

Unlawful resolution of shareholders of a limited liability company

Doctoral dissertation by mgr Radosław Tomasz Poprawski, LL.M.

SUMMARY

The object of the dissertation is an unlawful resolution of shareholders of a limited liability company.

The aim of the study was to analyse the legal nature of the resolution of shareholders and the consequences of its unlawfulness. The literature and judicial decisions expressed doubts if a resolution of shareholders is a legal act. There is also a lack of consent as to whether unlawfulness may concern a violation of a non-mandatory provision of law. Furthermore, there is a dispute against the list of persons entitled to bring an action for pronouncing a resolution of shareholders invalid. One of the views considers that the list is exhaustive. There are also discrepancies regarding the effectiveness of a final judgment pronouncing a resolution of shareholders invalid. They relate to the constitutive nature and retroactivity of such a decision. As a consequence, the answers to the questions above determine the type of sanction affecting an unlawful resolution of shareholders.

It is not possible to carry out the aforementioned considerations without evaluating the specific issues. Among them, the admissibility of constructing the so-called negative resolution should be mentioned. It is sometimes pointed out that the lack of obtaining a majority of votes by a motion to adopt a resolution of shareholders with a specific content means that such a majority was achieved by a resolution with a content contrary to it. Moreover, it should be assessed whether it is justified to distinguish the category of the so-called non-existent resolution. The lack of a legal definition of a resolution of shareholders renders it difficult to determine the moment from which such a resolution exists in the legal sense. Next, the influence of bringing an action for pronouncing a resolution of shareholders invalid on the registration proceedings for the entry in the National Court Register of circumstances resulting from such resolution remains to be considered. In turn, the nature of a judgment pronouncing a resolution of shareholders invalid relates to whether the unlawfulness may be assessed by another court; for instance, the registry court. What is more, the question arises as to the scope of the cognisance of the registry court if the resolution of shareholders is deemed to be unlawful. Eventually, the object of the examination should also cover the pronouncement of invalidity of a resolution of shareholders on the merger, division or transformation of a limited liability company due to the differences relating to the actions in such matters and the importance for determining the sanction affecting an unlawful resolution of shareholders.

In order to resolve the problems presented, it has become appropriate to compare how foreign law doctrine and jurisprudence view these issues. Given the structural similarity

of capital companies, the opinions expressed in German literature and judicial decisions were chosen as such a point of reference.

The studies were included in six chapters, preceded by an introduction and ended with conclusions. Chapter I presents the nature of the resolution of shareholders. The starting point for further analysis was to determine the similarities and differences between the resolution of the meeting of shareholders and the resolution of shareholders, as well as between the resolution of shareholders and the act of the sole shareholder having equivalent effect to the resolution. The examination of the nature of a resolution of shareholders also required consideration of the relationship between a resolution of shareholders and a legal act. The last part of this chapter compares the nature of a resolution of shareholders with a resolution of the general meeting of *Aktiengesellschaft*¹. Chapter II is devoted to the unlawfulness of the resolution of shareholders. In this section, there was a need to verify this defect with unlawfulness of bi- or multilateral legal acts. At the end of this chapter, the ground for pronouncing a resolution of shareholders invalid has been compared with those for declaring a resolution of the general meeting of *Aktiengesellschaft* null and void as well as for annulment of the latter respectively. Chapter III discusses the issue of action for pronouncing a resolution of shareholders invalid. The studies included primarily the capacity to bring the aforementioned action. In addition, the analysis covered the action for pronouncing resolutions of the meeting of shareholders on the merger, division or transformation invalid. The impact of bringing an action for pronouncing a resolution of shareholders invalid on the proceedings to enter data covered by this resolution in the National Court Register was presented. The chapter concludes with a comparison of the action for pronouncing the resolution of shareholders invalid with similar legal measures under German law. Chapter IV concerned the judgment pronouncing the resolution of shareholders invalid. The mechanism of applying invalidity in case of the unlawfulness of a resolution of shareholders was described. The said judgment was compared with a judgment declaring a legal act null and void as well as a judgment repealing a resolution of shareholders. The considerations made in Chapter III have also resulted in the obligation to determine the impact on the entry in the National Court Register of a judgment pronouncing a resolution on a merger, division or transformation of a limited liability company invalid. The issues of the cognisance of the registry court to examine the lawfulness of the resolution of shareholders and the arbitration court to pronounce such resolution invalid are presented. In the following part, the judgment pronouncing the resolution of shareholders invalid was analysed in comparison accordingly with the judgment declaring the resolution of the general meeting of *Aktiengesellschaft* null and void as well as the judgment annulling the latter. At the end, the arbitrability of the dispute concerning the pronouncement of the resolution of shareholders invalid was compared with the arbitrability of the dispute concerning the annulment of the resolution of the meeting of shareholders of *Gesellschaft mit beschränkter Haftung*. The above considerations rendered it possible to determine in Chapter V the type of the sanction affecting an unlawful resolution of shareholders. This chapter concluded the comparative research on the type of the sanction affecting a null and void as well as

¹ *Aktiengesellschaft* is a German joint-stock company. The provisions on defects in a resolution of the general meeting of *Aktiengesellschaft*, on its annulment or declaration of its nullity apply *mutatis mutandis* to a resolution of the meeting of shareholders of *Gesellschaft mit beschränkter Haftung*, which is a German limited liability company. Therefore, the comparative analysis carried out focused on the resolution of the general meeting of *Aktiengesellschaft* and its conclusions also apply accordingly to the resolution of the meeting of shareholders of *Gesellschaft mit beschränkter Haftung*.

an annulable resolution of the general meeting of *Aktiengesellschaft*. Chapter VI covered the issue of the non-existence of a resolution of the meeting shareholders. As a consequence of the adopted systematics, an action for declaration of the non-existence of the said resolution is also discussed, taking into account the capacity to bring it. Next, a judgment declaring the non-existence of a resolution of the shareholders meeting was examined, including the nature of its effectiveness. This chapter was concluded with comparative research on an action for declaring the adoption of a resolution of the general meeting of *Aktiengesellschaft*.

In order to assess the nature of an unlawful resolution of shareholders, it became necessary to use more than one examination method. The first method was the dogmatic method, which took into account the results of linguistic, systemic and teleological interpretation. The result of the analysis conducted with the use of the dogmatic method was the starting point for the use of the comparative method.

The achievement of the aim of the dissertation rendered it possible to prove the following theses:

- 1) a resolution of shareholders is a special type of legal act;
- 2) an unlawful resolution of shareholders should be respected until a constitutive judgment pronouncing it invalid with retroactive effect becomes final;
- 3) the registry court is not entitled to pronounce the resolution of shareholders invalid;
- 4) the arbitration court has a cognisance on the invalidity of the resolution of shareholders of a property nature, and no cognisance on the invalidity of the resolution of shareholders of a non-property nature;
- 5) it is justified to distinguish a category of a non-existent resolution; however, such a state of affairs cannot be identified with a resolution of shareholders;
- 6) it is admissible to bring an action to declare the existence of a resolution of shareholders.

With respect to the consequence of an unlawful resolution of shareholders, it should be proposed to use the term 'conditional validity' until the time limit for bringing an action for the pronouncement of invalidity has expired ineffectively (and at the latest until the judgment dismissing such action becomes final). The resolution of shareholders upon its adoption is valid. However, this validity is of a conditional nature. The condition subsequent is that a constitutive judgment pronouncing the resolution of shareholders invalid and depriving it retroactively of legal effects is final. The described condition does not correspond to the condition reserved by the will of the parties, but with the so-called legal condition (*conditio iuris*), which means a future and uncertain circumstance defined by the law (granting an action for pronouncing a resolution of shareholders invalid), on the fulfilment of which the cessation of legal effects depends (depriving the resolution of shareholders of its legal effects by a judgment).

Radosław Poprawski