NEWS
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SOCIEDADE DE ADVOGADOS

AMENDMENT TO THE COMMERCIAL CODE

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INTRODUCTION

Decree-Law no. 1/2018 of 4 May, has come into force. This Decree-Law amends the Commercial Code approved by Decree-Law no. 2/2005 of 27 December, partially amended by Decree-Law no. 2/2009 of 24 April, "to adapt it to the need to reduce bureaucracy, increase flexibility and simplify the procedures to incorporate commercial companies."

The amendment cover the subjects addressed in the general part on commercial companies and some of the special rules on limited liability companies. They include the form of the articles of association, special rights of shareholders, and their suppression, limitation or modification, the right to information of the shareholders, changes to the powers of the general meeting, additions to those who can represent the shareholder at the general meeting, and the removal of some formalities, chiefly the need for documents to be witnessed and notarised. Not only are some changes made to the duties of the directors of companies, but also, some new ones are added. The new law regulates the matter of voting and calculating the majority, and it also enshrines the possibility for any interested person to obtain a copy of the articles of association of a given company.

Besides the new provisions and wording, these changes are characterised by repealing certain rules either because they were already covered in the general part on the commercial companies, or because they no longer made sense in view of the aims of the amendment

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1. AMENDMENTS TO THE GENERAL PART ON COMMERCIAL COMPANIES

Besides, their legal representatives may also sign the articles of association, without the requirement for their signatures to be witnessed in person. The signature need only be recognised by similarity.

The new law expressly enshrines the possibility for the share capital to be paid up in cash, in kind, or both, on the date of the incorporation, without prejudice to its deferral. When the share capital is paid up in kind by transferring real property into the ownership of the company, the articles of association must be executed by public deed. In this regard, the wording of the previous law was not sufficiently clear on this point.

As to the information the articles of association must contain, besides its harmonisation, the terminology was fine-tuned from "object of the company" to "corporate object".

When it comes to the registered office of the company, the wording of article 92(1)(d) of the Commercial Code, which provided that the registered office must be established in a specifically defined location or, if not, at the private address of one of the shareholders, was autonomously regulated Now, the registered office must be registered before the company in question begins its operations.

The special shareholder rights are now regulated in more detail.

The creation of special shareholder rights is no longer only possible by means of a stipulation in the articles of association. It is now possible to establish and remove these rights by a resolution of the general meeting.

Besides those inherent to the situation of shareholder, special shareholder rights now also include asset-related or non-asset-related rights which, merely by way of example, are those listed in article 105(2) of Decree-Law no. 172018 of 4 May.

The abuse of the position of minority shareholder is prohibited with the requirement that their individual interests may not prevail over those of the company or over loyalty to it. This abuse of position in violation of the shareholder's duties – for example, in cases of obstructing the passing of a resolution – may give rise not only to liability for any losses caused to the company, but also, depending on the seriousness of the violation, to the withdrawal of the special right.

However, in principle, the special rights may not be suppressed, limited or modified without the consent of their holder given in the general meeting.

As to the right to information, while the authorisation of the board is not necessary to consult and obtain a copy of the minutes of the general meeting, the same cannot be said for exercising the right to consult and obtain a copy of the minutes of the board. This is subject to prior authorisation, and the board may refuse the exercise of the right, shielding itself with confidentiality, commercial and/or industrial secrecy, or an act that cannot be disclosed to the public. These facts may mean that access to and the potential disclosure of the content of the minutes could cause damage to the company.

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MAURO PINTO - MOÇAMBIQUE
Mercearia do Povo, 2007 *(detail)*

Prova jacto de tinta
46,5 x 70 cm
From the Collection of the PLMJ Foundation

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The powers that are exclusive to the general meeting have been broadened and highlights include (i) the obligation to distribute profits up to 6 months after the resolution and the treatment to be given to losses, (ii) the above-mentioned creation of special shareholder rights, (iii) the call for and reimbursement of shareholder loans and additional capital contributions, (iv) the exclusion of the shareholder.

Non-exclusive powers of the general meeting have also been established. These include the power to (i) set the remuneration of the corporate bodies, (ii) dispose of and charge shareholdings, and (iii) appoint an external auditor.

As to shareholder's participation in the general meeting, shareholders may also be represented by a director, by a third party or by an attorney-in-fact. All that is necessary is a proxy letter addressed to the president of the board of the general meeting signed by the shareholder. No other formality is necessary.

It is no longer necessary for a notary to recognise the signature of the minutes drawn up in a separate document.

The duties of directors have been changed and carrying on a commercial activity that competes with the activity covered by the corporate object of the company, either on their own behalf or for a third party, now requires the express prior consent of the shareholders. However, there is an exception to this rule if the directors were already carrying on this activity prior to their appointment as director and this activity was known to all the shareholders.

The balance sheet and annual accounts submitted to the general meeting are, within 90 days of the date the meeting is held, deposited at the Registry Office of Legal Entities.

The new law prohibits directors from: (i) entering into contracts with the company, obtaining guarantees from the company and its obligations, receiving payments on account of personal obligations contracted or receiving advances of more than one month of their monthly salary; (ii) taking out or using a loan or credit, or resources or assets of the company, for their own benefit or that of the parties, without the prior authorisation of the general meeting; (iii) receiving any personal advantage from third parties, whatever form it may take, because of holding the position of director; (iv) making any disposals of assets, advantages or rights for no consideration at the expense of the company, except if authorised in advance by the general meeting and this disposal is for the benefit of the employees of the company or of the community in which it operates, in view of the social responsibilities of the company; and (v) obtaining advantages, for themselves or for another, at the cost of not taking advantage of a business opportunity in the interest of the company.

The balance sheet and annual accounts submitted to the general meeting are, within 90 (ninety) days of the date the meeting is held, deposited at the Registry Office of Legal Entities. Any interested party may make a written request for them to be made available to that party or to the company. This procedure is imposed to companies subject to IRPC (Corporate Income Tax) that are required to have organised accounting.

The information that must appear in the simplified statement of the articles of association are expressly enshrined. Any interested party may, if they so wish, obtain a copy of the articles of association from the Registry Office of Legal Entities, or from the company.

2. AMENDMENTS TO THE RULES ON LIMITED LIABILITY COMPANIES

When it comes to the ownership of the assets of the company, the law provides that they belong to the company alone and the company is responsible for its debts to its creditors, except as provided for in article 287 of the Commercial Code.

When there is no legal or contractual provision to the contrary, the assets of the shareholders are protected from the debts of the company.

In the context of the division of quotas, the rule requiring that any act regarding the division of a quota had to appear in a public deed in the cases in which real property was involved and in a written document signed by interested parties with their signatures witnessed in person, or in a judicial decision, has been eliminated. Registration in the company's books and registration of the division of the quota are also no longer necessary.

If the shareholders have established share capital, one vote corresponds to one metical of the nominal value of the quota. If there is no share capital, the votes are calculated based on the percentage to which each quota corresponds in the share capital.

However, as a special right, the articles of association may allocate another number of votes to one metical.

Resolutions are passed when they obtain one half of the votes plus one in their favour.

When there is no legal or contractual provision to the contrary, the assets of the shareholders are protected from the debts of the company.

3. REPEALS

Article 414(3) of the Commercial Code has been repealed. However, the matter of participation of the shareholder in the general meeting is now regulated in the terms described above.

The rule on the duties of directors enshrined in the article 433 of the Commercial Code has also been repealed and this matter is also regulated in the terms described above.

CONCLUSION

The objectives that the legislature laid down with the publication of Decree-Law no. 1/2018 of 4 May, including less bureaucracy, more flexibility and simplification of the procedures to incorporate commercial companies can be achieved through the various amendments introduced by the new law. These include the elimination of the need for the signatures on the articles of association to be witnessed, the addition of persons with new capacities who can now sign those articles, and the fact that special shareholder rights no longer have to be created in the articles of association alone. The new law also (i) introduces rules on the minority shareholder and the consequences of abuse of this position, (ii) broadens the possibilities to exercise the right to information, (iii) increases the powers of the general meeting, (iv) adds new persons that can represent the shareholder in the general meeting, (v) imposes new duties on company directors, and (vi) allows any interested party to obtain a copy not only of the articles of association, but also of the annual accounts of certain companies.

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