

NEWSLETTER

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For the annulment of the resolution must be judgment - a few words about the controversial resolution of the Supreme Court

We would like to draw your attention to the outcome of one of the most controversial issues in the field of company law concerning civil effects of the illegal resolutions of the shareholders of companies. The Supreme Court in its resolution of the 18th of September 2013 assumed that **the judgment annulling the unlawful resolutions of the company's shareholders is constitutive, which means that the resolution is not necessarily invalid, and only a rebuttable.**

- I. At the outset considerations it is worth recalling that the regulations of the Commercial Companies Code provide for the possibility to bring an action against the company for annulment of the illegal resolutions of the Shareholders' Meeting (in limited liability company) and the general meeting (in joint-stock company). Regulation of the challenging the resolutions of the shareholders' meeting and the general meeting is the same in a limited liability company and joint-stock company, which is why further below for simplicity we talk about resolutions of shareholders of companies.
- II. Divergence of views as to the type of regarding the illegal resolutions of the shareholders of companies was presented in the doctrine and jurisprudence for many years. The essence of the problem under consideration was confined itself to the question of **whether in the event of a conflict with the Act of resolutions of shareholders of companies, the resolutions are *ab initio* and *ex lege* absolutely void and therefore do not produce any legal effect and we do not have to follow them or whether they are valid and effective until a final determination by a court of annulment of the contested resolutions (mutability).**
- III. The Supreme Court had to perform quite a task. The Court had to face many arguments militating in favor of one or the other of the abovementioned opinions. Finally, the Court held that the unlawful resolutions of the shareholders of companies are valid since they are taken until finding by the court of invalidity by a final decision. The judgment, which collapses after finding the resolution of conflict with the law is thus constitutive. The ruling undermines the legal existence of the contested fact of the resolution since its adoption - *ex tunc* - leading to the creation of fiction, even if the resolution was not adopted.

- IV. Without going here into a deeper discussion with the present position, but it should be considered that argument implies that the Supreme Court's recognition of the unlawful resolutions as an valid and impressive legal effect until the (possible) ruling to be annulled by a final judgment of a court. In other words, according to the Supreme Court, **until the resolution is found by the court to be invalid (in any case) there is an obligation to respect its legal consequences and ensure that it is carried out by the company's authorities, the courts, including the registration courts.**
- V. Therefore it can lead to a situation in which the resolution of the shareholders of company is clearly contrary to the law, but it will have to be carried out (the only way to avoid this situation is to bring an action for annulment of the resolution together with an application for precautionary measures). For example, it is worth at this point to recall even one example.

Example: Meeting of Shareholders dismisses board and appoints a new one. Resolution of the meeting is illegal due to the fact that there was no proper convening (some shareholders do not know whether to hold assembly, and their participation would make it possible to "lock" the adopted resolution). The new management goes to the bank and obtains the right to dispose of the account of the company (manages of the financial resources of the company).

The effects of the decision: Resolutions regarding the appointment of the board can not be treated as invalid until a final court decision. Even when absent shareholders will raise the allegations concerning the invalidity of the resolution (ie. they will present a legal opinion to the bank), the bank will not be able to refuse to pay the management board funds from the bank account of the company.

It is possible to undertake precautionary measures through the execution of the contested resolution or suspension of the proceedings before the court register in terms of the deletion of the old board and entry a new one, however it involves even several weeks waiting period.

- VI. As you can see, the resolution is of great practical importance. In justification of the adopted resolution, the Supreme Court has appointed a number of reasons, which led to take position presented above by the court composed of seven judges. It is worth to recall even one, the most important of them. The crowning argument put forward by the Court had regard to the 'need to ensure security and a sense of stability un trading and certainty of counterparties of its participants.' According to the position of the Court 'The adoption of the idea that a shareholder's resolution contrary to the Act is *ab initio* and *ex lege* absolutely void could threaten the safety and stability of the market, because the board members

could then refuse to comply with resolutions of-favor their shareholders, relying solely on its own assessment of the conflict resolution of the shareholders of the Act. This behavior of the board, without judicial review could result in arbitrary decision of the board members to refuse implementation of the statutory obligation of carrying out the resolutions of the board of shareholders.

- VII. The analyzed resolution is now important for companies. Although it is controversial, it has been carefully justified and represents a compromise between the two - extremely varied and involving a far-reaching impact on concepts regarding defective resolutions of companies.
