

## LESSON 9: PARTNERS' LEGAL STATUS

### SUMMARY:

- 1.- Partners' rights
- 2.- Partners' obligations
- 3.- Right to withdraw and exclusion of partners

### 1.- Partners' rights

Shares and equity participations contain the rights and obligations which define each partner's position within a public and private LLC.

Art. 93 of the LSC sets out the list of rights granted by a share or equity participation. Nevertheless, the articles of association may eliminate some of them or include new rights not provided by law. It is possible to distinguish between political, economic, mixed, and minority partners' rights.

#### *a) Political rights:*

#### **1.-Right to attend the general meeting (art. 179.2 LSC)**

All the partners have the right to attend the general meeting under the conditions provided by law. Nevertheless, the articles of association of a public LLC may require the ownership of a minimum number of shares in order to attend the general meeting. The minimum number of shares required cannot exceed one per thousand of the share capital.

#### **2.-Right to vote**

As a general rule, all partners have the right to vote and the voting right granted by each share or equity participation must be proportional to its par value. As a result, each share or equity participation grants one vote. Nevertheless, this general rule may be modified in the articles of association.

- The articles of association of a public LLC may establish the minimum number of shares that a shareholder must own in order to exercise the voting right and they can also lay down the maximum number of voting rights which one shareholder can have. Nevertheless, the articles of association of a public LLC cannot break directly or indirectly the proportionality between the par value of each share and the voting right or the preferential subscription right which it confers. As a consequence, no share can confer more than one voting right (arts. 96.2 and 188.2 LSC)

- On the contrary, the articles of association of a private LLC can break the proportionality between the par value of each equity participation and the voting right. This means that one single equity participation can confer more than one voting right. The articles of association can also limit the number of voting rights which one partner can have.
- Public and private LLCs can issue shares or equity participations without voting rights (arts. 98 to 103 LSC). In public LLCs, shares without voting rights must be issued with a par value not higher than half of the share capital already paid. In private LLCs, equity participations without voting rights must be issued with a par value not higher than half of the share capital.

As compensation, shares and equity participations without voting rights grant their owners some economic privileges. These privileges are:

- 1.-The right to receive an extra dividend (fixed or variable), together with the dividend which corresponds to ordinary shares or equity participations.
  - 2.-The right to receive the liquidation dividend before the partners owning ordinary shares or equity participations.
  - 3.-In the case of capital decreases due to company losses, shares and equity participations without voting rights are not affected unless the reduction exceeds the par value of the ordinary ones.
- Exclusion of the right to vote due to conflict of interests. Art. 190 LSC prevents partners from exercising the right to vote in case of general meeting resolutions of this kind:
    1. Resolutions, which allow partners to transfer shares or equity participations subject to restrictions (in PbLLC the prohibition to exercise the right to vote must be expressly set out in the articles of association).
    2. Resolutions, which decide partners' exclusion (in the PbLLC the prohibition to exercise the right to vote must be expressly set out in the articles of association).
    3. Resolutions, which eliminate partners' obligations or grant partners' rights
    4. Resolutions, which provide financial assistance to the partners
    5. Resolutions, which exempt partners from the obligations involved in the duty of loyalty

The shares or equity participations of those partners in conflict of interests will be deducted from the share capital in order to count the majority of votes. Beyond the situation described above, partners cannot be deprived from the right to vote.

### **3.- Right to be informed:**

This is a right recognized by the law, which is necessary for exercising the voting right. The content of the right to be informed has been regulated differently in public and in private LLCs.

- In public LLCs, shareholders can request the administrative body any kind of information or explanation related to the items on the agenda of the general meeting or ask any question in writing up to the seventh day prior to the date of the general meeting. The administrative body must provide that information in writing until the day of the general meeting. During the general meeting, shareholders are entitled to verbally request any information or explanation related to the items on the agenda. If the administrative body cannot provide the required explanation or information at that moment, it will have to be provided within the following seven days after the general meeting (art. 197 LC). The administrative body must provide the information required before or during the general meeting, unless this were considered unnecessary or there were reasonable grounds for believing that the information was going to be used for purposes outside the company or against company's interests.

- In private LLCs, partners are allowed to request in writing before the general meeting, or to request verbally during the meeting, any information or explanation related to any item on the agenda, without observing deadlines. In the same way the administrative body must provide the information according to the moment and nature of the requested information, except from those situations in which providing such information is considered by the administrative body against company's interests (art. 196 LSC).

In both cases, the information cannot be refused when partners representing 25% of the share capital have requested it.

### **4.- Right to challenge resolutions of the general meeting.**

- a) Resolutions, which can be challenged.

Resolutions of the general meeting, which go against the law, the articles of association or the regulations of the general meeting, or which affect the company interests for the benefit of one or more partners or third parties can be challenged. Company interests are affected not only when company assets are damaged, but also when the general meeting resolution has been adopted in an abusive manner by majority of shareholders against minority interest and without any justified reason.

The LSC has restricted the general meeting resolutions which can be challenged. In this sense, those general meeting resolutions which have been overruled or substituted by another one cannot be challenged. Resolutions based on the following grounds cannot be challenged in any case:

- Breach of procedural requirements, except for those requirements related to the form and period of time in which the general meeting must be convened, the basic rules to constitute it and the required majorities to make decisions.
- Lack or inaccuracy of the information provided by the body of administration on request of partners before the general meeting.
- Participation in the general meeting of people, who were not entitled to unless this participation were essential to declare the general meeting quorate or to adopt a general meeting resolution.
- Invalidity of one or more votes, or inaccuracy in the process of counting votes, unless this inaccuracy or invalidity were considered essential in the achievement of the majorities required.

b) General meeting resolutions can be challenged by any member of the administrative body, third parties who have a legitimate interest and partners who acquired that condition before the general meeting resolutions was adopted provided they own at least 1% of the share capital. In case of resolutions against the public order any partner will be entitled to challenge even in the case he acquired such condition after the resolution was adopted. The members of the administrative body and third parties are also entitled to challenge in those cases.

c) The right to challenge general meeting resolutions expires after one year from the date of the resolution. If the resolution is against the public order the right to challenge does not expire.

*b) Economic rights:*

## **5.- Right to receive the dividend:**

Partners are entitled to receive an annual dividend, unless otherwise provided in the articles of association (art. 275 LSC).

Nevertheless, receiving the dividend depends on different circumstances. There must be earnings at the end of the fiscal year and the general meeting has to decide whether to distribute these earnings or reinvest them in the business. Unless there is a resolution of the general meeting deciding the distribution of earnings, partners do not have the right to obtain a dividend.

As a general rule, each partner receives a dividend in proportion to their contribution to share capital and the general meeting must set out the method and moment of payment. When the general meeting has not set out anything in this regard, the dividend is payable at the company's registered address the day after the resolution of the general meeting deciding the distribution of the dividend.

The right to receive the dividend agreed in the general meeting will expire after five years from the date of the resolution.

#### **6.- Right to receive the liquidation dividend:**

The liquidation dividend is distributed in proportion to each shareholder's contribution to share capital, unless otherwise provided by the articles of association (art. 392 LSC).

##### *c) Mixed rights*

#### **7.- Preferential subscription rights of new shares or preferential assumption rights of new equity participations**

In the case of capital increases with the issuance of new shares or equity participations, all the existing partners have the right to be offered a pro-rata part of the new shares or equity participations before they are offered to a new partner. Existing partners must exercise the preferential subscription right of new shares or preferential assumption right of new equity participations within 15 days from the publication of the announcement of the capital increase in the BORME in the case of listed companies, and within one month among the other companies (arts. 304 to 308 LSC).

##### *d) Minority partners' rights*

The following rights are granted to partners owning shares or equity participations which represent 5% of share capital:

- Right to request the administrative body to convene the extraordinary general meeting

- Right to request the administrative body to include new items in the agenda of the general meeting
- Right to challenge the resolutions of the board of directors
- Right to exercise the company action to claim liability of the company's directors
- Right to request the presence of a notary to take the minutes of the general meeting

## **2.- Partners' obligations**

The main partners' obligation in public and private LLCs is their duty to contribute to the company (lesson 7).

Apart from that, the articles of association of public and private LLCs may provide ancillary services.

In public LLCs, shareholders may have the obligation to pay the unpaid part of the par value of each subscribed share (capital call) if this is provided by the articles of association.

*a) Obligation to pay the unpaid part of the nominal value of each subscribed share (capital call) (arts. 81 to 85 LSC)*

The LCS states that share capital must be fully subscribed, but not fully paid up, at the moment in which a public LLC is set up. The Spanish legislator allows shareholders to pay only a part of the par value of the subscribed shares in the formation of the company. As a result, the portion of the par value of the subscribed shares which has not been paid is called a capital call. The capital call cannot exceed 75% of share capital. This means that shareholders must pay at least 25% of the par value of the subscribed shares in the formation of the company. The articles of association may modify these percentages, but shareholders cannot be required to pay less than 25% of the par value of the subscribed shares.

The articles of association of the company must also provide the way and the moment in which the shareholders must pay the unpaid part in the capital call.

The transfer of shares is allowed in a capital call. In those cases, the acquirer and the transferor are jointly and severally liable to the company for the payment of the unpaid part of the par value of the subscribed shares.

The LSC provides several rules to be applied if the shareholder does not pay in the capital call in the form and at the moment set out by the articles of association. According to the LSC, the shareholders are not allowed to:

- Exercise their voting rights.
- Receive dividends.
- Exercise their preferential subscription rights of new shares.

When paying the unpaid part of the par value along with the default interest, shareholders are allowed to apply for the unreceived dividend, but not for their preferential subscription rights of new shares, if the time limit for exercising this right has expired.

*b) Obligation to provide ancillary services, only if stipulated in the articles of association (arts. 86-89 LSC)*

The articles of association of public or private LLCs may introduce ancillary services to be provided by all or some partners. These ancillary services consist of performing a service or work for the company which can be compensated in the way specified in the articles of association. Ancillary services do not form part of the share capital.

The articles of association may regulate the content and remuneration of these ancillary services and the consequences of not providing them. The articles of association may also include the name of the partners who are obligated to carry out the service or work, in the case of private LLCs, or the shares or equity participations with ancillary obligations attached, in the case of private or public LLCs.

### **3.- Right to withdraw and exclusion of partners**

*a) Right to withdraw (arts. 346-349 LSC)*

The legal causes to exercise the right to withdraw are related to:

- Amendments to the articles of association: replacement of the company's purpose, transfer of the company's domicile abroad, changes in the regulation of the ancillary services or in the transfer of equity participations.
- Extension of the company contract or the reactivation of the company.
- Partners who have voted in favor of the distribution of earnings can also exercise the right to withdraw if a general meeting resolution goes against the distribution. The right to withdraw will be exercised in

this case once five fiscal years have elapsed from the company's formation. This cause does not work in case of listed companies.

The articles of association may also include other reasons for exercising the right to withdraw. In order to include the new reasons in the articles of association, the consent of all partners will be required.

b) *Exclusion* (arts. 350-352 LSC)

The LSC only provides legal reasons for excluding partners in the case of private LLCs. In this type of company, partners can be excluded in the event of a breach of their ancillary services. In the same way, directors, who are also partners of the company at the same time, can also be excluded in case of breaching their non-competition obligation or in case of being sentenced to pay damages to the company for negligent actions contrary to the law or articles of association.

In public LLCs, the reasons for exclusion of partners may be included in the articles of association, with the consent of all the shareholders.

The exclusion of a partner requires a general meeting resolution.

#### **4.- Vocabulary**

**Ordinary shares / equity participations-** Acciones / participaciones ordinarias

**Preferred shares / equity participations-** Acciones / participaciones preferentes

**Right to attend the general meeting-** Derecho de asistencia

**Voting right-** Derecho de voto

**Shares / equity participations without voting right-** Acciones / participaciones sin derecho de voto

**Unrepealable right-** Derecho inderogable

**Right to challenge-** Derecho a impugnar

**Preferential subscription right of new shares-** Derecho de suscripción preferente de acciones

**Preferential assumption right of new equity participations-** Derecho de asunción preferente de participaciones sociales



**Ancillary services-** Prestaciones accesorias

**Capital call-** Dividendo pasivo

**Right to withdraw-** Derecho de separación

**Exclusion of partners-** Exclusión de socios