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CLAIM FOR THE DISSOLUTION OF A LIMITED LIABILITY COMPANY

1. Introduction

The institution of a claim for the dissolution of a limited liability company, as implemented in Polish Commercial Companies Code (Official Journal of Laws of the Republic of Poland, 2019.505, as amended, hereinafter abbreviated as C.C.C.) enables for a shareholder to protect his corporate interests by filing the statement of claim (request) aiming at the company's liquidation [1]. It may be described as the final way for the protection of shareholder's interests, as its goal is the termination of company's business, usually when the minority shareholder is in conflict with the management board or with the other shareholders and has no other legal opportunity to leave the company. In its core part the institution deserves the full approval, yet there are certain interpretation problems requiring clarification, mainly connected to the practical adoption of this institution. The aim of this article is to present and to analyze the topic, focusing on the condition of "important reasons" and ways of securing such a claim.

While considering the institution of this claim it is obvious that very broad discretion is left to the doctrine and jurisprudence to formulate practical rules pertaining the use of the claim. Due to this fact it is much more important to clarify the grounds on which the statement of claim should be filled.

2. The analysis of the institution

The institution of the claim for the dissolution of a limited liability company in Polish law is regulated in the provisions of Article 271 C.C.C. If the requirements specified in the provisions are met, the court will rule in favor of the plaintiff filling against the company, for the dissolution of the company. The procedure of filling the statement of claim itself is no different than in the case of other claims under civil procedure, for example a claim for compensation or claim for damages, and in Polish law it is regulated by the Code of Civil Procedure (Official Journal of Laws of the Republic of Poland, 2019.1460, as amended, hereinafter abbreviated as C.C.P.)[2]. It is important to point out, that the court ruling for the dissolution of the company, in favor of the plaintiff only leads to the start of the liquidation process, and in

itself does not mean a sudden termination of the company. Even if the court's final judgement has been delivered, the winding-up of the company may be prevented by an unanimous resolution of all shareholders on further existence of the company. The unanimous resolution for the continued existence of the company is not possible if the plaintiff was a member of the company's body, who at the same time is not one of the shareholders. Pursuant to Art. 271 C.C.C. (apart from the cases referred to in article 21 of C.C.C.) the court may issue a judgement on dissolution of the company at the request of:

1. a shareholder or a member of the company's authority, where achievement of the company's objectives has become impossible or where any other important reasons resulting from the company's internal relations have occurred

2. a state authority specified in a separate Act, where the company's unlawful activities threaten the public interest

The provisions enabling a state authority specified in a separate Act to file the claim when the company's unlawful activities threaten the public interest may be disregarded, as such authority has not been indicated by Polish legislator and this provision is of no importance for the practical use of the institution [3, p. 587; 4; 5, p. 1372; 10].

Pursuant to Art. 271 point 1 C.C.C. the statement of claim may be filed by:

- one of the shareholders (regardless of the number of shares held)
- a member of the company's authority (for example a member of the management board).

It should be emphasized that a small number of shares held by the shareholder does not exclude him from filling the statement of claim for dissolution of a company [5, p. 1371]. With a restriction relying on the amount of shares held the institution would be rendered meaningless, as the shareholders holding the majority of shares in the company may just vote on the resolution of shareholders on dissolving the company, without filing the claim, and without the involvement of the court. The institution of the claim for the dissolution of a company does not impose further restrictions, unlike the claim for the exclusion of the shareholder, stipulated in article 266 §1 C.C.C. which enables the shareholders to file the claim, provided that the shareholders requesting exclusion account for more than half of the company's capital [6].

The provision of Art. 271 C.C.C. was created in a way, that authorizes to file the claim only the persons that have (or should have) deep, personal knowledge about current situation in the company. For example company's creditor is not entitled to filling such a claim. The institution of the claim in

general should not become a weapon in relations existing outside of company's internal dealings.

Beforementioned provision of Art. 271 C.C.C. indicating the conditions of filing the statement of claim for dissolution refers also to the provisions of Art. 21 C.C.C., concerning the case in which the registry court may decide on the dissolution of a company entered in the register. Pursuant to Art. 21 C.C.C. the registry court acts without any previous mandatory legal actions (claims) of shareholders or other entities. This provision of Art. 21 C.C.C. was introduced to the Commercial Companies Code as a result of the implementation of Article 11 of *Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law* (Official Journal of the European Union, L 169, 30.6.2017) which apply to Polish limited liability company, limited joint-stock partnership and joint-stock company [7]. Apart from the grounds of nullity referred in the article 11 of the mentioned Directive a company may not be a subject of nonexistence, absolute nullity, relative nullity or declaration of nullity. The claim for the dissolution of a limited liability company based on provisions of Art. 271 C.C.C. does not result in a form of nullity of a company but by resulting in winding up the company shall have an effect in the future (ex nunc)and as such is not prohibited by stated Directive.

3. Mandatory conditions for filing the statement of claim

As stipulated in Art. 271 C.C.C. one of the two alternative conditions has to be met before the statement of claim for the dissolution of a limited liability company can be correctly filed by one of the shareholders or a member of a body of the company.

The first condition indicates, that the goal (objective) of the company has become impossible to achieve. In each case it must be verified by the court, if the obstacles in the achievement of the goal of the company (all of its goals) are transient or not, and if they may fade or change in foreseeable or rational future [4]. In the Polish jurisprudence it was concluded that following obstacles may result in the impossibility of achieving the company's goal:

- loss of a business license (concession)
- loss of assets required to continue business operations with no possible way to regain them
- imposition of high duties on products unavailable to the company in the market
- long-lasting shutdown in the payment of the dividend, as a result of others shareholders actions

- granting unreasonably high remuneration for shareholders performing functions in the company bodies
- an attempt to forcibly buy out one of the shareholders for a reduced sum [4].

It is worth mentioning the opinion of the Polish Supreme Court expressed on this matter in the judgment of 22 of April 1937 (signature I C 1868/36), in which the Supreme Court stated that: "The important reason for the dissolution of a limited liability company shall occur also when, in particularly obvious manner, company authorities basing on the majority of shareholders deprive one of the shareholders of his contractual or statutory rights, which renders his continuous participation in the company meaningless, but the withdrawal from the company or selling his share for the real value is impossible for that shareholder, and the recovery of his rights in any other way is highly hindered"[4; 8]. Cited ruling is equitable to this day.

The occurrence of a conflict between shareholders may as well provoke obstacles in achievement of the company's goal. However, as it was stated by the Polish Appeal Court in Warsaw, not each conflict will have such a strong effect so as to justify the claim for winding-up the company (judgment of 17 February 2015, signature I ACa 1214/14). If the conflict only revolves around the future strategy of the company, and the company nevertheless concludes its normal businesses as usual, such a conflict cannot be the ground of filing the statement of claim for the dissolution of a company. It would be different, if the conflict, regardless of its origin, would result in such a proportion of shares among the shareholders that a company would be unable to adopt resolutions for a prolonged period of time [4; 5; 9].

The second condition is a very broad clause covering any other important reasons resulting from the company's internal relations. It is virtually impossible to describe a closed number of such "other important reasons", but the doctrine formulated examples which might be helpful with the interpretation of this clause :

- the company's bodies are unable to make decisions in the company (judgment of the Polish Appeal Court in Białystok of 19 December 2014 r., I Aca 519/14)
- the members of company's bodies cannot be appointed
- dominant shareholder overuses his dominant position
- there is a prolonged conflict between members of the management board.

Mentioned conditions must occur regarding the company's relation and its ability to function and not solely concern one of its shareholders [6; 10].

Important reason occurs also in the situation where one of the shareholders is refused to be employed by the company (contrary to the deed of the company), if at the same time other shareholders shall obtain the profits from the company in the form of employment bonuses, which shall result in denying the same shareholder his right for participation in company's profits, in a period of a few years [8; 11, p. 415]. A the same time, if a lack of divided is only an effect of paying off company's creditors, it itself, cannot be a sole condition for the claim for a dissolution of a limited liability company.

Shareholders may stipulate in the company's articles of association some individualized examples of important reasons, which they consider sufficient to file a statement of claim for the dissolution of a company, but the court in each case will separately consider if the specified condition may be considered as an important reason in the meaning of Art. 271 C.C.C. Anyway the court shall not be bound by the provisions of company's articles of association in this matter [9; 10].

4. Measures of securing the claim for the dissolution of a company

The institution of a claim for the dissolution of limited liability company in many cases is the only possibility for a "trapped minority shareholder" to leave the company, without the loss of the funds invested in the company beforehand, especially if other shareholders refuse to buy out his shares for reasonable sum, or buy them out at all. Potential investors from outside of the company are rarely willing to invest in the company, if the internal situation in the company shall justify to fill the statement of claim for the dissolution of the company. In this case, without a prospective buyer the only way for a minority shareholder to leave the company is to file a claim for the dissolution of the company. In the filing shareholder's vital economical interest is to obtain remuneration in the amount as close to the market value of his shares as possible. Due to the practical reasons the shareholder meets many obstacles on his way to leave the company.

The first one, possibly driving most shareholders away from becoming plaintiffs, is the court's fee for filling the statement of claim. The claim for the dissolution of the company is of a property nature, so if the value of the claim exceeds 20.000 zloty the court's fee shall be evaluated up to 5% of the amount of the claim's value, as stated in Article 13 point 2 of the Act on Court's Fees in Civil Cases (Official Journal of Laws of the Republic of Poland, 2019.785, as amended) [8; 10; 12]. It appears that the value of the claim should be equal to the capital of the company. Some authors claim that the value of the claim should be equal to the whole amount of current company assets, but this opinion should be treated as incorrect, as it puts the burden of checking the financial

status of the company solely on the plaintiff, in situation where the plaintiff as a minority shareholder may be void of such a knowledge. Nevertheless the minority shareholder as a plaintiff participates in the costs of the proceedings single-handedly, when he only indirectly benefits from the profits of the proceedings by having the right to his share of company's liquidation mass.

It is of most importance, to secure the claim for the dissolution of a limited liability company, as the financial condition of the company may deteriorate during prolonged proceedings, especially in case of the conflict with majority shareholders controlling company's executives who may be interested in subtle withdrawal of company assets in violation of other shareholders rights. Without securing the claim the final shape of company's financial situation may be dependent on the good will of dominant shareholders.

The legal basis for securing the claim lies in the regulations of the Code of Civil Procedure (C.C.P.). Pursuant to Art. 755 §1 C.C.P., if the collateral is not a monetary claim the court should secure the claim in any way it considers appropriate, taking into consideration current circumstances. The court may especially:

1. modify the rights and obligations of the parties or proceedings participants for the duration of the proceedings
2. establish a ban on the disposal of objects or rights concerned
3. suspend the enforcement proceedings or other proceedings aimed at enforcement of the judgment
4. order the input of appropriate warnings in the land register or in the other appropriate registry [13].

The question arises in what particular way should the claim for dissolution of a limited liability company be secured. Considering the rights of minority shareholder (or shareholders) the court should not allow the securing of the claim to become a weapon in internal corporate conflicts. Measures of securing the claim should not become a way to put pressure on other shareholders or executives of the company. At the same time taken measures must be decisive enough to protect interests of minority shareholders. Such a balance is not easy to obtain.

The easiest conclusion would be to secure a part of the liquidation assets per the plaintiff. Unfortunately it is not possible, as at this point of proceedings, before the liquidation process, the amount and value of liquidation assets is unknown to the court. Furthermore the court, ruling on the claim for the dissolution of a company only verifies, if the requirements for the dissolution stated in Art. 271 C.C.C shall be met. It severely limits the possible measures of securing the claim.

Additionally, the Polish Supreme Court in judgment of 9 of October 1991 (signature III CZP 93/91) stated that securing the claim should not be concluded by freezing the company's bank accounts and assets belonging to the company. Large part of the doctrine in contrast to this sentence states, that the freezing of company's property should be allowed, as otherwise the company in cooperation with dominant shareholders may undertake legal actions and financial transactions leading to the decrease of future liquidation assets [4; 10]. It should be adopted – in author's opinion - that freezing the company assets or their part does not seem like a suitable solution. Rather than helping to secure the finances for the liquidation phase, it may result in making it impossible for the company to conclude usual business operations in a previous form, thus leading to a further financial loses. In that case the claim for the dissolution of a company may have the reverse effect rather than intended.

The author believes that the adequate means for securing the claim would be for the court to adjust the contractual relationship in the company for example so that the affairs exceeding the scope of ordinary acts should require the permission of the court's custodian. It seems that this solutions puts the least amount of additional pressure on the company's affairs, at the same time prohibiting the company executives from undertaking radical decisions without so much needed transparency. It would be also reasonable to prohibit the company bodies from enforcing the resolution on paying further dividends [4].

The other possible securing method is to prohibit the company from disposing and encumbrancing certain significant, indicated parts of company's assets, in a way that does not influence normally conducted affairs of the company. Nevertheless each and every time the scope of measures undertaken to secure the claim should be thoroughly verified by the court, taking into consideration current circumstances and the state of company's affairs.

5. Conclusion

The institution of a claim for the dissolution of limited liability company is one of many instruments of corporate rights protection for minority shareholders. The legislator left a broad margin of discretion to the doctrine and case law in shaping the practice of establishing the conditions which justify filling the claim. It allows to include in the regulation all the potential situations that are impossible to predict, yet it introduces a certain aspect of uncertainty resulting from the lack of ironclad clauses, which should be covered by reliable Court practices based on the case law and output of the doctrine.

Measures of securing the claim for the dissolution of a limited liability company are a crucial part of the process of protecting the rights of minor shareholders. The measures decided on by the Court should be appropriate for the state of current affairs in the company and may consist of prohibiting the company from disposing and encumbrancing certain company assets or stating that the affairs exceeding the scope of ordinary acts should require the permission of the court's agent. Lack of appropriate measures taken may result in a gross harm of the plaintiffs rights.

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Łabno M. Claim for the dissolution of a limited liability company

The following article refers to the issue, relatively rarely raised in the jurisprudence, of the claim for the dissolution of a limited liability company, as one of the methods of corporate rights protection according to the legislation of Poland and partially of the European Union. The intention of the author was to describe the institution of the

claim and describe the most essential doubts arising with regard to it's practical use. The main focus was put on the interpretation problems connected to the condition of "important reasons" and most importantly on the ways of securing such a claim. Even though the institution as such deserves the full approval, as it may function as a last resort for a trapped minor shareholder to leave the company, very broad discretion is left to the doctrine and jurisprudence to formulate practical rules pertaining the use of this claim. Due to this fact further discussion on this topic seems reasonable and beneficial for the economic safety of the market's participants.

Key words: securing the claim, dissolution, limited liability company, company law.