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# The rights of shareholders – basic principle of corporate governance by means of case- specific jurisprudence

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## Abstract

*Respecting shareholders' rights represents one of the fundamental principles of corporate governance, underpinning the establishment of economic entities, as a form of association of individuals and / or legal entities in order to carry out profit-oriented activities. However, there are situations in which the management, the other shareholders, or even the authorities, do not respect certain shareholders' rights, leading to a number of negative effects, such as the closing of companies. Based on these considerations, in this paper, we set as research objective to analyze the circumstances, which may affect shareholders' rights. To meet the research objectives, we analyzed the case-specific jurisprudence published by the courts of law till 31<sup>st</sup> of December 2015. The results of the study show that the shareholders' rights, which are not respected, include: the property right, the right to receive dividends, the right to participate and vote in the general assemblies of shareholders, the right to be elected in the governing bodies, and not the least, the most important one in accounting terms, the right to be informed.*

**Keywords:** corporate governance, the right to be informed, property right, the right to receive dividends, the right to vote, governing bodies

**JEL Classification:** D72, F53, G15, K33, M16, M41

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## Introduction

Corporate governance represents a set of responsibilities and practices exercised by the Board of Directors and the executive management, in order to achieve strategic objectives, ensure risk management and the examination of the responsible use of resources' (IFAC, 2009). The theories regarding corporate governance are linked to financial instruments' issuers, wanting to maximize the results of their companies, while the emergence of the concept is due to the fact that the private sector has always played a very important role in the life of a country, contributing towards ensuring the socio-economic balance.

Globally, the international organizations have played a key role in the development of the concept. Thus, the Organisation for Economic Co-operation and Development (OECD) has drafted certain guidelines containing a set of recommended principles to be applied by companies. The first set of principles was developed in 1999 and, in 2004, an improved version of these was published. Their analysis reveals that, among the shareholders' rights to be respected by both the governing bodies and by other shareholders, there are included: the right to be informed, the property right, the right to receive dividends, the right to participate and vote in the general assemblies of shareholders and the right to be elected in the governing bodies. Consequently, we shall proceed at these rights' further assessment.

In this context, property is a core element in defining the concept of corporate governance. It lies at the foundation of the establishment of companies, the associates pooling certain goods, on which they have a property right, in order to pursue economic activities aimed at gaining economic benefits.

*"The property right is that subjective right, which gives expression of the appropriation of a good, right which allows the owner to possess, use and dispose of the good, in its own power and self-interest, and in compliance with the existing legislation"* (Bîrsan, 2001). The Universal Declaration of Human Rights adopted and proclaimed on 10 September 1948 by the General Assembly of the United Nations stipulates in Article 17 that *"Anyone has the right to own property, alone as well as in association with others [ ... ] no one can be deprived arbitrarily of his/her property"* (UN, 1948).

Property theory is referred to in Article 65 of the Law no. 31/1990 regarding the commercial companies, thus – *"[...] the goods representing a contribution to the company become its property [...]"* as well as in article 66: *"[...] the creditors of the associate may exercise their rights only on the part of the shareholder benefits due after the balance sheet [...]"*.

With reference to *guaranteeing shareholders' property right*, the national regulations stipulate that the right of property of the nominative shares issued in material form is transmitted by means of the statement made in the shareholders' register and by a note made on the title. If nominative shares, the ownership is transferred through an entry in shareholders' register. The property right over quoted shares, traded on a stock exchange, is transferred in accordance with the requirements of the capital market law. In the case of bearer shares, the property right is transferred with the simple possession of the physical stock certificate (Law no. 31/1990).

As for *respecting shareholders' rights in issues related to the general assemblies of shareholders (GASs)*, we note that GASs can discuss, approve or modify the annual financial statements. Associates or shareholders make decisions based on the reports prepared by the Board of Directors, management, supervisory board and financial auditor. Also, the ordinary general assembly of shareholders decides, when appropriate, the allocation of profits to dividends, appoints and dismisses the financial auditor, and sets the duration of the financial audit contract.

After analyzing the report of the Board of Directors, the annual financial statements and financial auditor's report, the general assembly of shareholders decides on the discharge from duty of Board members.

Regarding the recommendations on voting rights, national regulations state that shareholders exercise their right to vote at the general assembly in proportion to the number of shares they own.

On *convoking the general assembly of shareholders*, national rules stress that the general meeting is convened by the Board of Directors or management. If the entity's shares are nominative, the convocation can only be done by registered letter. The convening notice must include a series of elements such as: location, time and agenda.

Companies must comply with international recommendations regarding information disclosure, so

that all persons involved in the mechanism of corporate governance to have access to the information necessary in the decision making process. The annual financial statements, along with the annual report of the Board of Directors and the proposal regarding the distribution of dividends, may be studied by shareholders at the headquarters of the entity. At shareholders' request, copies of these documents may be issued under certain conditions concerning the minimal costs.

Entities with a website must disclose online the information included in the convening notice as well as its annual financial statements, the annual report of the Board of Directors, the Management Report and the financial auditor's report. The economic entities whose financial statements are audited must compulsorily publish the financial auditor's report. If some shareholders need additional information, they may address written questions to the Board, which is expected to address them in the general assembly.

In order to ensure business continuity, a solution is needed so that the decisions of the general assembly take effect. In this respect, national regulations stipulate that the decisions are mandatory even for shareholders who did not attend the meeting or voted against. They can still ask in court the annulment of a decision, which was taken in violation of the legal requirements.

## 1. Literature review

Corporate governance principles were at the basis of studies elaborated by various authors in scientific papers. Thus, some authors have addressed the issue of a conceptual framework alternative to the existing one. To support their arguments, they used agency theory (Ciancanelli and Reyes Gonzales, 2000, pp.4-5).

With regard to the national implementation of the OECD principles on corporate governance, a series of studies was developed on the degree of implementation of these principles in the Romanian banking sector (Bîgioi, 2012). In connection with the enforcement of OECD principles on corporate governance, there were developed several studies on their implementation in emerging economies (Feleagă et al., 2012).

The results of some studies show that poor corporate governance affects the whole economy, with negative

consequences on economic development (Levine, 2003).

In other studies, there is analyzed the effect of corporate governance at company level on the cost of capital and how it is influenced this effect by the legal protection of investors (Chen, Chen and Wei, 2009). Other authors have explained the role that corporate governance plays in the performance of commercial banks (Macey and O'Hara, 2003).

Governance has been studied from a perspective different from the existing one, with more emphasis on control and management roles (Kim, Burns and Prescott, 2009).

Also, some papers addressed ethical issues in business and described the relationship between ethics theory and law (Crane, 2007). The analysis of how concentration of ownership affects the independence of the Board and audit committee, has indicated the negative impact of ownership concentration on board independence, but no impact on audit committee independence. The results suggest that the Board independence increases firm value (Setia-Atmaja, 2009).

Other authors have addressed: the long-term evolution of investors' protection in UK companies (Franks, Mayer and Rossi, 2009), the shareholders' right to vote in companies in the United States and Europe (Ferrarini and Chiodini, 2010), issues related to the control of a company by majority shareholders, at the expense of minority shareholders, in developing countries (Gilson, 2007).

By reviewing the literature mentioned above, we note that a great body of literature shows that the implementation of corporate governance principles by companies is beneficial for shareholders, leading to the maximization of their profits.

## 2. Data and research methodology

When preparing the study, we used data extracted from case-specific jurisprudence, as published by national courts of law. Thus, in the first stage, we extracted a sample of 120 sentences. They were issued by Bucharest Courthouse, till 31.12.2015 (<http://portal.just.ro/3/Lists/Jurisprudenta>). In the second stage, based on qualitative analysis, the sentences were grouped according to object of their actions and, out of

these, we extracted 20 decisions related to shareholder rights. These correspond to a sample of 17% of all sentences. We consider that the sample is representative. In the third stage, we selected the regulations invoked by the parties in the process. These were grouped by types of articles, and, based on quantitative methods, we determined which were the articles of law more frequently invoked by the complainants in their actions. In the last stage, based on qualitative analysis, we determined which of those articles relate to a non-compliance of shareholders' rights.

### 3. Defining the mathematical model on which the study was conducted

In order to determine which of the shareholders' rights were most commonly cited in court sentences, we have

determined their weight in total, using the following empirical model:

$$g(d_i) = \frac{d_i}{D_c}, \text{ where:}$$

$d_i \in [0; 100]$  and  $d_i$  represents the number of times law articles concerning shareholders' rights were invoked in Court's sentences; and

$D_c = [g(d_1) + g(d_2) + g(d_3) + g(d_4) + \dots + g(d_i)]$  and

$D_c$  – represents the total number of times law articles concerning shareholders' rights were invoked in Court's decisions.

### 4. Results

From our study, we obtained the results summarized in Table 1:

No.	Judicial decision	The legal document cited	The object of the action	Type of right
1	Commercial sentence no. 4280/18.10.2005 of Bucharest Courthouse. The VI Commercial Division - irrevocable by the decision no. 449/30.01.2007 of the High Court of Cassation and Justice	Article 117 of the Law no. 31/81990 R	Annulment of the decision of shareholders' general assembly. Convening notice. Content. Shareholders right to information. Penalties for non-compliance.	The right to participate at the general assemblies of shareholders
2	Sentence no. 3518 of 18.06.2015, Court file no. 3608/3/2015, Bucharest Courthouse. The VI Civil Division	Article 192 paragraph (1) and 2 of the Law no. 31/1990, Article 193 paragraph (3), Article 196, Article 132 paragraph (2) and paragraph (3) of the Law no. 31/1990, Article 195 paragraph (3) of the Law no. 31/1990	Annulment of the decision of shareholders' general assembly. Double majority rule	The right to participate at the general assemblies of shareholders
3	Sentence no. 6336 of 23.06.2014, Court file no. 1453/3/2014/a2 Bucharest Courthouse - The VII Division	Article 14 and Article 19 of the Law no. 85/2006	The appeal against the decision of creditors' assembly	The right to participate at the general assemblies of creditors

No.	Judicial decision	The legal document cited	The object of the action	Type of right
4	Sentence no. 6336 of 23.06.2014, Court file no. 1453/3/2014/a2 Bucharest Courthouse - The VII Division	Article 14 and Article 19 of the Law no. 85/2006	The appeal against the decision of creditors' assembly	The right to participate at the general assemblies of shareholders
5	Commercial sentence no. 8022/13.06.2007 of Bucharest Courthouse, irrevocable by the commercial decision no. 1162/2007 of the Bucharest Court of Appeal	Articles 196, 132 and 133 of the Law no. 31/2990	Suspension of the enforcement of shareholders general assembly's decision. Conditions. Appearance law.	The right to participate at the general assemblies of shareholders
6	Commercial sentence no. 1327, public meeting on 7.02.2011, Court file no. 7268/3/2011, Bucharest Courthouse. The VI Commercial Division	Articles 133 and 132 of the Law no. 31/1990R	The admissibility conditions, in the presidential decree, regarding the shareholders general assembly's decisions, whose suspension is sought	The right to participate at the general assemblies of shareholders
7	Sentence no. 17200/3/2006 of Bucharest Courthouse in the court file no. 929/3/2006	Article 134 of the Law no. 31/1990	Annulment of shareholders general assembly's decision. Nullity of the proxies granted by majority shareholders in order to be represented in the the general assembly of shareholders	The right to participate at the general assemblies of shareholders
8	Commercial sentence no. 2458/24.05.2005 of Bucharest Courthouse - The VI Commercial Division, irrevocable by the decision no. 307/2007 of the High Court of Cassation and Justice	Article 195 of the Law no. 31/1990R	Annulment of shareholders general assembly's decision. Convocation unlawful. Consequences	The right to participate at the general assemblies of shareholders
9	Commercial sentence no. 4280/18.10.2005 of Bucharest Courthouse - The VI Commercial Division, irrevocable by the decision no. 449/30.01.2007 of the High Court of Cassation and Justice	Article 184 of the Law no. 31/1990R	Annulment of shareholders general assembly's decision. Convening notice. Content. Shareholders right to information. Penalties for non-compliance.	The right to vote
10	Sentence no. 3518 of 18.06.2015, Court file no. 3608/3/2015, of Bucharest Courthouse - The VI Civil Division	Article 192 paragraph (1) and (2) of the Law no. 31/1990, Article 193 paragraph (3), Article 196, Article 132 paragraph (2) and paragraph (3) of the Law no. 31/1990, Article 195 paragraph (3) of the Law no. 31/1990	Annulment of shareholders general assembly's decision. Double majority rule	The right to vote

No.	Judicial decision	The legal document cited	The object of the action	Type of right
11	Sentence no. 3518 of 18.06.2015, Court file no. 3608/3/2015, of Bucharest Courthouse - The VI Civil Division	Article 192 paragraph (1) and (2) of the Law no. 31/1990, Article 193 paragraph (3), Article 196, Article 132 paragraph (2) and paragraph (3) of the Law no. 31/1990, Article 195 paragraph (3) of the Law no. 31/1990	Annulment of shareholders general assembly's decision. Double majority rule	The right to participate at the general assemblies of shareholders
12	Sentence no. 3518 of 18.06.2015, Court file no. 3608/3/2015, of Bucharest Courthouse - The VI Civil Division	Article 192 paragraph (1) and (2) of the Law no. 31/1990, Article 193 paragraph (3), Article 196, Article 132 paragraph (2) and paragraph (3) of the Law no. 31/1990, Article 195 paragraph (3) of the Law no. 31/1990	Annulment of shareholders general assembly's decision. Double majority rule	Property right
13	Commercial sentence no. 8022/13.06.2007 of Bucharest Courthouse, irrevocable by the commercial decision no. 1162/2007 of the High Court of Cassation and Justice	Articles 196, 132 and 133 of the Law no. 31/1990	Suspension of the enforcement of shareholders general assembly's decision. Conditions. Appearance law.	The right to vote
14	Commercial sentence no. 1327, public meeting of 7.02.2011, court file no. 7268/3/2011, of Bucharest Courthouse - The VI Commercial Division	Articles 133 and 132 of the Law no. 31/1990R	The admissibility conditions, in the presidential decree, regarding the shareholders general assembly's decisions, whose suspension is sought	The right to vote
15	Commercial sentence no. 4971, public meeting of 18.04.2011, court file no. 17485/3/2010	Article 1431 (paragraph 1) of the Law no. 31/1990R	Nullity of sale-purchase agreement	The right to vote
16	Sentence no. 17200/3/2006 of Bucharest Courthouse in the Court file no. 929/3/2006	Article 134 of the Law no. 31/1990	Annulment of shareholders general assembly's decision. Nullity of the proxies granted by majority shareholders in order to be represented in the general assembly of shareholders	The right to vote
17	Commercial sentence no. 2458/24.05.2005 of Bucharest Courthouse - The VI Commercial Division, irrevocable by the decision no. 307/2007 of the High Court of Cassation and Justice	Article 195 of the Law no. 31/1990R	Annulment of shareholders general assembly's decision. Convocation unlawful. Consequences	The right to vote

No.	Judicial decision	The legal document cited	The object of the action	Type of right
18	Sentence no. 13662, of Bucharest Courthouse on 10.12.2008	Article 117, item 6 and 7 of the Law no. 31/1990	Annulment of the general assembly of shareholders. Expired mandates of the Board of Directors' members. General shareholders assembly – supreme governing body of the company	The right to vote
19	Sentence no. 3205, of Bucharest Courthouse on 12.03.2012, court file no. 6593/3/2012	Article 193 paragraph 3 of the Law no. 31/1990	Suspension of the enforcement of shareholders general assembly's decision.	The right to vote
20	Sentence no. 3518 of 18.06.2015, court file no. 3608/3/2015, Bucharest Courthouse - VI Civil Division	Article 192 paragraph (1) and (2) of the Law no. 31/1990, Article 193 paragraph (3), Article 196, Article 132 paragraph (2) and paragraph (3) of the Law no. 31/1990, Article 195 paragraph (3) of the Law no. 31/1990	Suspension of the enforcement of shareholders general assembly's decision. Double majority rule	Property right
21	Civil sentence no. 5316, public meeting on 04.07.2013, court file no. 31406/3/2011	Article 115 of the Law no. 31/1990, Article 207 of the Law no. 31/1990 and with the infringement of Article 26 (4) of Government Emergency Ordinance no. 88/1997	Nullity of the legal act. <i>Res judicata</i>	Property right over shares, Property right over tangible assets
22	Civil sentence no. 1060 of 18.02.2013, court file no. 41263/3/2012	Article 129 paragraph 1 of the Law no. 31/1990, Article 12 of the Law no. 137/2002, Article 142 and the following in the Government Order no. 577/2007	Annulment of shareholders general assembly's decision.	Property right over shares
23	Commercial sentence no. 8022/13.06.2007 of Bucharest Courthouse, irrevocable by commercial decision no. 1162/2007 of Bucharest Court of Appeal – V Division	Articles 196, 132 and 133 of the Law no. 31/1990	Suspension of the enforcement of shareholders general assembly's decision. Conditions. Appearance law	Property right over shares
24	Commercial sentence no. 1327, public meeting on 7.02.2011, court file no. 7268/3/2011, Bucharest Courthouse - VI Commercial Division	Articles 133 and 132 of the Law no. 31/1990R	The admissibility conditions, in the presidential decree, regarding the shareholders general assembly's decisions, whose suspension is sought	Property right over shares

No.	Judicial decision	The legal document cited	The object of the action	Type of right
25	Commercial sentence no. 2124 public meeting on 09.03.2010 Bucharest Courthouse - VII Commercial Division	Article 138 of the Law no. 85/2006	Request to attract personal liability	Property right
26	Commercial sentence no. 4690 meeting in the council room on 22.06.2010, court file no. 32525/3/2009	Article 59 of the Law no. 85/2006	Appeal against the report required by article 59 of the Law no. 85/2006	Property right
27	Commercial sentence no. 4971, public meeting on 18.04.2011, court file no. 17485/3/2010	Article 1431 (paragraph 1) of the Law no. 31/1990R	Nullity of sale-purchase agreement	Property right
28	Sentence no. 17200/3/2006 of Bucharest Courthouse, court file no. 929/3/2006	Article 134 of the Law no. 31/1990	Annulment of shareholders general assembly's decision. Nullity of the proxies granted by majority shareholders in order to be represented in the general assembly of shareholders	Property right over shares
29	Commercial sentence no. 4690, meeting in the council room on 22.06.2010 court file no. 2525/3/2009	Article 59 of the Law no. 85/2006	Appeal against the report required by Article 59 of the Law no. 85 / 2006, issued by the judicial insolvency practitioner	Property right
30	Commercial sentence no. 2 of 04.01.2011, Bucharest Courthouse, Court file no.49034/3/2009	Article 226 paragraph 1 letter c) of the Law no. 31/1990	Associate withdrawal. Inadmissibility of the action in case the company is dissolved	Property right over shares
31	Sentence no. 200 of 21.01.2015, Bucharest Courthouse, Court file no.36082/3/2014	Article 227 paragraph (l) letter b) and Article 235 of the Law no. 31/1990	Complaint against the resolution of O.R.C Director	Property right
32	Sentence no. 7363 of 28.09.2015, issued in the Court file no. 40598/3/2014	Articles 79 and 80 of the Law no. 85/2006	Action for annulment	Property right
33	Civil sentence no. 1009 of 02.03.2015, issued in the Court file no. 8549/3/2014	Article 237 paragraph 10 of the Law no. 31	Former associate's personal liability. Lack of interest	Property right
34	Civil sentence no. 6036/2013 issued in the Court file no. 28473/3/2013 Bucharest Courthouse – VI Civil Division	Article 5 item 6 of Securities and Exchange Commission's Regulation no. 6/2009, Article 7 of the above Regulation, Article 5.10 of the above Regulation	Suspension of the enforcement of shareholders general assembly's decision.	The right to be informed
35	Sentence no. 13662, issued by Bucharest Courthouse on 10.12.2008	Article 117 item 6 and 7 of the Law no. 31/1990	Annulment of the general assembly of shareholders. Expired mandates of the Board of Directors' members. General assembly of shareholders - supreme governing body of the company	The right to be elected



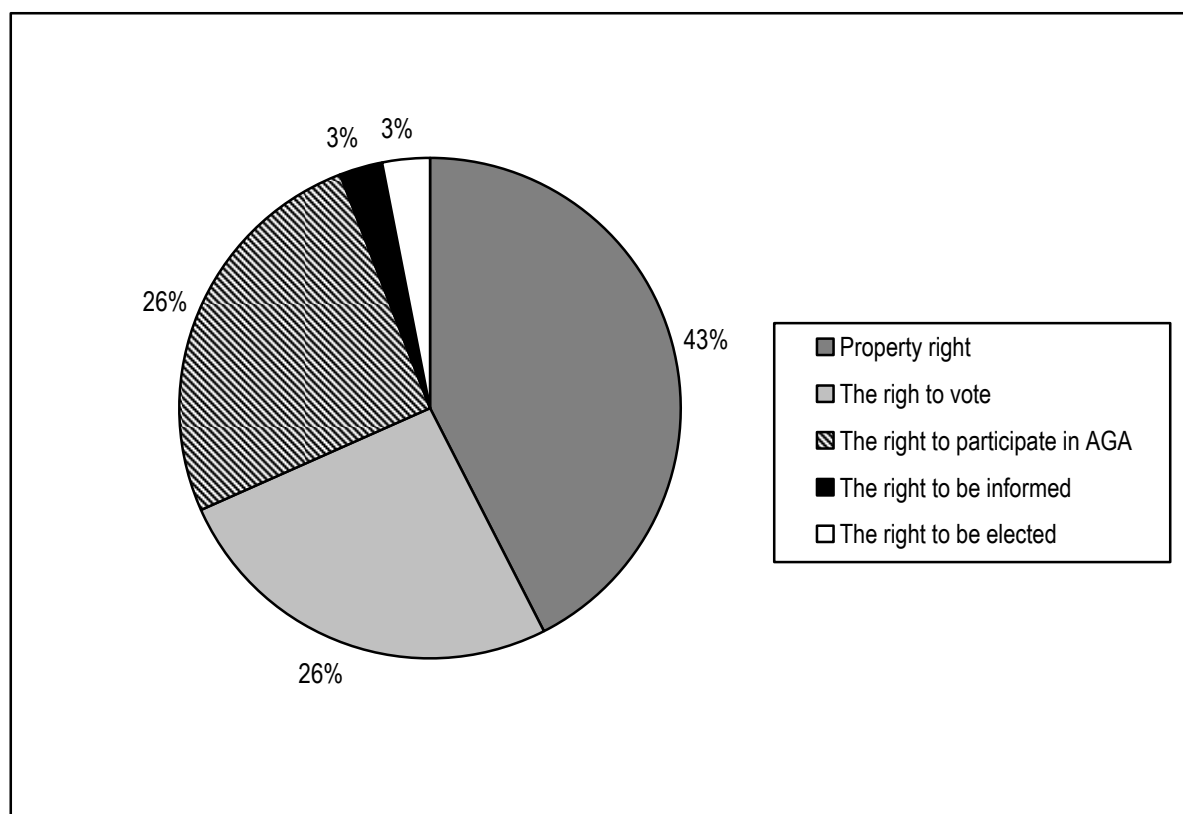
Based on the data in Table 1, we get the following | weights of shareholders' rights (Table 2):

Table 2. The weight of non-compliance with shareholders' rights in case-specific jurisprudence		
Type of right	Number of summons	Weight (%)
Property right	15	43%
The right to vote	9	26%
The right to participate at the general assemblies of shareholders	9	26%
The right to be informed	1	3%
The right to be elected	1	3%
Total	35	100%

Source: Authors' projections based on data extracted from specific jurisprudence

Graphically, the obtained results are as follows:

**Figure 1. The weight of non-compliance with shareholders' rights based on Court sentences**



Source: Authors' projections based on data extracted from specific jurisprudence

## 5. Conclusions

After analyzing the results, we observe that, among the shareholders' rights not respected by governing bodies and other shareholders, there are included:

- Property right, which accounts for 43%;
- The right to vote in the general assemblies of shareholders, which accounts for 26%;
- The right to participate in the general assemblies of shareholders, which accounts for 26%;
- The right to be informed, which accounts for 3%;
- The right to be elected in the governing bodies, which accounts for 3%.

Among the causes of non-compliance with shareholders' rights, we note:

- a. In the case of property right, the sentences targeted two main situations. The first concerns invoking the nullity of documents regarding the transfer of shares or a capital increase. Thus, minority shareholders have felt aggrieved in their rights, as it represents a contravention of the preemptive right. The second case concerns the property right in regard to the tangible assets owned by companies, minority shareholders requesting the annulment of the respective sale-purchase agreements. Among the reasons put forward by the complainants, we mention: sale of land and buildings at undervalued prices and in non-compliance with the competences of the governing bodies, as these were not authorized by the general assembly of shareholders to approve the transactions in question<sup>1</sup>.
- b. In the case of the right to participate in the general assembly of shareholders and to vote, the Court sentences addressed more circumstances. Thus, in most cases, the complainants invoked the limitation of this right by various means<sup>2</sup>. For example, certain shareholders have not allowed a shareholder to participate in the the general assembly and vote by proxy, citing the fact that in the Articles of

Association is not stipulated such a right. We believe that this represents a violation of shareholders' rights, corporate governance principles recommending the participation and voting in the general assembly of shareholders, including by proxy or by correspondence.

- c. Regarding the right to be informed, the sentences reveal that most situations refer to abuses of governing bodies in relation to: the refusal to convene the general assembly of shareholders, at the request of minority shareholders; the publication on short notice of the convening note of the general assembly of shareholders, so that shareholders do not have access to information regarding the date and place of the meeting. Furthermore, another situation relates to the refusal of the governing bodies to communicate shareholders the annual financial reports, directors' report, financial auditor's report and the proposal for profit distribution<sup>3</sup>.
- d. regarding the right to be elected, among the causes of non-compliance, we notice invoking the nullity of shareholders general assembly's decision, in which the General Manager is elected directly by it; or the delegation of certain powers to the General Manager is limited by shareholders general assembly, in order to impose the election of another person in that function<sup>4</sup>.

The results of our study show which are the main shareholders' rights not respected by companies' governing bodies and other shareholders, as revealed by the judicial practice. Given the results, we propose as further research direction, to determine the impact of the non-compliance of these rights on companies' financial results.

<sup>3</sup> Civil sentence no. 6036/2013 issued in the Court file no. 28473/3/2013 Bucharest Courthouse – VI Civil Division

<sup>4</sup> Sentence no. 13662, of Bucharest Courthouse on 10.12.2008. Thus, the complainant invoked the fact that de decision regarding the election of the General Manager of the company and the delegation of the managing attributes of the administrative board to the General Manager, according to art. 143 in the Law of the private companies is null as the delegation has to be express and the delegation act has to have a written form. It is the attribute of the administrative board to decide the delegation and the person or persons who benefit from the delegation. This act has to be acknowledged by a decision of the council, taken according to the law.

<sup>1</sup> Civil sentence no. 5316, public meeting on 04.07.2013, court file no. 31406/3/2011

<sup>2</sup> Commercial sentence no. 8022/13.06.2007 of Bucharest Courthouse, irrevocable by the commercial decision no. 1162/2007 of the Bucharest Court of Appeal, Division V

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### Jurisprudence

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7. Hotărârea nr. 7363 din data de 28.09.2015, pronunțată în dosarul nr. 40598/3/2014
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