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CONSIDERATION ON THE POSSIBILITY OF THE CANCELLATION OF THE DECISIONS ADOPTED BY THE SPECIAL MEETING OF SHAREHOLDERS UNDER THE CONDITIONS OF ART. 132 OF LAW NO. 31/1990 REGARDING COMPANIES

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Abstract: *The issue of law in question concerns the possibility of verifying the legality of a decision adopted by the special meeting of shareholders, based on the provisions of art. 116 of Law no. 31/1990, by way of an action for annulment, regulated by the provisions of art. 132 of Law no. 31/1990. Basically, based on art. 132, the admissibility of an action in annulment of the decision of the special meeting of shareholders, adopted under the conditions of art. 116, is questioned.*

Keywords: *action for annulment, decision of the general meeting of shareholders, decision of the special meeting of shareholders*.

1. Introduction

The provisions of art. 96 of Law 31/1990 regulate the special meetings in which the holders of different categories of shares may meet, meetings in which only the holders of the respective share category have the right to participate and vote. The fact that the holders of each category of shares can meet in special meetings under the conditions established by the articles of association does not mean that they can make decisions regarding the functioning of the company, because, as stated in the literature (Cărpenaru Stanciu, 2006, p. 347), the special meeting is not a social body, so that the decisions of these special meetings will be able to produce their effects regarding the functioning of the company only under the conditions of the approval by the general assembly. Examining carefully the legal provisions that constitute the object of our analysis, we will be able to ascertain that the legislator did not provide absolutely anything regarding the rules of organization and functioning of these special assemblies, the only issue regulated by art. 96 in this respect being the reference to the conditions established in the memorandum of association. However, in a completely uninspired way, the legislator regulated the legal regime of the special assemblies precisely in the

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second section of the present chapter, respectively in art. 116, when naturally this last text of law should have been inserted either in the content of art. 96, or in the next article. Thus, according to the provisions of art. 116 par. (1) of Law 31/1990, the decision of a general meeting to amend the rights or obligations relating to a class of shares shall take effect only after the approval of that decision by the special meeting of shareholders of that class.

Also, according to art. 116 par. (2) of Law no 31/1990, the provisions of the section governing general meetings regarding the convening, quorum and conduct of general meetings of shareholders shall also apply to special meetings. Therefore, the legal provisions that apply to the general assembly regarding the mentioned aspects constitute the common law in the matter of special assemblies, which means that the organization and functioning of the special assembly follow the rules specific to the general assembly.

The provisions of art. 96 of Law no. 31/1990 regarding the companies did not regulate the conditions of organization and functioning of the special meetings, the company legislator instituting through the provisions of art. 116 of Law no. 31/1990 some rules governing the legal regime of special assemblies.

In this regard, the provisions of art. 116 par. (1) of Law no. 31/1990 conditions the effects of a decision of the general meeting of shareholders by which the rights and obligations of the holders of a certain category of shares were modified by the approval of this decision by a decision issued by the special meeting of shareholders of that category. Thus, the legislator does not forbid *de plano* making a decision to modify the content of the rights and obligations conferred by the respective category of actions, but conditions the implementation of this decision on the additional approval by a decision issued by the special assembly of amending measures ordered by that judgment.

The situation is also valid for the reverse hypothesis when the legislator allows special meetings of shareholders of a certain category to initiate decisions, but in order for them to take effect, the approval of the corresponding general meeting is required. Therefore, the fact that the holders of each category of shares may meet in special meetings under the conditions established by the articles of association does not mean that they can make decisions regarding the operation of the company, because the special meeting is not a corporate body, so the decisions of these special meetings will be able to produce their effects regarding the functioning of the company only under the conditions of the approval of the general assembly.

Regarding the rules that will govern the special meetings in terms of functioning and adoption of decisions, art. 116 par. (2) of Law no. 31/1990 stipulates that the provisions regarding the general meetings, regarding their convocation, quorum and their development also apply to the special assembly. Therefore, the legal provisions that apply to the general assembly regarding the mentioned aspects constitute the common law in the matter of special assemblies, which means that the organization and functioning of the special assembly follow the rules specific to the general assembly.

However, the issue of the organization and functioning of special meetings has not been completely resolved by the corporate legislator because the section governing general meetings covers both ordinary general meetings and extraordinary general

meetings, so the wording of the law is confusing and leaves room for interpretation. This is because the law does not clearly distinguish which provisions of general meetings apply to the special meeting on the modification of the rights and obligations of a category of shares: those regarding the ordinary meeting or those regarding the extraordinary meeting? In other words, the provisions of art. 116 par. (2) of Law no. 31/1990 does not specify which rules will govern the conditions of convocation, quorum and majority of the special assembly regarding the modification of the rights or obligations of a category of shares the specific conditions of the ordinary general assembly or the specific conditions of the extraordinary general assembly? As far as we are concerned, we consider that the rules that will govern the special assembly under the aspects of convocation, quorum and majority required for the valid adoption of a decision by the special assembly are those specially provided for by the extraordinary general assembly, as regulated by art. 115 of Law no. 31/1990. The argument of the thesis we defend finds its foundation in the provisions of art. 94 par. (2) of Law no. 31/1990, which allows the issuance of various categories of shares only under the conditions of the articles of association, which means that any change in the rights and obligations relating to a category of shares under the provisions of art. 116 par. (1) of Law no. 31/1990 represents practically a modification of the memorandum of association, an attribute which is exclusively incumbent upon the extraordinary general assembly. Thus, the decisions of the extraordinary general meeting regarding the modification of the rights or obligations of a certain category of shares will be subject to the approval of the special meeting and vice versa. In other words, for other decisions of the special assembly, except for those regarding the modification of the rights and obligations of a category of shares, the provisions of art. 116 par. (3) of the LSC apply, meaning that they will be subject to the approval of the corresponding general meetings. Therefore, the special assembly has the power to make decisions both on matters within the competence of the ordinary general assembly and on matters within the competence of the extraordinary general assembly, so, depending on the specific measures taken by the special assembly will meet either the ordinary general assembly, or the extraordinary one. In our opinion, the decisions of the special meeting of shareholders adopted under the conditions of art. 116 of Law no. 31/1990 may be subject to judicial control by way of an action for annulment regulated by art. 132 of Law no. 31/1990. In support of this view, we will present arguments taken from the subject of special meetings and general meetings, the topography of legal texts representing the subject matter, by reference to the specific rules of the legislative technique, as well as arguments regarding the notion, nature and legal regime of special meetings.

2. Arguments extracted from the Subject Matter and the Topography of the Legal Texts that regulate the General and Special Assemblies

Sedes materiae of the special assemblies is scant, these are being regulated in the content of only two legal provisions of Law no. 31/1990, respectively art. 96 and art.

116, unlike the general assemblies, which enjoy a wider regulation in the content of the mentioned normative act.

Thus, according to art. 96, *"The holders of each category of shares meet in special meetings, under the conditions established by the articles of incorporation of the company. Any holder of such shares may participate in these meetings*", and according to art. 116 (1) *"The decision of a general meeting to amend the rights or obligations relating to a class of shares shall take effect only after the approval of that decision by the special meeting of shareholders of that class. 2. The provisions of this section concerning the convening, quorum and holding of general meetings of shareholders shall also apply to special meetings. 3. Decisions initiated by special meetings shall be subject to the approval of the appropriate general meetings."*

From the point of view of the topography of Law no. 31/1990, the provisions of art. 96 and those of art. 116 are placed separately. Thus, the text of art. 96 is found in Section I - About shares of Chapter IV - Joint stock companies under Title III - Operation of companies, while the provisions of art. 116 is located in Section II - About the general meetings of the same Chapter IV, within the same Title III, as well as the provisions of art. 132 with which it is completed. It should be noted that Section II, being entitled "On General Assemblies", in the context in which the provisions of para. (2) and (3) of art. 116 of Law no. 31/1990 refers, inter alia and especially to special meetings, we could say that we are in the presence of an erroneous topography, in the sense that paragraphs (2) and (3) of art. 116 should have been located in Section I, in the content of art. 96 of Law no. 31/1990. From our point of view, this terminological contradiction, between the name of Section II (About General Assemblies) and the actual content of para. (2) and (3) of art. 116 of Law no. 31/1990 (which mainly refers to special meetings) does not represent an error in the topography of legal texts because the intention of the legislator was that the legal regime, mainly procedural, of the two types of shareholders' meetings (general and special) be regulated compact, within the same Section (II), which also includes the provisions of art. 132 of Law no. 31/1990, observing the standards of Law no. 24/2000 republished, regarding the norms of legislative technique for the elaboration of normative acts, as we will argue further. Thus, according to art. 53 par. (2) of Law no. 24/2000, *"The succession and grouping of the substantive provisions contained in the normative act are made in the logical order of carrying out the regulated activity, ensuring that the provisions of substantive law precede those of a procedural nature ..."*. By referring to these legal provisions, we appreciate that, although the provisions of art. 96 of Law no. 31/1990, create the appearance of a procedural norm, in reality it is a norm of material law because it regulates the right of the holders of different categories of shares to meet and participate in special meetings, a reason why the location of art. 96 of Section I complies with those rules of legislative technique, as long as the latter section contains rules of substantive law governing the actions and the various categories thereof. In accordance with the same standards of legislative technique, the provisions of art. 116 of Law no. 31/1990 are correctly placed in the content of Section II - About general meetings, a section that mainly includes procedural rules both regarding the general meetings and regarding the special meetings. Therefore, a first premise that leads to the conclusion that an action for

annulment can be filed against the decisions adopted by the special meeting of shareholders results from the topography of the two texts of law, respectively art. 116 and art. 132 of Law no. 31/1990, legal provisions that were placed in the same Section II - About general meetings. If the legislator had not intended that the special assemblies should not be subject to the provisions of art. 132, then the provisions of art. 116 would have been placed in Section I - About shares, along with the provisions of art. 96 or even in its content in the form of other paragraphs, an aspect which, in our opinion, would have been a topographical error.

3. Arguments Derived from The Notion, Nature and Legal Regime of Special Meetings

From the point of view of the terminology, the special meetings of the shareholders are not defined by Law no. 31/1990, but from the provisions of art. 94 par. (2) of Law no. 31/1990 it is shown that they represent the consequence of the legal possibility for a joint stock company to issue, under the conditions of the articles of incorporation, categories of shares that confer different rights such as preferential shares with priority dividend without voting rights, shares that create a distinct category of shareholders which, according to art. 96, have the right to participate in special meetings.

If the general meeting is the supreme governing body of the company, the special meeting of shareholders does not have such a nature, according to the provisions of art. 96 from which it follows that it is the expression of the right of the holders of special classes of shares to meet, participate and decide on the legal fate of those special classes of shares. Precisely for this reason, through para. (1) and (3) of art. 116, the legislator instituted a double conditionality or a reciprocal conditionality regarding the legal effects of the decisions of the general / special meetings regarding the modification of the rights and obligations regarding a special category of actions. Such reciprocal conditioning is both a means of protecting the rights of holders of a particular class of shares and a means of protecting the rights of holders of so-called ordinary shares, thus all shareholders, regardless of the type of shares held in portfolio (special or ordinary) being sheltered from potentially abusive / illegal changes adopted by special assembly decisions or adopted by general assembly decisions, as appropriate.

Also in order to protect the rights of the holders of the categories of special shares by art. 116 par. (2) the legislator stated that *"The provisions of this section on the convening, quorum and holding of general meetings of shareholders shall also apply to special meetings".* In the content of art. 116 par. (2), the legislator did not make an express reference to the possibility of challenging in court, with an action for annulment, the decisions of the special meetings, nor do we consider that such a reference was necessary, even in the context in which art. 132 of Law no. 31/1990 refers only to the decisions of general meetings, because the legal provisions governing general meetings constitute the common law on special meetings (Adam Ioan, 2010, p. 394), so that the organization and operation of various special meetings, including their aspects of illegality, follow the legal regime of general meetings which also includes the action for annulment. Through the provisions of art. 116 par. (2), the legislator did not regulate a specific situation, a particular case that derogates from the common law, but on the

contrary made an express reference to the common law in the matter of meetings of companies, according to the principle *generalia specialibus non derogant*. It is not possible to support the thesis according to which under the dome of the action for annulment the decisions of the special meetings would not enter because in the content of art. 116 par. (2), the legislator did not indicate and did not individualize the texts of the law on general meetings to be applied to special meetings, but the reference is made to the entire legal regime of convening, quorum and holding general meetings, legal regime which includes the coercive means of protecting the rights of special shareholders, namely the action for annulment.

4. Conclusions

As a legal nature, art. 116 par. (2) is a reference rule which not only complies with the requirement of the legislative technique to avoid regulatory parallels, but also creates the appropriate procedural framework that guarantees holders of a particular class of shares both the subjective right to meet and attend special meetings , as well as the rules regarding the effective conduct of such meetings, rules whose observance is ensured by the coercive force conferred by the action for annulment regulated by art. 132 of Law no. 31/1990. On the other hand, as it results from the provisions of art. 95 of Law no. 31/1990, the holders of preferential shares with priority dividend, although they have the right to participate in the general meetings, do not have the right to vote (Schiau Ioan, 2009, p. 256). Thus, even if the decision of the special meeting is subject to the approval by decision of the general meeting, the holders of these preferential shares do not have the right to vote against the latter decision, which means that it is natural for them to have the right to express their will on the decision of the special assembly. The expression of will in the sense of voting for or against the decision of the special assembly must be complete, in the sense that the right to vote must be accompanied by the procedural judicial means to endorse or refute.

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