

LESSON 11: AMENDMENTS TO THE ARTICLES OF ASSOCIATION OF A COMPANY

SUMMARY:

1. Amendments to the articles of association of a company: concept and legal requirements
2. Amendments with special regulations
3. Increase of share capital
4. Reduction of share capital
3. Vocabulary

1- Amendments to the articles of association of a company: concept and legal requirements

The articles of association of a company can be amended at any time after the formation of a company according to a formal procedure which tries to protect as much as possible the company's interests, its partners and debtors (Arts. 285 to 290 LSC). The most important feature of this procedure is that any amendments to the articles of association should be resolved only by the general meeting, taking into account the majorities and quorums laid down by the law or the articles of association. The general meeting resolution resolving the amendment of the articles of association must be adopted by complying the following requirements:

- 1.-Administrators or partners must draw up a written proposal to amend the articles of association of the company. In case of a private LLC, the proposal will include a report to justify the amendment and its content.
- 2.-The general meeting should be convened clearly stating in the notice the articles which are going to be amended.
- 3.-The notice should also state the right of all the partners to examine at the registered office the full text of the proposed amendment to the articles of association and the report which justifies it. Partners will also be entitled to request delivery or remittance of the documentation free of charge.
- 4.-The resolution for the amendment should be adopted in compliance with the quorums and qualified majorities laid down by the law or the articles of association.
- 5.-The general meeting resolution will be executed as a public deed, and will be registered in the Trade Register and published in the BORME (Official Gazette of the Trade Register).

2.- Amendments with special regulations

1.-Any amendment to the articles of association of the company whereby its members *assume further obligations* will require the consent of the parties concerned, who should vote in favor (art. 291 LSC).

2.-Any amendment to the articles of association whereby *ancillary services are created, modified or extinguished* will also require the consent of the parties concerned. In this case, partners also have the right to withdraw (art. 89 LSC).

3.-Any amendment to the articles of association of the company which directly or indirectly *damages the rights of a certain class of shares* requires the votes in favor not only of a qualified majority of the shareholders present at the general meeting but also of a majority of the shareholders owning the shares of the class to which the amendment applies (art. 293 LSC). When the amendment affects the *personal rights of any partner of a private LLC*, the consent of all the members affected will be required (art. 292 LSC).

4.-The *restriction to the free transfer of registered shares*, validly adopted by the general meeting, will not be binding on the shareholders who opposed the adoption of the resolution for a period of three months after its publication in the BORME. In this three-month period, the shareholders temporarily not subject to the restriction of the free transfer of their shares may freely, without observing any restriction, dispose of them (art. 123.1 LSC).

5.-The corporate purpose represents one of the main reasons why the partners decide to set up a company. Therefore, its replacement or significant modification involves that the partners who have not voted in favor are entitled to withdraw from the company. Partners can exercise the right to withdraw within one month of the date on which the resolution of replacement is published in the BORME (art. 346 LSC).

6.-Resolutions to change the company's registered address within Spain can be adopted by the administrative body, unless otherwise provided in the articles of association of the company (art. 285.1 LSC).

3.- Increase of share capital

The increase of a company share capital represents an amendment of the articles of association. As a consequence of that, any modification of this fixed sum of money must meet the general requirements provided by law. Nevertheless, increasing the share capital of a company can also affect the interests of third parties. To protect them, this special amendment of the articles of association is also subjected to a special legal regime contained in the chapter II, title II of the LSC (arts. 295 to 316). This special legal regime is applicable to corporations with some differences depending on the legal type.

- **Types**

The different types of increase of share capital can be classified according to different criteria:

1.- According to the procedure. The increase of share capital can be carried out:

- By creating new shares or equity participations.
- By increasing the par value of the existing shares of equity participations.

2.- In both procedures, the increase of share capital can be classified attending to its counter-value. According to this it can be distinguished:

- Increase of share capital charged to new monetary or non-monetary contributions.
- Increase of share capital charged to benefits or reserves.
- Increase of share capital carried out by compensating credit rights.

3.- Attending to the body which resolves the increase of the share capital:

- Increase of the share capital through a general meeting resolution. This is the general rule.
- Increase of the share capital resolved by the body of administration. This is the case of the authorized capital which can only be used by public LLC. According to this, the general meeting of the PbLLC can delegate to the body of administration the faculty to resolve and execute the increase of share capital taking into account certain limitations and requirements. The increase of authorized capital cannot exceed on half of the existing share capital at the moment of the authorization. The increase can only be carried out with monetary contributions and within a maximum period of time of five years. This authorization to delegate the increase of share capital is stable and continues existing during those five years even though the members of the body of administrations change or the general meeting resolves one or several increases of share capital.

- **Partners' preferential right**

In case of increase of share capital issuing new shares or equity participations with charge to monetary contributions, each partner will have the right to acquire a number of new shares or equity participations proportional to the par value of the ones which they already own (art. 304.1 LSC). This right tries to

avoid changes in the participation percentage of each existing partner when the increase of share capital involves the entry of new ones.

The preferential right does not exist in case of increase of share capital with charge to non-monetary contributions, in case of merger or spin-off of companies or conversion of securities into shares (art. 304.2 LSC).

The general meeting can also eliminate the preferential right in case of increase of share capital for the benefit of the company. This possibility tries to reconcile the interest of the company, which wants to obtain secure additional funding in a short period of time, with partners' interests, who want to maintain their percentage of participation in the company. Anyway it will be necessary to justify the adequacy, convenience and proportionality of this measure and to comply with all the legal requirements of the procedure. In case of simultaneous increase and reduction of share capital partner's preferential right cannot be removed.

4. Reduction of share capital.

The reduction of share capital involves an amendment of the share capital, which must fulfill all the general requirements provided by law for the amendment of the articles of association. Together with these general requirements, the reduction of share capital must meet other specific requirements derived from the complexity and significance of the procedure. These special requirements are as follow:

- The reduction of share capital must be resolved by the general meeting through a general meeting resolution which must include the following information: the main purpose of the reduction, its amount, the procedure and period of execution, the sum of money which has to be paid to the partners (if necessary) and the new wording of the articles of association related to the share capital.
- In case of a public LLC the general meeting resolution must be published in the BORME and the Web site of the company. If the company does not have Web site the information will be published in a one widely-circulation newspaper within the province of the registered office.

Exceptionally the directors of the company will be allowed to reduce the share capital without a general meeting resolution in case of one partner exercising the right to withdraw or being excluded from the company.

- **Types:**

The LSC distinguishes different types of reduction according to the purpose of it or procedure to performed it.

Reductions of the share capital can have the following purposes:

- To find a balance between the share capital and the equity, when it has been reduced due to company losses.
- To build up or increase the legal reserve.
- To return contributions to the partners.
- In public LLC, reduction of share capital can be used to eliminate the obligation to pay the amount of share capital which is pending of payment.

Reductions of the share capital can be carried out according to the following procedures:

- By reducing the par value of the shares or equity participations
- By repaying shares or equity participations
- Using the consolidation of shares or equity participations.

3.- Vocabulary

To amend the articles of association- Modificación estatutaria

Proposal- Propuesta

Report- Informe

To call the general meeting- Convocar la junta general

The notice- El anuncio de la convocatoria

To execute the general meeting resolution as a public deed- Incluir el acuerdo en una escritura pública

To be binding on someone- Vincular a alguien jurídicamente

To oppose something- Oponerse a algo

Advertising requirements- Requisitos de publicidad

To withdraw from the company- Separarse de la sociedad