SOME CONSIDERATIONS REGARDING THE REVOCATION OF THE COMPANY DIRECTOR

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Abstract

In principle, in Romania, according to current regulations, the director of a company can not address the court against the decision of the general meeting of shareholders through which he/she was revoked from his/her position, regardless of the reasons for the revocation. However, if the director is also the shareholder of that company, he/she may appeal the decision of the general meeting of shareholders, for other reasons than the revocation itself. This is the case even if, by that decision of the general meeting of shareholders it has been decided, inter alia, the revocation of the director. Also, the laws of Romania stipulate that the revoked director has the possibility to claim in court damages if he/she fulfilled correctly the duties as director of the company. At the same time, the article looks at the concept of director, his/her relations with the company and the revocation of the director as general concept.

Keywords: *company, revocation, director, general meeting of shareholders*

JEL Classification: *K22*

I. Introduction

The idea behind this article started from a relatively recent decision of the High Court of Cassation and Justice[2], essentially ruling that the right of a shareholder that was revoked from his/her capacity as director to challenge the relevant resolution of the general meeting of the shareholders cannot be restrained for other reasons than those referring to the very revocation.

In our case, the general meeting of the shareholders of the company in question approved, during the same session and under the same resolution, an increase of the share capital and the revocation of the director. The revoked director challenged the relevant resolution, however not with respect to his being revoked from his capacity as director, but claimed the absolute nullity of the resolution for breach of the legal provisions related to the convening.

The arguments brought on the merits against the action filed by the revoked director referred to the court ignoring that, by the challenged decision, the general meeting of the shareholders decided not only to increase the share capital of the company but also to revoke the defendant from his capacity as director, therefore, once the resolution is challenged in connection with one aspect, it is challenged in terms of all aspects.

Moreover, it was argued that the plaintiff, in order to be able to challenge the resolution regarding his revocation, should have voted against it in the general meeting and such vote should have been mentioned accordingly in the meeting minutes, which did not happen.

In order to analyze this situation, it is first required to carry out an analysis of the conditions under which the director mandate terminates and particularly of the cases when revocation takes place.

II. The notion of "director"

Any legal person operates based on the decisions of its management and administration bodies, under the operation of the law[3].

The director position is regulated by Companies Law no. 31/1990[4] (hereinafter referred to as the "**Law**"). Any company is administrated by one or several directors.

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[2] High Court of Justice and Cassation, IInd Civil Section, Decision no. 713 of 15 February 2012

[3] Ioana Nely Militaru, „Dreptul afacerilor. Introducere în dreptul afacerilor. Raportul juridic de afaceri. Contractul.", Universul Juridic Publishing House, Bucharest, 2013, p74

[4] Published in Official Gazette, Part I, no. 126 of 17.11.1990, with the last amendment by Government Emergency Ordinance no. 2/2012 published in official Gazette, Part I, no. 143 of 02.03.2012.

As regards having several directors, please note that as per the above-mentioned law, in case of unlimited companies, limited partnerships and limited liability companies, the law does not regulate the case when there are several directors; on the contrary, as regards joint stock companies and partnerships limited by shares, the case when there are several directors is regulated under the laws as a collegial body referred to as board of directors[5].

In accordance with the Law, usually directors are individuals. For joint stock companies, as per article 153[13] paragraph (2) of the Law, a legal entity may also act as director, provided that it appoints an individual to act as personal representative and to carry out the duties of the legal entity.

The law also sets forth the rules regarding the director's status, rules that refer to the capacity of director, the conditions that such director must meet in order to be appointed for this position, how directors are appointed, the length of their mandate, the registration of the appointment, the legal nature of this office, the obligations, the rights and powers, as well as the cease of the director office.

As regards the cease of the director office, such will cease upon expiry of the mandate term, upon the director's resignation, his/her death, the director's disability and by revocation.

III. Rules for revoking the director

The revocation of the director, as per the legal provisions, is the exclusive attribute of the general meeting of the shareholders, because, if we were to accept that the court could also have this power, this would mean admitting to operating an amendment to the articles of incorporation via a legal action, which the law only accepts under exceptional circumstances.[6]

However, the rules for such revocation depend on the type of company.

In a joint stock company and a partnership limited by shares, i.e. in case of equity companies, it is required to meet the quorum and majority conditions provided for the general meeting to pass resolutions, without being relevant whether the directors were appointed under the articles of incorporation of the company or by the general meeting of the shareholders.

In general partnerships and limited partnerships, as well as regards limited liability companies, directors are revoked with an unanimous vote, if the directors were appointed under the articles of incorporation, and, respectively, with the vote of the shareholders that represent at least the absolute majority of the share capital if the directors were appointed by the general meting of the shareholders.

Moreover, also related to the rules based on which directors are revoked, please note that they are provided in article 1.914 of the Civil Code, which sets forth that revocation takes place as per the rules provided in the mandate agreement.

This regulation thus brings into question the matter of the legal nature of the relationship between the director and the company, which has given rise to contradictory discussions in the legal works over the years[7].

IV. Legal nature of the legal relation between the manager and the company

Considering the nature of the director office, but also the purpose of companies, some authors[8] have put forth the idea that, as far as the relationship between the director and the company is concerned, we could not simply speak of a mere mandate, but of a legal mandate. It was deemed that we would be dealing with a body whereby the company's activity is carried out, but this opinion misses out the fact that the director only fulfils corporate will and does not contribute to the formation of such will and therefore he/she cannot be a body of the company.

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[5] St. D. Cărpenaru, „Administrarea societăţilor comerciale în reglementarea Legii nr. 31/1990", in RDC. No. 2/1993, p. 30; E. Munteanu, „Regimul juridic al administratorilor societăţilor comerciale", All Beck Publishing House, Bucharest, 2001

[6] See Supreme Court of Justice, S. Com, dec. no. 4030/2002, in RRDA no. 9/2003, p. 112

[7] E. Munteanu, „Unele aspecte privind statutul juridic al administratorilor societăţilor comerciale", in RDC. No. 4/1997, p. 76-82; Claudia Roşu, „Natura juridică a raporturilor dintre administrator şi societatea comercială", in RDC. No. 4/2001, p. 80; St. D. Cărpenaru, „Administrarea societăţilor comerciale în reglementarea Legii nr. 31/1990", in RDC. No. 2/1993. p. 30 and following

[8] See for example N.Catană, „Rolul justiţiei în funcţionarea societăţilor comerciale", Lumina Lex Publishing House, Bucharest, 2003, p. 331 and following

Moreover, starting from the idea that a director carries out a permanent and remunerated activity, it was deemed that we would be dealing with an employment relationship, omitting the fact that the essence of a director's activity is given by the legal paperwork he/she signs, not by a material activity.

Actually, concerning the legal nature of the relations between the director and the company, as argued by certain authors[9] and as in fact set forth in the current Civil Code, these relations are mandate relations – which was also indicated by the previous Commercial Code and it was set forth in the previous doctrine.

Thus, these legal relations are contractual ones, the director being named by the articles of association or by the resolution of the general meeting of the shareholders, which also set forth a director's obligations. In fact, article 72 of the Law sets forth that a director's obligations and responsibility are regulated by the provisions related to mandate[10].

However, if this is the essence of the legal relations between a director and a company, it should be noted that such director mandate cannot be exclusively contractual, as the public order of legal regulation of companies determines the law to regulate certain obligations, and thus according to the same article 72 of the Law, the provisions regarding mandates are applied in this case, and also the special provisions set forth in the companies law. Thus, we may speak of a regulation of the director's mandate, both a contractual and a legal one.

A director's mandate is one given in consideration of the person, and thus revocation may take place anytime, even if no contractual negligence on part of the director may be noted. Article 2.031 paragraph (1) of the Civil Code sets forth that "the principal may revoke the agent's mandate anytime, expressly or tacitly, regardless of the form in which the mandate agreement was signed and despite being declared irrevocable"[11]. Based on this principle, the Law provides that directors may be revoked by the ordinary general meeting of the shareholders anytime – article 137^1 paragraph (4) – and also that the directors cannot challenge the resolution of the general meeting of the shareholders revoking them– article 132 paragraph (4) of the Law[12]. As emphasized in the legal works[13], a revoked director cannot complain in court in order for his/her position to be reinstated, although such revocation had no fair cause. A possible legal action filed by a director can only be one claiming damages precisely taking into account that the revocation had no fair cause and such a solution was set forth by the Law in article 137^1.

In the case under review, the circumstances are somewhat of a different nature, because here the director is at the same time a shareholder of the company and, in addition, grounds of absolute nullity are also invoked by the legal action filed. The court noted that the plaintiff did not challenge the resolution of the

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[9] See St. Cărpenaru, Op.Cit. p. 214

10 About mandate agreement, see also Florentina Camelia Stoica, „Dreptul Afacerilor. Contracte", A.S.E. Publishing House, Bucharest, 2012, pag. 152 and following

[11] See also . Ţuca, „Revocarea administratorului societăţii comerciale", in RDC no. 6/1999, p. 90.; Supreme Court of Justice, S. com. , dec. no. 2564/2002, in RRDA no. 2/2003, p. 119.

[12] **Art. 132. - (1)** The resolutions passed by the general meeting under the laws or the articles of incorporation are binding even for the shareholders that did not attend the meeting or voted against.

(2) The resolutions of the general meeting of the shareholders that are contrary to the law or to the articles of incorporation may be challenged in court, within 15 days from the date they are published in the Official Gazette of Romania, part IV, by any of the shareholders that did not attend the meeting or that voted against and requested for this to be included in the minutes of the meeting.

(3) When grounds of absolute nullity are invoked, the right to file legal action does not have a statute of limitation, and the claim may also be filed by any concerned person.

(4) The members of the board of directors or of the supervisory board, respectively, cannot challenge the resolution of the general meeting regarding their revocation from such office.

(5) The claim will be settled versus the company, which will be represented by the board of directors or by the management board, respectively.

(6) If the resolution is challenged by all members of the board of directors, the company will be represented in court by the person appointed by the chairman of the court from among its shareholders, who will fulfill the mandate that he/she was entrusted with until the general meeting, convened for this purpose, appoints a representative.

(7) If the resolution is challenged by all members of the management body, the company will be represented in court by the supervisory board

(8) If several legal actions for cancellation were filed, they may be jointed under the same court case.

(9) The claim will be tried in the counsel chamber. The decision issued by the court will only be subject to recourse within 15 days from the date it was served.

(10) The irrevocable decision to cancel will appear in the Trade Register and will be published in the Official Gazette of Romania, Part IV. After the publishing date, it will be biding against all shareholders.

[13] See St. D. Cărpenaru, Op. Cit. p. 219

general meeting of the shareholders with respect to the revocation from the director office, but invoked the absolute nullity of the resolution due to breach of the legal provisions on convening.

V. The settlement ruled by the court in this case

The court notes in its substantiation that restricting the right of the shareholder that was revoked from his/her office of director to challenge the resolution of the general meeting of the shareholders for other reasons than those related to his/her own revocation means offering an excessively formal interpretation for article 132 paragraph (4) of Law, which would lead to a breach of the principle of free access to justice as regulated in article 21 paragraphs (1) and (2) of the Romanian Constitution.

The case in itself is interesting because the above-mentioned reasons lead in fact to a cancellation of a resolution of the general meeting of the shareholders, by which, inter alia, the revocation of the company's director was ordered, and thus, to some extent, on a determined way, the principle according to which, regardless of the existence or inexistence of a fair cause, a company's director may be revoked anytime by the general meeting of the shareholders may be defeated.

However, it is just as true that such a principle cannot have priority over the one according to which a resolution of the general meting of the shareholders is rendered absolutely null and void for breach of the legal provisions related to convening, provisions that are sanctioned, in case of breach, with absolute nullity. In addition, the resolution also refers to article 21 of the Constitution, although no one invoked in any way the unconstitutionality of the mentioned legal text, rightfully showing that not acknowledging the right to file legal action of the revoked director who is also a shareholder of the company and to claim for the absolute nullity of the resolution of the general meeting of the shareholders to be acknowledged by the court equals a limitation of the free access to justice, a principle set forth in the Constitution which cannot be breached in any way.

VI. Conclusion

In stead of conclusion, we will only mention that in our opinion, the settlement handed down by the court in this case comes to resolving similar situations in practice, but it remains as time passes, the practice to confirm or disprove this solution.

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