Applicable sanction regarding the breach of the separation of powers principle within the companies' governance

Lecturer **Simona CHIRICĂ**[1]

Abstract

Companies participate at the civil circuit by concluding legal documents. According to the principle regarding the separation of powers in the company's governance, a distinction must be made between the duties of the company's shareholders general assembly and the duties of the administrator. Thus, shareholders general assembly holds the deliberative power of the company and determines the working strategy of the company, whereas the administrator expresses, executes the will of the shareholders general assembly and concludes legal documents in the name and on the behalf of the company. Such legal documents are considered the documents of the company itself. From the perspective of the two management bodies, we can ask ourselves what is the applicable sanction when the shareholders general assembly decides to nominate a third person to represent the company for the signing of a legal document? From a certain point of view this represents an extension of the legal powers, throughout the legal documents of the company's bodies (including the shareholders general assembly's resolutions) and a breach of the exclusive duties of the administrative bodies of a company. The applicable sanction regarding such legal documents is non-existence of legal acts.

Keywords: *companies' governance, trade law, shareholders, the separation of powers principle.*

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1. Preliminary issues

Any legal entity participates at the civil circuit by concluding legal documents. In order to comply with their activity object, companies are also participants of this civil circuit. In this regard, companies must fulfill certain obligations under Law no.31/1990 regarding the Law of Companies, republished including the subsequent amendments and inclusions ("**Companies' Law**")[2], as well as the provisions under the New Civil Code ("**NCC**")[3]. To be more precise, companies must comply with the legal provisions regarding (i) incorporation, (ii) registration, (iii) functioning, (iv) dissolution, merger and demerger of the

[1] Simona Chirică - Law Department, Bucharest University of Economic Studies, s.chirica@schoenherr.ro .

[2] Law no. 31/1990- Companies' Law, published in the Official Gazette of Romania, no. 126-127 dated 17.11.1990

[3] Romanian Civil Code, published in the Official Gazette of Romania, no 511 dated 24.07.2009.

company. The incorporation of the company is settled by its associates, who decide whether they award the company with legal personality or not. Although a company with legal personality is based on a contract, nevertheless, a company is an institution, a legal subject that is different from its constituents[4].

The legal provisions state that the penalties of the legal documents concluded by the company with third parties, without observing the conditions of the functioning of the companies are: relative nullity, absolute nullity or non-existence of the clauses or resolutions of the company's management and control bodies.

Furthermore, we would like to highlight the following situation that has become very common nowadays, namely the case when the shareholder's general assembly decides to authorize a third party to sign in the company's name a legal document and this legal document is concluded based on the shareholder's resolution. In this case, the question is whether the shareholder's general assembly resolution and the following legal documents concluded are valid or not.

Hereinafter, we shall detail the following relevant aspects, namely (i) the participation of companies at the civil circuit, (ii) the exercise of civil rights and undertaking of obligations by the companies, (iii) the effects of exceeding the limits of the power of representation regarding companies, (iv) applicable penalties regarding the legal documents concluded without observing the legal provisions in respect of representation of companies and (v) the annulment procedure of the resolutions or decisions of the company's bodies.

2. Participation of companies at the civil circuit

In order for a company to participate at the civil circuit, it must hold civil capacity to conclude legal documents. The civil capacity of a legal entity is a part of its legal capacity, also known as "rightful capacity" and represents the capacity of the legal subject to have rights and obligations in any legal domain[5].

Therefore, the legal capacity of legal entities comprises two parts, namely (i) the capacity to have rights and obligations and (ii) the capacity to exercise these rights and obligations.

2.1 Companies' capacity to have rights and obligations

A company can have rights and obligations beginning with the registration of the company and means to be a legal subject.

However, a company is entitled to anticipated capacity to have rights and obligations regarding the activities that are necessary for its legal registration.

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4 St. D. Cărpenaru, Gh. Piperea, S. David, *Legea societăților, comentariu pe articole*, 5 edition, C.H. Beck, Bucharest, 2014, p. 12.

5 E. Chelaru, *Drept civil. Persoanele – în reglementarea NCC*, 3 ed., C.H. Beck, Bucharest, 2012, p. 192.

Therefore, in compliance with the provisions of article 205, paragraph (1) NCC, legal entities hold the capacity to have rights and obligations starting with their registration date. Nevertheless, according to paragraph (3), the legal entities may have rights and obligations starting with the date of the articles of incorporation, only in relation with its legal incorporation process. In this regard, there are two types of legal capacities regarding a company:

a) *Full capacity to have rights and obligations*
   - represents the rule;
   - begins with the date of (i) registration (for legal entities that are subjects to registration), (ii) articles of incorporation, authorization of its incorporation or fulfillment of any other legal requirement (regarding other legal entities);

b) *Anticipated capacity to have rights and obligations*
   - represents the exception;
   - begins with the date of the articles of incorporation;
   - available only for the incorporation process of the company.

The capacity to have rights and obligations has the following legal characteristics[6]: *(i) legality* – the law settles all aspects regarding this capacity, *(ii) generality* – highlights the general and abstract capacity of a legal entity to have rights and obligations, without having to customize them, *(iii) inalienability* – is a legal character for all entities, without distinction, and therefore is available for legal entities also and *(iv) untouchability* – no limitations can be brought to this capacity, except for the express legal provisions.

For legal entities, the capacity to have rights and obligations is also limited by the principle of specialization, meaning that the existence of the legal entity is justified by the existence of a certain purpose and therefore, all rights and obligations must be fulfilled and undertaken in order to comply with this purpose.

By comparison with the natural person, and according to article 206 paragraph (1) NCC, the capacity to have rights and obligations regarding a legal entity is limited by: (i) the principle of specialization of the legal entity and (ii) the lack of possibility for the legal entity to have rights and undertake obligations that are only specific for the natural person.

2.2 Companies' capacity to exercise their rights and undertake obligations

A legal entity participates at the civil circuit by concluding legal documents. A company does not have a natural existence like a natural person and therefore the law created the institution of the legal person through which it can exercise its rights and undertake obligations, as well as conclude legal documents. In this regard, according to article 209, paragraph (1) NCC, the legal entity

[6] E. Chelaru, *op cit.*, p. 193.

exercises its rights and undertakes obligations throughout its **administrative bodies**, starting with the date of their establishment.

However, according to the provisions of article 210 NCC, the law makes an exception from this rule and states that the legal entity may exercise its rights and undertake obligations throughout its *founders* or *legal entities* or *natural persons* (specifically designated in this regard), in the following cases:

i. *incorporated legal entities that have not designated their administrative bodies*
   - the designation of the administrative bodies is subsequent to the incorporation of the legal entity and, therefore, it is allowed for the legal entity to conclude legal documents throughout other bodies than the administrative bodies;
   - this exception is available until the designation of the administrative bodies;

ii. *legal entities in process of incorporation*
   - the legal entity that is in the process of incorporation is entitled to exercise its rights and undertake obligations in advance, in order to conclude legal documents necessary for this procedure;
   - the exercise of rights and obligations beyond its boundaries and limits is sanctioned with the non-opposability of the legal documents and therefore, the person who signed such legal documents shall undertake the obligations under the legal document;

3. The exercise of rights and undertaking of obligations |by the companies

3.1 Duties of the administrative bodies

As per article 209 paragraph (1) NCC, the will of the legal entities is fulfilled through its management bodies. This aspect is also confirmed by the provisions under article 70 paragraph (1) of the Company's Law, according to which, *the administrators can exercise all operations requested in order to perform the object regarding the company's activity, except for the restrictions indicated in the articles of association.*

Grating powers to the administrator is a prerogative of the associates that is enabled on the basis of the articles of association or the shareholders general assembly, pursuant to the legal provisions[7].

Also, according to article 218 paragraph (1) NCC, the legal entity exercises its rights and undertakes obligations throughout its administrators, and the legal documents concluded by the administrators (within the limits of their powers), are considered to be the legal documents of the company.

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[7] St. D. Cărpenaru, Gh. Piperea, S. David, *Legea societăților, comentariu pe articole*, 5 edition, C.H. Beck, Bucharest, 2014, p. 12.

Article 218 NCC refers strictly to "administrative bodies" of the legal entity and not to "management and administration bodies" or "bodies of the company" in general. The other bodies are either decision bodies, either control and supervision bodies, which are not appear in relation with the signing of legal documents between third parties and the company[8].

"Administrative body" is defined by article 209 paragraph (2) NCC, as the legal entity or natural person that according to the law, articles of incorporation or status is designated to act in the name and on the behalf of the company, regarding the legal documents concluded between third parties and the company.

When concluding legal documents, the company will be, in general, represented by its unipersonal management body, as a legal representation. The management body can authorize another person to represent the legal entity and in this case the representation will be conventional[9].

Usually, the legal relationship between the company and the persons that comprise the administrative bodies are governed by rules regarding the power of attorney and the rules under the Company's Law, except when it is stipulated otherwise by the law, articles of incorporation or company's status. In this regard, not all administrators can represent a company, but only those designated according to the provisions of the articles of incorporation or the shareholders general assembly's resolution.

The administrator, especially the administrator that holds representation powers, is not a simple attorney in fact, meaning that he **holds the social will of the company**[10]. The administrators' duties contain all legal activities necessary to fulfill the company's object of activity.

Regarding the capacity of the company to conclude legal documents, namely, to have rights and to undertake obligations, the company will act throughout its administration bodies, namely throughout its administrator who that holds representation powers of the company, and only he can designate a third party to conclude a legal document in the company's' name, if this prerogative was granted to him on the basis of the articles of incorporation or by the shareholders general assembly.

One must observe that, according to the legal provisions, in order to ensure that the third parties have knowledge of the person who represents the company, it is necessary to fulfill the publicity formalities throughout the trade registry[11].

Regarding the power of representation granted to the company's administrator, the conjunct representation principle (in Austrian legislation is referred to as the four eye principle[12]) presents certain advantages in comparison with the case of a sole administrator.

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[8] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil. Comentariu pe articole*, 2 ed., C.H. Beck, Bucharest, 2014, p. 247.

[9] E. Chelaru, *op cit.*, p. 204.

[10] St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *Legea societăților comerciale, comentariu pe articole*, 4 ed., C.H. Beck, Bucharest, 2009, p. 532.

[11] *Idem*, p. 275.

[12] German "Vier Augen Prinzip".

The conjunct representation principle is possible also with regards to the powers of the national companies' administration. However this principle is not expressly provided in our national legislation. This principle is commonly found in the other countries' legislation such as the Austrian right. The conjunct representation is the possibility to grant a mandate to at least two persons in order to conclude legal documents in the name and on the behalf of the company.

Therefore, the conjunct representation principle regarding companies has the following advantages (i) decrease of possible risks regarding the company, (ii) the improvement of the decisional transparency regarding the administrative bodies, (iii) the improvement of the control and monitoring of the legal documents concluded in the company's name and (iv) the diminishing of cases when legal documents are concluded in the company's administrators interest.

3.2 Duties of the shareholders general assembly

The supreme management and decision body of a company is the general assembly of the shareholders that comprises the entire social will of a company[13]. The shareholders general assembly is not a management and administration entity, but a decisional body. The shareholders general assembly controls the administrators and decides the working strategy of the company. As a consequence, there is an incompatibility between the duties of the shareholders general assembly and the duties of the administrators, due to the principle of separation of powers in a company, between the management bodies and the administrative bodies. Although the Company's Law acknowledges certain competences from the shareholders general assembly to the administrator, such as: the changing of the headquarters, establishing secondary headquarters, etc., one must observe that the law does not allow a delegation of duties from the administrator to the general assembly. The administrator's powers can be delegated to third parties if this right is granted by the shareholders general assembly throughout the articles of incorporation. The incompatibility between the shareholders general assembly and administrator's duties is also highlighted in the provisions regarding the amended principles for corporate government (G20/ OECD Principles of Corporate Governance[14]). The elaboration of such principles was required due to the necessity to create a balance between the company's bodies, in order to protect the best interests of the majority shareholders as well as those of the minority shareholders. Therefore, as per principle VI, letter E from the guide mentioned above, an independence between the management bodies of the company is required.

Usually, the applicability of such principles can be seen at the companies that are listed at the stock exchange market. However, even the companies that are not listed at the stock exchange market but who perform complex activities use such principles in order to attract capital. Regarding small companies, the

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[13] O. Căpățână, *Societățile comerciale*, Lumina Lex, Bucharest, 1996, p. 297.

[14] http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf

applicability of such principles is limited due to the lack of interest in this regard, namely in many cases the shareholders are fewer and generally hold an equal percentage of the company's stock capital.

3.3 Power of representation

The administrator is entitled to conclude any legal document in compliance with the purpose of the company. In this regard, the administrator is held responsible in the legal relationships with third parties.

In order to conclude legal documents, the administrator does not require a special power of attorney as long as the mandate (the power to represent the company) has its source in law or in the articles of incorporation[15]. If the legal representative of the company does not personally participate at the signing of a legal document, than a third person can sign the legal document in the company's name and on its behalf, upon having a power of attorney. For clarity sake, this power of attorney must be issued by the company's administrator, as the representative of the social will of the company and must observe the same legal form of the document that will be executed in the name and on behalf the company.

Moreover, according to article 70^1 of The Company's Law, the legal documents regarding the assets of a company are concluded by the legal representatives of the company, on the basis of the power granted by law, articles of incorporation or status. Therefore, it is very clear that no special authenticated power of attorney for the administrator is required in this regard.

Even before this article was adopted, the supreme court[16] established that *"if the shareholders general assembly decided to mandate the administrator to conclude a certain legal document in the company's name, than there is no need for an authenticated power of attorney, due to the fact that he is the company's administrator and, as a consequence, he is the legal representative of the company"*.

3.4 Apparent mandate

If a legal document was concluded without observing the legal limits of the representation mandate than one can ask oneself if such a legal document can be sanctioned with nullity or non-opposability or does this legal document can be applicable for the company. According to article 218 paragraph (2) of the NCC and dominant doctrine[17] the sanctions mentioned above are not applicable because the company assumes liability through its bodies, even if these legal documents are concluded without observing the power of representation of the company, except for the legal documents concluded with third parties that acted in bad-faith. If the

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[15] C. Todică, *Statutul juridic şi puterile administratorului în societatea comercială*, Universul Juridic, Bucharest, 2011, p. 264.

[16] *Dec. No. 267/R of 21 March 2003*, rendered by the High Court of Cassation and Justice, published in RDC no. 10/2004, p. 214.

[17] St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *op. cit.*, 4 ed., C.H. Beck, 2009, p. 29.

third parties acted in bad-faith, than the applicable sanction will be the non-opposability of the legal document regarding the company.

As per the third parties that have acted in good faith, the legal documents concluded without observing the administrator's limits of representation, will be considered valid, legal and will be fully effective.

The apparent mandate is characterized by the fact that the attorney in fact overseas its representations powers or acts without having a power of attorney from the principal. In order to invoke the apparent mandate it is necessary that the third party acts in good-faith. If the third party acted in bad-faith and was aware of the lack of power of attorney or that the attorney acted beyond its representations powers granted by the principal, than the legal document shall be considered as non-opposable.

The law presumes, in absence of contrary proof that the third party acted in good-faith. According to the legal provisions, in order to ensure the information of third parties of the persons that represent the company, it is necessary to fulfil the publicity formalities throughout the trade registry. Meaning that, the presumption of the representation powers required by law is applicable regarding third parties only if the publicity formalities have been performed[18].

Nevertheless, the validity of the good-faith presumption regarding third parties can be questioned, due to the fact that a diligent third party would proceed to verify the limits of the representations powers regarding the company's administrator or would proceed to verify the validity of the power of attorney grated by the management bodies of the company in this regard. Only after verifying these aspects, one can consider that the third party acted in good-faith.

On the other hand, it is necessary to mention that the company has the right to hold responsible the administrator that acted without observing the limits of the power of attorney granted throughout the articles of incorporation or by the shareholders general assembly and also the company has the right to claim damages from the administrator in order to compensate its prejudice. If the shareholders general assembly does not consider that the company's interests have been violated, namely that the company did not suffer any prejudice due to the signing of legal documents as per the situation mentioned above, than the shareholders general assembly can adopt a resolution that expressly ratifies the legal documents concluded by the administrator without observing the power of attorney's limits.

4. The effects of exceeding the limits of the power of representation

Regarding the effects of exceeding the limits of the power of representation, a distinction must be made between (i) legal limits and (ii) conventional limits:

(i) Legal limits

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[18] Idem, p. 275.

The powers granted to the administrative bodies, as well as the limits of such powers are generally granted by law to the administrative bodies of legal entities[19]. The limits of capacity to have rights and obligations are considered legal limits:

a) the lack of possibility of the legal entities to have rights and obligations that are available only for natural persons, due to their nature, or according to the law;
b) the lack of possibility of the legal entity without lucrative purpose to have other rights and obligations that are not necessary for the establishment of the purpose settled by law, articles of incorporation or status.

(ii) Conventional limits

The conventional limits are those settled through the articles of incorporation and/or status.

5. Applicable sanctions regarding the signing of legal documents without observing the legal provisions of representation

(i) Absolute nullity

Exceeding the legal limits of representation regarding the signing of legal documents with third parties is sanctioned with absolute nullity if there is a breach regarding:

- the principle of specialization, meaning that the existence of the legal entity is justified by the existence of a certain purpose and all rights and obligations must be exercised in order to fulfill this purpose;
- the possibility of the legal entity to have any rights and obligations, except for those that are grated exclusively to the natural person, by their nature or by law.

According to the provisions of article 207, paragraph (2) NCC, the persons who concluded legal documents or performed legal operations without observing the legal provisions regarding the capacity to have rights and obligations of the legal entity, will be unlimited and in solidarity held responsible for all damages, independently from any other applicable legal sanction.

(ii) Relative nullity

All legal documents concluded by incapable persons, by persons with limited capacity of exercise, by persons who are precluded from their right to hold a position in management and control bodies, as well as persons declared by law or by articles of incorporation as incompatible, are sanctioned with relative nullity. According to the provisions of article 211 paragraph (2) NCC, the relative nullity can be invoked regarding the above cases only if a damage has occurred.

Moreover, according to article 215 paragraph (1) NCC, the legal document concluded by a member of the administrative body, as a fraud for the interests of

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[19] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil. Comentariu pe articole*, 2 ed., C.H. Beck, Bucharest, 2014, p. 247.

the legal entity, is sanctioned with relative nullity if: (i) a member of the administrative body, its spouse, ascendance or descendants, relatives in collateral line or in-laws until the fourth degree including, had an interest in the signing of that certain legal document and if (ii) the other contracting party knew about it or should have known about it.

(iii) Non-opposability

If the legal document is concluded by exceeding the representation limits of the administrative bodies, than the legal document does not represent a document of the legal entity and therefore, the legal document is not opposable to the legal entity if there is proof that the contractual party knew about the exceeding of the representation powers.

(iv) Non-existence

The resolutions of the management bodies, clauses or disposals in the article of incorporation or status that extend or limit the powers of administration determined exclusively by law, are considered to be unwritten, even though they have been published.

The term *unwritten clause* is not clearly defined by the NCC, but it refers to the nonexistence of that disposition or even the nonexistence of the legal document itself.

Also, the principle of separation of powers in the company's structure opposes to the situation in which the general assembly decides matters that are in the competence of the board of administration or censors[20].

Therefore, if the shareholders general assembly decided to mandate a third party to conclude a legal document (in contradiction with the legal limits regarding the shareholders general assembly), than this situation represents an extension of the legal duties of the general assembly's duties and as a consequence a breach of the separation of powers in the structure of a company's principle. As a consequence, the shareholders' general assembly resolution will be considered unwritten, that is equivalent with the nonexistence of the shareholders resolution. In this case, the subsequent document shall cease, even though it is authenticated.

There is no need to file a claim for the annulment or to declare it non-opposable, in order to invalidate the clause, because it is necessary only to allege – in case of amiable or judicial request to apply the unwritten clause character[21].

6. The annulment procedure regarding the resolutions or decisions of the companies' bodies

According to the provisions of article 216 paragraph (1) NCC, the following category of documents can be brought before a court by the management or administrative bodies:

(i) The decisions and resolutions of the administrative bodies;
(ii) The censors' decisions;

[20] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *op. cit.,* p. 247.
[21] *Ibidem.*

(iii) The shareholders' general assembly resolutions.

Notwithstanding, the dispositions regarding the annulment or nullity of the resolutions or decisions of the legal entities' bodies are not applicable to the shareholders general assembly or the censors decisions, because they are subject to the provisions of the Company's Law[22].

The annulment of the shareholders general assembly resolutions

Subjects

- the shareholders that were not present at the assembly
- the shareholders that have voted against the resolution and requested to insert this aspect in the protocol of the meeting;
- any interested person, if they invoke the absolute nullity, except for the persons mentioned above.

According to the supreme courts' decision[23], the associates cannot be considered any interest person, in the meaning of article 132 paragraph (3) of the Company's Law, because according to paragraph (2) of the same article, the associates can contest the shareholders' general assembly resolution only if (i) they have not participated at the meeting, or (ii) even though they have participated at the meeting, they have voted against the resolution and have requested to insert this aspect in the protocol of the meeting.

Term

- the *absolute nullity* is imprescriptible;
- the *relative nullity* must be invoked in 15 days term starting from the date of the publishing of the resolution in the Official Gazette of Romania, Part IV.

Judgement procedure

- the county court where the legal entity has its main headquarters is competent for the annulment petition;
- the petition is solved in the council room, with the summoning of the legal entity;
- the plaintiff may request the court along with the sue petition, to suspend the execution of the resolution by way of presiding judge's order;
- the court's resolution cannot be challenged by appeal.

7. Proposals of *lege ferenda*

Regarding the general partnership companies, the limited partnership companies as well as limited liability companies, the right to represent the company is available to every single administrator, except for the case when the

[22] Idem, p. 244.

[23] *Decision no. 3915/2013*, rendered by the High Court of Cassation and Justice, II , Civil Section.

articles of association state otherwise. Therefore, if the articles of incorporation do not provide a certain person who represents the company, than all the administrators will be assumed to have unlimited powers to represent the company.

From this point of view, it is necessary to acknowledge/ to enact the independence of the management bodies of the company principle regarding the situation of more than one administrator, for the general partnership companies, the limited partnership companies as well as the limited liability companies. It is necessary that these administrators have only the powers that have been granted to them according to the articles of incorporation.

Also, we consider necessary to regulate in our national legislation the principle of conjunct representation of the company (Eng. *Four eye principle*) regarding the administrative bodies of the company, in order to provide the independence and objectiveness of the legal documents concluded in the name and on the behalf of the company. The advantages regarding the implementation of such legal provisions refer to (i) the decrease of possible risks regarding the company, (ii) the improvement of the decisional transparency regarding the administrative bodies, (iii) the improvement of the control and monitoring of the legal documents concluded in the company's name and (iv) the diminishing of cases when legal documents are concluded in the company's administrators interest.

8. Conclusions

Considering the aspects mentioned above, the law provides a series of applicable sanctions regarding the non-compliance of the legal provision of the company's representation and the valid signing of legal documents in the name and on the behalf of the company.

Therefore, if a legal documents was concluded by the company's administrator without observing the limits of the powers of representation of the company, than the legal document will not be annulled and will be effective between the third party and the apparent attorney at law. This is possible only if the third party has acted in good-faith at the signing of the legal document.

Also, if the shareholders' general assembly resolution was declared null, the subsequent documents concluded based on the null resolution will also declared as null.

Nevertheless, according to the supreme courts' decision[24], *"the shareholders general assembly resolution that was used for the signing of a sale-purchase agreement that was declared null and void, cannot produce legal consequences regarding the validity conditions of the agreement, because this agreement can be sanctioned with absolute nullity only for the content and form conditions at the date of its signing.*

Therefore, in the case of signing a sale-purchase agreement long time before the shareholder's' resolution issued for the signing of the agreement became

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[24] *Decision no. 254/29.01.2015*, rendered by the High Court of Cassation and Justice, II Civil Section

irrevocable, the effects of the absolute nullity of the shareholders' general assembly cannot be extended upon the validity conditions of the agreement, because at the date of its signing the validity conditions of the agreement were complete."

A different situation is the case of extension of the powers granted exclusively by the law, by the legal documents of the company's bodies (including the shareholders' general assembly resolution) the applicable sanction will be the *non-existence* of those resolutions and not relative nullity.

Therefore, if the shareholders' general assembly resolution states that a third party shall represent the company to conclude a legal document, than this is equivalent to exceeding the shareholders' duties and also a breach of the administrative body duties.

In this case, the shareholders' general assembly resolution will be considered to be unwritten (the sanction applicable is the non-existence of the resolution). Therefore, it makes no difference whether the power of attorney granted to the third party is authenticated or not, because the authenticated form does not cover the non-observance of the legal provision regarding the capacity to represent the company.

As a result, the subsequent legal document, concluded on the basis of the resolution and the special power of attorney are also sanctioned as non-existing.
The solution in this case would be to redo the legal document, signed by *(i) the legal representative of the company,* namely the administrator, who does not require a special power of attorney in order to legally conclude the legal document or *(ii) a third party*, that was mandated by the administrator in this regard (and not by the shareholders general assembly), on the basis of a special power of attorney, authenticated if necessary.

However, the provisions of the High Court of Cassation and Justice Decision no. 254/2015, can be applicable by association for the sanction of non-existence of the legal document, and as a consequence, that legal document is considered to be valid.

Bibliography

1. St. D. Cărpenaru, Gh. Piperea, S. David, *Legea societăților, comentariu pe articole*, 5 ed., C.H. Beck, Bucharest, 2014.
2. E. Chelaru, *Drept civil. Persoanele – în reglementarea NCC*, 3 ed., C.H. Beck, Bucharest, 2012.
3. St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *Legea societăților comerciale, comentariu pe articole*, 4 ed., C.H. Beck, Bucharest, 2009.
4. Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil. Comentariu pe articole,* 2 ed., C.H. Beck, Bucharest, 2014.
5. O. Căpățână, *Societățile comerciale*, Lumina Lex, Bucharest, 1996.
6. C. Todică, *Statutul juridic și puterile administratorului în societatea comercială*, Universul Juridic, Bucharest, 2011.