges to third parties.

Managers' liability. The Board of Directors members shall exert their mandate with loyalty in the interest of the company. The manager does not violate this obligation if, in making a business decision, he is reasonably entitled to consider that he is acting in the interest of the company and on the basis of adequate information.

The Board of Directors must not disclose confidential information and business secrets of the company to which they have access in their capacity as managers. This obligation remains even after ceasing the manager's mandate.

The managers are responsible for the fulfilment of all duties as per Articles 72 and 73.

The managers are liable towards the company for the directors' or personnel's activity, when the damage would not have happened if they had exercised the supervision which was incumbent upon them by virtue of their positions.

The company's managers are jointly liable with their immediate predecessors, if, being aware of the irregularities perpetrated by them, they don't denounce them to the auditors.

In the companies with several managers, the responsibility for the actions performed or for the omissions does not extend over the managers who had their opposition recorded in the register of decisions of the Managing Board and who made a written report about that to the auditors.

According to Article 144³ The manager who, in a certain operation, has, directly or indirectly, interests opposed to those of the company, must inform the other managers and the auditors about this matter and must not take part in any proceeding concerning the respective operation. The manager has the same obligation, in case he knows that, in a certain operation, his wife, relatives and kindred up to the fourth degree included take an interest.

The manager who didn't observe these provisions would be liable for the damages resulting for the company.

Manager's revocation. Managers' revocation directors is done by the general meeting of shareholders under the conditions of quorum and majority provided by law for the making of decisions by the decision-making body of the company (article 112 of the Law 31/1990) whether the managers were appointed by the constitutive act or by subsequent general meeting of shareholders.⁹⁷

⁹⁷ The case law has held that the revocation status of manager can not be considered a temporary measure to be ordered by presidential decree under the Article 581 of the Civil Procedure Code (C.S.J. com. section dec.59/1996, in Dr.nr.8/1996, pag .133 and in R.D.C. nr.9/1996, page156). It has admitted, however, the temporary suspension of the manager from his position in this procedural way for default management (See C.Ap., Braşov, dec. civ. Nr.141/A/1995, în R.D.C. nr.7-8/1997, page 162

Starting from *intuitu personae* quality of the manager in all cases we are dealing with a *revocation ad nutum*, meaning that it can occur at any time and independently of the will or any breach of contract of the manager, being the exclusive prerogative of the decision-making body of the company, empowered to appoint or revoke the managers.

About the revocation *ad nutum* of the managers both doctrine⁹⁸ and jurisprudence⁹⁹ have retained that while an ordinary mandate is revocable by nature, the manager's mandate is revocable not only by nature, but also by its essence.

The manager who deems unfair his revocation cannot submit a reintegration request but only he can claim for compensatory damages if the revocation has been made to certain torts¹⁰⁰ (Article 391 of Commercial Code - "the mandant or the mandatory that unjustly by revocation or renunciation interrupt the execution of the mandate, is responsible for damages"). However, the shareholders may provide in the constitutive act that compensatory damages are not due in case of revocation.

Dual system

According to Article 153 the constitutive act may stipulate that the joint-stock company is managed by a Managing Board and a Supervisory Board.

Managing Board. The joint-stock company's management rests exclusively with the Managing Board, which completes the necessary and appropriate acts to achieve the objects of the company, except those reserved by law for the Supervisory Board and the general meeting of shareholders. The Managing Board shall exercise the powers under the Supervisory Board's control.

The Managing Board is composed of one or more members, their number being always odd. When there is one member, it is called CEO. In the case of joint stock companies whose financial statements are subject to a legal obligation auditing the Managing Board is composed of at least three members.

⁹⁸ In terms of doctrines see St.D.Cârpenaru, quoted work, Ed.1995, page212-213, Ed.1998, page219-220; C.Bîrsan, V.Dobrinoiu, A.Țiclea și alții, quoted work, Ed.1995, vol.I, page134, and for foreign doctrine: Navarini,II,nr.739; Societa nr.328; De Gregorio, nr.167; Rousseau,I, nr.3029; Houpin-Bosvieux, vol.II, nr.1030; Thaller-pic, vol.II, nr.1117; Lyon-Caen-Renault, nr.812.

⁹⁹ Regarding the case law see Cas.III, dec.1474 of 21 May1939, in R.D.C.,1939, page 719 or „Practica judiciară în materie comercială”, vol.II, Ed. Lumina Lex, Buc. 1991, page106

¹⁰⁰ In this sense, the jurisprudence pronounced by presidential order of 7 October 1935 Court of Ilfov, section I in the judicial practice, quoted work, vol.II, Ed. Lumina Lex, Buc. 1991, page124

The appointment of members of the Managing Board rests with the Supervisory Board, which also assigns one of them as president of the Board. The Managing Board members can not be simultaneously members of the Supervisory Board.

The Managing Board members may be revoked at any time by the Supervisory Board. . The constitutive act may provide that they can be removed as well by the ordinary general meeting of shareholders. If their dismissal is unjust, the Managing Board members are entitled to the payment of damages.

The Managing Board represents the company in dealings with third parties and in court. In the absence of a stipulation to the contrary in the constitutive act, the Managing Board represents the company only by acting jointly. Where members of the Managing Board are only acting jointly, by unanimous agreement, they can empower one of them to enter in certain operations or types of operations. The Managing Board records with the trade register the names of the persons authorized to represent the company, indicating whether they act jointly or separately. They submit to the trade registry a specimen signature.

At least every three months, the Managing Board submits a written report to the Supervisory Board regarding the management of the company, its activity and its possible evolution. In addition to this regular information, the Managing Board communicates timely to the Supervisory Board any information on events that may have a significant influence on the company.

Supervisory Board. The Supervisory Board represents the company in its relations with the Managing Board.

The Supervisory Board members shall be appointed by the general meeting of shareholders, except the first members, who are appointed by the constitutive act. The number of the Supervisory Board members is determined by the constitutive act, but it cannot be less than 3 nor more than 11.

The Supervisory Board members may not be simultaneously members of the Managing Board. They also cannot serve as a member of the Supervisory Board and as an employee of the company.

The Supervisory Board elects from its members a president of the Board. In case of vacancy of a member's seat on the Supervisory Board, the Board may proceed to appoint an interim member until the next general meeting. If this vacancy lowers the number of members of the Supervisory Board under the legal minimum number, the Managing Board must without delay convene the general meeting for filling the vacancies and whether the Managing Board does not fulfil its obligation to convene a general meeting, any interested party may appeal to

designate the person responsible for convening the ordinary general meeting of shareholders, in order to make the necessary appointments.

The Supervisory Board has the following main tasks:

- a) exercises permanent control over the management of the company by the Managing Board;
- b) appoints and dismisses members of the Managing Board;
- c) verifies the compliance with the law, the constitutive act and the decisions of the general meeting of the company's management operations;
- d) reports at least once a year to the general meeting of shareholders regarding the activities' supervision.

The Supervisory Board meets at least once every three months. The president shall convene and preside the Supervisory Board meeting. The Supervisory Board shall be convened at any time at the reasonably request of at least two of Managing Board members; the Board shall meet within 15 days of the convocation. If the president does not convene the Board, the request's authors themselves convene the Board, setting the agenda for the meeting.

The Managing Board members may be summoned to meetings of the Supervisory Board, but they do not vote in the Board.

After each meeting, minutes will be prepared, which will include the names of the participants, the agenda, the deliberations sequence, the decisions taken, the number of votes received and separate opinions. The minutes will be signed by the president and by at least one other Board member present.

The Supervisory Board members may be revoked at any general meeting of shareholders by a majority of at least two thirds of the votes of the shareholders present.

Provisions common to both unitary system and dual system

Mandate's duration. The managers, respectively of the Managing Board and the Supervisory Board's mandate duration is determined by the constitutive act and it may not exceed four years. The managers are re-eligible, unless by constitutive act otherwise stipulated.

The mandate's duration of the first members of the Board of Directors and the first members of the Supervisory Board may not exceed two years.

For the appointment of a manager or of a Board member to be legally valid, the person appointed must expressly accept, and this person must be cover by professional liability insurance.

Appointment of individuals and legal entities. The joint-stock company's directors in the unitary system, ie Managing Board members, in the dual system are individuals.

A legal entity may be appointed manager or member of the Supervisory Board of a joint stock company. By this appointment, the legal entity is obliged to appoint a permanent individual representative who is subject to the same conditions and obligations and has the same civil and criminal liability as a manager or member of the Supervisory Board, individual, acting on their own, without that through this the legal entity to be exempted from liability or to have a lower joint liability. When the legal entity revokes its representative, it shall simultaneously appoint a replacement.

Overlapping mandates. An individual may simultaneously hold more than 5 manager and/or Supervisory Board member's mandates in joint-stock companies with headquarters located in Romania. This limitation applies equally to individual manager or member of the Supervisory Board and individual permanent representative of a legal entity manager or member of the Supervisory Board.

The prohibition of overlapping maximum 5 mandates does not refer to cases the one elected in the Board of Directors or the Supervisory Board is the owner of at least a quarter of the total shares of the company or a member of the Board of Directors or the Supervisory Board of a joint-stock company holding the quarter.

The person who violates this prohibition is forced to resign from the position of member of the Board of Directors or Supervisory Board exceeding the maximum number of mandates, within one month of the incompatibility's occurrence. Otherwise, at the end of this period, he will lose the mandate obtained by exceeding the legal number of mandates in the chronological order of appointments, and will have to refund the remuneration and other benefits received by the company where he exercised this mandate. The deliberations and decisions where he took part in the exercise of their mandate shall remain valid.

Remuneration. The remuneration of Board of Directors or Supervisory Board's members is established by the constitutive act or by resolution of the general meeting of shareholders.

Additional remuneration of the Board of Directors or Supervisory Board's members tasked with specific functions within the body and the remuneration of managers, in the unitary system, or the Managing Board's members in the dual system are determined by the Board of Directors, or the Supervisory Board. The constitutive act or the general meeting of shareholders sets the general limits for all remuneration granted in this way.

The general meeting, the Board of Directors or the Supervisory Board and, where appropriate, the remuneration committee will ensure that upon the setting up of remunerations or

other benefits, they are justified by the specific duties of the persons concerned and the economic situation of the company.

Conditions for decisions' validity. For the validity of the Board of Directors, the Managing Board or the Supervisory Board's decisions the present at least half of the members of each of these bodies, is necessary if the constitutive act does not provide for a higher number. The Board of Directors, the Managing Board or the Supervisory Board's decisions shall be taken by majority vote of the present members. The decisions on the appointment or revocation of presidents of these bodies are taken by a majority vote of the Board.

The Board of Directors, the Managing Board or the Supervisory Board's members may be represented at meetings of that body only by other members. A member present may represent one member absent.

The constitutive act may provide that the participation in the Board of Directors, the Managing Board or the Supervisory Board's meetings may be held by means of remote communication, specifying their way. However, the constitutive act may limit the types of decisions that can be taken in these circumstances and provide for a right to object to such a procedure for a given number of members of the body. These means of remote communication must meet the conditions necessary for the identification of participants, their effective participation in the Board meeting and for the continuous forwarding of the deliberations.

If the constitutive act does not provide otherwise, the president of the Board of Directors or of the Supervisory Board shall have a casting vote in case of equal votes. The president of the Board who is at the same time, the company's director cannot have a casting vote.

If the acting president of the Board of Directors, of the Managing Board or of the Supervisory Board cannot or is not allowed to vote in that body, other members will elect a president of the meeting, having the same rights as the acting president.

In case of a tie and if the president does not benefit from casting vote, the proposal for voting shall be deemed rejected.

According to Article 153²¹ the constitutive act may provide that, in exceptional circumstances, justified by the urgency of the situation and the interests of the company, the decisions of the Board of Directors or the Managing Board may be taken by unanimity written consent of the members without the need for a meeting of that body. It's impossible to use this procedure for the decisions of the Board of Directors or the Managing Board on annual financial statement or authorized capital.

Powers' limits. The Board of Directors, respectively the Managing Board conclude legal documents by which to acquire, alienate, lease, change or deposit as collateral, goods belonging to the company's assets whose value exceeds half of the company's assets' book value as at the

time the legal document is concluded, but only with the approval of the extraordinary general meeting of the shareholders, given as stipulated by Article 115. (Article 153²²).

Action for damages. According to Article 155 paragraph 1, an action against the founders, managers, directors, members of the Managing Board and the Supervisory Board and the auditors or auditors for damages caused to the company by them in breach of their duties to the company, belongs to the general meeting who decides by the majority laid down in Article 112.

The general meeting appoint by the same majority the person responsible for bringing an action in court. When the general meeting decides on the financial statements, it may take a decision on the liability of the managers or directors, members of the Managing Board and Supervisory Board, even if this issue is not on the agenda.

If the general meeting decides to start the proceedings against the managers, namely against the Managing Board members, their mandate shall cease as of the date of adoption of the decision and the general meeting, namely the Supervisory Board shall proceed to replace them.

If the action is started against the directors, they are suspended from the position until the legal judgement remains irrevocable. If the general meeting decides to start the action against members of the Supervisory Board by the majority laid down in Article 115 paragraph 1, the mandate of those members of the Supervisory Board ceases by law. The general meeting shall proceed to replace them.

The action for damages against members of the Managing Board may be as well exercised by the Supervisory Board, following a decision of the Board itself. If the decision is taken by a majority of two thirds of the total membership of the Supervisory Board, the mandates of those members of the Managing Board ceases and the Supervisory Board proceeds to replace them.

If the general meeting is unable to bring in justice an action for damages under Article 155 or does not comply with one or more shareholders' proposals to initiate such an action, the shareholders representing, individually or jointly, at least 5% of the share capital, are entitled to bring an action for damages in their own name but on behalf of the company against any person referred to in Article 155 paragraph (1); persons exercising this right must already have the quality of shareholder at the time the issue of bringing the action for damages was debated in the general meeting; the costs will be borne by shareholders who brought the action and in case of admission, the shareholders are entitled to reimbursement of the amounts advanced by the company with this title. After the court's decision on the admission of action promoted by the shareholders remains irrevocable, the general meeting of shareholders or the Supervisory Board may decide to cease the mandate of the managers, directors or members of the Supervisory Board, respectively of the Managing Board and replace them.

Financial audit, internal audit and auditors

The joint-stock company will have three auditors and the same number of deputy members unless the constitutive act stipulates a larger number. In all cases, the number of the auditors must be an odd one. At least one of them must be legally authorized accountant or auditor.

In the beginning, the auditors are elected by the constitutive assembly. They have a three years mandate and can be re-elected.

The financial statements of companies subject to statutory audit will be audited by financial auditors - natural or legal - as provided by law.

The joint stock companies opting under Article 153, for dual management system are financially audited. The companies, whose financial statements are financially audited, according to the law or the shareholders' decision, will organize the internal audit according to the rules issued by the Chamber of Financial Auditors of Romania.

In companies whose financial statements are not financially audited, the ordinary general meeting of shareholders shall decide the contract of the financial audit and the appointment of auditors, as appropriate.

The auditors have to be shareholders, except for the bookkeeper auditors that can be third party exercising its profession individually in associative forms.

The following persons may not be auditors, and if they were elected, they are denied their mandate:

- a) relatives or kindred up to the fourth degree included or managers' spouses;
- b) persons receiving any form of salary or remuneration from the managers or from the company, for another position than that of an auditor;
- c) persons who are denied the position of a manager as per Article 135¹⁴;
- d) persons who, during the exercise of the powers conferred by this quality control the attributions in the Ministry of Finance and other public institutions, except as provided by law.

The auditors are remunerated by a fixed salary determined in the constitutive act or by the general meeting which appointed them.

In case of death, physical or legal obstruction, termination or renouncement to the mandate by one auditor, the oldest deputy member will substitute him. If in this way, the auditors' number cannot be completed, the remaining auditors will appoint other persons to fill in the vacancies, until the next meeting of the general assembly is held. In case no auditor stays in

office, the managers will urgently convene the general meeting, which will appoint other auditors.

According to Article 160, the auditors are bound to supervise the company's administration, to check if the balance sheet and the profit and loss account are legally drawn up and according to the registers, if these are regularly kept, and whether the assets assessment was made according to the regulations settled for the drawing up of the balance sheet.

Regarding all this, as well as regarding the proposals they think fit for the balance sheet and for the distribution of profits, the auditors will submit to the general meeting a detailed report.

The general meeting will not be in a position to approve the balance sheet and the profit and loss account, if these are not accompanied by the auditors' report.

The extent to which the auditors are responsible and the effects of their responsibility are determined by the regulation of the mandate and will be revoked on the basis of the vote required for the extraordinary meetings.

Shares

Notion. Shares are equal fractions of the registered capital that give to the holder its quality of shareholder, patrimonial and non-patrimonial rights.

Legal nature. In an attempt to analyze the legal nature of the shares, it is necessary first to determine whether they meet all the conditions of commercial securities. However, as noted in the doctrine¹⁰¹ they do not satisfy two of the conditions of commercial securities: autonomy and literalness.

Thus, the shares are not independent from the legal document from which they are issued, namely the constitutive act, and the acquirer of such shares does not acquire a new right, like in the bill's case. Regarding the literalness, we can observe that in the shares' case, the extent of rights does not totally issue from the wording of the title, but to determine what patrimonial and non-patrimonial rights certain shares confer, the constitutive documents must be observed.

For these reasons it is considered that the shares are not perfect commercial securities, which may be characterized as corporate securities (corporate) or ventures¹⁰².

¹⁰¹ Mircea N. Costin, *Titlul societar ca varietate a titlului de valoare, cu specială privire la acțiuni*, R.D.C. nr. 3/1998, page 40 și urm.; Stanciu Cârpenaru, quoted work, page 309; Elena Cârcei, *Societățile comerciale pe acțiuni*, Ed. All Beck, 1999, page 171.

¹⁰² I.L. Georgescu, *Drept comercial roman*, vol. II, Ed. All Beck, Bucharest, 2002, page 487.

The legal nature of shares, bearer or registered, is of incorporeal movable assets.¹⁰³

This nature reflects that the shares born a holder's personal right against the company and not a property right corresponding to a part of the company's assets.¹⁰⁴ For example in the case of joint stock companies, the withdrawing shareholder has the right to obtain the shares he possesses, at the average value determined by an expert (Article 134 paragraph 1).¹⁰⁵

This personal right is not to be understood as a simple personal right as the quality of shareholder confers, according to the constitutive act and the laws in this area, a number of patrimonial and non-patrimonial rights.

Shares' content

The shares will include:

- a) denomination and life of the company;
- b) date of the constitutive act, number in the trade register under which the company is incorporated and number of the Official Gazette of Romania, Part IV issue in which the publication was made;
- c) the registered capital, number of shares and their running number, nominal value of the shares and the deposits made;
- d) advantages granted to the founders.

For registered shares the name, first name and shareholder's place of residence when it is a natural person, denomination, the registered office and incorporation number of the shareholder when it is a legal person shall be indicated too, if applicable.

The shares must bear the signatures of 2 managers in case there are several ones or, of the sole manager, a condition which is designed to certify the authenticity of that share; the data being mention by share may be proved by other evidence.

Mentioning such data aims to warn third parties who would like to purchase of shareholders with respect to patrimonial and non-patrimonial elements of the company, thus providing sufficient data for wider information or contrarily these data are binding the one who has assigned such shares cannot claim their recognition. Obviously this is where the actual data entered correspond to the real one in the trade register. The law does not provide for a penalty if the shares have not the mandatory data entered. In this doctrine it was considered that this lack

¹⁰³ It is true that in the doctrine it was considered necessary to distinguish between bearer shares that would be movable assets and registered shares as property rights.

¹⁰⁴ H.C.C.J., dec. 208 of 24 January. 2006, R.D.C. n. 4/2006, page 140-142.

¹⁰⁵ The legislator made in terms of exclusion, an express application of this principle; according to art. 224 paragraph 2 the excluded shareholder is not entitled to a proportionate share of the patrimony, but only to an amount of money representing its value

would bring absolute nullity of the title.¹⁰⁶ We believe that this assessment is wrong, because once the share lacks its literalness character specific to other commercial securities (bills of exchange), character making that what is mentioned on the title is deemed to exist, and what it is not mentioned on the title – does not exist, we cannot consider applicable the nullity of these shares.

The exact scope of the rights is not fully apparent from the wording of the title, but to determine what patrimonial and non-patrimonial rights certain shares confer the constitutive documents must be observed.

If in the bill's case, this character leads to certainty of the personal right (data) in the shares' case, the lack of this literalness assumes that the data are only informative.

This character strictly informal seems fair, especially since the data entered (capital, number of shareholders, etc.) can change often, so it is almost impossible for the company to ensure full consistency between the data from the trade register and the data entered on the shares. This is simply for a joint-stock company with a small number of shareholders, but for companies with tens or hundreds of shareholders, which, moreover, are the rule, the data correlation is hard to hold.

However, it is visible in this period (in contrast to the interwar period) a decrease in the companies' management interest, but also those transferring, for the materialization of shares, which is not a requirement, a rigorous mechanism for the transfer of shares.

Shares' character

1. The shares are fractions of capital and have a certain nominal value.
2. The shares are equal fractions of capital
3. The shares are indivisible, ie one share does not bear the division subject between several owners.
4. The shares are negotiable and may be transferred by law depending on the type of company (Law 31/1990 and Law 297/2004).

Conditions for shares issuance

The issuance of shares subject to the following conditions:

¹⁰⁶ I.L. Georgescu, quoted work, page 484.

1. The shares may be issued only after the company's incorporation with the trade registry;
2. The shares cannot be issued for an amount lower than their nominal value;
3. The issue of shares to increase the capital is forbidden if the shares in the previous issue are not fully paid.
4. The shares cannot be issued for an amount lower than their nominal value. The shares not fully paid for are always registered shares

Categories of shares

1. According to the transfer way, Article 91 of Law 31/1990, the shares are registered and bearer shares.

The registered shares are characterized by the fact that they mention the name, surname, address or denomination, registered office of the shareholder. Contrarily, the bearer shares have unidentified shareholder.

The shares kind shall be determined by the constitutive act; otherwise they shall be bearer shares. The registered shares may be issued in a material form, on paper support or in a dematerialized form by registration in account.

In case the company did not issue and did not distribute shares in a material form, then, *ex officio* or at shareholders' request, it shall issue a shareholder's certificate containing the data prescribed by paragraphs (2) and (3) of Article 93 and, also, the number, the category and the nominal value of the shares belonging to the shareholder, the position at which he is registered in the shareholders' register and the running number of the shares in question, as the case may be.

The registered shares can be converted into bearer shares and conversely by the decision of the extraordinary general assembly of shareholders.

2. Depending on the rights granted, the shares are classified into ordinary shares and preference shares.

Ordinary shares confer to shareholders the rights laid down in Law no. 31/1990 or other special laws or the constitutive act.

Preference shares are those that confer to holders other rights than those of the holders of ordinary shares.

Thus, according to Article 95 of Law no. 31/1990, the company may issue preference shares with priority dividend without the right to vote. Holders of such shares are entitled to a to

a priority dividend out of the distributable profits before any other payments and have the rights recognized to shareholders of ordinary shares, except for the right to attend and to vote in the general meetings. The shares with priority dividends, without the right to vote, cannot exceed a quarter of the registered capital and shall have the same nominal value as ordinary shares have.

The representatives, the managers and the auditors of the company cannot detain shares with priority dividends without the right to vote.

Preference shares and ordinary shares can be converted from one category into the other by the decision of the extraordinary general assembly of the shareholders.

Shareholders of each category of shares shall meet in special meetings, according to the conditions prescribed by the company's constitutive act. Any holder of such shares may attend these special meetings.

Rights and obligations of shareholders¹⁰⁷

The right to attend to general meetings of shareholders all shareholders have, except those holding priority dividend preference shares without the right to vote.

Shareholders participate either directly or through representatives that must have the quality of shareholders¹⁰⁸ and the warrant must have special character. Shareholders who do not have legal capacity and legal entities may be represented by their legal representatives who, in turn, may give warrant to other shareholders.

The Law 31/1990 contains specific provisions prohibiting the participation in the decisions-making, ie only to effective deliberation, which means that they may be present at general meetings, but without getting involved. Thus:

- Company's managers and clerks cannot represent the shareholders, subject to the decision becoming null and void if, for lack of their votes, the required majority would not have been met
- The managers cannot vote on the basis of shares they possess, neither personally nor by proxy, the discharge from their administration duties or any other issue in which their person or administration would be involved

¹⁰⁷ Regarding the shareholders' rights see for a larger analysis Cristian Duțescu, Drepturile acționarilor, Ed. Lumina Lex, Bucharest, 2006

¹⁰⁸ From this provision it is possible to waive by mentioning the possibility of granting the mandate to third parties (Article 125 paragraph 4)

- The shareholder who, with regard to a certain operation, has personal, or as proxy of another person, opposite interest to that of the company, will have to refrain from taking part in the proceedings concerning that operation
- The right to vote is suspended for the shareholders not updated on the payments which are falling due (Article 101 paragraph 3)

The right to vote. According to Article 101 of Law no. 31/1990 each paid for share gives the right to a vote in the general meeting, providing the constitutive act does not prescribe otherwise. The constitutive act can limit the number of votes belonging to the shareholders who possess more than one share.

As noted above there are situations when certain shareholders lose their right to vote either for an operation or for a certain period of time.

If the shares are encumbered by a right of usufruct, the right to vote granted by these shares belongs to the usufructuary in ordinary general meetings and to the real owner in the extraordinary general meetings (Article 124 paragraph 1)

If the shares are mortgaged, the right to vote belongs to the shareholder.

The right to information means the right of shareholders to have access to all company information so that to know its activity, and on the other hand, accordingly, the managers and auditors of the company have an obligation to inform the shareholders about this activity.

Thus:

- the managers are required to provide shareholders with the company records and to issue, upon request, at their expense, extracted from them (Article 178 paragraph 1)
- the shareholders will be entitled to ask for copies of the balance sheet, which together with the report of the Managing Board and of the auditors shall be deposited at the company headquarters and branches at least 15 days before the general meeting (Article 184)
- the shareholders may ask the court to appoint an expert to examine certain operations of the company management and the report so prepared will be available to the company's auditors for review and to take appropriate measures.

Right to dividends. The share of the profits to be paid to each shareholder represents a dividend, payable in proportion with their participation quota in the registered and paid capital, providing the constitutive act does not provide otherwise.

Dividends can be distributed only out of real profits determined by law and paid by the deadline set by the general meeting of shareholders, but no later than eight months from the date of approval of the annual financial statement for the year then ended. In case of non-payment within this period, the company will pay a penalty for the period of delay at the statutory rate.

The right to a share from the liquidation of the company. According to Article 268 after the liquidation has been completed the official receivers draw up the final balance sheet indicating the quota allotted to each share, out of the company's assets distribution.

General Meeting of Shareholders

Introductory remarks. General meeting of shareholders is the governing and the decision-making body of the company through which all shareholders are involved in the company. The possibility for shareholders to participate in the company was expressly regulated by the legislature, so that the shareholder's right to attend the meeting was described as an intangible right. For these reasons, ie the protection of shareholders, but also for the vote to be freely expressed, the provisions of Law 31/1990¹⁰⁹ regarding the general meeting are imperative, expressly providing for the cases where shareholders may waive.

The general meeting was defined¹¹⁰ as the meeting of shareholders at a given date in a particular place, in order to take decisions in the course of the company.

Creation of the corporate will. As we mentioned before, the supreme governing and the decision-making body of a joint-stock company is the general meeting of shareholders at which shareholders on vote basis will express the corporate will. The free expression of the shareholders' will aims to create the corporate will. It is true, as we will show, in some cases, the shareholders may waive or add additional conditions.

Majority principle. Creating the corporate will is the result of applying the majority principle in the general meeting, so the corporate will in a particular time, is given by

¹⁰⁹ To avoid unnecessary repetition, reference to an article without mentioning the law should be understood as part of Law. 31/990 on trading companies. Every time we have quoted or referred to the articles of other laws, the law was indicated every time.

¹¹⁰ I.N. Fiñtescu, Curs de drept comercial, vol. I, Ed. Al. Th. Doicescu, Bucharest, 1929, page 256.

shareholders holding a majority of the capital at that time; so that the will of the majority is the will of the company, even if there are shareholders who disagree with the general meeting, the latter being able to appeal the decisions contrary to law or the constitutive acts.

The need if the majority principle issues on the one hand from the state of passivity of shareholders who do not participate in general meetings and, on the other hand taking unanimous decisions is not possible either for the reason previously stated, either for contrary interests that may exist at some point between shareholders.

We can retain only that the corporate will is just the sum of individual wills and that is another will issued from the majority principle, that “so fertile in results, is the result of necessity.”¹¹¹

Capital majority. The decisions are taken by majority of votes held by shareholders present or represented (Article 115 paragraph 2), but majority is not made of persons, but it is a majority of the capital.

Presumptions. The application of the majority principle has determined the shaping of some presumptions (some authors called them principles¹¹²), respectively:

- the general meeting has absolute power, the tasks of ordinary and extraordinary general meetings, as established by Article 111 and 113, on all aspects of the company’s activity or changes of the constitutive act; the general meeting’s power is limited by law and by the constitutive act;

- the general meeting will is the corporate will;

- the general meeting’s decisions are binding even for the shareholders who did not attend the meeting or voted against (Article 132 paragraph 1); it is an application of the principle of *pacta sunt servanda* (agreements must be respected) mentioned in Article 969 paragraph 1 of the Civil Code “agreements legally made have the power of law between the contracting parties.”

Abuse of rights. The rule of the majority principle is obscured by the institution of abuse of rights.

The abuse of rights is nothing but the consequence of breaching the principle of civil law of individual interests merged with collective interests. As we mentioned before, the principle of civil law is a matter of express consecration for the trading companies, Article 136 providing that shareholders must exercise their rights in good faith, respecting the rights and interests of the company and other shareholders.

¹¹¹ I.L. Georgescu, quoted work, page 293

¹¹² Cristian Duțescu, quoted work, page 35-36

As noted in the doctrine¹¹³ to determine the exact boundary of the attributes contained in the subjective right of a person and the point where the subjective right of other person starts has given rise to many difficulties of interpretation, for which settlement “the expression abuse of rights was been introduced in legal language, which cannot have another meaning than that to overcome the subjective boundary”¹¹⁴

Therefore, in a company there will be abuse of rights whenever the exercise of subjective rights by a shareholder is inconsistent with social interest or violates another subjective right of a shareholder.

The adage formulated by Ulpian *neminem laedit qui sono iure utitur* (I am not injured by anyone who uses his right)¹¹⁵ is still valid in the actual law in the sense that if subjective right is exercised in accordance with certain principles established by law and morality, then this exercise does not infringe on anyone. As noted, it is about the exercise of subjective right and not the subjective right itself that cannot be expected to cause harm.

The subjective right must be exercised according to its economic and social purpose (article 3 of Decree 31/1954 concerning natural and legal persons). Also, the exercise of subjective right must be in accordance with the law and morality (Article 5 of the Civil Code) and in good-faith (Article 970 paragraph 1 of the Civil Code.). The principle of exercise in good faith the subjective rights arises from the logical interpretation of the Article 57 of the Constitution: “Romanian citizens, foreign citizens and stateless persons shall exercise their constitutional rights and freedoms in good faith, without infringing the rights and liberties of others”. Therewith, the subjective right must be exercised within its limits.

The adage has no value unless all these principles of exercise of civil subjective rights are respected. Any violation constitutes an abuse of rights that harms others. The abuse of rights is punishable either in a passive way by refusing the participation of the state’s coercive force, either in an active way by promoting against the holder of the abusing right a liability claim by the person injured by the abuse of rights.

The abuse of rights brings to the fore the malicious use of the law¹¹⁶ (*malitiis non est indulgentum*) and occurs when the holder of the right acts given more, the “offenses and damages” it produces, instead of the advantages that his right can offer.¹¹⁷

¹¹³ Ion Dogaru, Sevastian Cercel, Drept civil. Partea generală, Ed. C.H. Beck, Bucharest, 2007, page 19.

¹¹⁴ M. Cantacuzino, Elementele dreptului civil, 1921, page 145

¹¹⁵ Lucian Săuleanu, Sebastian Rădulețu, Dicționar de expresii juridice latine, C.H. Beck, Bucharest, 2007, page 210-211

¹¹⁶ Ion Dogaru, Sevastian Cercel, quoted work, page 20.

¹¹⁷ P. Roubier, Droits subjectifs et situation juridiques, Dalloz, Paris, 2005, page 335

Abuse of majority and abuse of minority. The abuse of rights institution has outlined in the matter of company law the principle of investors protection¹¹⁸ aimed at protecting minority shareholders' rights through legal recognition of certain special rights.

Obviously the abuse of rights institution has certain specificity in this area, resulting from the position of people involved. If in civil law the limit to be exercised certain subjective rights is easily discernible and "the person exercising his rights diligently, without committing recklessly or negligently shall not be liable for damages"¹¹⁹, in the company law the exercise of rights by a shareholder must cohabit with the legitimate rights of the other shareholders, regardless of the position of the first.

The dominant position of shareholders holding a majority, creates difficulties for the interpretation of an abuse of rights; For example, we can consider as unfair the decision of the general meeting by which dividends has not been settled and distributed, although there was a profit, deciding its reinvestment; we could argue that such a decision is not abusive, because one cannot deny the use of the profit in the interests of the company; the same, it can be argued that getting dividends was one of the shareholders' rights, so that if in the course of two or three consecutive years the dividends are not distributed, although there is profit, we consider such a decision as abusive.

On the other hand we should not consider that the simple dominance is able to justify an abuse of rights. We must not forget that it is natural that in a company with more shareholders to be a constant struggle to better protect their interests. Also from this perspective some shareholders will tend to hold the majority, even by minimizing the rights of others. But just because companies will need also minority shareholders, the principle of investors' protection has been outlined. By legislative measures the balance of the exercise of "majority" and "minority" rights and the access of minority shareholders to the economic life of the company (corporate governance) is intended.

In this context the concepts of abuse of majority¹²⁰ and abuse of minority have emerged. Without developing these two concepts¹²¹, however, regarding the subject of our study we need to make some remarks. Even of the Law 31/1990 provides a number of opportunities on the protection of minority shareholders, enclosing all of them in the category of legal measures of protection, there is also the creation by the shareholders in the conventional way of additional protection measures by inserting some clauses in the constitutive acts or even by separate

¹¹⁸ Cristian Duțescu, quoted work, page 35 and 37

¹¹⁹ C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil*, vol. II, page 469

¹²⁰ For more details see Radu Nicolae Catană, *Abuzul de majoritate*, *Revista de Drept Comercial*, n. 6/2002, page 93 104

¹²¹ See in this sense Paul I. Demetrescu, *Protecțiunea acționarului și minorităților în societățile pe acțiuni*, *Revista de Drept Comercial*, 1936, page 161-175

agreements (extra clauses), the big difference between the two categories being observed on the realm of enforcement against shareholders and third parties.

These clauses regardless of the form and purpose are based on the principle of freedom of contract, but are inextricably linked to the right to vote. In this respect there is a problem because the operation of such protection clauses is related to voting. By way of example, some protection clauses: agreement clause, early withdrawal clause, drag along clause can only work if those having initially set them in the default conditions decide the production of effects, so that it occurs in some cases, on the basis of a vote in the GM. Still, Article 128 provides that the right to vote should not be assigned, and paragraph 2 indicates that any agreement concerning the exercising in a certain way of the right to vote is void.

In this context we note that although the principle of freedom of contract allows the conclusion of protection clauses or agreements and though their range is restricted to the exercise of voting, so the drafting of such clauses must be rigorous and the interpretation of a GM decision should not fall under the penalty of Article 128 paragraph 2, imposing the interpretation from case to case. The interpretation is natural once we see that we are within the scope of interaction of the principle of freedom of agreements with two principles specific to company law provided in Article 128: the principle of freedom to vote and the essential character of the right to vote cannot be waived.

Categories of meetings

Enumeration. There are three types of general meetings: ordinary, extraordinary and constitutive.

What separates the ordinary meetings from the extraordinary meetings is "the deliberation subject or matter and not the moment in which the meeting is convened"¹²², namely in the ordinary meetings issues of current activities of the company are decided, while in the extraordinary meetings important issues involving the modification of the constitutive acts are decided. From this differentiation, the ordinary meeting was defined¹²³ as being the meeting having as its subject the normal management of the company and the extraordinary meeting having as its subject exceptional, unexpected matters, like the modification of the constitutive act.

Duties. Besides the debate of other issues on the agenda the general meeting is obliged:

¹²² I.L. Georgescu, quoted work, vol. II, page 309.

¹²³ Idem

- a) to discuss upon, approve or amend the balance sheet, after listening to the managers and auditors' report and to determine the dividend;
- b¹) in the case of companies whose financial statements are audited, to appoint and establish the minimum duration of the audit contract and to revoke the auditor
- c) to establish the proper remuneration for the managers and auditors for the current financial year, unless it was settled by the constitutive act;
- d) to decide on the Board of Directors' management, Managing Board respectively;
- e) to determine the income and expenditure budget and the activity program for the next financial year as the case may be;
- f) to decide upon the mortgaging, renting or dissolving of one or several of the companies' units.

Quorum. According to Article 112 of Law no. 31/1990, to ensure the validity of the proceedings of an ordinary meeting it is necessary to have the shareholders' attending it representing at least one quarter of the total number of voting rights and the decisions to be taken by shareholders holding a majority of the votes in case the constitutive act or the law do not stipulate a larger majority.

If the meeting cannot operate due to unfulfilment of the conditions of the first convening the meeting gathered after a second convening may proceed upon the issues on the first meeting's agenda, whatever the registered capital part represented by the attending shareholders is, with a majority.

Extraordinary meeting. The extraordinary general meeting gathers whenever a decision is necessary to be made for:

- a) changing the legal form of the company;
- b) changing the location of the registered office of the company;
- c) changing the object of activity of the company;
- d) setting up or closing of secondary offices: branches, agencies, representative offices or other such unincorporated units, if the constitutive act does not provides otherwise;
- e) extending the company's life;
- f) increase of the registered capital;
- g) writing down of the registered capital or its completion by means of the issue of new shares;
- h) merging with other companies or its partition;
- i) early dissolution of the company;
- j) ¹ conversion of registered shares into bearer shares or bearer shares into registered shares;
- k) conversion of shares from one class to another;
- l) conversion of shares from one category into another;
- m) issue of bonds;
- n) any other modification of the constitutive act or any other decision for which the approval of an extraordinary general meeting is requested.

Quorum. According to Article 115 to ensure the validity of the proceedings of the general extraordinary meeting, in case the constitutive act do not stipulate otherwise, to first

convening, is necessary to have the shareholders' attending it representing at least one quarter of the total number of voting rights and at the next convening the presence of shareholders representing at least one fifth of the total voting rights.

The decisions are taken by majority of votes held by the shareholders present or represented.

The decisions to amend the objects of the company, to reduce or increase the registered capital, to change the legal form, to merge, to divide or to dissolve the company shall be taken by a majority of at least two-thirds of the voting rights held by shareholders present or represented.

The constitutive act may stipulate other requirements for quorum and majority.

Special meetings

According to Article 116 the decision of a general meeting to amend the rights or obligations regarding a certain category of shares does not go into effect unless it is approved by the special meeting of the shareholders of shares belonging to that category.

The provisions of Section II "On general meetings" in Chapter IV regarding the convening, the quorum and the unfolding of a general meeting of the shareholders are applicable to special meetings too.

The decisions initiated by the special meetings are subject to approval of the relevant general meetings.

Convening the general meetings

Convening by the managers. The general meeting shall be convened by the managers any time it appears to be necessary (Article 117 paragraph 1) according to the provisions of the constitutive act. As this is the rule, in the doctrine¹²⁴ the other convening opportunities were considered "abnormal convening" (by the court, by auditors etc.) having an exceptional character and being provided by the legislature to protect the minority shareholders.

In the Board of Directors, the convening decision may be taken independently by a manager, but should be taken within the Board by a majority of votes. A single manager or Board president cannot convene a general meeting of shareholders.

¹²⁴ I.L. Georgescu, quoted work, vol. II, page 315.

Summons by auditors. Have the right to summon the meeting the auditors under Article 164 paragraphs 1 and 2. The auditors cannot summon a general meeting where managers do not summon such meeting, the provisions of Article 163 paragraph 4¹²⁵ is repealed by Law no. 441/2006.

According to Article 164 paragraph 1 and 2, where shareholders representing, individually or jointly, at least 5% of the registered capital (or a lower rate if it is provided for in the constitutive act) require to auditors certain matters, and the latter find that the complaint is justified and urgent will convene a general meeting to present their comments. If they don't summon the meeting, the auditors must question the claim at the first meeting, which will take a decision on the claimed. Thus, the auditors may summon the general meeting only after a complaint from shareholders holding 5% of the registered capital, the complaint to be justified and to involve the urgent convening. The general meeting summoned by the auditors in these circumstances is ordinary.

Summons by the court. Law no. 31/1990 has provided, in order to alienate possible abuses of directors, the possibility of convening the general meeting by the court.¹²⁶

There are two cases in which the court may authorize the convocation.

The first case is provided by Article 137 paragraph 3 and regards the convening of an ordinary general meeting in case of vacancy of one or more managers below the legal minimum; if the remaining managers do not fulfil their obligation to convene a general meeting, any interested party may apply to the court to designate the person responsible for convening the ordinary general meeting of shareholders to make the necessary appointments. A similar provision is for members of the Supervisory Board (Article 153⁷) as well, when, if the number of members falls below the legal minimum, the Managing Board shall convene a general meeting for filling the vacancies; if the Managing Board does not convene the meeting, any interested party may appeal to designate the person responsible for convening the ordinary general meeting of shareholders, to make the necessary appointments.

The second case is provided by Article 119 that the managers are obliged to immediately convene a general meeting upon the request of shareholders representing, individually or jointly, at least 5% of the registered capital or a lower quota, in case the constitutive act stipulates it, and in case the request contains dispositions that are part of the meeting prerogatives.

¹²⁵ The auditors are also bound:

....

b) to convene the ordinary or extraordinary meeting when it was not convened by the managers".

¹²⁶ M. Pascu, L.N. Pârvu, Convocarea adunării generale a asociaților de către instanță, RDC nr. 4/2005, page 62-69.

The general meeting will take place not later than 30 days since the request has been forwarded.

If the managers do not convene the meeting, the court at company's registered office following the quotation of the Board of Directors, namely the Managing Board may authorize the general meeting by the shareholders who made the request. By the same decision, the court approves the agenda, establishes the reference date referred to in Article 123 paragraph 2, the date of the general meeting and among the shareholders, the person who will preside.

The costs of convening the general meeting and the court charges, if the court approves the request shall be borne by the company. However, the general meeting may decide on the basis of Article 155 paragraph 1 that the amounts to which the company was obliged to pay to be supported by the managers under Article 73 paragraph 1 point e) of Law 31/1990. The managers who agreed with the request of convening by the agreement recorded in the register of Board of Directors will not be forced to pay such amounts. (Article 144² paragraph 5).

Summons term. The gathering term can not by any means be shorter than 15 days as from the publication of the meeting convening in the Official Gazette of Romania, Part IV(Article 117¹ paragraph 2). This term is of public policy, shareholders not being able to provide for a period of less than 30 days.

Arrangements for convening. Rule. The convening shall be published in the Official Gazette of Romania, Part IV, and in one widely circulated newspaper in the locality of the company's registered office or in the nearest locality.¹²⁷

The publication is a cumulative condition, so it is mandatory to publish the convening in the Official Gazette and in a newspaper.¹²⁸

Arrangements for summons. Exceptions.

If all the shares of the company are registered shares, then the convening may be done by registered letter or, if it is allowed by the constitutive act, by simple letter, sent with at least 30 days before the day fixed for the meeting to the shareholder's address as it is registered in the

¹²⁷ C.S.J. commercial section, decision nr. 2205/1997, în Buletinul Jurisprudenței, Culegere de decizii pe anul 1997, Ed. Argessis, 1998, page 405

¹²⁸ C.S.J. commercial section, decision nr. 555/1995, în Buletinul Jurisprudenței, Culegere de decizii pe anul 1995, Ed. Proema, 1996, page 265.

register of shareholders. The change of the address cannot be opposed as an excuse to the company as long as the shareholder did not inform the company in writing about it.

This provision is intended to eliminate the difficulties created by the publication in the Official Gazette and in a local newspaper, so that when shares are registered and there are a small number of shareholders, it is preferable to call it this way. Obviously, these two ways, by registered mail or letter sent electronically shall not be used if they are forbidden by the articles of association or by legal provisions.

The shareholders representing the entire registered capital may, if none of them object, to hold a general meeting and take any decision of its competence, without the formalities required for its summons.

Content of summons. The summons announcement will list the place and the date when the meeting is to take place¹²⁹, as well as the agenda, explicitly indicating all the problems that will constitute the subject of the meeting's proceedings.

Place means the locality and not the location. The locality where the meeting is convened must be that of the headquarters of the company, the decision made after the convening in another locality being absolutely void.¹³⁰ A specific location for conducting the meeting may be expressly provided in the convening announcement by indicating the correct address, but without thereby preventing the participation of some shareholders; for example, it will be considered legally convened to conduct a meeting at the residence of an administrator in the absence of adequate space at the company and without thereby to hinder or impede access to the meeting. If the convenor does not provide a specific location, it is presumed that the meeting will take place at the company, ie the address listed in the trade register. The company's headquarters means the registered office and not the legal seat.

The date of the meeting requires express mention of the date and time when the meeting begins.

Agenda. It is mandatory to enter on the convening announcement the agenda expressly mention all the issues, so that shareholders can prepare in order to be informed for voting. Even

¹²⁹ C.S.J., commercial section, decision nr. 798/1996, in Buletinul Jurisprudenței, Culegere de decizii pe anul 1996, Ed. Proema, 1997, page 232.

¹³⁰ Exemption if the decision is taken in another locality by all stakeholders; it is not necessary that all shareholders have agreed to the pending agenda, but important is that no shareholder has not disputed that the assembly to be held in another locality.

the text expressly states to mention all the issues, so it is not sufficient simply an enumeration but, in the circumstances, it requires a reasonable explanation of the issues that will be debated.

If the debate has shown the need of voting on other issues, the meeting may include on the agenda the issue and may vote. Likewise, to the extent that shareholders consider that it is appropriate to debate a particular point on the agenda, the meeting may vote its elimination from the agenda.

As an exception, the general meeting may vote without being mentioned in the convening announcement the liability issues of governing bodies; thus Article 155, paragraph 3 provides that when the general meeting decides on the annual financial statement, it may take a decision on the liability of managers or the directors, namely members of the Managing Board and Supervisory Board, even if this issue is not on the agenda.

If the agenda includes the appointment of managers or Supervisory Board members, the notice shall specify the list containing information about the name, the address and the professional qualifications of the persons proposed for the manager position.

When the agenda includes proposals to amend the constitutive act, the notice shall include the full text of the proposals.

Introduction of new elements on the agenda. Have the right to require the introduction of new elements on the agenda one or more shareholders representing individually or jointly, at least 5% of the registered capital.

The requests shall be submitted to the Board of Directors, namely to the Managing Board, within 15 days as from the publication of the convening, for publication and disclosure of the other shareholders.

The shareholders of closed type companies can make in written proposals to the managers to complete the agenda, unless they intend to amend the constitutive act, at least five days before the meeting, the proposals to be included on the agenda living following the approval of the general meeting.

A second meeting. While making the announcement of the convening of the first general meeting, the day and the hour of the second meeting could be fixed, in case the first meeting could not take place.

The second meeting cannot take place on the very day established for the first meeting.

If the day for the second meeting is not indicated in the convening announcement published for the first meeting, the term stipulated under Article 117 could be reduced to 8 days.

Place of meetings. When the constitutive act does not provide otherwise, the general meeting will take place at the company and the location will be indicated on the notice as mentioned above concerning the convening contents.

Conduct of the meeting

Exercise of the right to vote. The shareholders exercise their right to vote at General Meetings in proportion to the number of shares they own in accordance with their own convictions.

A joint-stock company shall not be incorporated if the constitutive act restricts the right to vote only to shareholders who have a minimum of five shares, because if they would allow such an exemption, other shareholders should be excluded from any management control of the company.¹³¹

Agreements on voting

According to Article 128 the right to vote cannot be assigned, otherwise, any agreement concerning the exercising in a certain way of the right to vote is void. The voting rights may be assigned only with the shares. We note that the violation of this provision implies the nullity of the agreement but not the nullity of the decision of the General Meeting of shareholders. However, ad hoc arrangements are permitted, ie agreements made at the meeting, without a previous agreement to vote in a certain way.

There are certain limitations on the right to vote:

- the exercising of the right to vote is suspended for the shareholders not updated on the payments which are falling due under Article 101 paragraph 3

¹³¹ Court of Appeal Bucharest, , section IV, decision of 30 January 1921, in Practică judiciară în materie comercială, vol. II, Ed. Lumina, Bucharest, 1991, page 128

- the constitutive act can limit the number of votes belonging to the shareholders who possess more than one share under Article 101 paragraph 2 to a smaller number than the one resulting from the percentage held by the entire share capital.
- the shareholder who, in a certain operation, has, either personally or as representative of another person, an interest contrary to that of the company, he should abstain from deliberations on that operation; who violates this provision is liable to damages to the company if, without his vote, the majority would not be required.

The exercise of voting rights is made by the shareholder or his representative during the meeting, though there are differences between companies that have issued registered shares or bearer shares.

Thus, according to Article 122 in the case of closed companies with registered shares, by the constitutive act, it may agree to hold the General Meetings by mail, so the idea of debate is excluded. Into this category fall only the means of correspondence involving a gap between the shareholder sender and the debates of the meeting. It is not covered by this article, the exercise the right of one or more shareholders through technical means that enable direct communication, allow direct communication between several shareholders or allow those who are not in that location to observe in real time the conduct of the meeting and to participate directly to it (eg, video communication).

In the general meetings, the shareholders possessing bearer shares have the right to vote only if they deposited them in the places indicated by the constitutive act or by the convening notice, at least five days prior to the meeting. The auditors will ascertain, through a minute, the deposit of shares in due time. The shares will remain deposited until after the general meeting, but it will not be possible to keep them more than 10 days from the date of the meeting.

If the shares are encumbered by a right of usufruct, the right to vote granted by these shares belongs to the beneficial owner in ordinary general meetings and to the real owner in the extraordinary general meetings.

If the shares are mortgaged, the right to vote belongs to the shareholder.

The decisions of the general meetings are made following a vote by show of hands. Irrespective of the provisions of the constitutive act the secret vote is compulsory for the election of the Managing Board members and auditors, for their dismissal and for decisions making concerning the responsibility of the managers.

Rules of the meeting. On the day and hour indicated in the convening, the meeting will be opened by the president of the Managing Board or by his substitute. The General Meeting of shareholders may elect a president among the managers.

As we said before, the meeting takes place at the location specified in the convening notice or, in default, to that specified in the trade register. Whatever the reasons, for example the abusive, violent attitude of shareholders, does not justify the conducting of the meeting to another location.

The general meeting will elect, from among the shareholders present, one up to three secretaries who will verify the shareholders attendance list¹³², indicating the capital represented by each one, the minutes drawn up by the auditors to ascertain the numbers of shares deposited and the fulfilment of all formalities imposed by the law and the constitutive act in order for a general meeting to proceed. If after preparing the attendance list and voting some points on the agenda, other shareholders shall present, it is necessary to mention their attendance and given that they can vote the points on the agenda that have remained subject to debate; they cannot express their vote on the matters already voted, except that, for example, given the importance of those shareholders, the meeting decides that the matter to be subjected again to a vote; so it is not decided that only those to express their vote, but the meeting decided to exercise a new vote by all shareholders present.

The General Meeting may decide that operations for checking the attendance list and other prior formalities to be supervised or performed by a public notary at the expense of the company. The president may appoint, among the company's clerks, one or more technical secretaries to take part in the implementation of the operations described above.

After finding the fulfilment of legal requirements and the provisions of the constitutive act in order to conduct the General Meeting, the agenda is open.

Minutes of General Meeting

One of the secretaries shall draw up the minutes of the general meeting.

The minutes signed by the president and the secretary will ascertain the fulfilment of formalities for the convening of the general meeting, date and place, attending shareholders, number of shares, the summary of the proceedings, the decisions made and, upon shareholders' request, their statements made during the meeting.

The document referring to the meeting convening as well as shareholders' attendance lists will be attached to the minutes.

The minutes will be registered into the register of the general meetings.

¹³² In the absence of mandatory specifications on the attendance and way of voting, the deliberations of the General Assembly are void (C.S.J., dec. n. 157/1996 in R.D.C. 9/1996, page 155)

Criminal penalties regarding GM's decisions. According to Article 274 It is to be sentenced to jail in the range of one month up to one year or to a fine the manager, the director, the executive director or the legal representative of the company, who

1. carries out the decisions of the general assembly, regarding the changing of the company's form, its merging or its division or the writing down of its registered capital prior to expiration of the time limits stipulated by law;

2. carries out the decisions of the general assembly regarding the writing down of the registered capital without first forcing the shareholders to effect payments due or without a decision of the general assembly which exempts them from the subsequent payments.

It is to be sentenced the person who has accepted or retained the charge of auditor contrary to the provisions of Article 161 paragraph 2 or the person who accepted the charge of expert in violation of the provisions of Article 39.

Decision of the General Meeting of Shareholders

Principle. The decisions taken by the General Meeting of Shareholders within the law or the constitutive act are mandatory even for the shareholders who did not attend the meeting or voted against.

This principle is based on the manifestation of the will of the shareholders in the General Meeting as a result of voting by those present. The corporate will is the result of individual wills expressed in the General Meeting of shareholders by the majority of votes, but differs from the latter, being a simple arithmetic accumulation of individual wills.¹³³

Creating the corporate will is the result of applying the majority principle in the general meeting, so the corporate will in a particular time, is given by shareholders holding a majority of the capital at that time; so that the will of the majority is the will of the company, even if there are shareholders who disagree with the general meeting, the latter being able to appeal the decisions contrary to law or the constitutive acts..

Claims for the annulment and nullity of the decisions of the general meeting of shareholders. Suspension

¹³³ Regarding this topic, see Cristian Gheorghe, *Societățile comerciale. Voința asociaților și voința socială*, Ed. All Beck, Bucharest, 2003, page 70-76

Object of the action for the annulment. The decisions of general meeting contrary to law or the constitutive act may be suit in court by any of the shareholders who attended the General Meeting or voted against and asked to insert it in the minutes of the meeting. Therefore, only the decisions of General Meetings of trading companies can be the subject of an action.

There may not be such actions the decisions taken by companies de facto or decisions taken by associations that have entered into a joint venture agreement because they do not have legal personality, the Law 31/1990 applying only to companies established in one of the forms mentioned in Article 2.

The promotion of an action for the annulment does not seek the capitalization of the applicant's claim that may be required by the term set by Article 132 paragraph 2, and not in the general term of prescription.¹³⁴ If the reason for nullity is public the right of action is imprescriptible.

Active party in a law suit. To establish the persons being party in a law suit it is necessary to make the distinction between actions for annulment and action of declaration of nullity.

In the case of the action for annulment party in a law suit are only the shareholders who did not take part in the General Meeting or who were present and voted against and asked to insert it in the minutes of the meeting. The evidence in that case is made by the minutes of the meeting, and if refused or any mention of refusal was omitted any evidence is admissible.

If the vote was secret, the shareholder voting against may require the mention of the refusal in the minutes of the meeting, even if so the secrecy of voting is violated.¹³⁵ We believe that this statement, not to influence other shareholders is made after expressing all votes and announcing the final result of the vote. Both statements are justified if we consider that a secret vote is mandatory in those situations, the vote is given or not for a person or his activity (appointment or dismissal of managers and auditors, responsibility of managers), and the purpose is meant to protect the shareholder voting in a certain way, eliminating the possible influences on him.

As the text does not create another distinction on the exercise of voting, it means that the shareholder, who was present and abstained from voting, will not be able to formulate the action for annulment.¹³⁶

¹³⁴ C.S.J. commercial section, decision 249/1997, in Buletinul Jurisprudenței, Culegere de decizii pe anul 1997, Ed. Argessis, 1998, page 406

¹³⁵ S. Cărpenaru, C. Predoi, S. David, Gh. Piperea, quated work, page 290

¹³⁶ Cristian Duțescu, quated work, page 249.

In terms of absolute nullity action, Article 132 paragraph 3 states that the action can be formulated by any interested person.

Regarding the quality of the managers as party in a law suit, Article 132 paragraph 4 provides imperatively that they cannot attack the decision of the general meeting regarding their dismissal.

Control of legality versus control of opportunity. It is considered that by promoting an action for annulment a control of legality is conducted, but not control of enforceability, since in the latter case the court would interfere with the company instead of its bodies, which is unacceptable¹³⁷, although it is recognized as relative nullity reason a decision taken against the social interest, by diverting the social function of the meeting's vote.¹³⁸ However, the analysis by the court of such reason involves an analysis of the company's business, its economic conditions and influence of the decision attacked, i.e. its opportunity. As will be seen from the arguments we present below, we believe that we have to overcome the theory according to which a judge is exercising only a control of legality, the necessity of a control of opportunity being evidenced by the findings of the commercial activity.

Limited liability company

Definition. The Article 3 of Law 31/1990 provides that the limited liability company is the company whose social obligations are secured by the social patrimony and the shareholders are liable only within the limit of the subscribed capital.

The limited liability company may be defined as a company incorporated based on full trust by one or more persons that set up certain assets to conduct a business in order to share profits and respond to social obligations to the extent of their contribution.¹³⁹ The sole shareholder can be a natural or a legal person. The limited liability company cannot have more than 50 shareholders.¹⁴⁰

¹³⁷ Sorin David, quated work, page 398

¹³⁸ Sorin David, quated work, page 401

¹³⁹ Stanciu D. Cărpenu, *Drept comercial român*, Ed. a VII-a, revised and enlarged, Universul Juridic, Bucharest, 2007, page 379

¹⁴⁰ In this sense, see Sorana Popa, *Societățile comerciale*, Editura Universul Juridic, Bucharest, 2007, page 177

Establishment of a limited liability company. The limited liability company is established according to the general rules (Article 7, 11, 36-41 of the Law 31/1990).

The foundation of society is represented by the articles of association.

The company contract and the constitutive act of the LLC are concluded in written form prescribed by law. They must contain the elements required by Article 7 of Law 31/1990.

The registered capital of a limited liability company cannot be less than 200 lei and is divided into equal shares which cannot be less than 10 lei. The shares are distributed to each partner in proportion to its participation in the formation of the social capital.

The concept of patrimony is not to be confused with the notion of social capital.

The patrimony is a universality of law, established by law, which includes in its accounting expression the social active (i.e. assets that entered in the company upon the setting up - contributions, and assets that are acquired during the commercial activity) and social liabilities (comprising trade and civil obligations of the company).

The main differences between capital and patrimony are:

- the capital is a value expression of all contributions made by the shareholders; the patrimony is a legal universality established by law;
- the capital is fixed throughout the duration of the company, except as specified above; the patrimony has a wider or narrower coverage depending on the efficiency of the trading activity.

Organization of the company. Members' meeting in a limited liability company.

Common legal regime.¹⁴¹ Observing Article 196 according to which the provisions for joint for a joint-stock company in terms of right to appeal the decisions of the general meeting, apply to the limited liability companies as well, the term of 15 days specified in Article 132 paragraph 2 is to run from the date on which the shareholder became aware of the general meeting that he appealed against. So the bridge between the two types of meetings exists only in terms of appeal of decisions of General Meetings, the legislature providing special provision regarding the convening, the duties, the majority, adapted to the form of the company.

Definition. The General Meeting of shareholders is the supreme decision-making body of the limited liability company. There are not two types of meetings as in the case of joint stock companies, two types of meetings, but one General Meeting.

¹⁴¹ Lucian Săuleanu, *Societățile comerciale. Adunările generale ale acționarilor*, Ed. Hamangiu, Bucharest, 2008, page 325-329.

Duties. According to Article 194 the General Meeting of shareholders has the following main duties:

- a) to approve the balance sheet and to establish the allotment of the net profit;
- b) to appoint the managers and the auditors, to dismiss them and to relieve them of their activity;
- c) to decide upon the suing of the managers and auditors for damages caused to the company, also designating the person in charge of taking action against them;
- d) to modify the constitutive act.

Summons. The summons of shareholders meeting is made by the managers at the registered office at least once a year or whenever necessary.

However, an shareholder or a number of shareholders, representing at least one quarter of the registered capital may request the summons of the General Meeting, indicating the purpose of the convocation.

The summons of the meeting will be made under the form stipulated by the articles of association and, in the absence of any special provision, by registered letter, at least ten days prior to the established date, mentioning its agenda.

Exercise of the right to vote. The shareholders' decisions are taken in the General Meetings.

Each social participating share gives the right to one vote, without limiting the number of votes.

Exercising the right to vote shall be personally or by proxy.

Exercising the right to vote is suspended for an shareholder in the debates of the meeting regarding his contribution in kind or legal documents concluded between him and the company.

Vote by mail. The constitutive act may provide that voting can be done by mail (Article 191 paragraph 2) without making other statements about the concrete way to conduct the meeting.

It was considered¹⁴² that adopting the procedure of voting by correspondence excludes the procedure of convening the shareholders¹⁴³, the decision to conduct this type of meeting or belonging to shareholders or managers holding $\frac{1}{4}$ of registered capital.

¹⁴² C. Predoiu, quated work, p. 601.

We do not believe that the Article 191 paragraph 2 implies the situation where the meeting as a whole to be conducted by mail, procedure rather cumbersome as noted also by the quoted author. Interpreting the statutory provision in a flexible sense and consistently with the commercial reality, we believe that an shareholder can cast his vote by mail, to the extent that the constitutive act provides it, meaning that he will cast his vote under the rules analyzed for general meetings of shareholders. It is true that the text does not exclude that all the shareholders to vote by mail, but in any case we cannot sustain that convening procedure to be excluded.

Because:

- a) Article 191 paragraph 2 refers to voting by mail, and not to conduct the meeting in its entirety; fully conduct of the meeting is not possible once that, as the quoted author retains, it would involve a tedious, never-ending and difficult to control procedure.
- b) the convening is designed to ensure the participation of all, even directly, which is why it must be given the possibility to shareholders wishing to directly express their views
- c) the convening is taking place at the registered office (Article 195 paragraph 1)

Majority. The General Meeting decides by absolute majority vote of the members and shares, unless the constitutive act provides otherwise (Article 192). Double majority of shareholders and shares rule was established from which the shareholders may waive stipulating a qualified majority inferior to the double majority; as the text is not specific, we believe that they can waive even from the double majority rule, stating that only the majority of shares is considered.

For the decisions amending the constitutive act, the vote of all members is necessary, unless the law or the constitutive act provides otherwise. By this provision the character of *intuitu personae* of the limited liability company was strengthened, which the shareholders remove.¹⁴⁴

If the legally constituted meeting cannot make a valid decision because the required majority was not met, the reconvened Meeting can decide the agenda, whatever the number of shareholders and the registered capital represented by the shareholders present. Regarding the second convening it was considered, in the absence of an express provision, that the decision is taken by a simple majority of shareholders and shares¹⁴⁵ being fought the possibility that upon

¹⁴³ Totalitarian meetings remain the only case when it is not necessary to convene according to art. 195

¹⁴⁴ Ioan Macovei, Nicoleta-Rodica Dominte, *Implicațiile principiului libertății convențiilor în exercitarea dreptului de vot în societatea cu răspundere limitată*, R.D.C. nr. 10/2006, page 22.

¹⁴⁵ C. Predoiu, *quoted work*, page 603

the second call decisions to be taken by majority of shares;¹⁴⁶ we tend to agree with the latter opinion, once the legislature has not set a minimum threshold or double majority, as long as he used the expression “whatever the number of shareholders and the share capital represented” wishing the release of decision-making process and the decision making.

To note that it is not possible that the first call to provide the date also the second meeting (as in Article 118 for joint stock companies), the text of the law expressly providing that only the “second call” can decide it.

A different majority was established by Article 202 paragraph 2 regarding the assignment of shares to persons outside the company when the decision must be approved by the shareholders representing at least three-quarters of the registered capital.

Decision of general meeting of shareholders. On the occasion of the meeting, the shareholders conclude a minutes recording:

- the convocation formalities
- the date and place of the General Meeting
- the shareholders present and the number of shares held
- the summary of the debates
- the decisions taken
- the statements of the shareholders in a meeting, but only if they require the mention in the minutes

In the minutes the documents relating to convening, the documents duly establishing the voting by mail, the proxies, etc. shall be enclosed.

The minutes were signed by the shareholders present.

Company’s management. The limited liability company is managed by one or more managers (Article 197 of Law 31/1990).

The managers can be shareholder or non-shareholder and appointed by the constitutive act or the shareholders meeting.

To protect the interests of the society, the law prohibits the managers to exercise, without the meeting’s authorization, the managers’ mandate in other competitor companies or having the same type of activity, and to do the same type of trade or another competitor on their own or on behalf of another natural or legal persons, under penalty of revocation and liability for damages to the company.

¹⁴⁶ Ion Turcu, *Drept bancar*, vol. II, Ed. Lumina Lex, page 442

In the case of multiple managers, the shareholders may require them to work jointly or individually.

If it is determined that the managers work jointly, the decisions must be taken unanimously and in case of divergence the double majority will decide.

Where the constitutive act has not established how the managers' mandate would be exercised it must be admitted that each of them can work individually (Article 389 C.com.).

When a manager takes the initiative of operations required to fulfil the object of the company, he shall notify in advance the other managers, under penalty of repair of the damages caused to the company.

The managers of the limited liability company can perform all operations required for the fulfilment of the object of the company, apart from the restrictions set by the constitutive act.

The managers are required to keep a register of the shareholders of the company (Article 198 of the Law No.31/1990). Registry includes: the name and first name, denomination, place of residence or registered office of each shareholder, his part of the registered capital, the transfer of the participating shares or any other amendments thereto. Failure to comply with this obligation will attract the joint and several liability of the manager for damages caused to the company.

The register may be examined by the shareholders and by the creditors.

The limited liability company is represented by the manager who has been nominated by the shareholders, or by subsequent decision of the members' meeting as its representative. If the constitutive act has not established that the manager has the power to represent the company, the law presumes that the right of administration belongs to each manager (Article 75 and Article 197, paragraph 3 of the Law 31/1990).

The duties and liabilities of the managers are governed by the provisions relating to the mandate and the special provisions from the company law (Article 72 of Law 31/1990).

Given the *intuitu personae* character of the manager, his revocation is a revocation *ad nutum* being able to intervene at any time and independently of any contractual breach of the manager.¹⁴⁷

Company's management control. In the limited liability company, the company's management control can be achieved by:

¹⁴⁷ C. Roşu, *Contractele de mandat și efectele lor în dreptul civil și comercial*, Editura Lumina Lex, Bucurest, 2003, page 234.

- Auditors, as in the joint stock company.
- Shareholders, as if the general partnership.

In the limited liability company, the election of auditors is optional if the number of shareholders does not exceed fifteen (Article 199 of the Law 31/1990).

According to an opinion, the criterion of shareholders' number is not able to satisfy the purpose of the law in the appointment of auditors.¹⁴⁸ For example, there may be a limited liability company with 50 shareholders but with a lower economic activity than a company with two partners. Thus, the correct criterion to fulfil the purpose of the law is the turnover. In relation to this figure and the volume of trading operations, it may be inferred that the activity of the company is simple or complex, so the appointment of auditors is necessary or not.¹⁴⁹

The financial statements of limited liability companies, which fall within the accounting regulations harmonized with the European directives and international accounting standards, should be audited by financial auditors, natural or legal persons, as provided by law.

In the companies whose financial statements are not financially audited, the shareholders' meeting may appoint one or more auditors.

For lack of auditors, each shareholder who is not a manager of the company will exercise the auditing right which the shareholders have in general partnerships. The shareholders have control on the company's management by exercising the rights conferred by the quality of shareholder. These rights are:

- the right to participate in the deliberations and decision-making on all key issues of the company's activity (Article 186 of Law 31/1990).
- the right to inspect the register of shareholders and the commercial registers of the company (Article 193 paragraph 3 of the Law 31/1990).
- the right to be informed, before being presented to the shareholders' meeting for debate, about the balance sheet and profit and loss account.

Exclusion and withdrawal of the shareholders.¹⁵⁰ May be excluded from a limited liability company:

- a) the shareholder put into delay, does not make the contribution he has committed himself to make;

¹⁴⁸ St. D. Cărpenaru, *quoted work*, page 427

¹⁴⁹ Claudia Roșu, Lavinia Tec, *Constituirea și funcționarea societăților comerciale*, Editura World Teach, Timișoara, 2007, page 338

¹⁵⁰ In this sense, *Legea societăților comerciale nr. 31/1990. Repere bibliografice, practică judiciară, decizii ale Curții Constituționale. Adnotări*, Ed. Hamangiu, 2007, page 501-524

- b) the shareholder having unlimited liability, has declared bankruptcy, or became under a disability;
- c) the shareholder having unlimited liability without any right interferes in administration or breaks the provisions of Article 80 and 82;
- d) the shareholder who defrauds the company or uses the registered signature or the registered capital for his own benefit or for others.

The exclusion is delivered by a court award upon request of the company or of any shareholder.

If the exclusion issued by an shareholder, both the company and the defendant will be subpoenaed.

Following the exclusion, the court shall order, in the same judgment, also on the structure of participation in the capital of the others shareholders.

The exclusion final award of court will be deposited within fifteen days with the trade register office in order to be registered, and the enacting terms of the court award will be published upon the company's request in the Official Gazette of Romania, Part IV.

The excluded shareholder is liable for losses and he has a right to benefits to the day he has been excluded, but he will not be in a position to ask for their liquidation, until they are allotted according to the provisions of the constitutive act.

The excluded shareholder has no right to a proportional part of the social assets, but he is only entitled to a sum of money representing the value thereof.

The excluded shareholder stays liable against third parties for the operations carried out by the company until the date the final award concerning the exclusion is delivered.

If, in the moment the exclusion take place operations are being carried out, the shareholder is bound to bear the consequences and he may not withdraw the share he is entitled to, until these operations are completed.

The shareholder in a limited liability company may withdraw from the company:

- a) a) in the instances stipulated by the constitutive act;
- b) with the agreement of all the other shareholders;

in the absence of such provisions in the constitutive act or when the agreement of all the shareholders cannot be reached still the shareholder may withdraw for justified reasons, based on a court decision, subject only to an appeal, within 15 days as from the day the decision has been notified.

In the latter case, the court shall order, in the same judgment, also on the structure of participation in the capital of the others shareholders.

The rights of the withdrawn shareholder, for which he is entitled against his participating shares, shall be determined with the agreement of the shareholders or by an expert designated by them or, in case of misunderstanding, by the court.

Dissolution and liquidation. The company enters dissolution by:

- a) expiration of the period established for the life of the company;
- b) impossibility to carry out the object of activity of the company or its fulfilment;
- c) the declared nullity of the company;
- d) the decision of the general assembly;
- e) the court decision, initiated by any one of the shareholders, for justified reasons, such as serious misunderstandings between the shareholders which hinder the company's operation;
- f) bankruptcy;
- g) other reasons as prescribed by the law or by the constitutive act of the company.¹⁵¹

The general partnership and limited liability companies are dissolved through bankruptcy, legal inability, exclusion, withdrawal or death of one of the shareholders when, owing to these causes, the number of the shareholders was reduced to only one.¹⁵²

An exception is represented by the case in which the articles of incorporation contain a provision according to which the company may continue its existence with the inheritors.

¹⁵¹ Article 227, Law 31/1990 on trading companies

¹⁵² In this sense, T.C. Medeanu, *Discuții în legătură cu unele cazuri de excludere a asociatului din societatea cu răspundere limitată*, in *Dreptul* n. 1/2001, page 88