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# FEATURES OF THE DISPOSITION PRINCIPLE IN THE FIELD OF CORPORATE LAW

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**ABSTRACT:** *The present study aims to analyze the enshrined provisions on the typologies of companies with legal personality regulated by the Law no.31/1990. The provisions under consideration would not be considered "novel" and have been widely debated in the doctrine. The novelty lies in identifying, within these norms, the ways in which the disposition principle is manifested as principle of material law. Revealing the constants of manifestation and the limitations of this principle in corporate law outlines a new perspective for applying the regulations on companies. The perspective focuses on freedom / the right of associates / shareholders to associate, organize and carry out their business according to their own means and interests, within the limits set by the legal norms in the matter. Hence, the center of gravity in applying the corporate regulations is shifted from the restrictive perspective to the non-restrictive perspective.*

**KEYWORDS** *disposition principle, corporate law, substantive law, private law*
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## 1. INTRODUCTION

Corporate law as an integrated part of the vast field of private law is coordinated by rules and principles that are specific to the economic / commercial activity and its professionals as enshrined in the Civil Code. [1]

One of these principles that govern private law and, implicitly, the matter of corporate law is the *disposition principle.* We deem appropriate for this to be formally recognized as such, more precisely as a *principle of substantive law* by reference to the principles of law as defined by Popescu et al (2016, p.68) and criticized by Dogaru (2018), alongside the other principles expressed by the provisions of the Preliminary Title, Chapters I - III of the Civil Code, namely: the principle of the general application of civil law (art.3), the principle of priority application of international human rights treaties (art.4), the principle

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[1] Civil Code was republished in the Off. Gazette, Part I, no.505/15.07.2011, consolidated version on 31.12.2018, hereinafter called *Civil Code*.

of the priority application of European Union law (art.5), the principle of the non-retroactivity of civil law (art.6), the principle of territoriality of civil law (art. 7), the principle of extraterritoriality of civil law (art.8), the principle which enshrines the freedom of persons to dispose of their possessions (art.12) the principle of good faith (art.14), the principle of publicity of civil rights, acts and legal deeds (art. 18 and subsequent) and the principle of legality (art.19 para.1).

Private law is, by definition, an area of legal relationships governed by *non-restrictive rules* (permissive rules and / or supplementary rules) which leaves the subjects of law that are involved in these relations, the possibility to choose *to exercise of the right of option* between several legal courses of action. Obviously, as it is normal, these must be conducted within the boundaries of imperative norms that embody the essential aspects that require a uniform, unified, and generally mandatory regulation in corporate law. This is the way in which operates the disposition of subjects of law - natural persons, legal persons, professionals or persons acting outside the professional sphere, to dispose by choosing a conduct that is in accordance with the law but expressing their own desires or personal or professional needs.

## 2. EXPRESSIONS OF THE DISPOSITION PRINCIPLE IN THE FIELD OF PRIVATE LAW

### 2.1.Sedes materiae

In the present study, we intend to present, but not in exhaustive manner, aspects regarding the manifestation of the disposition principle, developed in Apan & Miff (2018), in the regulation of companies as per Law no.31/1990.[2]

It is appropriate to point out that *corporate law* is not limited only to the corporate typologies prescribed in the special laws and mentioned principally and generally by the rule of common law in art.1888 Civil Code, but is now enshrined in - a uniform and unitary manner of principle provisions contained in Book VII, Title IX, Chapter VII "The Company Contract" of the Civil Code, which completes the framework of special laws in this matter and becomes applicable in the alternative and for the completion of the special laws in the degree of compatibility with them.

So, the disposition principle, to the extent to which we accept it as *a principle of substantive law* and not just a procedural law principle, the way it is presented in Deleanu (201, p.441-446) and Ciobanu (1996, p.136-139), we consider it is primarily reflected in the legal construction of corporate law and the company contract on which the principle is founded according to civil law (Civil Code) and consequently manifests itself as such also in many of the clauses of the company contract / constitutive act on which are based the five corporate legal typologies provided by Law no.31/1990 and referred to generally by art. 1888 letter c) – letter g) of the Civil Code: the general partnership, the limited partnership, the limited partnership by shares, the joint stock company and the limited liability company.

Under corporate law, we consider that the disposition of a person is manifested primarily through the exercise of the option to associate in one of the legal types of companies regulated by law using the legal means provided by the substantive rules of

[2] republished on 17.11.2004, consolidated version on 31.12.2018, hereinafter referred to as *Law no.31/1990*.

civil law and the special legislation and hence making use of the freedom and the right of association enshrined constitutionally and principally by art.40 and art.45 of the Constitution, as developed in Ionescu & Dumitrescu coord. (2010)

The specific means of exercising the right of association is *the constitutive act* or *the company contract* as a document that concentrates the set of rights and obligations assumed by the future associates and expresses their will to start a company by choosing one of the legal types of company provided by law .

The option of the associates, as an expression of their disposition, can be exercised first by choosing, as the case may be, and having in view the type of activity that it intends to carry out as a company or as an entity without legal personality, between the legal types of companies provided by art.1881 of the Civil Code, namely: the simple partnership of Chapter V, Title IX, Chapter VII, Section 2, Joint Venture - Art. Chapter V, Section 3, developed in Apan, (2018, p.46-56) or the corporate typologies provided by special laws such as cooperatives or joint-stock companies, general partnerships, limited partnerships, partnership limited by shares, limited liability companies governed by Law no. 31/1990.

In other words, we can also observe that the principle under consideration is derived from the constitutive act of companies with legal personality, in the five company typologies prescribed by the corporate law, many of these clauses which make up *the minimum content of the constitutive act*, distinctively configured by the law *for partnerships* namely: in art. 7 – the general partnership, the limited partnership and the limited liability company, respectively for the *capital companies* in art. 8 namely : the joint stock company and the partnership limited by shares, being provided as a minimum requirement for the constitutive act. The classification of companies in partnerships and capital companies is given by Cărpenaru (2016 p.40-50). This posibility is instituted through legal texts containing *permissive provisions* which leave to the associates the right to choose the legal conduct or concrete method expressed formally in the clauses of the contract by which the company is to be founded.

Regarding the form of the constitutive act, the disposition of the members is manifested through the options to conclude it, as the case may be, in the form of the single document bearing the name "constitutive act" or in the form of two documents or acts that together make-up the constitutive act on which the company is founded, and these are the company contract and the articles of association. Similarly, when only a company contract or articles of association is concluded, in relation to the legal type of company for which the law provides only one of these documents (general partnership or limited partnership is established through a company contract, according to art.5 par.1 of the law, and the one-man limited liability company is established through the will of a single person, only the articles of association being drawn up, according to art.5, para.2 of the Law on trading companies no.31/1990). This act may also be referred to as constitutive act (art.5 para.4 of the law).

In the context of art.7 and art.8 of the Law no.31/1990, describing the minimum contents of the constitutive act, the associates' disposition shall be exercised punctually regarding the following terms, but in accordance with the legal conditions imposed by mandatory norms: the typology, the name and the registered office of the company ; the object of the company; the registered capital; contributions of associates; appointing the administrators of the company; appointing the censors or financial auditors; each associate's share in profit and loss; the setting up of the secondary offices or the conditions

for their subsequent establishment; the duration of the company, determined or, where applicable, indefinite; the method of dissolution and liquidation of the company.

**2.2. The associates/shareholders' right of option for a type of company with legal personality and the limitations of this right**

*Ab initio,* we invoke the right and the freedom of the associates - natural persons and / or legal persons - to opt firstly, as indicated by Apan (2017 -1, p.14-20) for one of the five typologies of companies established by art.2 of the Law no.31/1990. We must bear in mind, however, that once chosen the legal form of company as mentioned in art.2 of the law, it (the company) acquires legal personality as a result of the fulfillment of the constitutional formalities provided by law, developed by Apan (2017, p.65-79), and thus enters in the category of institutionalized types of company, resulting in the inability of the associates to consider it by their will as a company without legal personality. The technique of drafting the legal text in art.1, para.1 of Law no.31/1990, does not allow the associates to make any other interpretation, given the fact that the legal provision is imperative. It states that the companies established by the natural persons or legal entities established for the purpose of carrying out activities for profit, within the scope of this law, are companies with legal personality. In the case of capital companies, the founders of the joint stock company are able to choose between the two ways of setting it up, namely setting-up by full and simultaneous subscription of the share capital or the setting-up through public subscription, in relation to the fulfillment of the minimum conditions established by the legal provisions for each of the methods of setting-up mentioned in art.9 para.1 of Law no.31/1990.

**2.3. The associates/shareholders' right of option in choosing the name, the registered office and its limitations**

Regarding the *name and the registered office of the company*, the associates/shareholders are free to decide on the name of the company, on the trade name of the company. According to art.30, para.1 of Law no.26/1990[3], the trade name "is the name or where appropriate the denomination under which a trader they trade and sign", however, in relation to the legal type of the company, it is necessary to take into account the obligatory contents of the trade name, as they are specified by art.32-art.37 of Law no.26/1990. The availability of the trade name is verified by the future associates at the Trade Register Office, before the conclusion of the constitutive act. The registered office of the company will also be established by the will of the parties that decide the actual location, but in compliance with the conditions which result mainly from art.17 of Law no.31/1990. Thus, several companies may operate at the same registered office, but only if the cumulative conditions laid down in art.17, para.4 of the law are respected, more precisely the limitations, which restrict the ability of the associates/shareholders to exercise their right to establish the registered office, and which, on the one hand refer to the building which, by its structure and useful floor surface, must allow the operation of several companies in different rooms or distinct spaces and, on the other hand, the number

[3] Republished in 1998, in the Off. Gazette of Romania, Part I, no.49/4.02.1998, consolidated version of 31.12.2018, hereinafter called Law no.26/1990.

of companies for which associates have declared their registered office in the same building, and this must not exceed the number of distinct rooms or spaces.

**2.4. The associates/shareholders' right of option in establishing the object of the company and its limitations**

The *object of activity of the company* referes to specificating in detail the object, with the mandatory indication of the NACE code for the activities assumed by the company as a result of the option of the associates through the corresponding clause of the company contract, and in compliance with the obligation to specify the main field and the main activity of the company. The legal conditions *limiting the associates' right of option* in relation to the specification of the company's objects also refer to those *activities which are prohibited by law* and therefore can not constitute objects of business or are *activities that can only be exercised with due respect for the special legal regime*. For example, we invoke the provisions of art.2 of Law no.31/1996 on the state monopoly regime,[4] which lists the activities under the state monopoly and the exercise of which by the economic operators is subject, as the case may be, to the licensing regime or to some prohibitions. Also, the right of option applies to one main activity and to one or several secondary activities.

**2.5. The associates/shareholders' right of option in establishing the share capital of the company and its limitations**

The *share capital of the companies* governed by Law no.31/1990 is established by the associates who agree on the amount thereof but in compliance with the minimum legal limit for the capital companies (90,000 lei) - art.10 para.1 of Law no.31/1990 and, respectively, for the limited liability company (200 lei) - art.11 para.1 of Law no. 31/1990. In the case of capital companies, if the shareholders founders express their option of having also an authorized capital, the constitutive act must comprise the corresponding clause on the amount of authorized capital, but in accordance with art.$220^1$ para.3 of the law, its nominal value may not exceed half of the subscribed share capital existing at the moment of authorization. More specifically, the clause in the constitutive act may authorize the board of directors or the management, that in a certain period of time, not exceeding 5 years from the date of company registration, to increase the subscribed share capital up to a determined nominal value (authorized capital) by issuing new shares in return for contributions. However, such authorization may be granted by the general assembly of shareholders by means of an amendment to the constitutive act, for a specified time not exceeding 5 years from the date of registration of the amendment, the quorum requirements for such amendment may be increased through the constitutive act.

For companies under the *regime of other special laws*, the disposition of associates is restricted by the possible minimum requirements of capital set therein, such as, for example, credit institutions constituted as banking companies for which G.EO. no.99/2006 on credit institutions and capital adequacy,[5] stipulates in art.11 a minimum limit of 5 million euros in lei equivalent for initial capital, or in the case of traders operating as

[4] Published in the Off. Gazette of Romania, Part I, no.96/13.05.1996.

[5] G.E.O. no.99/2006 was published in the Off. Gazette of Romania, Part I, no.1027/27.12.2006 and was approved through Law no.227/2007 published in the Off. Gazette of Romania, Part I, no.480/18.07.2007.

limited liability companies, holders of a tourism license, whose share capital, starting with 1.01.2019, cannot be less than 25.000 lei according to the provisions of art. 20 para.2 of G.O. no.2/2018 on the package travel and linked travel services, as well as for the amendment of certain normative acts.[6]

Another section in which the associates' disposition is manifested, expressed in the corresponding clauses of the constitutive act, refers to the transfer of the share capital contribution. In the pertnerships (the collective company and the limited partnership) the *transfer of the share capital contribution* is possible if it was allowed by the corresponding clause of the constitutive act - art.87 para.1 combined with art.90 of Law no.31/1990.

Except for the cash contribution that is mandatory for all types of companies as well as for cases expressly provided for by law in which the contribution in debt-claims and respectively the contribution in work or service provision cannot be admitted by the associates/shareholders, they are entitled and able to agree on the type of contribution and the amount expressing the nominal value of the contribution. The limitations of the shareholders' disposition to decide in the above mentioned sense refers to: the obligation of the associates to make a contribution in cash to the formation of the share capital of the companies regulated by Law no.31/1990; contribution in debt-claims are not admitted in the case of shareholders in joint-stock companies constituted through public subscription, nor for joint-stock companies and limited liability companies; the work or service provisions cannot be contributed to the formation or increase of the share capital - art.16 para.3 and 4 of Law no.31/1990.

Finally, with regard to the contribution of assets to the formation of the share capital of the company, the disposition of the associates is manifested in the right to decide concerning the transfer of the property right or only of the right to use the contributed asset, but if the associate does not unequivocally express its intention to transfer to the company only the right of use on the property, ascertained by the corresponding clause of the constitutive act, therefore in the absence of a stipulation to the contrary in the constitutive act, the assets established as contribution to the company become its property from the moment of registration of the company in the trade register (art.65, para.1 of the law).

**2.6. The associates/shareholders' right of option in establishing the share on profit and loss and its limitations**

Another regulatory segment in Law no.31/1990, which emphasizes the incidence of the disposition principle refers to the right of the associates to freely determine, through the terms of the constitutive act, each associate's share of profit and loss. Art.67 of the law expresses the *principle of the freedom* of associates to decide on how to distribute the profit and to bear loss, the disposition of the parties being limited only by the *interdiction to stipulate the leonine clause* by which an associate is excluded from the sharing of benefits or from participating in loss. However, the presence of such a clause in the constitutive act does not produce any legal effect, since the sanction imposed by the law is to *consider the clause as unwritten*, as art.1902 para.5 of the Civil Code, republished in 2011, consolidated version of 31.12.2018 , which, as common law regulation in the sphere

[6] G.O. no.2/2018 was published in the Off. Gazette of Romania, Part I, no.728/23.08.2018.

of trading companies, complements the special law. Usually the criterion according to which the associates determine the participation in the profit and loss is the proportionality with each associate's share of capital if according to the law, "the constitutive act does not provide otherwise". Thus, if the constitutive act is incomplete in the sense that it is missing the clause regarding the participation of the associates in profit and loss, then the rule established by the supplementary regulation in art.67 para.2 stipulating that dividends are paid to associates/ shareholders to the extent of their participation in the share capital.

The disposition of the associates gathered in the general assembly is also expressed with regard to the term within which dividend are to be paid, but here again the legal text also stipulates a due date, ie "not later than 6 months from the date of approval of the annual financial statements for the previous year ", which cannot be overruled by the will and the decision of the associates. Failure to comply with the due date results in the company being ordered to pay penalties to associates, calculated in accordance with art.3 of G.O no. 13/2011[7] *if no higher interest rate was established* through the constitutive act or by the decision of the general assembly of the associates approving the financial statement of the previous financial year. Again, the legal provision confers efficiency to the principle of disposition by letting to the associates the prerogative to establish, through the constitutive act or in the general assembly, an interest higher than the legal one.

As a result of the amendment on art.67 of Law no.31/1990 through Law no.163/2018 amending and supplementing Accounting Law no.82/1991, Law no.31/1990, the associates/shareholders may opt for the distribution of the dividends proportionally with the participation share in the paid-up share capital, both quarterly, on the basis of the interim financial statements and annually, after the adjustment made in the annual financial statements. The associates/shareholders' rights also include the term in which quarterly dividends are to be paid on an optional basis by determining the general assembly's competence to establish it. The differences resulting from the adjustment are paid within 60 days of the date of approval of the annual financial statements for the previous financial year.

**2.7. The associates/shareholders' right of option in appointing the administrators and censors, respectively the finacial/ statutary auditor of the company and its limitations**

The appointment of the administrators and censors, respectively the financial/statutory auditor of the company, is another segment in which the principle of disposition in the matter of companies regulated by Law no.31/1990 is partially manifested. As a rule, associates have the prerogative to designate as administrators any of themselves or persons outside the company if the persons meet the legal conditions. The limitations refer to the compliance with the requirement of the odd number, the partnership administrator's quality of managing partner, the observance of the requirements for majority and quorum for the subsequent appointment of the administrators, respectively for their revocation, the examination of the incompatibilities and, where appropriate, the quality of the natural person or legal entity of the person designated to exercise the mandate of administrator in relation to the legal type of company and the conditions imposed by law. For example, the

[7] published in the Off. Gazette of Romania, Part I, no. 607 of 29.08.2011, consolidated version of 31.12.2018.

legal person cannot be appointed as a director within the executive body of joint stock companies governed by a one tier board structure, but may be a member of the managing board while in the companies having two tier board structures the legal person cannot be appointed as a member of the managing board but may be a member of the supervisory board.

Regarding the exercise of *the right to represent the company*, each administrator has this right *unless otherwise stipulated in the constitutive act*, and thus the associates are entitled to establish that a certain administrator or some of them are not entitled to exercise this right - art.75 of Law no.31/1990. The determination of the powers conferred on the directors, as well as the actual way of exercising them (together or separately, possibly with a certain quorum and majority), is incumbent upon the associates by the corresponding clauses of the constitutive act.

Moreover, in the normative acts related to the Law no.31/1990 it is expressly stipulated the interdiction to authorize and carry out certain categories of operations if in the tax record, regulated by Ordinance no. 39 of August 26, 2015 on the tax record,[8] certain facts / situations are registered regarding the associates / administrator.

This interdiction, stipulated in pt.5, is established in relation to the requirement of submitting the tax record certificate as a prerequisite condition in the following situations provided by art.8 par.1 of G.O. no.39/2015 on tax record: the set-up of companies, cooperatives, agricultural cooperatives and entities without legal personality, by their associates, shareholders, members and legal or designated representatives; authorization of self-employment; to the assignment or any form of transfer of shares by new associates, shareholders or members; the appointment of new legal representatives, as well as the take-up of new associates, shareholders or members on the occasion of the increase of the share capital by new legal representatives, associates, shareholders or members.

The acts that are included in the tax record of natural persons, legal entities and entities without legal personality are those established according to art.4 para.3, G.O. no.39/2015, namely: information on acts sanctioned with contravention according to criminal law, tax law, accounting law, customs law, as well as those concerning financial discipline, except for the offenses sanctioned by warning. The expressly determined acts which are entered in the tax record are established by government decision. In force at this date is the Government Decision no.1000 of December 23, 2015[9], in the annex of which are indicated the acts to be registered in the tax record and the normative acts that regulate them.

There is also an interdiction arising from the provisions of art.16, para.10 of Law no.85/2014[10] on insolvency and insolvency prevention procedures, according to which the person against whom was attached liability through a final court judgement may no longer be appointed administrator or, if he/she is an administrator in other companies, will be removed this right for 10 years from the date of the final judgement. Hence, regardless of the existence of budgetary claim in the composition of the prejudice, the attachment of patrimonial liability brings the interdiction to be appointed administrator in the future, and

[8]published in the Off. Gazette of Romania, Part I, no.655/31.08.2015, consolidated version of 31.12.2018, hereinafter called G.O. no.39/2015.

[9] published in the Off. Gazette of Romania, Part I, no. 977/30.12.2015.

[10] published in the Off. Gazette of Romania, Part I, no.466/25.06.2014, amended and supplemented, consolidated version of 31.12.2018.

also if the person holds the capacity of administrator then his/her right to manage terminates.

Concerning the appointment of the censors or of the financial/statutory auditor in joint-stock companies, limited partnership by shares and limited liability companies, through the constitutive act or subsequently through the decision of the shareholders'general assembly, respectively by the decision of the associates' general assembly in the limited liability companies, it is a prerogative belonging to the shareholders/associates at the time of the setting-up of the company or subsequently when assembled in the deliberative and decision-making structure of the company. For example, *limitations affecting disposition* refer to compliance with the minimum number of 3 censors and an alternate in joint-stock companies and in limited partnership by shares, which are not subject to the legal audit obligation, issues developed in Carpenaru (2016, p.236), the obligation to designate censors in limited liability companies with more than 15 associates, the odd character of the number of censors, the duration of the three-year mandate with the possibility to re-elect the censors, the obligation to appoint a censor representative of the Ministry Public Finance in the case of joint stock companies that are majority state owned.

**2.8. The right of option of the associates/shareholders in regulating the representation of the company and the activity of the administrators and its limitations**

The associates' disposition is also manifested in the content of the articles of the constitutive act governing the way in which the company is represented and the way in which the administrators carry-out their activity. Thus, the right to represent the general partnership belongs to each administrator, unless the constitutive act contains a contrary stipulation (art.75 para.1 of Law no.31/1990). The constitutive act may require that the administrators work together or separately, but if the clause requires the directors to work together, the management decision must be taken unanimously and, in the event of a discrepancy between the administrators, the decision-making power lies with the shareholders representing the absolute majority of the share capital (art.76 para.1 of the law). With the same majority, the associates may choose and appoint one or more administrators, determine their powers, the duration of the mandate, the remuneration, unless the constitutive act stipulates differently (art.77 para.1 of the law); also in compliance with the *principle of symmetry*, with the same majority, associates may decide to revoke administrators or limit their powers unless the administrators have been appointed through the constitutive act when unanimity is required to be respected.

Regarding the exercise of the capacity of administrator, art. 70, par. 1 of the Law no. 31/1990 states mainly that the administrators can perform all the operations necessary to carry out the activity of the company, *except those affected by the restrictions established in the constitutive act*. Therefore, as a manifestation of the disposition recognized by the law, the associates have the power to establish - through the terms of the constitutive act - the limits of the exercise of the right of administration of the person or persons designated to fulfill this capacity.

However, acts of disposition regarding the assets of a company may be concluded on the basis of the powers conferred to the legal representatives of the company - by law, *the constitutive act* or the decisions of the statutory bodies adopted in compliance with the law

and with the constitutive act - w*ithout the need for a special proxy and the fulfillment of the authentication requirement* even if the acts of disposition have to be drafted and acknowledged by a civil law notary - art.70 para.1 of Law no.31/1990.

In the context set out by art.71, para.1 of Law no.31/1990, the administrators who have the right to represent the company cannot transfer this right unless the prerogative has been expressly granted either through the company's constitutive act or later by the decision of the associates' assembly adopted under the law and under the constitutive act. As a consequence, the company may claim, in its discretion, from the substituted person, the benefits resulting from the transaction made by the person substituting by the administrator and having the right to represent the company if the latter has transmitted the right of representation despite the interdiction laid down by the legal text (art.71 para.2 of the law).

In a conclusive manner, however, it is necessary to emphasize the predominantly imperative character of the norms describing the composition of the bodies of the company and establish their powers, the associates not having the possibility to derogate by setting other rules and procedures but in the few limited cases excepted by the law.

**2.9. The right of option of the associates / shareholders on the means for convening and adopting the decisions of the general assemblies and its limitations**

The adoption of decisions by the corporate bodies of the company is also an area in which, it is expressed in principle the associates' disposition to agree, through the constitutive act, on the working arrangements of the corporate bodies of the company being set-up.

Thus, through the constitutive act of the limited liability companies, the associates decide on the way to adopt the decisions of the associates'general assemblies they will be part of, being able to derogate from the rule expressed in art.197 para.1 of the law, namely that the general assembly decides by the vote representing the absolute majority of associates and company shares (double majority), except when "the constitutive act provides otherwise ". The limitations refer to decisions that have the object of amending the constitutive act when it is necessary the vote of all associates (as an expression of the rule of symmetry of legal acts), *unless the law or the constitutive act provides otherwise*. Also, the constitutive act *may stipulate* that voting may also be done by correspondence (art.191 para.2 of the law).

Concerning the convening of the general assembly of the associates of the limited liability companies, this shall be carried out *under the conditions and with the observance of the type / means stipulated by the constitutive act*, but in the absence of a special clause, the convening will be fulfilled, according to art.195 para.3 of the law, by registered mail, at least 10 days before the day established, mentioning the agenda. There is the option to convene the meeting by an associate or a number of associates representing at least one quarter of the share capital, indicating the object of the convening.

Finally, in limited liability companies that are not subject to the statutory audit obligation, the shareholders' assembly may appoint one or more censors or a financial auditor (art.199 para.2 of the law), thus exercising the prerogative provided by art.194 letter b) of the law, which is the duty of the general assembly of the associates. But in limited liability companies with fewer than 15 associates, if the shareholders' assembly does not designate censors or a financial auditor, each of the associates - who is not the

company's administrator - will have the right to check on the bookkeeping of the company. The limitations arise from the text of art.199 para.3 of the law, according to which the appointment of censors is mandatory if the number of associates of the company is higher than 15.

**2.10. The right of option of the associates / shareholders in setting up the secondary offices and / or subsidiaries and its limitations**

The extension of the company's activity in other localities or even in the locality where it has its registered office is also an area in which the principle of disposition is manifested, the associates being entitled to decide, in relation to the prospects for the development of company, the set-up of the secondary offices and / or subsidiaries, *limitations* arising from the legal status of these entities, set up by the provisions of art.42 (for branches) and art.43 (for subsidiaries, agencies, offices, and other similar offices, etc.), as well as from the formalities to be fulfilled for the legal set-up and functioning.

**2.11. The right of option of the associates / shareholders in establishing the determined or undetermined duration of the company and its limitations**

Establishing the determined or undetermined duration of the company to be set up is also a prerogative of the associates whose consensus expressed in the corresponding clause of the constitutive act reflects again the incidence of the principle of disposition in this matter.

**2.12. The right of option of the associates / shareholders in the transfer of registered shares to persons outside the company and in establishing the continuation of the company with the successor (ii) of the deceased associate and its limitations**

In limited liability companies, art.202 para.1 of the law establishes the right of associates to pass on the registered shares *to one another*. The option of the associates regarding the transfer of registered shares is exercised freely; the limits derive from the compliance with the formalities stipulated by the law regarding the registration of entries in the trade register in connection with the transfer the shares and in the company's register of associates, as well as the updating of the company's constitutive act with the identification data of the new associates and its submission to the trade register.

The transfer of registered shares may be made by assignment *to persons outside the company* but *only if it has been approved by associates representing at least 3/4 of the share capital* and the decision of the shareholders' assembly is submitted within 15 days at the trade register office in order to be entered in the register and published in the Official Gazette of Romania, Part IV. We mention that the interdictions established by the tax code and insolvency code, developed at point 2.7, are maintained here.

Finally, the transfer of registered shares may take place *by inheritance* if a clause is included in the company's constitutive act. The continuation of the company with the successors of the deceased associate does not raise problems if it is respected the maximum limit of the number of associates provided for by the law for the limited liability companies; otherwise, if the legal maximum number of associates would be exceeded because of the number of successors, then they would have to designate a

number of full associate so as not to exceed the legal maximum of the number of associates.

However, the corroboration of the provisions of para.3 with para.2 of art.202 indicates the disposition of the associates to derogate, through a clause in the constitutive act, from the rule established by para.2 regarding the need to approve the assignment of shares to persons outside of the company with a majority of at least 3/4 of the share capital. In other words, unless the constitutive act provides otherwise, the provisions of para.2 of the legal text are not applicable. In the event of the inheritance clause, if the successor does not wish to continue, the company is required to pay the share to the successors according to the latest approved balance sheet.

**2.13 Shareholders' right of option in relation to the conversion of shares and its limitations**

In the joint stock company, according to art.91, para.1 of the Law no.31/1990, the registered capital is represented by shares issued by the company, which according to the way they may be transferred are classified as registered shares or bearer shares.

In this regard, the disposition of the founding shareholders of the capital company is manifested from the moment when the company is set-up, when through the constitutive act is determined the type of shares, otherwise they will be registered shares. Registered shares may be issued either in material form, on paper or in dematerialized form by registration in the shareholders' register. By way of exception, the shares not fully paid are always registered shares, as it is imperatively stipulated by art.92 para.2 of the law.

Throughout the existence of the company, the law allows shareholders to decide the *conversion of registered shares into bearer shares and vice versa*, through the decision of the extraordinary general assembly, in compliance with the conditions established by the Corporate Law in Chapter IV "Joint Stock Companies", in particular art.115 which lays down the requirements on quorum and majority for the validity of the deliberations and decisions adopted by the extraordinary general assembly, as well as those provided for by the constitutive act, given that "requirements for increased quorum and majority can be stipulated in the constitutive act", as it is provided by the legal text of art.115 para.3 of Law no.31/1990.

Therefore, for the validity of the deliberations of the extraordinary general assembly, at the first convening it is required the attendance of the shareholders holding at least one fourth of the total voting rights, and at the following convenings the attendance of the shareholders representing at least one fifth of the total number of voting rights. The decisions are adopted with the majority of the votes held by the present or represented shareholders. However, by way of exception, the decision to modify the main object of the company, to reduce or increase the share capital, to change the legal type of company, to merge, to divide or to dissolve the company shall be adopted by a majority of at least two thirds of the voting rights held by the present or represented shareholders. The constitutive act may stipulate higher quorum and majority requirements.

Finally, under the terms of the constitutive act, *categories of shares may be issued which confer different rights to holders*, such as *preference shares with a priority dividend without voting rights* which entitle the holder to a priority dividend out of the distributable profit obtained at the end of the financial year before any other payments, as well as the rights granted to shareholders with ordinary shares, including the right to attend the

general assembly, except for the right to vote. The legal text of art.94 para.2 of Law no.31/1990 thus evokes the shareholders' disposition expressed in the company's constitutive act, complying with the limit on these shares, which cannot exceed 1/4 of the share capital and will have the same nominal value as ordinary shares - art.95 para.1 and para.2 of the law.

The preference shares and ordinary shares may be converted from one category to the other through the decision of the extraordinary general shareholders assembly, adopted under the conditions of art.115 of the Law no.31/1990. Under the conditions established by the company's constitutive act, the holders of this category of shares meet in special assemblies.

Capital companies may issue bonds under Law no.31/1990 and under the constitutive act. Shareholders gathered in the extraordinary general assembly have the option to decide on the issue of bonds as well as the conversion of a category of bonds into another category or shares, if they comply with the quorum and majority requirements provided for the adoption of decisions, as set out in art.113 in conjunction with art.115 of Law no.31/1990.

**2.14 The right of option of the associates / shareholders in the stage of company dissolution and liquidation and its limitations**

The associates' disposition is manifested not only at the initial stage when the company is set-up but also when it ceases to exist following the decision taken at the general assembly to dissolve the company in accordance with the legal provision in art.227 letter d which mentions as one possible cause of dissolution of the company to be "the decision of the associates' general assembly". As the reasons of dissolution of the company cannot be listed in exhaustive or limitative manner, the constitutive act of the company or the law may also provide for other grounds for dissolving the company, as indicated by letter g of the legal text invoked. As regards the constitutive act, the law allows the members to lay down in the constitutive act clauses regarding the dissolution and liquidation of the company, art.7 letter i and art.8 letter p of Law no.31/1990 which highlights in the minimum set of clauses of the constitutive act of the company stating this power. Regarding the other *reasons provided by the law,* for voluntary dissolution of the company, more precisely, following the decision of the associates adopted in the associates' assembly - a corporate body expressing the will of the company, we can have the case of dissolution of the company before the time limit set as the duration of the company, in the case of fixed-term companies.

Dissolution may therefore be voluntary when associates assembled within the shareholders' assembly / shareholders' general assembly/ shareholders' extraordinary assembly adopt, in compliance with the legal and statutory requirements, the decision to terminate the company.

The disposition of associates in partnerships (general partnerships and limited partnerships) and in limited liability companies also manifests in their ability to *decide, at the same time the dissolution* - with the quorum and majority required to amend the constitutive act - *also the means to liquidate the company* if they agree on the distribution and liquidation of the company's assets and ensure the settlement of the liability or its discharge in agreement with the creditors of the company.

In order to decide on the way in which the assets remaining after the payment of the creditors will be divided among the associates, the unanimous vote of the associates is necessary, and in the absence of the unanimous agreement of the associates on the division of the assets, remains for the liquidation procedure to be applied as provided by the law, in art.235 para.1 and para.2 of Law no.31/1990.

In case of the voluntary dissolution of the company, established and recorded in the decision adopted by the associates in this respect, the law allows the associates to go behind the adopted decision, with the majority required for the amendment of the constitutive act, if no distribution from the asset was made - art.231 of Law no.31/1990. The new decision adopted by the associates shall be entered in the trade register, and then sent for publication to the Official Gazette of Romania, Part IV, at the expense of the company.

Finally, besides the general reasons of dissolution, Law no.31/1990 also provides for special reasons of dissolution which concern certain specific situations, such as those mentioned in art.229 and art.230. Hence, general partnerships or limited liability companies are dissolved by the bankruptcy, incapacity, exclusion, withdrawal or death of one of the associates when, because of these reasons, the number of associates has been reduced to one. *There can be exceptions* if the constitutive act contains a continuation clause with the heirs or when the remaining shareholder decides the continuation of the company as limited liability company with a sole associate, in the latter case witnessing the transformation of the type of the company. The provisions of art.229 para.1 and para.2 invoked are also applicable to limited partnerships or limited partnerships by shares, if the respective reasons concern the only active partner or sleeping partner. Therefore, the remaining sole associate in the aforementioned assumptions is entitled in the exercise of the abilities established by the legal text as a manifestation of the recognized disposition, to decide to go on with the company or, as the case may be, the transformation of company according to legal requirements in order to save its existence as a legal and institutional entity.

In general partnerships, if a partner dies and there is no contrary convention, and the remaining partners do not want to continue the company with the heirs who consent to that effect, then the company must pay the part that pertains to the heirs, according to the last approved balance sheet, latest 3 months after notification on the death of the partner, as stipulated in art.230 para.1 of Law no.31/1990. In the event of the death of one of the active partners, the solution also applies to limited partnerships, unless the heirs of the deceased partner wish to remain in the company and take on that capacity.

The dissolution of the company automatically results in the opening of the liquidation proceedings, keeping the company's legal personality for liquidation operations until its completion. The dissolution and liquidation of the company are distinct but successive phases, and need to be carried out in the specified order and in compliance with the requirements of the law, as the doctrine maintains (Cărpenaru, 2016, p.221, 271-272 and the referred case-law). By way of exception, the solution of the termination of the company "through a simplified procedure, in the sense of the merging of the two phases", as outlined in the doctrine, was enshrined in the law, in art. 235, in the case of general partnerships, partnerships limited by shares and limited liability companies, partners having the prerogative to decide together the dissolution and the method of liquidation of the company, observing the requirements stipulated by the law and the constitutive act.

The liquidation of the company is done in compliance with the legal provisions and the rules of the constitutive act. The set of legal provisions on liquidation contained in Title VII of Law no.31/1990 comprise in many aspects imperative provisions which exclude the disposition of the associates to decide and act to the contrary, as well as the non-compulsory rules that allow the associates to derogate by means of clauses inserted in the constitutive act or by decisions subsequently adopted in compliance with the law and with the constitutive act. In order to highlight this aspect, art.252 (4) of the law stipulates that, in addition to the provisions of Title IV of the law, "the rules laid down in the constitutive act and in the law, insofar as they are not incompatible with the liquidation, are applicable to the companies undergoing liquidation".

Even if in the constitutive act are introduced norms for the liquidation and distribution of the registered patrimony, the rules established by art.252 letters a) and b) are mandatory, namely: until the taking over of the position by the liquidators, the administrators and the directors, respectively the members of the management, continue to exercise his / her duties, except for those referred to in art.233 (a); the act appointing the liquidators stating the powers conferred on him/her or the judgement , as well as any subsequent act that would bring about changes concerning the person or the powers conferred, must be lodged by the liquidators at the trade registry office in order to be registered and published in the Official Gazette of Romania, Part IV (b). Upon completion of these formalities, the liquidators shall submit their signature in the trade register and are thus authorized to act as liquidator. Therefore, the disposition of the associates is limited by the mentioned legal provisions.

In joint-stock companies and limited partnerships by shares, as an expression of the shareholders' disposition, the appointment of the liquidators is made through the general assembly of the shareholders deciding the liquidation, unless otherwise provided in the constitutive act - art.264 para.1 of Law no.31/1990.

Liquidators may be natural or legal persons, as stipulated in art.253 para.1 of the law. In the case of the voluntary dissolution and liquidation of the company, the associates in the assembly decide on the appointment of liquidators, opting between liquidators natural persons or legal persons. In all cases, natural persons liquidators or permanent representatives - natural persons of the liquidating company must be authorized as liquidators.

The liquidators exercise the specific duties provided by the law and the powers conferred by the associates in compliance with the law and the constitutive act. Thus, the liquidators will be able to: go to law and be sued on behalf of the company (a), carry out and terminate the commercial opertions related to the liquidation (b), sell by public auction, the real estate and any movable assets of the company (c), make transactions on behalf of the company (d ), liquidate and collect the receivables of the company (s), conclude bills of exchange, non-mortgage loans as well as the fulfillment of any necessary documents (f). However, as provided for in art.255 para.2 of the law, in the absence of special provisions in the constitutive act or in the document of appointment, liquidators may not constitute mortgages on the assets of the company unless they are authorized by the court.

Finally, the termination of the companies regulated by the Law no.31/1990, usually by the way of dissolution followed by liquidation, is actually carried out through specific dissolution and liquidation operations, in compliance with the rules established by the law,

*but also by applying the rules established by the constitutive act* , hence by the will of the associates, however, *only insofar as they are not incompatible with the liquidation of company*.

The disposition of the associates is manifested not only at the initial stage when the company is set-up but also as regards the moment of its termination following the decision taken at the general assembly to dissolve the company in accordance with the legal provision in art.227 letter d which stipulates as one possible reason of dissolution of the company "the decision of the assembly of the associates". Since the listing of the resons for dissolution of the company is not exhaustive, the constitutive act of the company or, as the case may be, the law, may also provide for other reasons of dissolution of the company, as indicated by letter g of the legal text.

The dissolution of the company has the effect of opening the liquidation proceedings, keeping the company's legal personality for liquidation operations until its completion.

The liquidation of the company is done in compliance with the legal provisions and the rules contained in the constitutive act. The set of legal provisions on liquidation contained in Title VII of Law no. 31/1990 contain in many aspects imperative provisions which exclude the disposition of the associates to decide and act to the contrary, as well as non-imperative rules that allow the associates to derogate through clauses inserted in the constitutive act or through decisions subsequently adopted in compliance with the law and the constitutive act. In order to highlight this point, art.252 para.4 of the Law stipulates that, in addition to the provisions of Title IV of the law, "the rules laid down in the constitutive act and in the law, insofar as they are not incompatible with the liquidation, apply to the companies undergoing liquidation".

Even if the constitutive act stipulates norms on the liquidation and distribution of the registered patrimony, the rules established by art.252 letters a and b are mandatory, namely: until the liquidators take over the position, the administrators and the directors, respectively the members of the management, continue to exercise their duties and powers, except for those referred to in art.233 (a); the act appointing the liquidators, stating the powers conferred on them or the judgement, as well as any subsequent act that would bring about changes regarding the liquidators or the powers their are conferred, must be lodged by the liquidators at the trade registry office in order to be registered and published in the Official Gazette of Romania, Part IV (b). Upon completion of these formalities, the liquidators shall register their signature in the trade register and are thus empowered to act as liquidators. Therefore, the disposition of the associates is limited by the legal provisions mentioned.

As an expression of the shareholders' disposition, in joint-stock companies and partnerships limited by shares, the appointment of the liquidators is made by the general assembly that decides on initiating liquidation, unless otherwise provided in the constitutive act - art.264 para.1 of Law no.31/1990.

**2.15. The principle of disposition in relation to those who engage with the company in legal relations**

The principle of disposition can also be seen from the *perspective of other participants* who intersect with the company or associates. Therefore, during the existence of the company, *the creditors of the associate* have the right to put garnishment on the parts/shares that would pertain to the associates after liquidation or may seize and sell the

shares or equity shares of their debtor (art.66 para.2 of Law no.31/1990), leaving the creditor with the choice of the way to proceed, its interest being that of using the easier and faster way to recover the debt. We consider that the methods referred to in art.66 para.2 of the law can be applied alternatively or, as the case may be, may be consecutively. The creditors of the associate may, during the life of the company, exercise their rights only on the part of the benefits pertaining to the respective associate according to the balance sheet and, after dissolution of the company, on the part that would be due by liquidation, as provided by art.66 para.1 of Law no.31/1990. At the request of the mortgagee or executing authority, the administrators and directors are required to make available to them the financial statements and any other documents or information necessary to evaluate the shares or equity shares and to facilitate their takeover. Publicity, through the trade register, of the garnishment and seizure shall be carried out at the request of the executing body.

## 3. CONCLUSIONS

The principle of disposition enshrined in the domestic law system as a branch principle, associated in particular with the branch of civil procedural law, aspect mentioned in Năsui (2016, p.81-82), evokes through its content the prerogative of the subjects of law to exercise the right of option for conduct that is lawful but which also delivers efficiency to their legitimate interests, manifesting itself in a broader legal framework that justifies it being regarded as a *general principle of law*, present both in the sphere of public law and private law.

In the areas of private law, the incidence of the disposition principle is more evident than in any other field, given the nature of the legal relationships that are formed in the sphere of private law, relations which require regulations established, predominantly, by means of non-restrictive norms (permissive and / or supletive) which entitle the concerned subjects of law to make an option between several legally possible conducts but in compliance with the limits imposed by the imperative norms that embody the essential aspects that require unitary, uniform and generally binding corporate regulation. The technique used in drafting legal texts in the area of private law utterly expresses this legislative reality and also reveals the traits of this principle considered to be a *principle of substantive law.*

Therefore, based on the analysis of the manifestations of the disposition principle, indicated in points 2.1-2.14, we plead for its formal recognition as *a principle of private law and material law,* given the fact that it exceeds the scope of the procedural relations with which it is traditionally correlated, on the one hand, and that private law is, par excellence, an area of relations and regulations that evokes the content of this principle.

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