CORPORATE FINANCE/M&A - POLAND

Limitations on challenging resolutions at shareholder meetings for company mergers

June 14 2017 | Contributed by Kubas Kos Gałkowski

AUTHOR

Paweł Sikora

Introduction

The company merger procedure is regulated by the Commercial Companies Code, which provides for the adoption of shareholder resolutions during company mergers. Similar to other shareholder resolutions during general meetings, the resolution may be challenged according to the principles set out in the code. However, due to the specificity of the merger process and the necessity of recognising the primacy of a company's interest over that of a shareholder, certain exceptions to the general principles apply.

Background

Shareholder meeting resolutions may be overturned by way of:

- an action declaring the invalidity of a resolution (where a resolution contradicts a statute); or
- an action for setting aside a resolution (where a resolution contradicts the articles of the company – memorandum of association – or good practice and threatens the company's interest or where it is adopted with the view of harming a shareholder).

The first action may be initiated within six months after the date on which the knowledge of the resolution was acquired, but no later than three years after the date on which the resolution was adopted (one year in the case of a joint stock company).

The action for setting aside a resolution may be initiated within one month after the date on which the knowledge of the resolution was acquired, but no later than six months after the date on which the resolution was adopted (in the case of public companies no later than three months after the date on which knowledge of the resolution was acquired).

In terms of resolutions on company mergers, the Polish Commercial Companies Code provides for substantial departures from the general principles outlined above, both in the scope of the time limit for challenging a resolution and the necessary prerequisites.

First, a substantial limitation applies in terms of the time limit within which a merger resolution may be challenged – this is available within one month after the adoption of the resolution. This means that a shareholder may be easily deprived of the possibility of bringing an action aimed at challenging a resolution. Another modification excludes the possibility of overturning the adopted resolution in a situation where the cause of the challenge comes as an objection to the share exchange ratio.

The share exchange ratio means establishing – based on the comparison of the value of the companies to be merged – the quantity of shares in the acquiring company (or the company formed

as a result of the merger) to be taken up by shareholders of the acquired company. The share exchange ratio is an obligatory element of the merger plan, which is agreed between the management boards of the merging companies and is examined by an expert auditor.

Therefore, for companies participating in the merger process the question of establishing the exchange ratio is important. Predicting the possibility of shareholders initiating actions due to dissatisfaction with the adopted exchange ratio would result in stopping the merger process (in connection with the possibility of suspending the merger registration in the National Court Register), and thus the legislator can *a priori* exclude the possibility of actions being taken solely based on this prerequisite. As the Supreme Court explained in a judgment of December 7 2012 (II CSK 77/12), if a resolution challenged solely on the basis of questioning the par of exchange is excluded, challenging it by quoting the violation of procedural provisions which regulate the procedure of establishing whether the par of exchange is correct would also be excluded.

Facts

In this case, the Supreme Court focused on the fact that the complainant did not question the par of exchange itself, but charged the defendant company with the violation of the provisions regulating the merger procedure, stating that no valuation of assets of the merging companies was attached to the merger plan (as required under Article 499(2) of the Commercial Companies Code), and the document therefore had not been made available to the complainant (as required under Article 505 (1) of the Commercial Companies Code).

Decision

Despite the stated violation of the act, the court found that Article 509(3) of the Commercial Companies Code, which limits challenges to objections concerning the share exchange ratio, should be understood to mean that where a resolution stands in contradiction with any provisions which aim to guarantee that the par of share exchange is established correctly, the legislature grants a higher level of protection to the company's interest (and to upholding the merger in force) than to the shareholder's interest. Nevertheless, this does not mean that the shareholder is left without legal protection – the Commercial Companies Code directly provides that the lack of a possibility to challenge a resolution does not limit the right to seek damages according to general principles.

For further information on this topic please contact Paweł Sikora at Kubas Kos Gałkowski by telephone (+48 22 206 83 00) or email (pawel.sikora@kkg.pl). The Kubas Kos Gałkowski website can be accessed at www.kkg.pl.