LESSON 10: GOVERNING BODIES

SUMMARY:

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3.- Vocabulary

1.- General meetings

a) Concept

Corporate enterprises have two different corporate bodies:

- The general meeting (regulated in arts. 159 to 208 of the LSC).
- The administrative body (regulated in arts. 209 to 252 of the LSC).

The general meeting can be defined as a gathering of all the company members who have been convened and assembled according to the laws and articles of association, with the purpose of debating and resolving the issues in its powers with the majorities provided by the law or the articles of association. All the company members, including those who have not attended the meeting and the dissenters, are subject to the resolutions of the general meeting.

The general meeting is, therefore, the body through which the company's desire is expressed.

b) Powers

Art. 160 of the LSC sets out the powers of the general meeting, i.e. the issues which the general meeting can debate and resolve. Its powers are as follows:

1.- The approval of the conduct of business, the annual accounts and the distribution of earnings.

2.- The appointment and removal of company directors, liquidators and auditors, and the exercise of liability actions against any of them.

3.- The amendment to the company's articles of association.

4.- The removal or limitation of preferential subscription rights of shares or preferential assumption rights of equity participations.

5.- The conversion, merger and spin-off of the company and the transfer of the company's registered address abroad.

6.- The dissolution of the company and the approval of the final balance sheet.

7.- Any other issues provided by the law or the articles of association.

These are the minimum powers which can be extended by including new ones in the articles of association.

The general meeting cannot assume the functions which the LSC has exclusively reserved for the administrative body or for the auditors, nor give binding instructions to the administrative body regarding the issues in its powers. There is one exception to this general rule. In private LLC, the general meeting is allowed to give instructions to the administrative body or to submit to its authorization the decisions of the administrative body regarding certain issues related to the company management, unless otherwise provided in the articles of association.

c) Types

There are ordinary and extraordinary general meetings depending on their periodicity.

- The ordinary general meeting must be convened by the administrative body within the first six months of the fiscal year in order to examine and approve the management report, the annual accounts and the distribution of earnings (art. 164 LSC).

- The extraordinary general meeting refers to any other meeting convened by the administrative body to debate and resolve issues which may affect the company's interests (art. 165 LSC).

d) Convening general meetings

1.- Requirements of the general meeting notice

- The general meeting is convened through a notice which needs to be published on the company's website. In its absence, the notice will be published in the BORME and in one widely-read newspaper of the province where the registered office is located. The articles of association may establish the use of other individual and written procedures if this ensures that all shareholders receive the notice. This procedure may only be used in the case of shareholders residing abroad when they have indicated a location in Spain for receiving notifications. The articles of association may also set out additional advertising procedures different from the ones provided by law or may impose the company to provide an electronic alert system for shareholders when meeting notices are included on its website (art. 173 LSC).

- The notice should include the company's name, the date and time of the meeting, its agenda with all the items to be dealt with and the position held by the person(s) convening the general meeting (art. 144 LSC).

- Unless otherwise provided in the articles of association, the general meeting will be held in the municipality where the company has its registered office (art. 175 LSC).

- In public LLCs, there must be at least one month between the notice date and the meeting date, and fifteen days in the case of private LLCs. When the notice for the general meeting has been communicated through individual written procedures, the stipulated period will be calculated from the date on which the last communication was sent (art. 176 LSC).

- The notice of the general meeting may also include the date on which the general meeting has to be held at second call. In this case, the LCS sets out that the interval between the first and the second call should be at least 24 hours (art. 177 LSC).

2.- Who can convene the general meeting

As a general rule, the general meeting is convened by the ***company's administrative body*** (art. 166 LSC)*:*

❖ The ordinary general meeting must be convened by the administrative body within the first six months of the fiscal year. The articles of association may provide a different time period.

❖ The extraordinary general meeting must be convened by the administrative body in the case of issues under the powers of the general meeting, or if shareholders request this. The general meeting can only be requested by shareholders who represent at least 5% of share capital. Shareholders must indicate in their request the items to be included in the agenda and the general meeting will have to be held within two months

after the shareholders' request.

As an exception, the general meeting may also be convened by the ***Mercantile Court Judge of the place of the registered office*** in the following cases (art. 169 LSC):

- ❖ When the ordinary general meeting has not been convened within the first six months of the fiscal year, any shareholder is entitled to request the Mercantile Court Judge to convene the ordinary general meeting.

- ❖ When the administrative body has been asked to convene the extraordinary general meeting and the request has not been attended, shareholders representing 5% of share capital are entitled to request the Mercantile Court Judge to convene the ordinary general meeting.

In all these cases, the notice of the general meeting will be subject to a prior hearing of the directors.

There is another **special type of general meeting notice** which tries to avoid a paralysis of the company's governing bodies. In the case of death or removal of the sole director, some of the joint directors, all the joint and several directors, or the majority of the members of the board of directors without there being any replacements, any shareholder will be entitled to request the Mercantile Court Judge to convene the general meeting with the only purpose of appointing new directors. Apart from that, any director remaining in his office will be able to convene the general meeting for the same purpose (art. 171 LSC).

The LSC also regulates the **shareholders' meeting attended by all**. In this case, the general meeting is quorate to deal with any matter without being previously convened. The shareholders' meeting attended by all may only be held when two special requirements are met: all the share capital is present or represented at the meeting and all the shareholders have unanimously accepted to declare the general meeting and its agenda quorate. Once the general meeting has been declared quorate, the resolutions will be adopted according to the majorities set out by the law and the articles of association. The shareholders' meeting attended by all can be held anywhere in Spain and abroad (art. 178 LSC).

e) Constitution and functioning

1.-Right to attend the general meeting

In a private LLC, all partners have the right to attend the general meeting. The articles of association cannot require its partners to own a minimum percentage of equity participations in order to attend the general meeting (art. 179 LSC).

Nevertheless, the articles of association of a public LLC may require the ownership of a minimum percentage of shares to attend the general meeting, but the required percentage cannot exceed one per thousand of the share capital. The articles of association of a public LLC may also make the

attendance conditional upon the advanced proof of the partners's right to attend. In any case, the right to attend the general meeting cannot be denied to partners who have registered their registered or electronic shares five days before the date set for the general meeting. In the same way, the right to attend cannot be denied to partners who have deposited their bearer shares in the way provided by the articles of association five days before the general meeting. If the articles of association have not provided anything in this regard, the bearer shares can be deposited in the company's registered address.

In public LLCs, the articles of association may also provide the possibility for attending the general meeting by electronic means which duly guarantee each shareholder's identity. The notice of the general meeting must describe the way in which the partners will have to exercise their rights to enable the general meeting to go ahead in a well-organized manner (art. 182 LSC).

The directors or the company have the obligation to attend the general meeting and the articles of association may also require the attendance of directors or managers of the company (art 180 y 181 LSC).

2.- Representation

Unless otherwise provided in the articles of association, each shareholder of a public LLC, who is entitled to attend the general meeting, may be represented at the meeting by another person, even if the latter is not a shareholder. The representation must be granted for each meeting in writing or through remote communication means, which duly guarantee the identity of the represented shareholder (art. 184 LSC).

In private LLCs, each partner can only be represented at the general meeting by his/her spouse, ascendant or descendant, by another partner or by any other proxy who has the power to administer all the assets owned by the principal. The articles of association of a private LLC may provide for representation by other people. In this case, the representation must be made in writing through a public deed. If a public deed has not been used, the representation will be for each general meeting (art. 183 LSC).

3.- Right to vote

In public LLCs, there should be proportionality between the par value of each share and the voting right which each share confers. Together with this, the articles of association of a public LLC may establish the maximum number of voting rights which each shareholder or company belonging to the same group can have,

In private LLCs each equity participation grants its owner one voting right, unless otherwise provided in the articles of association.

4.- Constitution

The general meeting must be chaired by a chairperson and a secretary. Unless

otherwise provided in the articles of association, the chairperson and secretary will be the chairperson and secretary of the board of directors and, in their absence, the persons designated at the beginning of the meet by the partners attending the general meeting (art. 191 LSC). An attendance list must be drawn up, stating the number of present or represented partners, the percentage of share capital which they own and the number of voting rights which may be casted (art. 192 LSC).

In public LLCs, the general meeting will be quorate when a minimum quorum of attendance is achieved. The required quorum is different depending on the type of resolution to be adopted (arts. 193 and 194 LSC) .

In the case of ordinary resolutions:

- At first call, the general meeting will be quorate when it is attended by shareholders present in person or by proxy representing more than 25% of the subscribed and voting share capital.

- At second call, no minimum limit is established for the meeting to be declared quorate.

(The articles of association may require higher quorums)

In the case of qualified resolutions:

- At first call, the general meeting will be quorate when it is attended by shareholders present in person or by proxy representing more than 50% of the subscribed and voting share capital.

- At second call, the general meeting will be quorate when it is attended by shareholders present in person or by proxy representing more than 25% of the subscribed and voting share capital.

(The articles of association may require higher quorums)

Qualified resolutions are those particularly relevant for the company and shareholders, such as:

- Capital increases or decreases or any other amendment to the articles of association.
- Issuance of debentures.
- Removal or limitation of preferential subscription rights of new shares or preferential acquisition rights of new equity participations.
- Conversion, merger and spin-off of the company.
- Transfer of the registered office abroad.

f) Resolutions of the general meeting

In public LLCs, the resolutions must be adopted by a simple majority of shareholders present in person or by proxy. Qualified resolutions require a simple majority if the shareholders in person or by proxy own at least 50% of the subscribed and voting share capital. At second call, if shareholders present in person or by proxy own more than 25% of share capital but less than 50%, the resolutions will have to be adopted by a majority of shareholders representing three-quarters of the share capital present in person or by proxy. The articles of association may increase the attendance quorums and majorities although never a unanimous vote (art 201 LSC).

In private LLCs, the resolutions must be adopted by a majority of validly cast votes which represents one-third of the votes corresponding to the equity participations into which the share capital is divided. There are some exceptions to this general rule (arts. 198 to 200 LSC):

-Capital increases or decreases or any other amendments to the articles of association require a majority of validly cast votes which represents half of the votes corresponding to the equity participations into which the share capital is divided.

-The removal or limitation of preferential acquisition rights of new equity participations, the conversion, merger and spin-off of companies, the transfer of the registered office abroad, the exclusion of partners and the authorization granted to the directors so that they can develop similar commercial activities than the ones carried out by the company will require a majority of validly cast votes which represents two-thirds of the votes corresponding to the equity participations into which the share capital is divided.

g) Minutes of the general meeting

All resolutions of the general meeting must be recorded in the minutes. The minutes may be approved by the general meeting at the end or in a period of fifteen days after the meeting. In that case, the minutes will be approved by the chairperson and two partners, one representing the majority and the other the minority. The minutes privately certifiy the content of partners' opposition to the resolution with the purpose of challenging it. The minutes are written down by the secretary, with the chairperson's approval, and the resolutions can be executed from the moment in which the minutes are approved (art. 202 LSC).

The directors and shareholders representing 1% of the share capital in the case of public LLCs, and 5% in the case of private LLCs, may request the presence of a notary to take the minutes of the general meeting. In this case, the minutes must not be approved. This means that resolutions can be executed form the moment in which the minutes are closed (art. 203 LSC).

The minutes are also necessary for registering the general meeting resolutions in the Trade Register.

h) Challenging corporate resolutions

In order to protect all the stakeholders' interests (company, partners, creditors, workers, etc.), the LSC sets out a specific procedure to render resolutions null and void or annullable.

Null and void resolutions are those which go against the law or public order. The legal action to challenge them should be taken within a year after the date of the resolution. All partners, directors and any other person who can justify a legitimate interest are entitled to challenge null resolutions.

Annullable resolutions are those which go against the company's articles of association or which affect the company's interests for the benefit of one or more partners or third parties. In this type of resolutions, the deadline for challenging and the number of people entitled to challenge are smaller. The deadline for challenging is 40 days and the challenge can only be made by partners attending the general meeting who have stated for the record their opposition to the resolution, absent partners, partners illegally deprived of their voting rights and the company directors.

2.- Administrative body

a) Concept and functions

The administrative body manages and represents the company and assumes the following functions:

- Company management. This refers to all the activities involved in the day-to-day management of the company, including the commercial, financial, accounting, economic and administrative activities, except for those which modify the company's legal or economic structure or the supervision of the administrative body.

- Company representation.

- The administrative body also has a residual power regarding all the issues related to the company's commercial activity which the law or the articles of association have not given to other governing bodies.

b) Structure

The company management may be entrusted to a sole director, joint and severally directors (each being able to act independently), joint directors (who must act together) or a board of directors (art. 210 LSC).

In public LLCs, when the company management is entrusted to two directors, they must joint several liability for the company's debts. When the management is entrusted to more than two directors, they must form a board of directors.

In private LLCs, the articles of association may provide different ways of structuring the administrative body, giving the general meeting the power to choose any of them without being obligated to amend the articles of association.

Any amendment to the structure of the administrative body must be recorded in a public deed and registered in the Trade Register.

c) Legal status

1.- Appointment. When the company is set up, the directors are appointed by the company's founders or, in the case of a successive foundation, by the incorporation meeting. In all other cases, the general meeting has the power to appoint the directors (art. 214 LSC).

2. -Capacity and prohibitions. As a general rule, any legal or natural person can be director. It is not necessary to be a shareholder or member of the company in order to be appointed as a director.

3.-Term of office. The office of director is temporary. In public LLCs, the directors must hold the office during the period established in the articles of association, which cannot exceed six years. In any case, the directors may be re-elected several times for periods of the same duration. This procedure guarantees the periodic renewal of those who hold the office of director. Private LLCs, on the contrary, are more interested in stability and tenure of office, which is why directors hold their office for undefined periods, unless the articles of association set out a fixed period. In that case, the directors may be re-elected for periods of the same duration (art. 221 LSC).

The directors may be removed by the general meeting at any time, even if the removal has not been included in its agenda. The directors can be removed without providing any fair cause for this. This is an "*ad nutum*" removal based on the mutual trust which must underlie the relationship between the company and its directors, and which can be broken at any time.

4.-Remuneration. The office of director is free of charge, unless otherwise provided for in the articles of association. In that case, the articles of association must provide the remuneration system and the rules to be followed in order to establish the exact amount of money to be received by the director (art. 217 LSC).

- In the case of public LLCs, when the remuneration consists of profit sharing, it should be calculated taking into account the company's net profit once the legal and statutory reserves have been covered and shareholders have received a dividend of at least 4%, or the maximum dividend set out by the articles of association (art. 218 LSC). In this type of company, the remuneration may also consist of delivering shares or stock options to the directors (art. 219 LSC). As a result of the relevance and controversy of this remuneration system, especially in listed companies, and the need to establish an effective control, the Spanish legislator requires a general meeting resolution in order to apply this remuneration system. Listed companies are also obligated to submit to the general meeting an annual report regarding the remuneration of the company's directors as a way of ensuring the system's transparency.

- In private LLCs, when the remuneration consists of profit sharing, the articles of association should provide the specific amount of money to be received by the directors or the maximum percentage which in any case can exceed 10% of the profit to be distributed to the partners. When the remuneration does not consist of profit sharing, the general meeting should establish the amount of money to be received each fiscal year according to the rules established in the articles of association (art. 218 LSC).

d) Liabilities

1. Grounds for liability. Directors shall be liable vis-à-vis the company, the partners and the company's creditors for any damages they may cause by acts or omissions contravening the law or the articles of association or performed in breach of the duties inherent in their office (art. 236 LSC).

2. Actions to claim liability from the directors. The LCS sets out two different actions: the company action and the individual action.

a) Company action (arts. 238 to 240 LSC). The company action may be taken by the company to claim liability from the directors who have performed acts or transactions to the detriment of the company's interests**.** The action may be exercised by the company after a resolution of the general meeting. It is not necessary to include this item in the agenda of the general meeting. Partners may also exercise the company action when the following requirements are met:

- The partners own shares representing more than 5% of the share capital.

- The partners have asked the administrative body to convene the general meeting in order to decide about bringing a company action, and the administrative body fails to convene it.

- The general meeting has decided to bring company action to claim liability from the administrative body, and the action is not exercised within one month after the date of the general meeting resolution.

- The general meeting resolution goes against exercising the company action to claim liability from the administrative body.

The company's creditors are also allowed to bring a company action to claim liability from directors when the company action has not been taken by the company or its partners, and the company's assets are not enough to cover all the credits.

b) Individual action (art. 241 LSC). This action may be taken by any partner or third party whose personal interests have been damaged by acts performed directly by the directors. The economic damage should be caused directly to the partners or third parties and not indirectly, as occurs in those events in which the directors cause damage to the capital of the company. The exclusion would, therefore, not apply when the damage consists of a reduction in the value of the shares due to economic damage caused to the company itself.

e) Board of directors

The board of directors is a way of organizing the company's administration when it is conferred to different people. In fact, public LLCs are obligated to choose the board of directors when the administration of the company is carried out by more than two people.

The articles of association should establish the following:

- The fixed number of directors who must take part in the board of directors. The number of directors cannot be less than three; or

- The minimum and maximum number of directors. In this case, the general meeting will have to decide the exact number, taking into account that Private LLCs should not have more than twelve directors. In public LLCs, nevertheless, a maximum number of directors has not been fixed.

The general meeting has to appoint the directors, but there are some exceptions to this general rule.

The first exception consists of the possibility of appointing the members of the board of directors using a system of proportional representation (art. 243 LSC). This system avoids the appointment of directors to be monopolized by majority shareholders. For this purpose, the system allows minority shareholders who own at least a number of shares equal to the quotient resulting from dividing the

share capital by the number of directors who takes part in the board of directors to appoint one of them.

The second exception involves the possibility of appointing directors using the cooption system (art. 244 LSC). This allows the board of directors to appoint its own members in case of anticipated vacancies.

Unless otherwise provided in the articles of association, the board of directors can delegate its powers of attorney to an executive commission or to one or more managing directors, taking into account that the management accountability or the submission of the balance sheet to the general meeting are powers which cannot be delegated, unless express authorization of the general meeting (art. 249 LSC).

3:- Vocabulary

Governing bodies- Órganos de una sociedad

General meeting- Junta general

Ordinary general meeting- Junta general ordinaria

Extraordinary general meeting- Junta general extraordinaria

Powers of the general meeting- Competencias de la junta

To convene the general meeting- Convocar la junta general

Notice of the general meeting- Convocatoria de la junta

Agenda of the general meeting- Orden del día

Items of the agenda- Puntos del orden del día

To attend the general meeting- Asistir a la junta

Shareholders' meeting atended by all- Junta universal

To be quorate- estar constituido válidamente

Quorum of attendance- Quorum de asistencia

To declare the general meeting quorate- Declarar la junta válidamente constituida

To chair the general meeting- Presidir la junta general

Minutes of the general meeting- Acta de la junta general

Resolution of the general meeting- Acuerdo de la junta general

Dissenters- Socios que votan en contra del acuerdo

Annual accounts- Cuentas anuales

Amendment to the articles of association- Modificaciones estatutarias

Preferential subscription right of shares- Derecho de suscripción preferente

Preferential assumption right of equity participations- Derecho de adquisisción preferente de participaciones

Conversion, merger and spin-off of companies- Transformación, fusion y escisión

Mercantil Court Judge- Juzgado de lo Mercantil

At first call- En primera convocatoria

At second call- En segunda convocatoria

Debentures- Obligaciones

Proxy- Representante legal

Validly cast votes- Votos válidamente emitidos

Stakeholders- partes interesadas

To render resolutions (null /anullable)- declarar los acuerdos nulos / anulables

Administrative body- Órgano de administración

Sole director- Administrador único

Joint and serverally directors- Administradores solidarios

Joint directors- Administradores mancomunados

Board of directors- Consejo de administración

Office of director- Cargo de administrador

Profit sharing- Participación en beneficios

Fiscal year- Ejercicio económico

Company action to claim liability form the directors of the company- Acción social de responsabilidad contra los administradores

Individual action to claim liability form the directors of the company- Acción individual de responsabilidad contra los administradores

To take/ to exercise legal actions- Interponer una acción legal

Management accountability - Rendición de cuentas de la gestión social

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