

PRACTICAL ASPECTS REGARDING THE CLAIM FOR THE ANNULMENT OF THE RESOLUTIONS OF THE GENERAL MEETING OF SHAREHOLDERS, FROM A SUBSTANTIAL AND PROCEDURAL PERSPECTIVE

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Abstract

The purpose of this paper is to provide a brief analysis of the legal framework regarding the procedural and substantial dispositions governing the claim for the annulment of the resolutions of the general meeting of shareholders. The main objective is to render a practical tool both to stakeholders and third parties who are interested in the legal means available for blocking the implementation of any measures which are contrary to the company's interest.

Further to the amendments brought through the New Civil Procedural Code, the claim for annulment of the resolutions of the general assembly must be analyzed from a procedural point of view, as well as from a substantial standpoint. The shareholders must be aware of the grounds for challenging a general assembly's resolution to properly safeguard their rights. One common issue which is invoked as grounds for annulment is the abuse of majority of the majority shareholder. However, the difficulty of alleging such a reason is left to practitioners. Therefore, its application, although not wide, is highly imaginative.

Keywords: joint stock company, limited liability company, majority shareholder, minority shareholder, grounds for annulment

1. Introduction

This study aims to support young practitioners in establishing preliminary guide marks by assessing the possibility to file a claim in annulment of company resolutions based on the dispositions of Law no. 31/1990.

Although recent doctrine is emphasized on the substantial grounds for the annulment of general assembly's resolutions, few studies focus on practical matters which the claimant or the defendant may encounter. Therefore, this study represents an introduction into the basic practical knowledge one must be aware of in its capacity as shareholder in a Romanian company or in its capacity as legal practitioner if attempting to suspend or annul the resolution of the general meeting of shareholders.

Its relevance and importance resides in the necessity for the shareholders and their legal representatives to be aware and actively assert their rights to oppose disagreeable resolutions. While there is unanimity in accepting that the common will of the shareholders represents the core of the company, in practice there are frequent situations in which there is substantial disagreement between the shareholders' points of view, frequently leading to adopting resolutions without considering the minority shareholder's input. Since these disagreements must be resolved prior to the company to continue conducting business, it is mandatory for the shareholders to effectively express their point of view in a manner in which the company's interests are protected through the independent filter of the court.

The utility of the below analysis lies in the fact that although it reviews general concepts, it is focused on the conclusions of recent case law, outlining specific issues which are not covered by legal provisions and their solution.

1.1. General considerations regarding the legal framework applicable for Romanian companies

– The functioning and operation of companies in Romania is regulated by the New Civil Code, which constitutes the common legal framework for both civil companies and companies destined for commercial activity.

– The New Civil Code which entered force in October 2011 establishes the general principles for Romanian companies which are not oriented for lucrative purposes, whereas the special norms comprised in Law no. 31/1990 regarding companies for commercial activity ("**Law no. 31/1990**") set out rules for companies aimed at creating profit, by conducting production activities, commerce activities or supply of services.

– Although Law no. 31/1990 does not contain a precise definition of the company for commercial activity, this concept has been delimited from simple company through certain characteristics as described by legal scholars¹:

– the company for commercial activity has legal personality and becomes a different legal subject apart from the simple company, established based on the New Civil Code, which is generally a company without legal personality and the company for commercial activities, which becomes a new subject of law, able by itself to enter commercial relations with other subjects

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¹ Vasile Nemes, Commercial Law according to the New Civil Code, Hamangiu Publishing, 2012, p. 84.

of law,

– the company for commercial activity is fundamentally different from a civil company given the nature of its operations. While the company for commercial activity conducts production and commerce activities or supply of services aimed to obtain profit, the civil company carries out activities which are not aimed to obtain profit.

– as opposed to the civil company, which does not require special formalities for its incorporation, apart from those deriving out of the assets contributed as share capital or from special norms, the company for commercial activity must observe special rules dictated by Law no. 31/1990.

2. Legal nature of de general assembly of shareholders' resolution

The legal nature of the general assembly of shareholders' resolutions is somewhat controversial in Romanian doctrine. While some authors characterize the resolution as a agreement between the shareholders who aim to satisfy their own purpose, other believe have implied that the shareholders resolution represents a convergent manner of manifesting the their will. The most truthful opinion² outlines the *sui generis* character of the general assembly of shareholders' resolution. Therefore, the resolution of the general meeting of shareholders conveys the will of the shareholders aimed to fulfill both their purpose and the company's purpose.

3. Means for invoking the irregularities of the general assembly of shareholders' resolution

Law no. 31/1990 stipulates two different claims, based on the procedural standing of the party invoking the grounds.

As such, art. 132 of Law no. 31/1990 opens the way of the claim for the annulment of the resolution to shareholders, third parties having an interest, the company's directors and the company's censors, who can invoke absolute or relative grounds for nullity.

It is generally asserted in legal writings³ that breaches of the dispositions of the Articles of association are sanctioned with relative nullity, since the clauses of the Articles of association aim to safeguard the shareholders' personal interest.

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Law no. 31/1990 stipulates a special means of challenge for the company's creditors and for any other persons prejudiced by the resolutions of the shareholders adopted to the amendment of the company's constitutive act, through the opposition governed by article 61. Shareholders are not entitled to file the opposition⁵ since Law no 31/1990 expressly stipulate the special claim for the annulment of the resolutions for this category of claimants.

Generally, the purpose of such opposition is not to obtain the annulment of the resolution but to repair the prejudice produced by its adoption. Romanian courts⁶ have established the distinction between the opposition and the claim for the annulment of the resolution of the general meeting of shareholders considering that the approval of the opposition freezes the effects of the resolution against the opponent, until the requested damages for repairing the prejudice produced by the resolution are repaired. It is only when the material prejudice is not repaired that the opposition may lead to the annulment of the resolution itself.

The opposition may be filed by means of a claim addressed before the trade registry where the company is registered. The trade registry shall then forward the opposition to the competent tribunal within the range of the company's registered office for judgment.

As per article 62 of Law no. 31/1990, the term for filling the opposition is of 30 days as of the date of publishing the resolution in the Romanian Official Gazette.

² Stanciu D. Cârpenaru, *Treaty of Romanian Commercial Law*, Universul Juridic Publishing, 2016, p. 211.

³ S. David în St. D. Cârpenaru, S. David, C. Predoiu, Gh. Piperea, *Companies Law. Comments. IIIrd Edition*, C.H. Beck Publishing, Bucharest, 2006, p. 401.

⁴ S. David în St. D. Cârpenaru, S. David, C. Predoiu, Gh. Piperea, *Companies Law. Comments. IIIrd Edition*, C.H. Beck Publishing, Bucharest, 2006, p. 401.

⁵ Bucharest Court of Appeal, VIth Commercial Section, Decision no. 1299/2002, published in Bucharest Court of Appeal's Practice Collection for 2002, Brilliance Publishing, 2004, p. 152.

⁶ Craiova Court of Appeal, Commercial Section, Decision no. 54/21.01.2005.

4. Conditions for filling the claim for the annulment of the general assembly of shareholder's resolutions. Legal procedural standing

In compliance with art. 132 of Law no. 31/1990, the persons entitled to file a claim for the annulment of the general assembly of shareholder's resolutions must fall under the following categories:

- the company's shareholders who participated at the adoption of the general assembly of shareholders' resolutions and who voted against the matters approved by the general assembly, if their objection has been included in the minutes of the general assembly,
- the company's shareholders who did not participate at the adoption of the general assembly of shareholders' resolutions,
- the company's directors, in order to prevent any prejudicial consequences for the company itself,
- the company's censors,
- any person justifying an interest for the annulment of the general assembly of shareholders' resolution.

Therefore, while the shareholders may invoke both absolute and relative nullity as grounds for the annulment of the resolution, other third parties who justify an interest may request the annulment only based on its absolute nullity⁷. As such, their claim shall not fall under any statute of limitation.

Also, as opposed to other categories of claimants, the shareholders do not have to prove their interest in requesting the nullity of the resolution since Law no. 31/1990 presumes that the interest directly derives from their capacity as shareholders and is an expression of the social character of the claim⁸, which is aimed to support both the shareholders and the company.

Based on the above, Romanian courts⁹ have interpreted that a shareholder who participated in the general assembly and expressed its intention to abstain from voting in favour or against the matters discussed on the agenda of the meeting is not allowed to file the claim for the annulment of the resolution.

From the interpretation of art. 132 par. 5) of Law no. 31/1990, Romanian courts¹⁰ have rightfully reached the conclusion that passive legal procedural standing in a claim for the annulment of a general assembly of shareholder's resolution can only be granted to the company itself, which shall be represented by its board of directors or its directorate.

5. The competent court and means of appealing the ruling of the first court

In compliance with art. 63 of Law no. 31/1990, the competence for filling the claim for the annulment of the resolution of the general meeting of shareholders is within the competence of the tribunal within the territorial range of the company's registered office.

The ruling issued by the tribunal is subject only to appeal which shall be judged by the higher court of appeal.

Once the ruling over the annulment of the resolution of the general meeting of shareholders is delivered, it shall be published in the Official Gazette. Starting from the date of publishing, the ruling shall be opposable to all the shareholders, per article 132 par. 10) of Law no. 31/1990.

6. Grounds for the annulment of the general assembly of shareholders' resolution

6.1. Legality vs Opportunity of the Resolution

Prior to an analysis of the grounds which certain shareholders and interested third parties must prove for the annulment of a general assembly of shareholders' resolution, it is relevant to mention that the court entrusted with such a claim may proceed to analyze exclusively arguments related to the legality of the resolution.

Therefore, as many courts¹¹ have decided, the opportunity for the adoption of a general shareholders' resolution is outside the scope and object of a claim aimed for the annulment of said resolution. As such, any reasons pertaining to the profitability of the shareholders' decision for the company or for the shareholders' themselves cannot be duly analyzed by the court. For example, the court vested with a claim in annulment of a resolution approving a credit agreement cannot decide that the conclusion of a credit agreement leads to the bankruptcy of the company. However, the court can dispose the annulment of the resolution approving the conclusion of a credit agreement, if the conditions disposed by Law no. 31/1990 for the adoption of said resolution are breached.

This solution is based on the fact that the cases when the court is allowed to intervene in the prerogatives reserved for the company's shareholders are expressly provided by law and thus, it would be inadmissible for the court to act as one of the company's organs in lack of any such provisions in this respect.

The general resolution of the meeting of shareholders is meant to express the general will of the

⁷ Bucharest Court of Appeal, VIth Commercial Section, Decision no. 604/2002, published in Bucharest Court of Appeals' Practice Collection, 2002, p. 149.

⁸ Stanciu D. Carpenaru, Commercial Law Treaty, Universul Juridic Publishing, 2016, p. 212.

⁹ Bucharest Court of Appeal, VIth Commercial Section, Decision no. 1290/2003, published in Bucharest Court of Appeal's Practice Collection, 2003, Ed. Brilliance, Bucharest, p. 230.

¹⁰ Former Supreme Court of Justice, Commercial Section, Decision no 2142/2003, published in the Jurisprudence Bulletin.

¹¹ Former Supreme Court of Law, Commercial Section, Decision no. 6200/2001, published in the Jurisprudence Bulletin and in Judicial Courier no. 9/2002, p. 55).

company in deciding its future trajectory. Therefore, all resolutions are governed by the principle of majority, meaning that the will of shareholders must be formed through the shareholders' involvement and is mandatory for its shareholders. While the court cannot analyze and determine whether the measures adopted by the shareholders are appropriate for the company, the court is entitled to rule on the legality of the resolution or on its compliance with the Articles of association¹².

As pointed out in legal literature¹³, the ground for the annulment of the resolution of the general meeting of shareholders may be either the absolute nullity, for breaching norms securing the public order and general interests or the relative nullity, for violating norms securing the personal interest of the company's shareholders, which are mostly related to the shareholders' will or capacity.

From this perspective, the claim in annulment cannot completely solve the problems encountered within the company which lead to disagreement among the shareholders. The court may only intervene insofar as to verify the legality of a resolution, in compliance with Law no. 31/1990 itself or in compliance to the law of the parties expressed through the company's Articles of association. Therefore, even though the resolution is annulled, the court cannot replace and supplement the shareholders' will for that particular operation or suggest its amendment so that both shareholders are accommodated with the result.

It is also relevant mentioning that Law no. 31/1990 prohibits the directors to file a claim for the annulment of a resolution when the object of the resolution is the revocation of said directors, as per article 132 par. 4).

6.2. Suspension of the resolution of the general meeting of shareholders

Law no. 31/1990 also grants the person requesting the annulment of the resolution of the general meeting of shareholders the right to ask the court to dispose the interim suspension of the resolution's execution, until the main trial for the annulment of the resolution is definitively resolved. The suspension may be granted pursuant to article 133 of Law no. 31/1990 and to article 997 of the New Romanian Procedural Code.

In order to obtain such a suspension, the claimant must prove the fulfillment of several conditions before the competent court. One of these conditions is the urgency for the court to dispose the suspension. Another condition is that the appearance of rightfulness belongs to the claimant. Also, the claimant must prove either that the suspension is necessary for conserving a right which would otherwise be prejudiced through the

delay in obtaining the suspension, or for the prevention of a damage which could not otherwise be repaired or for the removal of any difficulties arisen with the enforcement.

For the court to dispose the interim suspension, the claimant may be asked to pay a bail, computed as a percentage established by the court.

6.3. Frequent grounds encountered in practice for filling the claim in annulment

6.3.1. Some cases of expressly stipulated grounds for invoking nullity, as mentioned under Law no. 31/1990

Law no. 31/1990 comprises a series of cases when the legislator believed it is important to specify the nullity sanction. Out of these expressly mentioned cases, some stand out through their frequency in practice, such as breaches of convocation formalities and breaches related to the length of the representation powers of a third party for a shareholder participating in a meeting.

A. Breaches of convocation formalities, sanctioned with absolute or relative nullity, as the case may be

Pursuant to article 117 of Law no. 31/1990, a summoning notice must comprise the date and time of the meeting, along with a detailed agenda of the items envisaged to be discussed. If the court is vested with analyzing the lack of observance of the convocation formalities for the adoption of a resolution by the shareholders and from the evidence administered by the parties, the court¹⁴ concludes that the convocation formalities have been breached, it shall dispose its annulment.

This case covers any situations in which either a shareholder was not duly summoned for the general meeting or the agenda transmitted through the summoning notice lacked some or all of the points which were discussed during the meeting, thus making it difficult for the shareholder's will to be duly formed. Any type of agenda comprising general items such as the economic situation of the company while the shareholders are voting the sale-purchase of shares represents a breach of legal dispositions and is sanctioned with the annulment of the resolution, as decided by the High Court of Cassation and Justice¹⁵.

Another case when the court¹⁶ considered the resolution of the general meeting of shareholders is null is when it acknowledged that the meeting has been convened at the registered office of one of the shareholders which conflicted with another shareholder.

¹² Constanta Court of Appeal, Decision no. 330/COM/2004, published in the Judicial Bulletin 2004, Lumina Lex Publishing, Bucharest, 2005, p.66.

¹³ Stanciu D. Cărpănar, *Treaty of Romanian Commercial Law*, Universul Juridic Publishing, 2016, p. 213.

¹⁴ Former Supreme of Justice, Decision no. 51/2002.

¹⁵ High Court of Cassation and Justice, Ruling no. 966/09.03.2007.

¹⁶ High Court of Cassation and Justice, Ruling no. 2690/28.09.2006.

However, the High Court of Cassation and Justice¹⁷ deemed that if the reference date was missing from the summoning notice sent to the shareholders of a joint stock company, this circumstance does not trigger the nullity of the resolution if the claimant does not prove a specific damage deriving from the lack of the reference date.

If the summoning formalities have not been at all fulfilled or have been performed by persons who are not entitled to perform them at all, the applicable sanction is the absolute nullity of the adopted resolution, as confirmed by recent case law¹⁸.

B. Shareholders were represented in the general assembly by members of the board of directors, by members of the directorate and of the supervision council or by the company's employees

Article 125 of Law no. 31/1990 stipulates a specific case when the resolution of the general meeting of shareholders is deemed null in case the shareholders were represented in the general assembly by members of the board of directors, by members of the directorate and of the supervision council or by company employees. Since the interest protected through art. 125 is a general one, the applicable sanction is the absolute nullity of a resolution adopted with its breach.

Although the company's shareholders are allowed to be represented at the general meeting, article no. 125 of Law no. 31/1990 establishes an interdiction for shareholders to be represented by the same company's members of the board of directors, of the directorate and of the supervision council or by its employees.

If Law no. 31/1990 would allow for shareholders to be represented by the directors or by employees, then there might be doubts whether the will of the company is duly born or whether it is impeded as a result of the involvement of other members functioning within the company, who may have contrary interests to the ones of the company.

Besides the claim in annulment of the resolution of the general meeting of shareholders where the latter breached the provisions of article 125, as outlined by the legal doctrine¹⁹, the company and the other shareholders may file a claim requesting damages from for the repair of the prejudices caused because of such violations.

6.3.2. A case of indirect nullity, which is not expressly stipulated by Law no. 31/1990

6.3.2.1. Majority abuse, sanctioned with relative nullity

In case the company is formed by shareholders with different participations and who have different views regarding the politics of the company, it opens

the gate for frequent misunderstandings related to the guidelines of the company. These disputes are manifested most actively in cases when the will of the company should be congruent, however it lacks common vision and consistency in the decision process. It is often the case that a shareholder owning a participation sufficient to grant him the possibility to determine the adoption of a certain decision without the support and approval of other shareholders with a significantly lower participation when the majority shareholder shall force passing the decision, irrespective of the other shareholders' point of view. In this case, there are no formal breaches of the law or of the Articles of association.

If this type of decision, although not contrary to the Articles of association or to the law, is contrary to the company's best interest while being supportive of the majority shareholders' interest, then we can consider that a majority abuse was committed.

Article 136¹ of Law no. 31/1990 expressly stipulates that shareholders must act in good faith and exercise their rights while observing the legitimate rights and interests of other fellow shareholders.

Legal scholars²⁰ have identified specific criteria for the identification of an abuse of majority participation, as follows:

- exercising a shareholder right without the observance of law and of morality,
- exercising a shareholder right in bad faith,
- exercising a shareholder right by exceeding its limits,
- exercising a shareholder right without the observance of the social and economic purpose of its regulation.

Using a right abusively has been also regulated in the civil legislation, through article 15 of the New Civil Code, which states that no right may be exercised with the direct purpose of harming another person in an excessive and unreasonable manner, contrary to good faith. Legal scholars²¹ have determined that for an abuse of rights to be acknowledged as such, the right must be exercised in bad faith and must be inappropriately used, outside its normal limits.

Nonetheless, a shareholder's majority participation is not always a signal of an abuse of majority since its dominant position must be concretely manifested in a resolution regarding a specific operation. The accusation of having a dominant position should be interpreted in connection to a relevant issue and it is related to the shareholder's conduct in a given situation and not in general.

¹⁷ High Court of Cassation and Justice, Ruling no. 3505/ 09.11.2011.

¹⁸ Bucharest Court of Appeal, Decision no. 195/11.04.2006, published in Bucharest Court of Appeal's Practice collection for commercial trials, Wolters Kluwer Publishing, 2007, p. 31-33.

¹⁹ SS. David în St. D. Cârpenaru, S. David, C. Predoiu, Gh. Piperea, *Companies Law. Comments*, IIIrd Edition, C.H. Beck Publishing, Bucharest, 2014, p. 414.

²⁰ Lucian Saulean, *Commercial Companies. General Meetings of shareholders*, Hamangiu Publishing, p. 213.

²¹ Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *New Civil Code Comments*, Hamangiu Publishing, 2013, p. 15.

7. Effects of filling the claim for the annulment of the general assembly of shareholders' resolution

Once a claim for the annulment of the general assembly of shareholders' resolution is filed before a court of law and approved by the latter, certain effects derive out of this situation. The effects of the nullity are the same, regardless whether the nullity is absolute or relative.

Since the resolution is mandatory for the shareholders, once it is invalidated by the court, the shareholders must be restored to their position prior to adopting the resolution. With respect to the company's management, the latter is obliged not to enforce the resolution once it has been invalidated by the court. As regards the company itself, it shall abstain from enforcing the resolution. Also, any registrations before the trade registry based on the resolution shall be erased, as it was outlined by legal scholars²².

However, as Romanian courts have established²³, trade registry mentions cannot be erased solely based on filing a claim for the annulment of the general assembly of shareholders' resolution.

Once the court definitively annuls a resolution of the general meeting of shareholders, any subsequent resolutions which are directly connected with the annulled resolution are therefore annulled. As shown in recent case law²⁴, if the subsequent resolutions are not

connected with and are not the result of the annulled resolution, then the latter's nullity shall not affect them.

Given that the any valid resolutions are mandatory for the shareholders, irrespective if they have voted in favour or against them, once the court issues a final ruling for their annulment, there resolutions are no longer mandatory for the shareholders or for third parties.

Conclusions

While the main aspects for filling the claim in annulment of the resolution of the general meeting of shareholders may be stipulated by the legislator, in order to supplement these findings one must turn to case law, since Romanian courts have extensively interpreted the grounds for obtaining such an annulment.

Although the claim in annulment generally represents a means of protection for the minority shareholder who disagrees with the majority of shareholders, their protection within the legal dispositions should be increased *de lege ferenda*, since the court cannot supplement the will of the shareholders if the latter do not reach an agreement. In such case, the minority shareholder's rights are difficult to be asserted and so are the breaches perpetrated by the majority shareholders in their abuse of majority.

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²² Marian Bratis, *The establishment of the joint stock company*, Hamangiu Publishing, 2008, p. 521.

²³ Cluj Court of Appeal, Commercial and Administrative Contentious Section, Decision no. 171/2004, published in National Jurisprudence, 2004-2005, Ed Brilliance, Bucharest, 2006, p. 378.

²⁴ High Court of Cassation and Justice, Commercial Section, Decision no. 1353/2006.