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Procedural Flaws of Shareholders' Resolutions – a Comparative Approach

Roman Uliasz
Dr. habil., Associate Professor, Institute of Law, College of Social Sciences, Rzeszów University; correspondence address: Grunwaldzka 13, 35-068 Rzeszów, Poland; e-mail: ruliasz@ur.edu.pl
https://orcid.org/0000-0002-3143-1941

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Abstract: The paper discusses legal consequences of violations of law which may occur in the course of passing resolutions by shareholders or when convening the meeting. Such violations take the form of procedural infringements, as opposed to material defects which concern the subject matter of the resolution. Several jurisdictions were taken into account in order to demonstrate that illegality of the procedure does not need to imply nullity of resolutions. There are various instruments which, despite illegality, are intended to preserve the resolution. This is all about the balance of preferences: in company law there are definitely situations where legality should be less valued than stability and certainty.

1. Introduction

Shareholders pass resolutions which affect a great number of company matters which may range from the appointment of company directors[1] or other company officers[2] to the exclusion of shareholders from the company[3]. The decision made by shareholders does not need to be unanimous and if it isn't

1 E.g. Article 201 § 4 of the Polish Code of Commercial Companies and Partnerships of 2000 hereinafter referred to as 'CCC' (Journal of Laws of 2022, item 1467, 1488).
2 E.g. Article 215 § 1 CCC.
3 Article 418 CCC.

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it is still binding on all company members. Thus the nature of the resolution, at least in part, lies in that the will expressed by such resolution does not need to be the true will of all shareholders. In particular, it is certainly not the will of those who failed to attend the meeting, then those who voted against and those who abstained from voting. Nevertheless, what has been decided by resolution is deemed to be the will of all shareholders[4]. On one hand the decision making process in companies may not work differently as otherwise in some instances it could disrupt the expression by shareholders of their will and consequently hamper the company activity. On the other hand, since the will expressed in the resolution is deemed to be the will of all company members, rigorous rules laid down in statutory law must be complied with, i.e. rules that govern the process of passing resolutions. Those rules require the board of directors to take particular action before the resolution is to be made or they govern the course of shareholders' meeting, including the voting procedure. The first group of rules impose on the board the duty to summon the meeting prior to date of that meeting[5] or to make its agenda sufficiently detailed[6]. Other rules require that particular resolutions should be passed in a secret ballot[7] or provide that some shareholders are not entitled to vote[8]. Such rules may be called procedural or formal and consequently the defects which arise may be referred to as procedural (formal) flaws as opposed to defects which arise because of the violations of substantive law. However, the latter category of violations will not be discussed in this paper.

The violation of formal rules while convening the meeting or at the meeting renders the resolution passed imperfect. Such imperfection may lead to various consequences, which – considering various jurisdictions – range

4 Zbigniew Radwański, *System prawa prywatnego, Vol. II, Prawo cywilne – część ogólna* (Warsaw: C.H. Beck, 2008), 182; Piotr Antoszek, *Cywilnoprawny charakter uchwał wspólników spółek kapitałowych* (Warsaw: Wolters Kluwer, 2009), 279–280; Wojciech Popiołek, "Charakter prawny uchwał wspólników i organów spółek handlowych," *Przegląd Prawa Handlowego,* no. 9 (2014): 17; Józef Frąckowiak, "Charakter prawny uchwał organów spółek kapitałowych a ich zaskarżalność," *Przegląd Prawa Handlowego,* no. 9 (2014): 30–31.

5 E.g. Article 238 § 1 CCC.

6 E.g. Article 238 § 2 CCC.

7 E.g. Article 247 § 2 CCC.

8 E.g. Article 244 CCC.

from the possibility to annul the resolution to its absolute nullity or, in some instances, even non-existence of the resolution.

Defective resolutions may trigger a legal action where corporate relations are far from being perfect. In the case of conflicts between minority and majority shareholders or shareholders and members of the board even minor imperfections of the resolution may give rise to a court action being brought, e.g., by a minority shareholder against the company and the actual reason for such an action may be that the claimant desires to tease the company or the board rather than act in the best interests of the company. Hence, the significance of procedural defects of shareholders' resolutions is huge as is the way in which such violations are regarded in different jurisdictions. This paper seeks to explore how different company law systems handle formal violations committed while convening the meeting or at the meeting itself; it is also intended to examine the consequences of such violations. There are different instruments which may hamper shareholders or board members to bring the action against the company. Such instruments require thorough examination considering various approaches adopted in selected jurisdictions. Also, there are regulations that seem to encourage potential claimants to sue the company because of the violation of formal rules. They also demand a closer look.

2. Mechanisms which encourage shareholders to contest resolutions in a court of law

As for Polish law, the provisions of the Code of Commercial Companies and Partnerships, at least at first glance, seem to encourage shareholders to contest those resolutions that are formally defective, even in the case of minor defects. Pursuant to Article 252 (1) CCC and Article 425 (1) CCC all resolutions which violate the law, including formal rules, are null and void. Sticking to literal (textual) interpretation it must be concluded that minor and major flaws are equally significant: they both may lead to a successful court action and consequently a court decision declaring the nullity of the defective resolution. E.g., an unintended omission of the vote of a shareholder[9] whose voting power is just one per cent of the share capital is equally reprehensible as voting by a show of hands where secret ballot is the preferred

[9] Article 242 § 1 CCC.

option[10]. It goes without saying that the omission of one per cent of the share capital bears little effect on the final result of the vote, while voting openly in personal matters may exert huge influence on the ultimate result of the vote. Irrespective of such controversies the result of textual interpretation is clear and leaves little space for other conclusions. As a result, in both cases the resolution could be declared null and void[11].

Similarly encouraging seem to be time limits set for the court action for the declaration of nullity. They are pretty long, where the action is to be based on the violations of law. For instance, in the case of limited companies (*spółki z ograniczoną odpowiedzialnością*) shareholders may contest defective resolutions within six months from the date on which they learnt about the meeting (which is usually the same day as the date of the meeting) but the deadline can be even longer and amount to three years from the date of passing the resolution (Article 252 (3) CCC).

In other jurisdictions contesting resolutions on the basis of violations of law may seem even easier if we consider time limits and an open catalogue of persons entitled to file the court action. E.g., in Swiss law the declaration of nullity may occur with no time limit[12], while in Italian law the deadline fixed for the declaration of nullity is three years[13]. Under German

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10 Article 247 § 2 CCC.

11 As will be furtherly explained, conclusions arising from the court interpretation seem to contradict that view.

12 Dieter Dubs and Roland Truffer, "Commentary on Article 706b," in *Basler Kommentar Obligationenrecht II*, ed. Heinrich Honsell, Nedim Peter Vogt, and Rolf Watter (Basel: Helbing Lichtenhahn Verlag, 2016), 1063; Davide Jermini and Alex Domeniconi, "Commentary on Article 706b," in *Kurzkommentar Obligationenrecht*, ed. Heinrich Honsell (Basel: Helbing Lichtenhahn Verlag, 2014), 2243; Peter Böckli, *Schweizer Aktienrecht* (Basel: Schulthess, 2009), 2305; Peter Forstmoser, Arthur Meyer-Hayoz, and Peter Nobel, *Schweizerisches Aktienrecht* (Bern: Verlag Stämpfli, 1996), 266–267; Bertrand Schott, *Aktienrechtliche Anfechtbarkeit und Nichtigkeit von Generalversammlungsbeschlüssen wegen Verfahrensmängeln* (Zürich: Dike Verlag, 2009), 61; Brigitte Tanner, "Commentary on Article 706b," in *Handkommentar zum Schweizer Privatrecht*, ed. Roberto Vito and Hans Rudolf Trüeb (Zürich-Basel-Geneva: Schulthess, 2016), 755; Hans Michael Riemer, *Anfechtungs- und Nichtigkeitsklage im schweizerischen Gesellschaftsrecht (AG, GmbH, Genossenschaft, Verein, Stockwerkeigentümergemeinschaft)* (Bern: Stämpfli Verlag, 1998), 138–139.

13 Article 2379 (1) of the Italian Civil Code. There is no equivalent of the shorter 6 months' period specified in Article 252 § 3 CCC or Article 425 § 2 CCC. However, much shorter time limits concern resolutions on the increase of share capital, lowering the capital and

law time limits are virtually non-existent[14] as is the case in Spanish law in which the action for the declaration of nullity is subject to no time limits at all (Article 205 (1) of Spanish *Ley de Sociedades de Capital*).

As for those who may contest the resolution by the action for the declaration of nullity, Italian law provides that it may be brought by any person who has a legal interest in it (*la deliberazione può essere impugnata da chiunque vi abbia interesse*)[15], with a similar view being presented in Swiss law[16]. In Spain, each shareholder (*cualquier socio*) has the right to request the declaration of nullity as well as company director (*administrador*) or a third party (*tercero*)[17]. Under German law (§ 249 (1) *Aktiengesetz*) the declaration of nullity may occur on the application of each shareholder, member of the board or the board itself, however, unlike in Polish law, the shareholder's right is unconditional as he is under no obligation to prove any other further qualifications (such as, e.g., voting against the resolution or demanding that his objection against the resolution be recorded in the minutes of the meeting)[18].

Such provisions may seem to favour the shareholders or even encourage them to sue the company but it must be stressed that the possibility to bring the action by virtually everyone and with no time limits or where the periods for bringing the action are relatively long, is restricted to major defects which are either enumerated by law[19] or the interpretation of the

bond issuance (Article 2379-ter (1) of the Italian Civil Code). Even stricter time limits bind in public companies (Article 2379-ter (2) of the Italian Civil Code).

14 Martin Schwab, "Commentary on § 249," in *Aktiengesetz. Kommentar*, vol. 2, ed. Karsten Schmidt and Marcus Lutter (Köln: Verlag Dr. Otto Schmidt KG, 2015), Legalis 7; Erik Ehmann, "Commentary on § 249," in *Aktiengesetz. Kommentar*, ed. Hans Christoph Grigoleit (Munich: C.H. Beck 2013), Legalis 1. There are exceptions concerning merger resolutions, which was raised by Claudia Junker, Commentary on § 14 Umwandlungsgesetz in *Gesellschaftsrecht*, ed. Martin Henssler and Lutz Strohn (Munich: C.H. Beck, 2016), Legalis 1.

15 Article 2379 of the Italian Civil Code.

16 Dubs and Truffer, *Basler Kommentar*, 1063; Jermini and Domeniconi, *Kurzkommentar*, 2243; Böckli, *Schweizer Aktienrecht*, 2305; Forstmoser, Meyer-Hayoz and Nobel, *Schweizerisches Aktienrecht*, 266–267; Schott, *Aktienrechtliche Anfechtbarkeit*, 61; Tanner, *Handkommentar zum Schweizer Privatrecht*, 755; Riemer, *Anfechtungs- und Nichtigkeitsklage*, 138–139.

17 Article 206 (2) of the Spanish *Ley de Sociedades de Capital*.

18 Schwab, *Aktiengesetz*, Legalis 3, commentary on § 249.

19 The best example is Italian law; see Article 2379 of the Italian Civil Code.

law is such that it accepts only serious infringements of the procedure as grounds for nullity[20]. Thus it can be concluded that in the above mentioned jurisdictions it is relatively easy to bring the action for the declaration of nullity but reasons for nullity are scarce and limited.

3. Mechanisms for preserving shareholders' resolutions

We can proceed now to those instruments which have the potential of making shareholders less eager to contest resolutions. Time limits and a closed list of persons entitled to bring the action are the clearest example. This is true with many European jurisdictions but it is also worth mentioning that violations of statutory law in most cases are reasons for the annulment of the resolution rather than for the declaration of nullity. It means that shareholders are limited in their right to contest the resolution in the case of minor violations of law while serious infringements of the procedure (e.g. failure to call the meeting) are not subject to such limitations. The distinction between major and minor violations of law will be discussed later.

The so-called principle of significance is another example. In short, it means that violations of the procedure of making resolutions may lead to nullity only in those situations where such a violation could have had an impact on the contents of the resolution. Such a principle has not been laid down in Polish law since it regards all infringements of the procedure equally: e.g. under Article 252 § 1 CCC, if a resolution (including the procedure of making thereof) is contrary to the law, it is sufficient for the court to declare nullity provided that the action has been properly filed, irrespective of the gravity of the infringement. As a consequence, all violations of law may render the resolution invalid which could lead to unacceptable results because even minor flaws of the procedure might imply nullity of the resolution. This in turn renders shareholders' decisions very unstable and

[20] Swiss law seems to be a good example: under Article 706b of the Swiss *Obligationenrecht* „*Nichtig sind insbesondere [in particular] Beschlüsse der Generalversammlung, die (…)*". See also Dubs and Truffer, *Basler Kommentar*, 1062; Riemer, *Anfechtungs- und Nichtigkeitsklage*, 119. Nevertheless, nullity is considered an exceptional remedy; as a rule, especially in doubtful cases, defective resolutions should not be regarded as null and void but are subject to annullment by court action. See Forstmoser, Meyer-Hayoz and Nobel, *Schweizerisches Aktienrecht*, 260; Tanner, *Handkommentar*, 755. This topic will be more extensively discussed below.

remains in clear opposition to the need for certainty of corporate relations. Bearing that in mind one should ask if all infringements of procedural rules should lead to the nullity of the resolution or only those which could have had some effect on the result of the vote? Should the stability of resolutions be given priority over the legality of procedure in the situation where only minor violations occurred during the voting procedure or while convening the meeting. Most courts in Poland seem to agree with the view that where a violation of procedure could not have had any impact on the result of the vote the nullity of the resolution may not be declared[21], though there are authors who oppose this trend[22]. Violations which could have affected the result of the vote include the infringement of the principle that all 'personal' matters should be voted in a secret ballot[23], while most infringements belong to the category of those violations which, as a rule, should not imply the nullity of the resolution. Nevertheless, assessment should be made separately referring to individual cases rather than seeking to give a ready-made formula or solution[24].

Even clearer example of attempting to preserve defective resolutions rather than eliminating them may be found in those legislations where

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21 Polish Supreme Court, Judgement of 16 March 2005, Ref. No. III CK 477/04, unreported; Polish Supreme Court, Judgement of 12 October 2012, Ref. No. IV CSK 186/12, unreported; Polish Supreme Court, Judgement of 6 June 2018, Ref. No. III CSK 403/16, unreported; Roman Uliasz, *Nieważność uchwały zgromadzenia spółki kapitałowej* (Warsaw: C.H. Beck, 2018), 452–455; Jerzy Paweł Naworski, "Commentary on Article 425," in *Kodeks spółek handlowych. Komentarz*, vol. 3, ed. Radosław Potrzeszcz and Tomasz Siemiątkowski (Warsaw: Lexis Nexis, 2013), 1033–1034.

22 Małgorzata Dumkiewicz, "Glosa do wyroku SN z dnia 5 lipca 2007 r., II CSK 163/07," LEX/el. 2010; Katarzyna Bilewska, "Sprzeczność uchwały walnego zgromadzenia z ustawą jako przesłanka stwierdzenia jej nieważności na podstawie art. 425 § 1 KSH," *Palestra,* no. 3–4 (2008): 230–231.

23 Such as the election of members of the board.

24 This means that, e.g., preventing shareholders from participating in the meeting (failure to let them in the room in which the meeting took place), even if their share was irrelevant from the point of view of the result of the vote (e.g. 5 per cent while the resolution was passed by 75 per cent of the capital), may nevertheless lead to the nullity of the resolution because such shareholders may exert influence on the contents of the resolution not only through voting but also by means of asking questions or raising arguments for or against a given resolution. Their influence may be far more significant than that resulting from the percentage of their shareholding.

grounds for the declaration of nullity form a closed list and include the most serious infringements committed in the course of passing the resolution or while convening the meeting. For example, pursuant to Article 2379 of the Italian Civil Code the cases of nullity based on procedural infringements include the situation where the meeting has not been summoned (*mancata convocazione dell'assemblea*) and where the minutes of the meeting have not been taken (*mancanza del verbale*)[25]. It should be stressed that such serious violations of law may be taken into account by the judge *ex officio* (*l'invalidità può essere rilevata d'ufficio dal giudice*). In Italian law, the reasons for nullity of the resolution form a closed list (*numerus clausus*); any other cases in which the resolution is contrary to the law may give rise to the action for the annulment of the resolution. Consequently, the resolution is more difficult to contest in court and becomes more stable (e.g. shorter time limits for the court action).

Among jurisdictions which seem to make shareholders' resolutions more stable one should also mention Swiss legislation in which grounds for nullity are scarce and the preferred (default) instrument for deleting resolutions is the action for annulment rather than the action for the declaration of nullity. This principle plays a key role in doubtful cases in which it might be disputable whether declaration of nullity is permissible or maybe the action aimed at the annulment of the resolution is the sufficient instrument.

To approach this topic in detail it is worth emphasizing that Swiss law exemplifies cases of nullity but the list is open. Article 706b (1) of the Swiss *Obligationenrecht* provides that resolutions of the general meeting are null and void if they remove or restrict the right to participate in that meeting, the minimum voting right, the right to take legal action or other shareholder rights that are mandatory in law (*Nichtig sind insbesondere Beschlüsse der Generalversammlung, die das Recht auf Teilnahme an der Generalversammlung, das Mindeststimmrecht, die Klagerechte oder andere vom Gesetz zwingend gewährte Rechte des Aktionärs entziehen oder beschränken*). Pursuant to Article 706b (2) of the Swiss *Obligationenrecht* resolutions are null

[25] Article 2379 of the Italian Civil Code lists one more ground for nullity, namely the situation where the subject matter of the resolution is impossible or illegal (*impossibilità o illiceità dell'oggetto*). However, this is not a formal (procedural) defect since it concerns the substance (contents) of resolution.

and void if they restrict shareholders in their right to control the company beyond the degree that is legally permissible (*Nichtig sind insbesondere Beschlüsse der Generalversammlung, die Kontrollrechte von Aktionären über das gesetzlich zulässige Mass hinaus beschränken*). Under Article 706b (3) of the Swiss *Obligationenrecht* resolutions are null and void if they disregard the basic structures of the company limited by shares or the provisions on capital protection (*Nichtig sind insbesondere Beschlüsse der Generalversammlung, die die Grundstrukturen der Aktiengesellschaft missachten oder die Bestimmungen zum Kapitalschutz verletzen*).

Bearing that in mind, a few doubtful cases might arise. For instance, failure to notify shareholders of the meeting in due time is generally considered as a case for the annulment of the resolution rather than for nullity. However, if the failure was intentional and the delay was long, it may as well lead to nullity. Delays which do not exceed 10 per cent of the whole period are considered as grounds for the annulment but if the violation of shareholders' right to participate in the meeting was a major one, it may justify nullity[26].

A similar view is presented while discussing the case of passing a resolution which had not been put on the agenda. Though such resolution is generally subject to annulment, there are situations where it also could be null and void, in particular where failure to put it on the agenda was intentional or where the agenda consisted only of trivial resolutions and the intention was to discourage shareholders to attend the meeting in order to make such decisions (in their absence) they wouldn't have consented to if they had attended the meeting[27].

Gravity of the infringement is crucial in German law, too. Only serious and exceptional violations of law may cause nullity. The latter is not a typical consequence of illegality as is annullability of the resolution. Common violations of law committed in the process of passing the resolution or while convening the meeting include failure to convene the meeting or calling the meeting in a defective way, e.g. the meeting being called by an

[26] Böckli, *Schweizer Aktienrecht*, 2313, 1371; Forstmoser, Meyer-Hayoz and Nobel, *Schweizerisches Aktienrecht*, 261–262.

[27] Bertrand Schott, *Aktienrechtliche Anfechtbarkeit*, 160.

unauthorized body (§ 241 (1) of *Aktiengesellschaft*) or failure to take minutes of the meeting (§ 241 (2) of *Aktiengesellschaft*).

Another example of legislation which seeks to prioritize the stability of resolutions rather than allow for its contestation in court is Spanish law, though, unlike in German, Swiss or Italian law, not a single example of null resolutions is given. Instead, the Spanish *Ley de Sociedades de Capital* provides for the so-called *acuerdos nulos de pleno derecho* (resolutions which are null and void by operation of law) which include resolutions that are contrary to legal order (*acuerdos contrarios al orden público*). Where the resolution is in line with legal order it is considered effective though it may be annulled if the court action is brought in due time by those which have the right to do so.

4. Conclusions

Having said that, the following conclusions may be made: violations of law committed while convening the meeting or at a later stage (in the course of passing the resolution) may, but does not need to, lead to the nullity of shareholders' decisions. Illegality of the procedure resulting from the violation of formal rules does not need to imply nullity. Unlawfulness, at least procedural unlawfulness, may cause nullity but only certain cases of such unlawfulness suffer such a level of gravity that authorize the declaration of nullity, while minor contraventions generally leave the resolution untouched and stable. This is true irrespective of the source of this principle, be it statutory law as is the case of Swiss, German, Spanish or Italian legislations, or court decisions as in Polish law.

Bearing that in mind we can conclude that there is no absolute connection between illegality and nullity. Textual interpretation may lead to diverse conclusions, particularly if we take into account Article 58 § 1 of the Polish Civil Code which expressly provides that a juridical act contrary to the law is null and void. This regulation seems to combine illegality with nullity which seem to be tangled in a permanent bond. However, as was demonstrated above, nullity is not just a natural aftereffect of illegality. This observation is more theoretical in its character. In some cases, illegality, understood as failure to comply with the law, is simply consequenceless but from the point of view of company law it may be considered as an advantage. Corporate relations favour stability and certainty. Nullity, although

sometimes justified and necessary, is likely to endanger the trust and confidence which, in company law, is very much needed. This is all about the balance of preferences: in company law there are definitely situations where legality should be less valued than stability and certainty. Sometimes, being in line with the law must give way to other values which are even more desired.

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