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TYPES OF SHAREHOLDERS' RESOLUTIONS IN PRIVATE LIMITED COMPANIES

1. Introduction

The provisions of the Polish Commercial Companies Code (the Official Journal of Laws of the Republic of Poland, 2017.1577, as amended, hereinafter abbreviated as CCC) concerning private limited companies provides for four methods in which resolutions are passed by shareholders. The first method for adopting resolutions is calling a general meeting, as set out in the provisions of art. 235 and 238 CCC. The second option is to adopt resolutions despite the shareholders' meeting not having been officially called, as regulated in art. 240 CCC. The third alternative consists in the adoption of a resolution in writing without calling a meeting, as laid down in art. 227 § 2 CCC. The last option would be voting by means of the ICT system. It was implemented into Polish law in the act of 11 November 2014 (OJL, 2015.4), however, the provision of art. of 2401 CCC granting the possibility of e-voting entered into force on 1 April 2016.

The provision of Art. 227 § 1 CCC introduces a rule that shareholders' resolutions shall be adopted at a shareholder's meeting, thus it is doubtful whether the written vote and voting by way of the ICT system may still be considered a resolution of the general meeting. In this respect we must distinguish between two terms, namely, the general meeting as a body of a legal person and the shareholders' meeting as a place where resolutions are passed. A private limited company is a legal person acting by means of its bodies. Since the general meeting of shareholders is a company body, it follows that the resolutions adopted by the shareholders are always the resolutions of a body of a juristic person, irrespective of the manner of their adoption. The difference between the traditional general meeting and the written voting or e-voting is that the resolutions adopted in writing or by means of the electronic system do not have to be adopted in the physical presence of the shareholders at the same place and time. Therefore, the resolutions of shareholders must be treated as the resolutions of the general meeting of shareholders, whether this applies to shareholders' meeting and written resolutions or e-voting, even if they take place without the shareholders being necessarily present at the same place.

2. Resolutions at the shareholders' meeting

In general, the shareholders' meeting shall be called by the management board (art. 235 § 1 CCC), meaning that a formal resolution of the management board is required. As the Supreme Court held in its judgment of 26 March 2014 (V CSK 220/13), calling an annual and extraordinary general meeting falls into the sphere of conducting the company's affairs and requires

a resolution of the management board. This judgment is commonly adopted in the literature [1, p. 1148; 5, p. 580; 6, p. 640]. Under the circumstances specified in art. 235 § 2 CCC, the supervisory body shall also have the right to call a general meeting. Moreover, one or more shareholders representing at least 10% of the share capital (so called minority right) shall have the right to call a general meeting upon authorization from the registry court (art. 236-237 CCC).

A shareholders' meeting shall be called by notices sent by registered mail or courier at least two weeks prior to its scheduled date. The notice may also be sent by e-mail, provided that a shareholder has given written consent to such a form of notification and stated an address to be used for this purpose (art. 238 § 1 CCC). The notice shall specify the date, time and venue of the meeting and its detailed agenda. No resolution may be adopted on matters which are not included in the agenda, unless the entire share capital is represented at the meeting and none of the persons present objected to the adoption of the resolution.

Unless the provisions of the Code or the articles of association provide otherwise, the meeting shall be valid irrespective of the number of shares represented thereat. Shareholders' meetings shall be held at the company's registered office, unless the articles of association provide otherwise (art. 234 § 1 CCC). A meeting may also be held at any other place in the Republic of Poland if all the shareholders consent thereto in writing.

A shareholders' meeting must be held at least once a year. The annual shareholders' meeting shall be held within six months after the end of each financial year (art. 231 § 1 CCC). The matters exclusively reserved to the competences of the annual meeting include: examination and approval of the management report on the operations of the company and the financial statement for the previous financial year; resolution on distribution of profits or coverage of losses if, pursuant to art. 191 § 2 CCC, these matters have not been excluded from the scope of powers of shareholders' meeting; acknowledgement of the fulfillment of duties by members of the company's authorities. The extraordinary meeting shall be convened in instances specified by law or the articles of association, and also in cases where the authorities or

persons authorized to convene the meeting deem it appropriate (art 232 CCC). The competences of the general meeting include e.g. disposal or lease of the business enterprise, acquisition or disposal of real property, amendments to the articles of association. The resolutions shall be adopted by an absolute majority of votes, unless the provisions of the code or articles of association provide otherwise (art. 245 CCC). For instance, amendments to the articles of association or winding-up of the company require a majority of two-thirds of votes. A resolution or an amendment to the articles of association which would result in a broader scope of shareholders' duties or a restriction of rights attached to the shares or personal rights require the consent of all the shareholders concerned.

Pursuant to art. 247 § 1 CCC, voting at the general meeting shall be open. A secret ballot shall be ordered in the case of election and voting on motions to remove members of the company's authorities or liquidators, or to hold such a person liable, and on motions concerning personal issues. Furthermore, a secret ballot shall be ordered at the request of at least one shareholder from among those present or represented at the shareholders' meeting (art. 247 § 2 CCC).

Shareholders may participate in the meeting and exercise their voting rights by proxy (art. 243 § 1 CCC). In order to be valid, the power of attorney shall be executed in writing and attached to the minutes' book.

3. General meeting without being officially called

A general meeting of shareholders may also be held without being officially called, as regulated in art. 240 CCC, provided that the entire share capital is represented and none of persons present objected to holding the meeting or placing any matters on the agenda. Resolutions are essentially adopted by this method in single-member companies or companies with a small number of shareholders. It allows for a meeting to be held within a short time, without having to wait two weeks from the date of its official convocation. The initiative to pass a resolution lies with the management board or supervisory organs, as well as with the shareholders. The meeting does not have to be held at the company's registered office, as the obligation resulting from art. 234 §1 CCC is not applicable [5, p. 580]. In this case, it must be assumed that the provision of art. 240 CCC lays down the requirements exclusively for holding a meeting.

It is also essential that the entire share capital is represented for the whole duration of the meeting. Should one or more shareholders leave the meeting, no resolution may then be adopted, however, the resolutions adopted thus far remain valid.

The procedure of informal convocation is applicable both to annual and extraordinary meetings [5, p. 588]. It must be noted that in the case where

the management board fails to call an obligatory annual meeting within the prescribed time limit, it shall be liable to a fine of up to PLN 20 000 to be imposed by the registry court (art. 594 CCC). Moreover, such a failure constitutes the basis for removal of the management board, or even its liability for the damage towards the company.

It should also be mentioned that resolutions concerning merger of companies, division or transformation must be adopted during an officially convened general meeting, given that in such instances two obligatory notices concerning the meeting have to be issued and even the period for its convocation is longer, i.e. at least a month prior to the date of the general meeting.

Shareholders may participate in an informally convened meeting and exercise their voting rights by proxy. The resolutions adopted during informally convened meeting shall be recorded in the minutes' book. The minutes shall state the competence of the meeting to adopt resolutions (representation of the entire capital and lack of objections), the list of adopted resolutions, the number of votes cast in favor of each resolution put to the vote. An attendance list signed by all the participants shall be attached to the minutes.

4. Written resolutions

Pursuant to art. 227 § 2 CCC, resolutions may be adopted without holding a shareholders' meeting if all the shareholders consent in writing to the decision to be taken or to voting in writing. This provision in fact foresees two different types of voting. The first one, when all the shareholders consent in writing to the decision to be taken, means that the resolution is adopted unanimously. The second one, when all the shareholders consent to a written vote means that the unanimity is required only for this special form of the adoption of resolutions, whereas the resolutions shall be adopted by majority vote required for each particular resolution. Taking into consideration the requirements for the resolutions, voting in writing is in practice possible in companies with a small number of shareholders.

As regards the technical manner of the adoption of resolutions, two specific possibilities exist. The text of the resolution may be signed consecutively by each shareholder or, alternatively, each shareholder obtains a separate text of the resolution which shall then be sent back to the company. The initiative to pass a resolution lies with the management board or supervisory organs, as well as with the shareholders.

Certain doubts as to the scope of the resolutions to be adopted in writing are mentioned in the Polish literature, given the fact that two terms, "shareholders' resolution" and "resolution of the general meeting," appear in the applicable provisions of law. Therefore, it is partly stated in the literature that in cases

when the provision requires a "resolution of the general meeting," the voting in writing is excluded [3 (2012), p. 416]. Nonetheless, the different terms used by the legislator do not reverse the fact that shareholders adopt resolutions as an organ of a legal person [6, p. 599].

The Supreme Court in its judgment of 29 August 2013 (I CSK 713/12) stated that in the light of the provisions of the Commercial Companies Code, the adoption of resolutions in writing is permissible in private limited companies on condition that such a possibility is not excluded by law or articles of association, or the form of a notarial deed is not required for the resolution.

The written vote is expressis verbis excluded in the provision of art. 231 § 4 of CCC on the matters listed for an annual general meeting. The written vote is also excluded in resolutions concerning merger, division or transformation of a company, as the provisions introduce special information rights for shareholders (art. 505, 540, 561 CCC). Moreover, as stated by the Supreme Court, resolutions which require the form of a notarial deed shall also not be adopted by means of a written vote. The form of a notarial deed is in fact required in private limited companies only for amendments to the articles of association, the resolution for winding-up of a company, or transferring its registered office abroad.

Shareholders may exercise their voting rights by way of written vote personally or by proxy [1, p. 1103; 5, p. 595]. Pursuant to art. 248 § 3 CCC, the management board is obliged to record the adopted resolutions in writing in the minutes' book.

In the case of a written vote, a shareholder who was omitted in voting or who did not consent to a written vote, or who voted against the resolution and, upon being notified of the resolution, filed his objection within two weeks, has a right to file a statement of claim for repealing a resolution or for declaring the resolution invalid.

5. Adopting resolutions in the ICT system

This new form of adopting resolutions, regulated by art. 2401 CCC, is only allowed for companies established by means of the model deed in the electronic registration system (ICT) for private limited companies (excluding those whose articles of association were later changed in the form of a notarial deed – art. 4 § 1 p. 15 CCC). The scope of the resolutions which may be adopted by means of e-voting is established by the Regulation of the Ministry of Justice of 14 January 2015 on the model resolutions of private limited companies available in the ICT system (the Official Journal of Laws of the Republic of Poland 2017.1005).

Pursuant to art. 2401 § 2 CCC, the adoption of a resolution by e-voting does not require calling a general meeting, provided that each shareholder's

voting rights are exercised, meaning that 100% votes must be cast. Given that the shareholders may vote "in favor" or "against" the resolution, the resolution does not have to be adopted unanimously, nonetheless, all shareholders must cast their vote. The resolution shall be deemed to be passed on the date the last shareholder casts the vote [1, p. 1179; 3, p. 544].

The voting right is exercised by a statement given in the ICT system confirmed by a qualified electronic signature or a signature authorized by the ePUAP profile (electronic Platform of Public Administration Services). Moreover, it is possible to raise an objection to a resolution when casting a vote. The objection is necessary should a shareholder intend to make a claim against the resolution. Given that the adoption of a resolution by e-voting requires votes cast by all the shareholders, it is easier to foil the adoption of the resolution by refraining from voting rather than raising a claim afterwards [4, p. 581; 1, p. 1179; 3, p. 545]. Where the resolution has to be filed at the registry court, the application shall also be made by means of the ICT system.

As mentioned in the introduction, the type of resolutions to be adopted in the ICT system is specified in the Regulation of the Ministry of Justice of 14 January 2015. The Regulation allows the following resolutions to be adopted by the shareholders: appointment and removal of management board members, appointment and removal of supervisory board members, approval of the financial statements, distribution of profits among shareholders, coverage of losses of the company, appointment of a proxy for the execution of the articles of association of the company, voluntary redemption of shares, further existence of the company, dissolution of the company and amendments to the articles of association. The introduction of an amendment to the articles of association (as well as the dissolution of the company) does not require in this case the form of a notarial deed (art. 255 § 4 CCC).

It is worth noting that in the course of appointment and removal of management board and supervisory board members, as well as the appointment of a proxy, the provision of art. 247 § 2 CCC which requires taking a secret-ballot vote is excluded due to technical reasons.

All the resolutions adopted by e-voting shall be recorded in the minutes' book in the form of printouts from the ICT system confirmed by the management board. The printouts do not have to be confirmed by all management board members, but in the manner prescribed for representing the company, as revealed in the registry court.

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Pinior P., Types of shareholders' resolutions in private limited companies

The provisions concerning private limited companies in Poland provide for four methods in which resolutions are passed by shareholders: during formally convened general meetings, during meetings held without having been officially called (art. 240 CCC), in writing without a need to hold a meeting (art. 227 § 2 CCC) and by means of the ICT system, also called e-voting (art. 2401 CCC). Resolutions of shareholders must be treated as the resolutions of the general meeting of shareholders, as is the case with the shareholders' meeting, written resolutions and voting in the ICT system, given that the resolutions come from an organ of a legal person, irrespective of the manner of their adoption.

Taking into account the requirements for the resolutions, the written vote, voting in the ICT system or resolutions adopted without officially calling a general meeting can be used in practice in single-member companies or in companies with a small number of shareholders. It should also be noted that voting in the ICT system is accessible only to the companies established by means of the model deed in the electronic registration system for private limited companies and the scope of the resolutions adopted by way of the ICT system is rather narrow.

Key words: private limited company, general meeting, resolution of shareholders.