

## Annulment of Assembly Joint Stock Company Decisions - Theory, Legislation and Practice in the Republic of Kosovo

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### Abstract

*The aim of this thesis is, treatment and give the response in question if the assembly of Joint Stock Company is obliged, to issue decisions in accordance with public moral, legal order, law and entrance regulation of Joint Stock Company. To give response in such questions, will be treated general theory aspects regarding notion of invalid decisions and causes that makes such decision invalid. Will be treated effects of invalidity or invalidation of decisions. We will try to found if is existed in the right of JSC in Republic of Kosovo, a solid theory, legal and practical base, initially for classification and than for annulment of assembly JSC decisions of the invalid character. We will try to show which are the basis from which in the judicial system continental and Anglo-Saxon states, are flow obligations to announce as invalid decisions of assembly of JSC. Will shows the consequences of invalid announcement of assembly of JSC decisions and especially will be treated claim for annulment of mentioned decisions and procedure for annulment of decisions. Will be clarified especially actual legislation in the Republic of Kosovo, which treat emphasized problematic and court procedure for annulment of mentioned decisions. At the end of thesis, will be given conclusions from findings from treatment and recommendation for actions in the future.*

**Keywords:** Assembly of Joint Stock Company, decisions of Joint Stock Company decisions with invalid character, claim and procedure for annulment of decisions.

### REVIEWED LITERATURE

For treatment with succes of discussed topic, are used and consulted books and articles which treat nullity and annulment of assembly decisions of shareholding, with specific emphasize, nullity and procedure of annulment of decisions of assembly of trade society in Kosovo. Basic literature for thir thesis is book; The right of society, from known Croatian author Jakša Barbic.<sup>1</sup> Author, in chapter VII in mentioned books, treated nullity and refutable decisions of general assembly. Treatment of mentioned matter from this author, mainly is made by based in Croatian law for trade societys, where are givene explanations for nullity and annulment of decisions of general assembly of trade society. In fact, in this project, because of restricted environment are not treated refutable of decisions of general assembly of trade society, but I was referred only to the acts-decisions of their annulment in the foreseen procedures by the law. Also in this article, I have been focused only in the annulment of general assembly trade society decisions, without treating nullity of assembly acts with limited liability, this is because the fact that there are some differences between these two forms of legal organization of trade society.<sup>2</sup> From books of local authors, are treated book; The Albanian right of trade society, I-st publishing, Tirana, of author Dr. Argita Maltezi.<sup>3</sup> Mainly we agree with basic standing of author that; "...nullity of trade society is treatable, different from absolute nullity of acts by the Civil Code. In trade law, this characteristic is shown as for acts which are required for establishment of society, but more visible also in provisions on nullity of legal acts issued from society during exercise of its activity".<sup>4</sup> Are treated Consitution, Laws and Regulations and Convention, with which are treated issues regarding nullity and annulment of decisions which are issued from trade society assembly, with specific emphasize in nullity in procedure for annulment of legal acts of nullity character also in web page with datas from internet.

<sup>1</sup>Barbić Jakša, Right of societies, First book, General part, second publishing amended; Organizator, Zagreb, 2006.

<sup>2</sup>Barbić Jakša, cited book, pg . 807-889.

<sup>3</sup>Dr. Maltezi Argita, Albanian right of trade societies, Editioni I, Tirana 2011, pg..284-298.

<sup>4</sup> Dr. Maltezi Argita, cited book, pg, 286.

## METODOLOGY

This thesis is treated by basing in historical, legal and comparative methods. By using historical method, is made comparison of data and findings by seeing in time aspect. By using legal method, are given findings, based in objective reality and legal solutions offered for regulation of treated problems. By using comparative method, was made comparison in time and area of treated data.

## RESULTS

Founded results are treated by given theoretical reasoning<sup>1</sup>, which are based in treated literature, legislation and practical solutions of the problem, because of this reason the same are not shown through graphics, figures and numbers.

## DISCUSSION OF ISSUE AND RESULTS

As it said above, in thesis are treated: general theoretical aspects; effects of nullity of decisions, legal base for classification and annulment of decisions of trade society assembly of nullity character in the Republic of Kosovo; bases from which in continental and anglosaxon legal system places, are derived obligations to reveal decisions as null of trade society assembly; consequences of revealed null decisions of trade society assembly, claim for nullity of mentioned decisions and procedure for annulment of decisions.

### 1. General theoretical aspects

Decisions of general Assembly of trade society is multilateral legal work, through which trade societies express their will. From this, decision contains positive and negative relocation regarding decided claims. However will be decided negative or positive, decision should be given in accordance with Constitution, Cogent provisions, legal order and public moral. Because it is talking for general assembly of trade society as his organ, its decisions should be in accordance with statute of society as basic legal act of society. Decisions should be based in abovementioned acts, in contrary should be in accordance with mentioned acts also in contrary will be considered as decisions with legal shortcomings. Decision of general assembly should be in accordance with mentioned acts also in formal aspect also in material aspect. Consequences of violence of formal legal rules and legal formal rules with which decision should be in accordance are not same. Based on that, decision will be: a) fictive, b) without legal effect, c) null and d) flawed<sup>2</sup>. From reasons that this thesis is dedicated only to the treatment of legal acts with nullity character, in thesis is not treated aspect of fictive flawed acts.

**1.1. Notion of null decision.** - Null is decision of trade society assembly which is not accepted by legal order because of hard legal shortcomings without taking into account that it is talked about material or formal shortcomings. In fact because of shortcomings which contains such decisions are null because to them is missing legal effect for which have been issued. Because of that, their annulment derive from law and that from their issuance. Consequences of nullity of trade society decision, are as of every other legal work.

### 2. Reasons for nullity of decisions.-

Reasons for nullity of decisions, in some places are tacitly numbered with laws-*numerus clausus*. In these places, laws tacitly has numbered cases when decision of trade society assembly can be invalid. Places which tacitly numbered in their legislation reasons of invalidance of decisions are Croatia, Germany, Austria etc<sup>3</sup>. Because of that

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<sup>1</sup> Eko Umberto, How is made thesis, translation from original ilialit dr. Kristina Jorgaqi, publishing Tirana 1997, page 31.

<sup>2</sup> Barbić Jakša, cited book, pg. 807.

<sup>3</sup> Barbić Jakša, cited book, pg. 815.

reason, Law for trade society of Croatia in article 355, taxatively numbered reasons from which decisions of assembly will be invalid and flawed<sup>1</sup>. In other side, numerous states, was not numbered taxatively with law-numeric klausus, reasons of invalidance of decisions. In this category are taking part also Republic of Kosovo and Republic of Albania. In fact, the advantage of this method stand in the fact that with the case of evaluation of invalidance of decisions of trade society assembly, has a flexibility possibility with the case of evaluation that one act is invalid or not and there court has a big possibility of free deciding and in accordance with factual situation. However this system created legal insecurity because of the fact that invalidance cases are not determined taxatively with the law. In the law for trade societies in Kosovo in article 192.2 is determined as follow: "Issues which are in exclusive competence of trade shareholders, which is foreseen as above, can not be decided from the board of director or officials/managers, or from whoever other body of the company.

Controversial provisions in statute or regulation, and every other taken decision in the base of these controversial provisions, by legal aspect, is invalid and has not legal effect" However, in general we agree with opinion of prof. Barbic, according to which reasons for invalidity of decisions can be separated in a) omissions made because of non regular summon of general assembly; b) formal omissions made in general assembly; c) material legal reasons according to which will be invalid every legal act; d) court decisions; e) special cases of invalidity and f) application of court decision for deletion of decision of general assembly in court registry or made registration in the base of this court decision"<sup>2</sup>.

### **2.1. Invalidity of decision, because of irregular summon of general assembly.-**

Kosovo legislation did not contain expressly provisions according to which were annulled decisions of general assembly because of irregular summon of assembly. However law in article 198.5 foreseen that "This failure immediately give the right to shareholders, to exercise from one or more shareholders that contains less 10% of votes with the right of vote in annual meeting, to invoke and held annual meeting of shareholders." Law for traders and trade societies of Republic of Albania, such cases has regulated in article 137 and in paragraph 4 of article 138, had determined as follow: "When general assembly is not summoned according formalities of this article and article 137 of this law, this can be take valid decisions only if all shareholders are not present and are agree to take decisions, independent of irregularity."<sup>3</sup> Legislation of Croatia, taxatively determined as invalid because of irregular summon of general assembly are these decisions, when: general assembly not summoned which for this were authorized with the law and for that was not issue valid decision and if summon for invoke of general meeting is not revealed or submitted as is determined with law, in article 277 paragraph 2, 3 and 5 of the Law.

### **2.2. Invalidance of decision, because of omissions in minute of general assembly.-**

Kosovo law also Albanian law, contain only provisions through which is regulated who take a minute and what should contain, while did not determine that violation of this provision submit to invalidance of approved decisions and written in minute.<sup>4</sup> In Croatia, taxatively is foreseen as invalid decision of general assembly of society and is not verified by head of general assembly which decision is approved, form of voting and result of voting. We consider that this issue in the law and Croatian legislation is regulated and is in accordance with European directives.

### **2.3. Invalidity of decision, because of non compliance of decision with existence of society and positive laws.-**

Nullity of decisions because of non compliance of decision with existence of society and contradictions with positive laws, is consisted in cases if decision is not in compliance with existence of the company or if content of decision is violated positive laws or provisions which protect interest of creditors, or is in contrary with provisions which protect public interest. Of such character is also issued decision which did not remain in the domain of competencies of general assembly but in the competency of other society bodies. As invalid decision because of violence of creditor interests, will be decision with

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<sup>1</sup> Article 355, Law for trade societies of Croatian Republic, cleaned text, 11 October 2011

<sup>2</sup> Idem.

<sup>3</sup> Law for traders and trade society of Albania Law No.9901, dated 14.4.2008, article 138 par.4.

<sup>4</sup> See article 203 of Law for trade societies in Kosovo and article 143 of Law on traders and trade societies of Albania

which shareholders will make separation of dividend in objection with rules for publication of share of incomes and show of active and passive of the society. Case according to which invalidity will consist because of violence of rules which protect public interest, before all are rules which made public order. As such will be violence of guaranteed provisions with constitution, as are guarantee of equality, freedom of trade, private property etc.

#### **2.4. Invalidity of decision, because is in contrary with public moral.-**

Until law not determine tacitly that, the decision being null, content of decision should be in contrary with public moral, so can conclude that decision of general assembly are invalid not only if content but also if purpose of their issuance is in contrary with public moral. With this standing, are protected shareholder but also employees, creditors and costumers. This is because the fact that issuance of decision which are in contrary with public moral, has not to do with decisions which are in contrary with determined norms but also with decisions issuance of which influence interest and public moral, has not to do only with decisions which are in contrary with certain norms but also with decision issuance of which influenced interest and public moral even that with concrete provisions is not foreseen.

#### **2.5. Invalidity of decision, on the base of court decision.-**

Decisions of shareholder society assembly, revealed as invalid also with court decision. Until this situation is came when against decision is raised claim for annulment or fails of decision. If claim is approved, decision of the court oblige society to delete from register of enterprises this decision or oblige society to replace its decision with another one.

#### **2.6. Nullity of decision, according other reasons for nullity foreseen with the law for trade societies or other laws.-**

Law for trade societies and other laws, foreseen other situations, according to which decision of general assembly can be annulled. As such can be decision which violates interest of employees, while with the case of approval, in assembly meeting not take part representative of employees.

#### **3. Claim for nullity of decision and court procedure.-**

Main form for revelation of decisions of shareholder assembly as invalid, is with raise of claim for nullity. In fact, claim is raised against society. The should not be directed from member of society against any member, but from society member against society itself. To raise this claim and presentation of public interest, shareholder should made believable, his quality as shareholder in society. Except shareholder, the right to raise claim is known also to the bodies of society as are directing board and any member of supervising board. Until shareholder raise claim is obliged to shown legal interest for its raise, mentioned bodies of society did not need to shown public interest for raise of claim, because their interest flows from itself position of these bodies of society. It is important fact who represent society in such claims. If the raised claim from one or some shareholders, so in this context society is represented by directing board. But if claim is raised by board or any other member of directing board, so society should be represented by supervising board. And in the last case when claim is raised by the member of directing board and other supervising board member, law has not any solution. Competent to decide for solution of contests from this area, in first instance is Basic Court in Pristina-Department for Economic issues. Second instance court is Appellate court in Pristina-Department for trade issues. In procedure according to extraordinary measures decide Supreme Court of Kosovo.<sup>1</sup> Interim measures, competent court can bring interim measure with purpose of prevention of execution of approved decision for which with lawsuit is required annulment, if is made believable that with its execution to the society can be caused considerable damage and irreparable. At the same time in such case will be

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<sup>1</sup>See article 11.3, article 12 par.1 point 1.1 and article 13 par.1 point 1.1 and 1.5, article 18 par.1 point 1.1 and article 22, of the Law on Courts of Republic of Kosovo Law No. 03/L-199 22 July 2010 and Law No. 04/L-171 For amendment and fulfillment of law for courts dated 20 december 2012

claim respectively content and its legal base, made believable.<sup>1</sup> Matter of contest to this claim is claim of claimant to be verified by the court nullity of decision of general assembly of trade society in the base of ascertainment of factual situation on which is based this claim, with effect to all. So, according is right the finding that decision of general assembly can be attacked with constitutive claim<sup>2</sup>. In the contests for annulment of decisions of general assembly is applied general principle for burden of proof, so each party should verify facts on which support its claim<sup>3</sup>.

## CONCLUSIONS

With this thesis, we document;

In addition of existent legislation and efforts for regular creation of procedures made with trade societies, the Kosovo is accompanmajor challenges and obstacles. Law for trade societies in Kosovo, did not contain provisions which tacatively will numbered (numerus clausus) causes of invalidity of decisions of general assembly of shareholder. This legal situation, give possibility for arbitrary interpretation of situations and conditions for revealance as invalid of mentioned decisions. Such situation, created legal insecurity, more, when court system, of Republic of Kosovo is in first steps of its consolidation. Legal practice and court practice, is not rich in such contests. This, is because the fact that in reality is not any problem and contests of such nature, but from the fact that in reality there is not problem, but from the fact that persons which are engaged with business activities, often missing knowledges in such area. To this satiation contribute non efficacy of court works. Is remained, recommendation that with the case of amendment of the Law on Trade societies in Kosovo, in its provisions be incorporated provisions with which taxatively will be numbered (numerus clausus) causes of invalidity of general assembly decisions of shareholding. Also is required increase of teoretical knowledge, which is necessary for successful protection of their interest which deal with business activities, and effective works of courts. All, with the purpose of removal of possibilities for broad interpretation of law and with purpose of creation of legal security.

## GRATITUDE

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<sup>3</sup> Jakša Barbić, idem, pg.513.

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