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THE ROLE OF THE REGISTRY COURT BY PROTECTING CORPORATE RIGHTS IN POLISH PRIVATE LIMITED COMPANIES

1. Introduction

Pursuant to the provisions of the Polish Commercial Companies Code (Official Journal of Laws of the Republic of Poland, 2019.505, as amended, hereinafter abbreviated as CCC), the corporate rights of shareholders of private limited companies include as follows: participation in the general meetings, voting right, right to raise claims against resolutions of the general meeting, right of individual control (supervision), minority rights (right to request that a general meeting be called and certain resolutions be placed on its agenda, right to request that a certified auditor be appointed to evaluate the company's accounts and operations), right to demand the winding-up of the company by the court and actio pro socio. The protection of these rights is often guaranteed by a judgment of the civil court or registry court. The civil court may issue a judgment repealing a resolution of the general meeting or declare the resolution null and void, it may also issue a judgment on the winding-up of the company or on redressing damage caused to the company. The registry court protects the minority rights and the right of individual control. The protection does not extend only to corporate rights, but it also covers other rights, such as the right of the disposal of shares. Apart from the shareholders' rights, the registry court must also consider in its decisions the interest of the company, as the provisions of the Code ensure the protection of both the shareholders and their interest and the company and its interest. Given that the protection of corporate rights of shareholders, as well as the protection of the interest of the company, is extremely important in the corporate relationships of the company, this paper aims to explore the issues of protecting corporate rights taking account of the role of the registry court.

2. Shareholder's right of individual control in private limited companies

2.1. The scope of the right of individual control

Pursuant to Art. 212 § 1 CCC, the right of supervision shall be conferred upon each shareholder. This right may be exercised individually by each of

the shareholders, independently of the number of shares represented by the shareholder, but in any case it is not a personal right but it is attached to the share [1, p. 528; 2, p. 546; 3, p. 1032; 4, p. 1198; 7, p. 323]. Notably, the articles of association may confer additional personal rights concerning the exercise of control in the company on personally indicated shareholders.

This right of individual control has a huge impact on the management in the company, as the supervision organs in private limited companies are not mandatory. The establishment of supervisory organs (supervisory board or revision committee) shall be required only if the articles of association so provide, or the obligation to appoint a supervisory organ is indicated by law, for instance, by way of the Act of 20 December 1996 on Municipal Economy (Official Journal of Laws of the Republic of Poland, 2019.712, as amended) concerning companies with the share capital represented by entities of the municipal government. Pursuant to Art. 213 § 3 CCC, where the supervisory organ has been established, the articles of association may exclude or restrict individual control of shareholders. The establishment of the supervisory organ shall not automatically lead to the exclusion of individual control, but an amendment to the articles of association shall then be required. In such a case, it is necessary to apply the provisions of Art. 246 § 3 CCC which indicate that any amendment to the articles of association which would result in the restriction of the rights attached to shares shall require the consent of all the shareholders concerned. Thus the exclusion of the right of individual control in the company shall require a unanimous resolution of the shareholders, which was also confirmed by a Supreme Court judgment of 13 June 2013 (IV CSK 694/12). On the whole, Art. 246 § 3 CCC should be considered to be a good example of provisions protecting shareholders rights.

For the purpose of exercising the right of individual control, the shareholder, acting individually or jointly with the person authorized by this shareholder, may at any time inspect the books and documents of the company, prepare a balance sheet for personal use or request the management board to provide explanations. The scope of this right is vast given that the shareholder may in fact request all the documents in paper or in an electronic form, review the correspondence with the trading partners, request information on contracts, assets and liabilities of the company, bank statements, etc. However, restrictions on exercising the right of individual control may be laid down in the provisions of law.

The management board may refuse to provide explanations to the shareholder or to make the books and documents of the company available to him for inspection if there are reasonable grounds to believe that the

shareholder will use the information thus obtained for the purposes contrary to the company's interest, causing material damage to the company. In the case of unreasonable refusal, the shareholder may request that the issue be settled by way of resolution of the shareholders. The resolution should be adopted within one month of such a request. Since the resolution shall be adopted in the circumstances of a dispute between a shareholder and the company, the voting right of this shareholder shall be excluded, as indicated in Art. 244 CCC [1, p. 552; 3, p. 581; 5, p. 1219; 6, pp. 119-120].

2.2. Protection of shareholders' rights by the registry court

The shareholder who has been refused explanations or access to the documents or books of the company may apply to the registry court to oblige the management board to provide explanations or make the documents or the books of the company available for inspection. The application shall be filled within seven days of receipt of the notification on the resolution of shareholders, or within seven days of the lapse of the deadline set forth for adoption of the resolution if the shareholders fail to adopt the resolution by such date. Notably, the lack of the resolution may often result from an intentional omission by the management board which does not call a shareholders' meeting. Such an application filed to the court should contain the text of the shareholders' resolution on the refusal to recognize the shareholder's right, or proof of submitting a request that a meeting be called [6, p. 352].

The protection mechanism provided by the Code shall protect both the interests of the company and its shareholders. On the one hand, the management board may refuse the right of control to a shareholder because of the existence of reasonable doubt of misusing the right by the shareholder resulting in material damage to the company. This may occur in particular where a shareholder (or his relatives or a person with whom the shareholder has a personal relationship) is engaged in competitive business. There is also a potential threat of corporate blackmail, which should be regarded as the abuse of the shareholder's right. In fact, in such a case the court must adjudicate on the primacy of one of the interests, i.e. the interest of the company or the interest of an individual shareholder. In the case of the abuse of power by the management board, in particular in a conflict between a shareholder and the company, the shareholder has the right to apply to the registry court. This is also a situation where a potential conflict of interests occurs, nonetheless, it should be emphasized that the interest of the company and the interest of the shareholder may not necessarily be contradictory. In numerous cases the shareholder shall act in the interest of the company when the management board does not properly manage the affairs of the company (wrongful management),

thus the interest of the company and the interest of the shareholder in fact converge.

The registry court shall inspect the shareholder's entitlement to apply to the court in the light of Art. 212 § 4 CCC. The court determines whether the shareholder shall have the right to exercise individual control depending on the circumstances of a specific case, including an evaluation of the interest of the shareholder and the interest of the company. The court is not obliged by the scope of the shareholder's request, so the court may also determine the scope of exercising the right of individual control, in particular, it may oblige the management board to undertake specific actions, such as facilitation of the books and documents, providing information in writing. The judgment of the court may be appealed against by the shareholder or by the company [4, p. 1222; 7, p. 352].

The unreasonable refusal to recognize the shareholder's right of individual control may justify claims against the management board for redressing damage. Namely, pursuant to Art. 293 § 1 CCC, unreasonable refusal may be considered as acting contrary to the provisions of law. It may also justify removal of management board members or result in a shareholder's claim against the company on general terms (ex contractu) where as a consequence of such a refusal, the insufficient information concerning the company has led to wrongful decisions of the shareholder, for instance, selling shares beneath their real value [4, p. 1222].

3. Rights of the minority shareholders in private limited companies

3.1. The rights to call a general meeting and to put items on the agenda

Minority shareholders in private limited companies have two rights pertaining to the general meeting of shareholders. Pursuant to Art. 236 § 1 CCC, shareholders, acting individually or collectively, representing at least 10% of the share capital have the right to require the management board to call an extraordinary general meeting and to put certain items on the agenda. The request shall be filed in writing with the management board no later than one month prior to the general meeting. Then pursuant to Art. 236 § 11 CCC, shareholders, acting individually or collectively, representing at least 20% of the share capital shall have the right to put certain items on the agenda of the upcoming general meeting. The request shall be filed in writing with the management board no later than three weeks prior to the general meeting.

In both cases the management board should agree to the request of the shareholders, and in the case where the request shall not be complied with, the requesting shareholder or shareholders may apply to the registry court. The Supreme Court stated in its judgment of 15 of June 2010 (II CNP 8/10)

that remedy of the damage suffered by a shareholder or the company due to the refusal of the management board to agree to the shareholder's request to call a general meeting may be pursued on general terms. It means that in such cases a claim for damage against management board members may be filed by the company (pursuant to Art. 293 CCC), by the shareholder as actio pro socio(pursuant to Art. 295 CCC) or on general terms pursuant to the provisions of the Civil Code. However, in practice there are numerous examples of the abuse of rights by shareholders, therefore in such cases the management board is entitled to reject the request of a minority shareholder.

Where within the terms prescribed by the provision of Art. 236 § 1 and Art. 236 § 11 CCC, the general meeting is not called or the agenda of the general meeting is not complemented, the registry court may authorize the requesting shareholder to call an extraordinary general meeting. Before the decision, the registry court should call upon the management board to make a statement providing explanations and may set a deadline for preparing such a statement [5, p. 209; 7, p. 397]. In the event where the management board fails to prepare the statement, the registry court shall still be competent to decide autonomously whether to authorize the shareholders or not. Regardless of the circumstances revealed in the shareholder's request or in the management board's statement, the registry court is obliged to explore all the facts of a particular case and to determine whether there has been an abuse of power by the management board or corporate blackmail by the shareholder [6, p. 48]. The judgment of the court may be appealed against by the shareholder or by the company [5, p. 212; 7, p. 400]. The shareholders' meeting shall adopt a resolution determining whether the company is to bear the costs of calling the meeting, however, the requesting shareholders may apply to the registry court to exempt them from the payment imposed on them by means of the shareholders' resolution.

3.2. The right to request the designation of an audit firm

Given that the supervisory board is not mandatory in private limited companies, the protection of the interest of the company and its shareholders must be guaranteed in another manner. One of the rights protecting the abovementioned interests is the right to request the designation of an audit firm. Pursuant to Art. 223 CCC, the registry court may, on request of a shareholder or shareholders representing individually or collectively at least 10% of the share capital and after having called upon the management board to make a statement, designate an audit firm to evaluate the company's accounts and/or operations. The scope of the evaluation is wide considering that apart from an evaluation of the financial statements, the shareholders may demand that all the

operations of the company be evaluated. Thus the evaluation may concern, in particular, all the contracts concluded hitherto, the contracts being negotiated, litigations, including the justification of all those operations. The decision of the court whether to designate an audit firm is autonomous, however it should be based, on the one hand, on the justification provided by the shareholders and, on the other hand, on the statement made by the management board.

The right to request the designation of an audit firm is an important measure adopted to protect the interest of the company and its shareholders from the abuse of power by the management board, or from its inefficiency, in cases where the management board is somehow connected (in cooperation) with the dominant shareholder or group of shareholders. However, the costs of the evaluation by the audit firm may form an obstacle to the exercise of the right. Pursuant to Art. 226 CCC, the remuneration of the certified auditor shall be set by the registry court and the costs shall be borne by the shareholders requesting such an audit. Only where the audit reveals an abuse, action detrimental to the company or gross violation of the law or the articles of association, the requesting shareholders shall have the right to request that the company reimburse the costs of the audit. Thus, on the one hand, such a solution limits the number of ill-considered requests of the shareholders and the abuse of the right by the shareholders, but on the other hand, it restricts the exercise of the right. The registry court should take into consideration these circumstances in each case. The court should not designate an audit firm in the case of an ill-considered request or corporate blackmail, and the decision of the court should be treated as an adequate protection of the interest of the company.

4. The right to disposal of shares

The basic rule of the corporate law is the freedom of disposal of the company's shares. However, pursuant to Art. 182 CCC, the articles of the association may make the disposal of share contingent upon the company's consent, or otherwise restricted. The aim of such a restriction is the company's control of the corporate structure of its shareholders to preclude the possibility of take-over of the company. In order to avoid a conflict of interest between the company and its shareholders, the provisions of the Code resort once again to the mechanism based on the active role of the registry court, protecting both the interests of the company and the shareholders.

In the case where the disposal of shares is restricted by the articles of association, the consent shall be granted in writing by the management board. The consent of the management board is in fact the consent of the third person, in the meaning of the Art. 63 of the Civil Code (Official Journal of Laws

of the Republic of Poland, 2019.1145), thus the lack of the consent results in suspended invalidity of the disposal of shares (Judgment of the Supreme Court of 29 of August 2013, I CSK 713/12). Where the consent is refused, the registry court may allow for the disposal of shares, provided that there exist important reasons. On the whole, the role for the registry court is to secure the freedom of disposal of shares and the interest of the shareholders. The consent by the registry court shall be given in situations where there is a conflict between a shareholder and the management board, for instance, in the case of unjustified refusal by the management board. Notably, the interest of the company is further protected given that where consent is granted by the registry court for the disposal of shares, the company may, within the period set by the registry court, designate another purchaser. The price and the payment date may also be set by the registry court on request of a shareholder or the company if there is no agreement in that respect between the shareholder and the purchaser designated by the company. The purchase price may be set by the registry court after consulting an expert, if necessary.

5. Final remarks

The mechanism for protection of corporate rights in the Polish Commercial Companies Code was established to protect both the interests of the company and of the shareholder, therefore, the mechanism foresees a significant role for the registry court. The registry court may have to adjudicate on difficult issues, such us evaluating the primacy of the interest of the company or the interest of its shareholders, and to protect the company from the abuse of shareholder's rights (corporate blackmail), or the abuse of power by management board members. The above examples indicate that the registry court plays an important role in the corporate relationships and may sometimes even be indispensable for the proper operation of the company.

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The mechanism for protection of corporate rights in the Polish Commercial Companies Code was established to protect both the interests of the company and of the shareholder, therefore, the mechanism foresees a significant role for the civil or registry court. The active role of the registry court is necessary in corporate disputes concerning exercising of shareholders rights, such as calling a general meeting and putting items on the agenda, the right of the disposal of shares or the right of individual control. The role of the registry court is also to protect the company and its shareholders from abusive management by designating the audit firm to evaluate the company's accounts and/or operations. Depending on the circumstances, the registry court may have to adjudicate on difficult issues, such us evaluating the primacy of the interest of the company or the interest of its shareholders, and to protect the company from the abuse of shareholder's rights (corporate blackmail), or the abuse of power by management board members.

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