

4th Lesson

1.4 Organizational Structure and Governance Models – The Corporate Governance

1.4.1 Bodies of commercial partnership companies

Through its bodies, companies express their will as legal persons with legal personality in order to achieve their ends and object.

1- Administration and Supervisory bodies

The administration functions are fundamentally the representation and the management of the company and they belong, in private limited companies to the Management and in public limited companies to the Board of Directors/Administrators. Administration bodies have all the necessary powers to carry out the object of the company and may not perform acts contrary to the law, against the articles of association or who fall within the competence of other bodies such as the General-Assembly or the Supervisory Board.

With regard to the duties of the members of administration, the law basically requires the duties of care and loyalty. The first requires availability, technical competence and knowledge of the company activity and the second relates to the fact that the administration has to serve the interests of the partners considering the interests of other important subjects to the sustainability of the company like workers, creditors or clients.

In public limited companies (SA/PLC), the partners have three Supervisory and Administration models established in law and they can choose one of the following:

Traditional: composed by a Board of Directors and a Supervisory Board;

Anglo-Saxon: that implies a Board of Directors, an Audit Committee and the Certified Public Accountant;

Dualistic: Executive Board of Directors, General and Supervisory Board and the Certified Public Accountant.

In the **Traditional** model, the powers of the Board of Directors are set out in the Law are non-exhaustively and this body only has as limits the deliberations of the General Assembly or the ones of the Supervisory Board. The Board of Directors has the representative and company management function. In what concerns to the Supervisory body the partners may choose between: 1) a Supervisory Board or a single Auditor who must be a Public Certified Accountant; 2) a Supervisory Board and a Public Certified Accountant that is not part of the Supervisory Board and is mandatory for companies listed on the stock exchange. The functions of the Supervisory Board or the single Auditor are, mainly, the supervision of the administration body, monitoring law and articles of association accomplishment, supervision of the financial and accounting management and elaborate reports of its own performance and about the accounts and proposals presented by the Board of Directors.

In the **Anglo-Saxon** model, the Administration body also has management and representation functions and the Supervisory body is called audit committee composed by at least three non-executive members of the Board of Direction and one of them should be independent. The examination of accounts is made by a Certified Public Accountant. In this model the audit committee's responsibilities are similar to the Supervisory Board in the traditional model.

In the **Dualistic** model, are subtracted powers to the General-Assembly and to the Supervisory Board to be assigned to the General and Supervisory Board which simultaneously has a deliberative powers, supervisory powers, powers to control the management processes of the company and it has the internal representation but without management powers. However, the Executive Board of Directors has representation functions to third parties and management functions. In the dualistic model is mandatory the existence of Executive Board of Directors, General and Supervisory Board and a Certified Public Accountant. The powers of the General and Supervisory Board are similar to those of the Audit Committee and the Supervisory Board.

The functions of the Certified Public Accountant are:

Check the books, the accounting records and the documents that serve to support it;

Verify, when considered convenient any kind of goods or assets belonging to the company or received by it as guarantee, deposit or otherwise;

Check the accuracy of the financial statements;

Check the accounting reports made by the Board of Directors;

Check if the accounting policies and valuation criteria adopted by the company lead to a correct evaluation of assets and results;

In private limited companies (Lda./Ltd.) The Supervisory Board is optional but if an Lda./Ltd. doesn't have this body will be required to designate a Certified Public Accountant if for two consecutive years, two of the three following limits are exceeded:

Balance sheet total: 1.500.000 euros;

Total net sales and other income: 3.000.000 euros;

Number of employees on average during the financial year: at least

As to the attributions of management in the Lda./Ltd., if the articles of associations doesn't establish otherwise, it's the partners that deliberate on General-Assembly the buy, sale or rental of immovable property, the sale, or the rental of company establishments and about the acquisition of shares in other companies and their sale, so we can conclude that, unless if there is an articles of association authorization, managers cannot perform such acts without first being empowered with a deliberation of the partners.

On the contrary, in relation to the SA/PLC Board of Directors, the Law gives it the power to buy, sell and rent of immovable property, to opening or close company establishments, to do important extensions or reductions in the object of the company, important changes in the organization of the company, establishing or terminating lasting and important cooperation with other companies. So the Board of Directors may deliberate on such matters. SA/PLC being bigger companies tend not make sense that all decisions were dependent on the General-Assembly deliberations because it would completely paralyze the company.

It can be concluded that the powers of the Board of Directors (SA/PLC) are reinforced, by virtue of wider competence, by contrast with the powers assigned to managers of the Lda./Ltd. companies.

2- General-Assembly

It's the supreme deliberative body where the will of the partners is created. It's in this body that other bodies' members are designated and it controls and approves the management of the company. The General-Assembly has the power of changing the articles of association.

Regarding the call for the Assembly meeting, in private limited companies, it can be made by any of the managers and must be made by registered letter, sent at least fifteen days before the assembly, unless the

law or the articles of association require other formalities or establish longer term limits.

On public limited companies, the call is made by the President of the Board of the General-Assembly or, in special cases provided by law, the Audit Committee, the General and Supervisory Board, the Supervisory Board or by the court and is always published. The articles of association may require other forms of communication to partners and the publication can be replaced by registered mail or, for partners who previously communicate their consent by e-mail with read receipt.

Among the last publication and the date of the meeting in the Assembly shall elapse at least one month and must pass between the dispatch of the registered letters or e-mails and the meeting date at least 21 days. The Supervisory Board, the Audit Committee or the General and Supervisory Board can only call a general meeting of partners if they had, without success, requested the call to the President of the Board of the General-Assembly, fitting to these bodies, in this case set the agenda and, if there are reasons to do so, choose a location diverse from the headquarters. The General Assembly should also be called by a shareholder(s) if he or they hold shares corresponding to at least 5% of the share capital.

The direction of the works in meetings it is up to the Board of General-Assembly. In Lda./Ltd. the President of the Board is the partner with biggest participation in the share capital or in the case of equality the oldest. In the SA/PLC on the Board of the General-Assembly is composed by a President and a Secretary who are elected by the body from partners or third parties for a period of four years.

In all meetings is elaborated a minute that aims to prove all the deliberations taken. In the Lda./Ltd. companies the minutes shall be signed by all partners or representatives. In the SA/PLC companies is signed by the President of the General-Assembly Board and for the Secretary.

1.4.2 Corporate Governance

The term "corporate governance" refers to the system of rules and codes of conduct relating to the management and control of companies issuing shares admitted to trading on a regulated market based on transparency of information, the protection of the interests of all stakeholders, independent control of the Board of Directors and proper liability of the decision-makers for its infractions. It expresses how business organizations should operate internally and before the financial markets and the market in general. This analysis of corporate governance is not designed to impose rigid and uniform models. It is rather aimed at contributing to the optimum development of companies and at protecting the interests of all those who are involved in these companies - namely investors, creditors and workers.

In the structure of Corporate Governance rights and responsibilities of the different actors are specified in the company whether they are Directors, partners or others. It's unanimous that good Corporate Governance practices contribute to better performance of the companies, it has been developed different kind of efforts to implement them, especially in companies issuing shares admitted to trading on a regulated market (listed on the stock exchange).

The Corporate Governance good practices are mainly four:

- **Information:** There must be transparency and all relevant information must be made public, whether the information on results, events or any other facts related to the company with interest to the financial community (investors, partners or analysts) and to the community.

- **Administration:** On the Board of Directors should be represented several interests, including the interests of the most important partners, small partners, workers and even elements without any special bond. On

the other hand, conflicts of interest should be avoided in the relationship between directors and the company and an important part of the remuneration should depend on the results obtained.

- **Control:** There must be internal control structure composed by elements that are independent of the Board of Directors to assist the own Board of Directors in fulfilling its responsibilities of financial reporting, audit and implementation of codes of conduct.

- **Liability/Accountability:** ensuring proper liability of the decision-makers for its infractions.

In Portugal, the companies listed on the stock exchange are required to adopt the Corporate Governance Code of CMVM (Market Securities Commission) or one similar. However, most of the rules of Corporate Governance are not mandatory, are only recommendations or proposals to the big companies. So the companies only adopt it if they want to, and in order to have social recognition and affirmation in the market.

Case Studies

1- Establish a parallel between the powers of the directors (SA/PLC) and the managers (Lda./Ltd).

As to the attributions of management in the Lda/Ltd., if the articles of associations doesn't establish otherwise, it's the partners that deliberate on General-Assembly the buy, sale or encumbrance of immovable property , the sale, encumbrance and the rental of company establishments and about the acquisition of shares in other companies and their sale or encumbrance, so we can

conclude that, unless if there is an articles of association authorization, managers cannot perform such acts without first being empowered with a deliberation of the partners.

On the contrary, in relation to the SA/PLC Board of Directors, the Law gives it the power to buy, sell and encumbrance of immovable property, to opening or close company establishments, to do important extensions or reductions in the object of the company, important changes in the organization of the company, establishing or terminating lasting and important cooperation with other companies. So the Board of Directors may deliberate on such matters. SA/PLC being bigger companies tend not make sense that all decisions were dependent on the General-Assembly deliberations because it would completely paralyze the company.

It can be concluded that the powers of the Board of Directors (SA/PLC) are reinforced, by virtue of wider competence, by contrast with the powers assigned to managers of the Lda./Ltd. companies.

2- How should be done the call of the General-Assembly in the SA/PLC and Lda. /Ltd. companies?

Regarding the call for assembly, in private limited companies, it can be made by any of the managers and must be made by registered letter, sent at least fifteen days before the assembly, unless the law or the articles of association require other formalities or establish longer term limits.

On public limited companies, the call is made by the President of the Board of the General-Assembly or, in special cases provided by law, the Audit Committee, the General and Supervisory Board, the Supervisory Board or by the court and is always published.

The articles of association may require other forms of communication to partners and the publication can be replaced by registered mail or, for partners who previously communicate their consent by e-mail with read receipt.

Among the last publication and the date of the meeting in the Assembly shall elapse at least one month and must pass between the dispatch of the registered letters or e-mails and the meeting date at least 21 days. The Supervisory Board, the Audit Committee or the General and Supervisory Board can only call a general meeting of partners if they had, without success, requested the call to the President of the Board of the General Assembly, fitting to these bodies, in this case set the agenda and, if there are reasons to do so, choose a location diverse from the headquarters.

3- Define Corporate Governance and discuss its importance.

The term "corporate governance" refers to the system of rules and codes of conduct relating to the management and control of companies issuing shares admitted to trading on a regulated market based on transparency of information, the protection of the interests of all stakeholders, independent control of the Board of Directors and proper liability of the decision-makers for its infractions. It expresses how business organizations should operate internally and before the financial markets and the market in general. This analysis of corporate governance is not designed to impose rigid and uniform models. It is rather aimed at contributing to the optimum development of companies and at protecting the interests of all those who are involved in these companies - namely investors, creditors and workers.

It's unanimous that good Corporate Governance practices contribute to better performance of the companies.

5th Lesson

1.5 Governing bodies' liability

1 - Managers and Directors liability towards the company

Managers or Directors are liable towards the company for the losses that they caused by their acts or omissions when they violate a legal obligation or the articles of association, except if they prove that they acted guiltless.

Liability is excluded if any of them prove that they acted, free of any personal interest and according to criteria of business rationality.

They are also not liable for losses resulting from a deliberation of the Administration Body that they did not participate in the voting process or voted against the deliberation.

The Managers or Directors liability towards the company has no place when the act or omission is based on a deliberation of the partners on the General-Assembly.

In companies that have a Supervisory Body, its assent or consent does not relieve of liability the Managers or the Directors.

2 – Managers and Directors liability towards the company creditors

Managers or Directors are liable towards the company creditors when, by their culpable acts or omissions in violation of a legal or an articles of association obligations, the company's asset become insufficient for the satisfaction of their credits.

The compensation obligation for the losses is not, in relation to creditors, excluded by the fact that the act or omission was based on a deliberation of the General-Assembly.

3- Managers and Directors liability towards the company partners and third parties

Managers and Directors are liable towards the company partners and third parties by the losses that they caused in the exercise of their functions.

1.6 Partners deliberations

The partners' deliberations form the will of the company. Usually the deliberations are taken at the General-Assembly. However there are other ways that we will analyze:

Deliberation Types

a) Deliberations taken at the General-Assembly regularly called and deliberations approved at a Universal Assembly.

The deliberations taken by a called General-Assembly have one thing in common with those taken in the Universal Assembly: both result from a meeting of the partners. However the Universal Assembly is not preceded by a call act addressed to all members but all were present and everyone expressed the will for the Assembly constitution and deliberation on an issue.

Universal Assembly only can take place by the cumulative checking of three elements:

- 1) Presence of all members;
- 2) Consent of all partners for the Assembly constitution;

3) Unanimous will of all partners that the meeting is constituted to discuss a certain subject.

b) Unanimous deliberations in writing

These are not adopted in a meeting of partners in an Assembly. Sometimes it's unnecessary or useless a meeting in the Assembly when the partners have a unanimous opinion.

c) Deliberations by written vote

They are admitted only in the Private Limited Companies.

The consultation addressed to the partners must be made by registered letter in which is indicated the deliberation object informing that the lack of response within fifteen days of the dispatch of the letter shall be considered as a consent to the abdication of the assembly.

If the partners agree to deliberate by written vote after their consultation the manager will send to all partners the proposal of deliberation with all the necessary elements setting a deadline for voting of no more than 10 days.

The deliberation is considered as taken on the day it is received the last answer or end of the scheduled period (10 days), if any partner does not respond.

It cannot be taken a deliberation by written vote when a member is prevented from voting

The number of votes of each partner

In Private Limited Companies it is up to each member one vote for each cent of the value of his share/quota. For example if a partner holds a share of 100 euros he has the right to 10.000 votes.

It is, however, allowed that the articles of association assign, as a special right, two votes for each cent of the value of the share.

On the other hand in the Public Limited Companies each partner has the right to one vote for each share he holds.

Despite, the articles of association may:

Provide just one vote to a certain number of shares.

Establish that votes should not be counted above a certain number, when issued by a single partner.

Majorities for the approval of the deliberations

In Private Limited Companies, usually, the deliberations are considered approved if they have the majority of the votes of the partners that voted. Abstentions are not taken into account. However, the articles of association modifications may only be taken by a majority of three-quarters ($3/4$) of the votes corresponding to the share capital or number even higher of votes if required by the articles of association.

In Public Limited Companies the deliberations are considered approved if they have the majority of the votes of the partners that voted, except if the articles of association or the Law demands for a higher number of votes. However, the articles of association modifications may only be taken by a majority of two thirds ($2/3$) of the votes of the partners who were present.

In the first call, the General-Assembly may deliberate whatever the number of partners present or represented, unless the decision is about changing the articles of association where must be present or represented partners holding at least shares corresponding to one third ($1/3$) of the share capital.

However, on second call, the partners may deliberate whatever the number of partners present or represented and the share capital they represented by them being required, however required at least a majority

of two thirds (2/3) of the votes of the partners who were present if the decision is about changing the articles of association.

Invalid deliberations

The partners deliberations are invalid if:

- Taken at the General-Assembly not called unless all members have been present or represented; The General-Assembly it's not considered called if the person who called it did not have the power to do it;

- Taken by written vote without all partners with voting rights have been invited to exercise this right, unless all of them have given it;

- Those, whose content is against the law;

- Those which are appropriate to meet the purpose of one of the partners to get through the exercise of voting rights, special advantages for themselves or third parties, to disadvantage of the company or other partners;

- Taken without providing the partners of the minimum elements of information.

Case studies

The company "GHIJL, Lda./Ltd." has "G", "H", "I", "J" e "L" as partners and the share capital is 50.000 euros. Each partner holds a share of 10.000 euros. "G" was designated the manager by the articles of association. In a General-Assembly called by "J", partners deliberate to increase the share capital. The deliberation was taken with the votes in favor of "H", "I" e "J" and against of "G". "L" was absent.

a) Who should have called the General-Assembly?

The manager G.

b) Who presides the General-Assembly?

The partner which holds the biggest part of the share capital. In this case of all partners hold exactly the same part. So it will be the older one who presides the General-Assembly.

c) Is the deliberation valid?

The deliberation is not valid because the call was irregular.

**d) Imagine exactly the same situation but the call was made by "G".
Could the deliberation have been taken?**

The share capital increase constitutes an alteration of the articles of association. In this company type the deliberation could only be taken by a majority of, at least, $\frac{3}{4}$ of the votes corresponding to the share capital. So, one vote for each cent of the share, means that each partner has 1.000.000 votes. The total number of votes corresponds to 5.000.000. So, to the deliberation to be taken will be necessary $\frac{3}{4}$ of 5.000.000 votes so 3.750.000 in favor. Only "H", "I" and "J" (3.000.000 votes) voted in favor so the deliberation could not be taken.

e) If the company was a SA/PLC, with a share capital of 50.000 euros represented by shares of 1 euro each, and being each partner holder of shares with the value of 10.000 euros, would your answer be the same?

The articles of association modifications may only be taken by a majority of two thirds (2/3) of the votes of the partners who were present. "H", "I", "J" and "G" were present. On PLC the partners have one vote for each share, so each one has 10.000 votes. For the deliberation approval it should have at least 26.666 votes in favor (2/3 of 40.000 euros). So the deliberation was approved because it obtained 30.000 in favor on the one hand and, on the other hand, were present partners holding at least shares corresponding to one third (1/3) of the share capital.

f) If "G", after a unanimous deliberation of the partners, acquired to the company a holiday apartment, and the company become unable to pay to its creditors. May the creditors require the payment of the claims they hold to "G"?

If G acted with guilt and violating his duties as a manager the answer would be positive even if the act was based on a partners deliberation.