ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

LL.M PROGRAM - BUSINESS LAW STREAM

NULLIFICATION OF COMPANY RESOLUTIONS IN ETHIOPIA:

THE LAW AND THE PRACTICE

By

MELAKU KASSAYE GEMECHU

ADVISOR: ZEKARIAS KENEA (Associate Professor)

September 2020

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September 2020

DECLARATION

I, Melaku Kassaye, declare that the thesis is my original work and has not been presented for a degree in any other university and that all sources of materials used in the thesis have been duly acknowledged.

Declared by:- Melaku Kassaye

Signature ________________

Date ____________________

Confirmed by: Zekarias Keneaa (Associate Prof.)

Signature ________________

Date ____________________

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Approval Sheet

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September 2020

Abstract

Corporate resolutions are meant to declare the basic decisions made at the forum of either the shareholders or the Board of Directors. The corporate resolutions made in accordance with the law and the respective corporate's constitutive documents are assumed to be the decision of corporate and shall be binding on all shareholders of the corporations. On the other hand, despite few jurisdiction related differences among countries the recognition for nullification of corporate resolution becomes a growing fashion in modern Company laws. Such recognition is primarily meant to provide the legal mechanisms through which shareholders could oppose disagreeable resolutions. In Ethiopian, matters of nullification of company resolutions are regulated in Article 416 of the 1960 Commercial Code. The notion under this article has become the growing controversy before the court. The scope, the interpretative application, and the practice of Ethiopian courts in resolving disputes involving nullification of company resolutions has not been studied in methodical way. Thus, the concern of this paper is to have a closer look in to what the practical application of the nullification of company resolution under the Commercial Code looks like.

Acronym

Art.	Article
BCC	Belgian Commercial Code
BOD	Board of Directors
OECD	Organization for Economic Cooperation and Development
PLC	Private Limited Company
S.C.	Share Company
TCC	Turkish Commercial Code

Dedication!

I would like to dedicate this small work to my mother, W/ro Tewabech Kitaw, whom I lost in the middle of writing this thesis. Emma! I always remember you!

May the Almighty God give you Eternal Peace!

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Study

The 1950s and 1960s marked as the great turn over in modern laws codification history of Ethiopia. These were the time where the country took massive measures in organizing its modern laws in to well written Codes. The 1960 Commercial Code of Ethiopian (herein after the Commercial Code) has been one of the then modern laws that blessed with the excellent organization of many of the modern laws in the country. The Commercial Code, the most comprehensive legislation on the matter and that is still in force, generally recognizes six forms of business organizations: two of which are named as Companies.[1] The form of business organization named as companies[2] under the Commercial Code are of two types, namely: Share Company (Arts. 304-509) and Private Limited Company (Arts. 510-543).[3]Despite the wider distinction among the two forms of companies as regards the nature of formation and management, both provide limited liability for their shareholders. That is to mean that the shareholders are not personally liable for company's debts but rather the company's liability should be met by the company's asset itself. In whatever form, once a company has successfully formed it has separate legal existence from is shareholders. The shareholders do not have direct decision making authority over their company; rather the day to day activity of the company falls on the hands of a few individuals. The so called divorce of shareholders from their company resulted in what some name it "the separation of ownership and control".[4]

This however does not mean that shareholders do not have a say on the managements of their company. The manner by which the shareholders take part in the management of the company is governed by the principles of corporate governance. In fact, there is no universally applicable

[1] Commercial Code of the Empire of Ethiopia ,Negaret Gazeta, extra ordinary Issue, Proclamation No. 3 of 1960, Art.212(1).
[2] The term used to denote "company" varies across jurisdictions. In some jurisdictions, it is named as "corporation", whereas in others the term "company" itself is used. (For instance, in United State of America and Germany, the term "Corporation is used to denote "Company" whereas in France the term Company itself applicable). Because of this, the two terms are adopted and used interchangeably in this paper.
[3] Id, supra note 1
[4] Adolf A. Berle and Gardiner C. Means, the Modern corporation and Private property, with a new introduction by Murray L.Weidenbaum and Mark Jensen, Transaction Publisher, UK, 1991, P-66

definition of corporate governance. The close examination of literatures on the area reveals that different scholars and regulatory organizations define the term corporate governance differently. Despite the absence of uniform definition, it can generally be understood that the major objective of corporate governance is to balance and protect the different competing interests among diversified stakeholders on a company.[5]

It is the Article of Association and Memorandum of Association that assumed to set the rules by which a company runs and administered. Certain decisions that are beyond the normal day to day running of a business require resolutions which are known as Company Resolutions. Generally, it is these constitutive documents that sets out the basic framework of the company and the general guiding rules governing the right, powers, duties and obligations conferred on the company, its Board of Directors and shareholders. Even if the routine daily activity of the company is on the hands of the its agents, but most decisions beyond the normal day to day activity of a business requires resolution. Company resolution is a formal decision of the company made at meetings of the either at Board of Directors, or at the meetings of shareholders. This decision could be done by company directors or shareholders. Whoever adopts the resolution; such decisions are still susceptible to contention particularly by the shareholders. It is this contention of the company resolution in Ethiopian that constitutes the major concern of this paper.

1.2. Statement of the Problem

The recognition of the right to quest for nullification of company resolution under Article 416/2/ of the Commercial Code is meant to balance two competing interests. On one hand the right to claim for annulment of company resolution is the principal defense mechanism that the minority shareholders in particular entitled to against the abuse of the majority shareholders. On the other hand the properly conducted company resolution is believed to convey the common will of the shareholders aimed to fulfill both their purpose and the company's purpose. In fact, its relevance and importance resides in the necessity for the shareholders and their legal representatives to be aware of and actively assert their rights to oppose disagreeable resolutions. While there is unanimity in accepting that the common will of the shareholders represents the core of the

[5] Kraakman, Dvies, Hnsman, Hertig, HOpt, Kanda, Rock, *The Anatomy of Corporate Laws: a Comparative and Functional Approach*, Oxford University Press, New York, 2004, P-18.

company, in practice there are frequent situations in which there is substantial disagreement between the shareholders' points of view, frequently leading to adopting resolutions without considering the minority shareholder's input. Since these disagreements must be resolved prior to the company to continue conducting business, it is mandatory for the shareholders to effectively express their point of view in a manner in which the company's interests are protected through the independent filter of the court.

As mentioned in the background study of this thesis the quest for annulment of company resolutions are increasing from time to time. The closer examination of those complaints largely grounded on Article 416/2/ of the Commercial Code. In fact Article 416/2/ of the Commercial Code sets the grounds for the nullification of company resolutions. Yet whether the grounds for the nullification of company resolutions that are heading to courts are within the spirit of the law is the question that needs a closer examination.

As noted above, the 1960 Commercial Code of Ethiopia contains the general rules on the corporate governance in the country. As regards Share Company, the Code recognized Shareholder Meetings as one of the three main organs of management of the share company along with Board of Directors and Auditors.[6] Shareholders exercise their governance rights through two outlets: namely Ordinary Meetings and Extraordinary Meetings.[7] On the other hand Article 416 of the Commercial Code sets the way through which company resolution can be set aside. Now a day, the notion under this article has become the growing controversy before the court. It is this growing allegation for nullity of company resolution that draws the attention of this thesis. The scope, the interpretative application, and the practice of Ethiopian courts in resolving disputes involving nullification of company resolutions has not been studied in methodical way. Thus, the concern of this paper is to have a closer look in to what the practical application of the nullity of company resolution under the Commercial Code looks like.

1.3. Research Questions

In light of the foregoing, this study examines the following research question:

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[6] Supra Note 1, Art.347ff.
[7] Id, Art. Art.388 -416

- Is the practical application of nullification of Company Resolution in Ethiopian consistence with the content and spirit of the relevant law regulating such nullification?

1.4. Objectives of the Study

In line with the above mentioned statement of the problem and research questions, the objective of the study will be:

- To clearly identify the substantive and procedural requirements set out for the quest for nullification of company resolution under the Commercial Code,
- To closely examine whether the practical application of the grounds for setting aside company resolutions are compatible with the aspire the relevant provision of the Commercial Code,
- To recommend what is next to be done so as to reconcile the practice with the law.

1.5. Significance of the Study

The study will focus on the compatibility problems of the claim for nullification of company resolutions in Ethiopia and the recommended solutions. Thus, it may contribute to the ongoing amendment of the Commercial Code of the country on the named specific topic, to create awareness for the legislative body, the Judges and lawyers on the area, serve as a basis and may call the attention of those who want to conduct further research in the field as well as a reference material in the academic sphere.

1.6. Scope of the Study

The study totally devotes to the practical examination of the compatibility of claim for nullification of company resolutions with the law under the 1960 Commercial Code of Ethiopia. To this end the contents of the rules governing the claim for setting aside company resolutions under the Commercial Code would primarily be consulted. Then the contents of the alleged claims for nullification in the Federal Court will be closely examined from substantives as well as procedural perspectives. Geographically the study focuses on the cases brought before the Federal Courts presiding in Addis Ababa.

In terms of representativeness of this study, it should be noted that almost all companies in Ethiopia are required to get registered at the Federal registries in Addis Ababa. Besides, cases falling under the Commercial Code are within the exclusive material jurisdiction of the Federal Courts.[8] This also implies that cases that are tried before regional courts could under most circumstances be brought to the Federal Courts on appeal. As a result, the study's focus on practices of federal courts may not be seen as a shortcoming in ensuring the representativeness of its findings.

1.7. Methodology

This study adopts a qualitative research method and undertakes predominantly legislative and case analysis. Legislative analysis is employed given that it is essential in particular to answer the first question of this study, namely, what are the grounds for nullification of company resolutions under the Commercial Code of Ethiopia?. A closer analysis of the law is also adopted her in order to clarify the spirit of the law against which their application (court cases) will be examined. In order to thoroughly examine the relevant provisions of the law and deduce its general spirit as regards nullification of company resolution, the research will further collect and examine *travaux préparatoires, if available,* background studies, explanatory notes, and relevant academic literature on the provision of the Commercial Code.

The research also resorts to case analysis in order to comprehensively examine the practical application the rules governing claim for nullification of company resolutions. Hence, it will focus on the study of the reasons, justifications or logical arguments relied upon in the jurisprudence of Ethiopian courts. As explained above under the scope of the study, the research undertakes analysis of judgments of federal courts. In this regard, the research refers to cases that have been adjudicated on appeal and at the Cassation Bench of the Federal Supreme Court, an approach that is chosen due to time constraints, as regards the former, and the legally binding nature of the decision, as regards the latter.

Under limited circumstances, and when relevant to further explain a point of discussion, this research may nonetheless make references to comparable issue under foreign jurisdictions, to be

[8] Federal Courts Establishment Proclamation No.25/1996, Article 5(6)

determined based on accessibility of legal jurisprudence. Nonetheless, the research does not aim at undertaking a full-fledged comparative analysis.

1.8. Literature Review

The term used to denote "company" varies over jurisdictions. In some jurisdiction, it is named as "corporation", whereas in others the term "company" itself is used.[9] Because of this the two terms are adopted and used interchangeably in this paper. Whatever the name may be, it's the sophisticated tools of poling capital together to undertaking huge investment businesses particularly in the capitalist world. A corporation, once acquired its legal personality, enjoys certain attributes which differentiate it from other forms of unincorporated business organizations. One of those particular attribute is the separate legal personality and limited liability of its incorporators or investment owners.[10] Because of this separate legal existence of the corporation the shareholders are liable only to the extent of their investments.[11] Yet, companies are represented and managed by natural person; be it director or manager. It's these agents of the company that under take the day to day activity of the company.

Companies, being an artificial person, are governed by what some called it "Company Constitution".[12] Basically it's the Memorandum of Association and Article of Association that constitute the constitution of a company.[13]

Studies on nullification of company resolution in the Ethiopian contexts are nonexistent. Yet, a brief glance at some other jurisdictions reveals the fact that the decisions made at company meetings can be disputed before a court of law for nullification. The grounds for nullifications, persons entitled to claim the annulment as well as the procedures to be followed varies from one jurisdiction to the other.

In Turkey for instance, the actions against the general assembly resolutions is regulated by the New Turkish Commercial Code No.6102 (here after called "TCC"). [14] The TCC categorized the

[9] Ibid, Supra Note 2
[10] Ibid, Supra Note 3
[11] Ibid
[12] Clive M.Schmitthoff and James H.Thompson, *Palmer's Company law* (21 ed., 1968), p.50
[13] Ibid

action to be brought before the court in to two: namely, action for Annulment and action for Nullity. Further, the TCC makes distinction between the two as regards the grounds, the time within which the action to be taken as well as the persons entitled to bring the action. As regards annulment action, the TCC recognized three grounds for annulment of the general assembly resolution. These are where the resolution is contrary to the TCC, or the articles of association or good faith rule. Where either of these conditions bumps into Shareholders, the Board of Directors or each members of the Board of Directors are entitled to initiate an action for annulment within three months.[15]

The TCC regulates the shareholders who can challenge the resolutions in two separate groups: namely shareholders who attended the meeting but cast negative votes; and shareholders regardless of whether or not they attended the meeting.[16] Shareholders who attend a general assembly meeting have the right to challenge the general assembly meeting resolutions on the condition that they cast a negative vote, and had their dissenting opinions stated in the meeting minutes. It is possible either to state dissenting opinions against several decisions as a whole, or separately, for each decision made in a general assembly meeting.

On the other hand shareholders who allege that, the convocation of the meeting has not been duly made, the agenda of the meeting has not been duly announced, persons who do not have the authority to attend the general assembly meeting, or their representatives attended the meeting and cast votes, or they have been unjustly prevented from attending the meeting and casting votes can challenge the general assembly resolutions regardless of whether or not they attended the relevant meeting provided that, in any case, the aforementioned breaches had an influence on the resolution.[17]

On the other hand the legal grounds for the nullity of general assembly resolutions have also been established under Article 447 of the Code of the TCC. Accordingly, the law subjected the general assembly resolutions to the nullity and considered it void *ab initio* where it's either

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[14] E. MOROĞLU, Anonim Ortaklıkta Genel Kurul Kararlarının Hükümsüzlüğü, İstanbul 2009, pg.194(available at https://www.mondaq.com/turkey/shareholders/262636/, last accessed June 2020)

[15] TCC Art.445
[16] TCC Art.446
[17] Id, Supra Note 15

contrary to the mandatory rules, public order or morality. When this happened any interested person may bring a declaratory action for the nullity of the general assembly resolution and such action is not subjected to any time limit. [18]

In Romania, until the enactment of Law no. 31/1990, companies in general were regulated by the civil Code. The promulgation Law No.31/1990 kicked out the application of the Civil Code on those companies oriented for lucrative purposes.[19] The new law recognized shareholders, company's directors, company's censors and any person justifying an interest for annulment of the general assembly of shareholders meetings as persons legally entitled to claim for annulment.[20] The grounds for annulment of the resolution of the general meetings of shareholders may be either Absolute nullity or Relative nullity.[21] Absolute Nullity is those made for breach of norms securing public order and the general interest whereas relative nullity is made for violations of norms securing the personal interests of the company's shareholders. The latter is mostly related with the will or capacity of shareholders.[22] Shareholders may evoke both absolute and relative nullity while other third parties are only entitled to claim for absolute nullity of the resolution which shall not fall under any statute of limitation.[23] But one important feature is that the law prohibits the directors to file a claim for the annulment of a resolution when the object of the resolution is related with revocation of the said directors.[24]

In Ethiopian the action for setting aside company resolution is regulated by the 1960 Commercial Code.[25] The law set forth certain guiding principles as regards the action for nullification of the company resolution under Article 416. As such in principles the resolution adopted in accordance with the law, the memorandum or article of association shall bind all the members, including those who were not present or dissented.[26] Yet, the resolution adopted contrary to the law, the memorandum or article of association may be challenged for setting aside within three

[18] TCC Art.447
[19] Roxana Mihaela CATEA, *Practical aspects regarding the claim for the annulment of the resolutions of the general meeting of shareholders, from a substantial and procedural perspective*, Lex ET Scientia International Journal, LESIJ Vol.2, No.XXIV(2017), P.182
[20] Id, p.184
[21] Id, p.185
[22] Ibid
[23] Ibid
[24] Law No.31/1990, Art.132 par.4(in supra note 18)
[25] Commercial Code, Supra Note 1
[26] Id, Art. 416(1)

months from the date of the adoption of the resolution or maximum from the entry of the resolution in the commercial register.[27]

To sum up, despite certain specific particularities across jurisdictions, the right to claim for setting aside company resolutions is the generally recognized legal tradition. In view of this, the study focuses on exhaustively exploring the application of nullifying company resolution in Ethiopian through further discovery of other possible statutory grounds and its practical application in courts.

[27] Ibid, Art.416(2)

CHAPTER TWO

THE NOTION AND THEORETICAL UNDERPINNINGS OF NULLIFICATION OF COMPANY RESOLUTIONS

Preliminary Remarks:

Nullification of company resolutions presupposes the existence of company resolution. In turn, the existence of company resolution presupposes the existence of legally defined and mandated corporate organ to pass the resolution. The power to pass company resolution goes in line with the corporate governance structure of a given company. So, when one talks about nullification of company resolutions it is a must, at least, to take a short glance to the concept of corporate governance in general and the possible options thereabout. Hence, the discussions in the following topic along with its sub-topics aim at providing a spark light on the theoretical concepts of corporate governance system in general and the possible frameworks thereof.

2.1. A Brief Account of the Theoretical Concept and Framework for Corporate Governance

2.1.1. Agency Theory and the Evolution of Corporate Governance

Literature evidences that the theoretical underpinnings for the emergence of corporate governance is to tackle the problem of what is called "Agency Theory".[28] The notion of agency theory came in to existence following the concept of separation of ownership and control in the modern company laws.[29] As discussed earlier, the concept of separation of ownership and control tells us that once a company has legally been established, the shareholders do not have direct decision making authority over their company; rather the day to day activity of the company falls in the hands of a group of individuals who presumably act in the interest of the owners as well as the company too.

Not surprisingly, this divorce of shareholders from their company throws the owners in to the dilemma that, once they put in their funds, they would not be left holding a worthless piece of

[28] Santosh Pande, *The Theoretical Framework for Corporate Governance,* Article *in* SSRN Electronic Journal · October 2011, P.2 (available at: http://ssrn.com/abstract=1949615)

[29] Ibid

paper issued by the manager; or so to say, that their funds are not expropriated or wasted on un - attractive projects.[30] So, viewed from this context, it's these investors' difficulties that resulted in the emergence of the notion of corporate governance which has been defined by Shleifer et al (1997) as "… how to assure financiers that they get a return on their investment".[31]

Nowadays, the phrase "Corporate Governance" is the most commonly used term particularly in relation to corporation. In fact, as indicated in the background study of this thesis, the term "Corporation" in certain jurisdictions is meant to denote the term "Company" as a result of which the writer opts to adopt and make use of the two terms interchangeably.[32] Hence, it should be noted that any discussion made on "corporate governance" under this thesis is meant to refer to "company governance".

The meaning and definition given to the phrase "Corporate Governance" varies across jurisdictions. The variation extends from the narrow definition that it's "a system by which business corporations are directed and controlled"[33] to a more elaborate definition given by the Organization for the Economic Cooperation and Development (OECD); the full text of which reads as follow:

> *Corporate governance involves a set of relationships between a company's management, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.*[34]

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[30] Ibid

[31] Id, P.2

[32] Refer to the note under Supra Note 2 above.

[33] Corporate governance definition: www.corpgov.net (retrieve on 12/8/2013) (Cited in: Dejene Alamirew: *Assessing Corporate Governance of Ethiopian Private Limited Companies With Particular Emphasis of Making Board of Directors Compulsory to Such Companies, (* 2014, unpublished, School of Law, Addis Ababa University), Under Note 79

[34] OECD Principles of Corporate Governance, 2004 (Cited In: Assefa Aregay, *Corporate Governance Rules In Ethiopia and Germany: A Comparative Analysis*,(2015, Central European University, Hungary), *P*. 6

As can be understood from the particular elements included under the definition given by the OECD, the issues covered by Corporate Governance encompasses matters that extend from regulating the relationship between a company and its governing bodies to the extent of setting out goals for an organization, direction to be taken to achieve these goals, and roles and responsibilities of functionaries in the organization. Yet, the definition is still criticized for being not broader enough to include such key principles common in corporate governance discourse as the issue of accountability of the managers, transparency and so on.[35]

It's because of this that some writers concluded that the notion "Corporate Governance" encompasses several issues and that there is no generally accepted definition therefore.[36] Nevertheless, literature shows that the variation among the different definition given for Corporate Governance from narrow to the broad ones revolves around the debate on "whether management should run the corporation solely in the interests of shareholders (shareholder perspective) or whether it should take in to account other constituencies (stakeholder perspective)".[37] These long lasting debates on the area drive one to look in to the modes and alternative theoretical frame works thereof for corporate governance, which the subsequent sub topic dwells on.

2.1.2 Models of Corporate Governance

The model of corporate governance is largely related to the ownership structure of the economy, which plausibly is an important factor in corporate governance particularly in shaping the agency relationship within firms.[38] In fact, the model of corporate governance of a given company has a lot to tell about the economic, historical, cultural and legal characteristics of that particular country.[39] As such it can be said that model corporate governance is an attribute of such factors as the ownership and control structures of a company, the legal system and economic model of

[35] Ibid

[36] Ibid

[37] Supra Note 33, P.31

[38] Id, P.35

[39] Id, P.38

the country and so on.[40] So, it's these multiple factors that triggered the prevalence of various models of corporate governance system around the globe. Yet, consultation of literature on the area reveals that scholars tend to cluster the various corporate governance models in the world in to two paradigms, without the prejudice of the specific peculiarities of the different jurisdictions. These are the Anglo-Saxon (American) and the European (or German-Japanese) models.[41]

The Anglo- American model of Corporate Governance is largely known as the "Shareholder Model" or "Shareholders Capitalisms".[42] The model is named so owing to the fact that it contains dispersed shareholders who provide the bulk of the financing to large public firms.[43] This model of corporate governance is largely prevalent in such jurisdiction as the United States of America, United Kingdom, Canada, Australia and New Zealand. Companies in these Jurisdictions are mainly directed by management teams that are constrained by Boards of directors. Besides, in such Jurisdictions as in the United State, other organs such as outside directors, private watchdog entities and government authorities are deployed and made use of to closely check the management activities.[44] It's because of this specific focus on the outsider investors that the model is sometimes labeled as an "outsider system".[45]

Conceptually, shareholders' model of corporate governance is associated with the agency theory.[46] The major concern under shareholders' model of governance is to maximize

[40] Id, P.38-40

[41] A. Zattoni, *The Structure of Corporate Groups: The Italian Case*, Corporate Governance - An International Review, Vol. 7, (1999), p. 38-48.

[42] Neil Fligstein and Jennifer Choo, *Law and Corporate Governance*, California: University of California, (2005), P. 70

[43] Ibid

[44] Ibid

[45] Zelalem Fekadu, *Shareholder or Stakeholder Model of Corporate Governance: Which One Should Ethiopia Choose?* (2016, unpublished, School of Law, Addis Ababa University), *P. 29.*

[46] Gerard Charreaux, *Corporate Governance Theories: From Micro Theories to National Systems Theories,* (2004), JEL Classification: G300; P500, p.6. (Cited In: "Alemayehu Yismaw- *Merits and Demerits of Introducing Non-shareholder Directors in the Governance of Ethiopian Share Companies (*2014)", Note 177

shareholders' wealth through allocative, productive and dynamic efficiency of a corporation.[47] The theoretical underpinning for this assertion is the inviolability of private ownership of companies which states that companies are the extension of their owners, so much so that corporate governance must reflect shareholders ownership in terms of both means and end. To this end, it must be owned by the shareholders and run in the interests of the same.[48]

Accordingly, the exclusive rights entrusted to the shareholders under this model of governance goes to the extent of determining how and for what purposes the companies' property may be used as well as the right to determine companies' priorities and profits that may be generated.[49] It's this pursuit of shareholders' interests that a certain writer called Friedman described it as "*there is one and only one social responsibility of business- to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud"*.[50]

To sum up, the forgoing discussion depicts that shareholders model of corporate governance puts a strong emphasis on the results achieved by companies and security of their shareholders, plausibly disregarding or at least, paying lesser importance to the long-term business development thereof, which makes the model susceptible to the fierce criticism for lack of strategic development plan.[51]

As pointed above, the other model of corporate governance is the so called the German-Japanese model. It's also known as stakeholder model. The share companies in those jurisdictions have large stock shareholders, often comprised of founding families, such as banks, insurance companies or other financial institutions who own the bulk of the shares therein.[52] The model stood on the notion that companies are social entities that comprise of various constituencies, and

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[47] Maria Maher and Thomas Andersson, *Corporate Governance: Effects on firm Performance and Economic Growth*, (Organization for Economic Co-operation and Development, 1999), p. 6

[48] Alemayehu Yismaw, Supra Note 46, Note 180

[49] Id, P.33

[50] Ibid

[51] Supra Note 45, P.30

[52] Prof. Dr. Jean J. du Plessis, et al, *German Corporate Governance in International and European Context*, Berlin: (Springer-Verlag Berlin Heidelberg, 2007), p. 119

that the corporate governance system needs to be designed in such a way to integrate the interests of all the stakeholders.[53]

Accordingly, it primarily focuses on social responsibility of firms and considers the whole society as stakeholders, within which shareholders are taken as one of the sets of stakeholders.[54] In line with this conception, the proponents of this model assert that all stakeholders' shall be given equal treatment and that any stakeholder group shall not receive preferential treatment over the other.[55] In addition, the advocators of this model opine that the objective of firms shall not be bound only within the ambit of making of profits to shareholders; but rather, shall be broader enough to encompass the objectives of providing social services and securing job for employees, quality services and products for customers, and welfare to the society.[56] And the primary role of the managers, according to this model, shall not be pursuing the interests of the shareholders only; but to pursue interests that care for the interests of others involved in the activities of companies.[57]

Finally, it's imperative to note that the Stakeholders model of corporate governance, unlike that of shareholders model, is characterized by the salient feature that it's "two-tier" or "dualistic" Board model. The two tier Board model is particularly familiar in Germany as having the management Board and supervisory Board with separate governance mandate.[58] Accordingly, the management Board is in charge of the day-to day functions of a corporation whereas the Supervisory Board is charged with providing advices for the management Board.[59]

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[53] Daniel K. Saint and Aseem Nath Tripathi, *The Shareholder and Stakeholder Theories of Corporate Purpose,* (available at: www.knowledgeworkz.com/samatvam/newsletter/, last accessed on July, 2020.

[54] Alberto Chilosi and Mirellla Damiani, *Stakeholders vs Shareholders in Corporate Governance*, Munich Personal RePEc Archive, (2007), P.2

[55] Donna Card Charron, *Stockholders and Stakeholder: The Battle for Control of the Corporation*,(Available at: www.researchgate.net/publication/ , Last accessed August 2020)

[56] E. Merrick Dodd, *For Whom are Corporate Managers trustee?,* Harvard Law Review, Vol. XLV, No.7 (1932)(Accessed from: www.jstor.org/stable/133169)

[57] Elena F. Perez Carrillo, *Corporate Governance : Shareholders' Interests' and Other Stakeholders' Interests'*, Corporate Ownership and Control, Vol.4, No.4(2007), p.99

[58] Assefa Aregay, Supra Note 34, P. 11

[59] Ibid

2.2. The Notion of Corporate Resolutions

It’s generally understood that a corporation duly established in accordance with the relevant laws is a legal entity that is separate and distinct from its owners. As such, it enjoys most of the rights and responsibilities that individuals possess. [60] One of the peculiar and fundamental features of a corporation is its limited liability; or so to say, shareholders may take part in the profits through dividends and stock appropriation without being personally liable for the company's debts. [61] In fact, shareholders do not have direct decision making authority over their company; rather the day to day activities of the company falls in the hands of a group of individuals. One instance where by shareholders express their interest in the corporation and its governance is by purchasing share(s) and gain votes in accordance with the number of shares bought.[62]

The shareholders exercise these rights largely at the forum set as “Shareholders General Meetings”. Typically it’s this formal decisions of the company conceded over at this meeting that constitute company resolutions or minutes of meetings. Company resolutions are needed whenever there is a formal decision to be made. And when so doing, corporate entities record their decisions by means of corporate resolutions. The kind of resolution needed as well as certain related matters are largely determined by the Company laws of a given Jurisdiction along with the company’s constitutive documents, i.e. Memorandum and Articles of Association. Whatever the kind may be, it should be noted that corporate resolution is a powerful document and an instruments of high significance for good corporate governance on the one hand and the protection of its directors as well as shareholders on the other hand.[63] Its significance, in particular, is vivid where the resolution is subsequently challenged.[64]

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[60] Mohammed Rezal salim, *Corporate insolvency: separate legal personality and directors’ duties to creditors*, Universiti Teknologi MARA Law Review, Vol. 2, No. 90, 2004, p.1

[61] Ibid

[62] Soo Young Hong, *Curb Your Enthusiasm: The Rise of Hedge Fund Activist Shareholders and the Duty Of Loyalty*, Fordham Journal of Corporate & Financial Law, Vol. 24, No.1(2019), P.196

[63] Available at https://www.tamimi.com/law-update-articles/corporate-resolution-an-instrument-of-high-significance-to-corporate-entities/(last accessed August 15, 2020)

[64] Id

2.2.1 Organs Entitled to Pass Corporate Resolutions

Company resolutions pre-suppose the power to do so. And the power to pass resolutions is something that relates to company governance. Company governance stands on the notion of the traditional separation of ownership and management in corporate law. The legal regime governing corporate governance differs across jurisdictions depending on the kind and nature of corporations. In Germany for instance, the principal bodies of corporate governance in Stock Corporations, which are equivalent to share companies in Ethiopia are the Supervisory Board, the Management Board and the General Shareholders Meeting.[65] On the other hand, the primary organs of corporate governance in Ethiopia are the shareholders meetings, the Board of Directors and auditors.[66] The typical feature that distinguishes the German Stock Corporate Governance from its counterpart in Ethiopia is that it follows Two-Tier Board Model; namely, the management Board and the supervisory Board.[67]

The management Board is the body that is bestowed with the management of the day to day activities of the corporation whereas the primary duty of advisory Board is to advise and oversee the Board of managers.[68] Even if the notion of separation of shareholders and the managements of corporation tells us that the shareholders do not have direct control over their corporation, the shareholders do still play decisive roles in the corporate governance. For instance, in the German Stock Corporation, where certain transaction requires the approval of the shareholders, the advisory Board of Stock Corporation is duty bound to secure the same.[69] Hence it follows that the shareholders of Stock Corporation have determinant decision making power to approve or disprove the named transaction. Likewise; as to be shown later in detail, shareholders meetings are the most important organ of management in Ethiopia besides Board of Directors and auditors.

Generally speaking, the short glance in to different literature depicts that despite the difference on the nature of participation, voting process as well as other particular instances, in almost all

[65] Id P.4

[66] Commercial Code Supra Note 1, Article 347

[67] Assefa Aregay, Supra Note 34, P.10

[68] Ibid

[69] Id, P.20

jurisdictions shareholders take part in the decision making process of their corporations. Yet, the role of shareholders in the management and governance of a company as well as their legal capacity to influence or become involved in matters of company management has been a matter of debate for centuries. The answer to these questions also varies across jurisdictions. For instance, in Australian corporate law, the answer lays on the case authority called *Cuninghame principles.*[70] *Cuninghame* was an appeal case decided by the English Court in *Automatic Self-Cleansing Filter Syndicate Co Ltd vs Cuninghame* ('*Cuninghame*') in 1906.[71] In the case, the court asserted that in the common situation where the constitution of a company vests the power to manage the company in the directors, the shareholders shall not seek to exercise that power, particularly through the mechanism of resolutions passed at the company's general meeting.[72]

The principle of *Cuninghame* has been applied by the courts in the United Kingdom and Australia for more than a century.[73] Despite the range of the descriptors and the manner in which the various proscriptions are explained, the closer examination of the court cases decided after *Cuninghame* depicts that they tend to restrict shareholders involvement in the management of the company thereby protecting the role of director of the company.[74]

To sum up, from the above brief discussion of the different jurisdiction it can be concluded that corporate resolution can be made via two major corporate bodies; namely, the Board of Directors and the Shareholders.

2.2.2. Types of Corporate Resolutions

As mentioned somewhere in our aforementioned discussions, company resolutions are needed whenever there is a formal decision to be made. In addition, it's also noted that the kind of resolution as well as the governing organ to do the same is determined by the respective company laws of a given jurisdiction and corporate constitutive documents. Largely, corporate

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[70] Stephen Bottomley**,** *Rethinking the law on Shareholder-Initiated Resolutions at Company General Meetings,* Melbourne University Law Review, Vol.43(2019), P. 93

[71] Ibid

[72] Ibid

[73] Id, P.94

[74] Id, P.99-100

management remains in the hands of the two governing bodies; namely Board of Directors and the shareholders meetings. Hence, whoever may make, it follows that corporate resolutions are the formal declarations of major decisions made by a corporate entity. The nature of resolution to be passed depends on the governing organ legally empowered to make the resolution. So, when a formal decision is made by the shareholders, it is named as a shareholders resolution, whereas it's known as a Board resolution when passed by the Board of Directors.

But one thing that needs to be vivid is that the types of corporate resolutions are quite distinct from the types of shareholders meetings. The former one primarily relates with the specific requirements needed to approve certain corporate acts whereas the later one is concerned with the manner and frequency within which shareholders may meet.[75] Literature on the area show that corporate resolutions are majorly of three types. These are ordinary resolutions, extra-ordinary (special) resolutions) and unanimous resolutions.[76] Ordinary resolutions in the majority of cases are used for routine changes, which needs a simple majority of shareholders or directors who cast a vote in the meeting to agree or disagree on the proposed decision.[77]

On the other hand, Special (extra-ordinary) resolutions are needed for more important decisions or those affecting the constitution of a company. In the majority of cases these require at least 75% of the shareholders or directors to agree on the proposed decision.[78] One peculiar feature of this resolution is that unlike ordinary resolutions, votes are determined by the number of shares given to each shareholder (as opposed to the number of shareholders).[79] Finally, unanimous resolutions are those resolutions that require the unanimous (100%) votes of the directors or the shareholders present at the meeting.[80]

[75] Andreas Cahn and David C.Donald, *Comparative commercial law, text and cases on the laws governing corporation in Germany, the UK and the USA*, Cambridge University press, P.549

[76] available at www.LEGALVISION.com.au (last accessed on August 17 2020)

[77] Ibid

[78] Ibid

[79] Ibid

[80] Ibid

The Commercial Code of Ethiopian generally categorizes shareholders meetings in to general and special meetings.[81] The Code further classifies general meeting in to ordinary and extra ordinary meetings which comprises shareholders of all class.[82] The special meeting recognized by the Commercial Code is meant to denote the meetings of the shareholders of a specific class.[83] Nonetheless, no special class shareholders have, to date been recognized in practice in Ethiopia. The two types of meetings are separately regulated under the Commercial Code from Article 417-418 and Article 422-425 respectively. The closer examination of the provisions Articles 417-418 of the Commercial Code reveals that ordinary general shareholders meetings itself is further categorized in to ordinary general annual meetings and other ordinary general meetings may be held if necessary.[84]

Ordinary annual general meeting is that one conducted within four months from the end of each financial year annually, notwithstanding the possibility to extend the four month time to six months by the articles of association.[85] Yet, there is still the possibility to convene ordinary general meetings within a year other than the annual one. It's this interim ordinary general meeting that's recognized under Article 418(3) of the Commercial Code. The typical example of this interim meeting may be one that could be called by the Board of Directors or officer of the court.[86]

Majority and quorum required in each of the above shareholders' meeting vary with the types of meeting.[87] From the readings of Article 421 through 425 of the Commercial Code, one can understand that the Code also recognized the above discussed three types of resolutions. Resolutions at ordinary meetings require a simple majority of those who are presented and cast voting, which we called it "ordinary resolution" above.[88] On the other hand, decisions at Extra-

[81] Commercial Code, Supra Note 1, Article 390

[82] Ibid, Article 390(2)

[83] Ibid, Article 390(3)

[84] Ibid, Article 418

[85] Ibid Article 418(1,2)

[86] Fekadu Petros, የኢትዮጵያ የኩባንያ ህግ, Far East Trading Pvt.Ltd.C, (2008), P.218

[87] Commercial Code, Supra Note 1, Article 421 and 425

[88] Ibid Article 421(3)

ordinary meetings require special as well as unanimous resolutions. Special resolutions in Extra-ordinary meetings are one that requires a two-third majority vote.[89] Generally, this resolution is required to make all resolutions other than the resolutions to change the nationality of the company or to require shareholders to increase their investment in the company. Conversely, the resolutions to change the nationality of the company or to require shareholders to increase their investment in the company require 100% attendance and unanimous vote of all shares having voting rights.[90]

To sum up, literature evidences that there are generally three accepted types of resolution across jurisdictions. As discussed above, the generally accepted resolution types are also given the same footage, mutatis mutandis, under the Commercial Code of Ethiopia.

2.3. Nullification of Corporate Resolutions

2.3.1. The Notion of Nullification of Corporate Resolutions

In the foregoing discussion it's shown that corporate resolutions are meant to declare the basic decisions made at the forum of either the shareholders or the Board of Directors. The corporate resolutions made in accordance with the law and the respective corporate's constitutive documents are assumed to be the decision of corporate and shall be binding on all shareholders of the corporations.[91] Yet, the resolutions are still susceptible to different challenges from different bodies. The name given and the notion of these challenges vary across jurisdictions. France, Germany and Italy call it Nullification[92] whereas Romania[93] and Belgium[94] named it Annulment. Turkey on the other hand uses both Nullification and Annulment with distinct

[89] Ibid Article 425(1)

[90] Ibid Article 425(2)

[91] Avtar Sing, *Company Law*, (14th ed. Estern Book Company, Lucknow, 2004) P.364

[92] Pierre Henri Conca, Luca Enriques and Martin Gelter, *Constraining Dominant Shareholders' Self-Dealing: The legal Framework in France, Germany and Italy*, European Company and Financial Law Review,(October 2007), P.513-518.

[93] Ibid to Supra Note 19

[94] Alexia Bertrand and Arnaud Coibion, *Shareholder Suits against Directors of a Company, against other shareholders and against the Company itself under the Belgian Law*, European Company and Finance Law Review, Vol.6, No.2 and 3,(2009), P.298

grounds and effect thereof.[95] Whatever the name may be, the significant point behind the claim is to obtain setting aside of decisions adopted by the corporate organ of company, more specifically the general meetings of shareholders and the Board of Directors.

2.3.2. Party/Parties Entitled to Challenge Corporate Resolutions

The legal remedies recognized to challenge the decision of corporate organs of companies, are of course, pointless without specifying the parties entitled to do so as well as the procedures to be adhered to. Literature evidences that, in almost all jurisdictions touched upon in this paper,[96] recognition for nullification of corporate resolutions has become fashionable. Yet, the persons/organs bestowed with the right to challenge corporate decisions vary across jurisdictions based on the kind of resolution to be contested.

The difference may be treated from substantive as well as procedural aspects. From substantive point of view, some jurisdictions recognized the right to challenge both shareholders' as well as Board of Directors' resolutions whereas others recognized the right only in relation to shareholders' resolutions. For instance, in France, shareholders have been given the right to request the nullification of a company's Board resolutions, where self-dealing transaction was made without obtaining ex ante authorization from the Board of Directors.[97] Whereas in Italy such right is reserved only for dissenting directors' and Board of auditors'. Individual shareholders are given the right to challenge the validity of the Board resolution only based on infringement the resolution brought on their individual rights.[98] The Belgian Commercial Code, despite the fact that the Code only covers grounds for the annulment of general meetings, is admitted to make both general meetings and Board of Directors' resolution susceptible to contention.[99] In Germany, on the other hand, shareholders are not permitted to challenge Board resolutions.[100]

[95] Id to Supra Note 14

[96] See the discussion made regarding the trends of Turkey, Romania, France, Germany, and Italy above

[97] Supra Note 92, P.515

[98] Id, P.515-516

[99] Supra Note 94, p.298

[100] Ibid

The practice in Turkey shows that shareholders, Board of Directors, each member of Board of Directors and any interested person is entitled to take action against shareholders resolutions.[101] In fact, the persons entitled to these challenges vary depending on the nature of the claim.[102] In the same fashion Romania empowered shareholders, company's directors, company's censors and any person justifying an interest in the annulment of the resolution to take court action.[103] On the other hand, Belgium recognized any interested party; or so to say, any person holding a legitimate and personal interest thereto to request the annulment of resolutions of the shareholders' general meeting as well as other corporate organ resolutions.[104]

From procedural point of view, the requirements as well as the procedures to be adhered to also differ across jurisdictions. For instance, Italy requires a minimum ownership threshold for challenges of shareholders' resolutions (at least 5% share for non-listed and 0.1% share for listed companies respectively).[105] Germany, on the other hand resorted to what they call "Clearance Procedure"[106] than putting a minimum ownership threshold for challenges of shareholders' resolutions.[107] In France, however, there are no restrictions for standing to sue either of.[108]

2.3.3. Grounds for Nullification of Corporate Resolution

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[101] Supra Note 14

[102] See the discussion on page 9 of this paper. There it was pointed out that Turkish Commercial Code categorized the right to challenge corporate resolution in to two. Accordingly, the right to quest for annulment of the resolution is reserved only for shareholders, board of directors and each member of board of directors whereas declaratory action for the nullity general assembly resolution can be made by any interested.

[103] See the discussion under page 10 of this paper. In Romania, General shareholders meeting are subjected to absolute and relative nullity. Shareholders may evoke both absolute and relative nullity while other third parties are only entitled to claim for absolute nullity of the resolutions.

[104] Supra Note 94, P.300

[105] Supra Note 92, P.513-514.

[106] "Clearance Procedure" (*Freigabeverfahren*), is meant to say the mechanisms which allows the court to allow an increase or reduction of capital or an agreement to enter a contractual group to proceed if the suit is patently baseless, or if the alleged violations of the law are less onerous to the firm and its shareholders than the disadvantage of the transaction grounding to a halt.(taken from Supra note 130, P.514)

[107] Ibid

[108] Ibid

Needless to repeat, corporate resolutions constitute basic corporate decisions. The decisions may be either that are directly related to the very existence of the corporation or with the major business activities of the corporation. So, in principle such basic corporate decisions need to be recognized and dully obeyed by the shareholders as well as any party showing interest thereon. But one needs to be realistic that some time there might be an instance where by corporate resolutions in one way or another may not be in line with the shareholders' or other third parties interest. The recognition for nullification of corporate resolutions is, thus, meant to address and balance between these two competing interests; or to put it otherwise, corporate interest on the one hand and shareholders interest on the other.[109]

Nevertheless, an unwarranted recognition of the right to claim for nullification of corporate resolution may entail an abuse of right which may possibly end in the collapse of a corporation. To tackle this at the outset, certain coping mechanism needs to be designed. One such mechanism is the pre-recognition and settlement of the grounds on which a given corporate resolution could be contested.

Despite the recognition for nullification of corporate resolution, literature evidences that the recognized grounds vary across jurisdictions. In France, Germany and Italy the grounds that are recognized to result in nullification of shareholders' resolutions are where the resolution violate either the company's bylaws or the law.[110] There, violations of the voting behavior set for by the rules or standards of conduct for the shareholders (i.e. duty of loyalty in Germany and abuse of majority rights in France and Italy) are considered to constitute violation of law.[111]

Particularly in France, nullity lawsuits are deemed to be exceptional measures taken to set aside irregularities committed up on incorporation of the company or during its terms.[112] The irregularities committed in due course of the business activity of the corporation are deemed to

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[109] Bernard Grelon, *Shareholders' lawsuits against the management of a company and its shareholders under French law*, European Company and Financial Law Review, vol.6, No. 2and 3(2009), P. 206

Note here that the question of third party interest is deliberately omitted, as there is no uniform understanding and recognition of third party's right to claim for nullification of corporate resolution across jurisdiction.

[110] Supra Note 92, P.513

[111] Ibid

[112] Supra Note 109, P.210

be either breach of the mandatory provision of the Commercial Code or breach of an agreement called “Regulated”.[113] The notion “Regulated” under French Commercial Code is a contract signed in between companies with a Board of Directors or companies with the management and supervisory Board.[114]

Under the Belgian Commercial Code, the general bases for annulment of general meetings’ resolutions are enumerated under Article 64 of the BCC. The full text of which reads as follows:[115]

1. *If a formal irregularity has influenced the decision;*
2. *In the event of breach of the rules relating to the organization of the meetings or in the event of non-compliance with the agenda of the meeting when the breach is tainted with fraudulent intent;*
3. *In the event of an ultra vires or of a misuse of powers*
4. *If a shareholder votes with shares of which the voting rights have been suspended; and*
5. *In the absence of the required reports of the Board of Directors.*

In Turkey, the grounds for annulment and nullity of general assembly resolutions are different. The general grounds for annulments are where the resolution is contrary to the TCC, or the articles of association or good faith rule.[116] On the other hand, the reasons which amount to nullity of the resolutions are where it’s either contrary to the mandatory rules, public order or morality.[117] One important aspect of the Turkish as well as Belgian Commercial Code in relation to annulment of general meetings’ resolution is that they both contain what’s called an “influence rule”.[118] An influence rule is the notion that the general assembly would not have taken the

[113] Ibid

[114] Ibid

[115] Supra Note 94, .299

[116] Supra Note 14, Art.445

[117] Supra Note 14, Art.447

[118] Turkish Commercial Code(Supra Note 14, Art.445) and Belgian Commercial Code (Supra Note 62, Art.64)

resolution had the subject breach not existed.[119] Thus, for shareholders to be able to challenge the resolution they are required to prove that the breach had influence on the outcome of the resolution.

Finally, in Romania, the grounds for annulment of the general meetings' of the shareholder vary depending on the kind of annulment claimed.[120] The grounds for absolute nullity are breach of norms securing public order and general interests whereas that of relative nullity are breach of norms securing the personal interests of the company's shareholders, which are mostly related to the shareholders' will or capacity.[121]

2.3.4. Effects of Nullification of Corporate Resolutions

As the term itself clearly indicate the general effect of setting aside corporate resolution; be it annulment or nullity, is making the respective resolution not to entail any result as if it has not been made. Despite the similarity as regards the general effect thereof, the closer examination of the afore-discussed jurisdictions reveals that there are still specific effects to be treated separately. In Turkey, where an action for annulment is taken on the general assembly's resolution the court, after having received the opinions of the members of Board of Directors, may suspend the execution of the resolution contested.[122] The final decision rendered as regards the annulment or the nullity of the general assembly resolution is binding on all shareholders and the company.[123] Accordingly, once the decision is made the Board of Directors is duty bound to

[119] Att. Ecem Cetinyilmaz, *Annulment of General Assembly Resolutions of the Joint Stock Companies and the influence rule*, (2015), (available at http://www.erdem-erdem.av.tr/publications/law-post/annulment-of-general-assembly-resolutions-of-joint-stock-companies-and-the-influence-rule/) (last accessed June 2020)

[120] Supra Note 19, P.185

[121] Ibid

[122] Gözde Gürünlü, Turkey: *Annulment and Nullity of the General Assembly Resolutions According to the New Turkish Commercial Code No. 6102*, (13 September 2013) (available at https://www.mondaq.com/Author/1050014/Koyuncuo287lu-Kksal-Avukatl305k-Brosu-Gzde-Grnl?article_id=262636 (last accessed June 2020)

[123] Ibid

register the court decision with the relevant trade registry office and publish it on the company's website.[124]

In Romania, irrespective of whether the nullity is absolute or relative, the effects of the nullity are all the same; or so to say, invalidation of the resolution. Here too, the decision is binding on all shareholders and the company. As such shareholders must be restored to their position prior to the adoption of the resolution. In addition, the company's management, as well as the company itself shall abstain from enforcing the resolution. Finally, any registrations before the trade registry based on the resolution shall be erased.[125]

In France, Germany and Italy any resolution rendered in violation of the company's bylaws or the law results in nullification of the concerned resolution.[126] Belgium, in the same fashion, recognized the possible effect thereof to be annulment of the resolution.[127] One peculiar feature of the Belgian Commercial Code is that it allows the claimant to quest for the suspension of the challenged resolution before instituting claim of annulment in so far as the plaintiff can demonstrate what is called "serious reasons".[128] Belgian courts have developed case laws that the notion "serious reasons" meant to include an irregularity in the convening notice or in the decision making process where such irregularities have had an influence on the resolution.[129]

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[124] Ibid

[125] Supra Note 19, P.187

[126] Supra Note 92, P.513

[127] Supra Note 94, P.299

[128] Id, P.300

[129] Ibid

CHAPTER THREE

NULLIFICATION OF COMPANY RESOLUTIONS IN ETHIOPIA: THE LAW AND THE PRACTICE

The discussions under the preceding chapters familiarized readers with the general notions and related experiences of relatively developed jurisdictions as regards company resolutions and their nullifications. In those countries, it's settled that despite few jurisdiction-related specific differences, the general concept of corporate resolutions as well as the legal framework for nullification of the same can be said is nearly the same. Where the discussion so required, the legal framework governing the two notions in the Ethiopian legal system has been given short glance too. Based on these general foundations, the discussions in the subsequent topics along with sub-topics there under are totally devoted to discussing the legal framework governing the topics under discussion in the Ethiopian Commercial Code in more detail and analyzing the practical applications thereof.

3.1. Company Resolutions and their Nullifications According to the Ethiopian Commercial Code

3.1.1. Mandate to pass Company Resolutions

Corporate resolutions generally denote formal decisions of a company at the various meetings of the respective corporate governing bodies of a given company, particularly at shareholders' meetings. The prevalent general opinion reveals that corporate resolution is directly related to and goes in line with corporate governance structure of a company. It's likely because of this inherent intertwining between the two that the Commercial Code of Ethiopia regulates the matter of company resolutions under the section dealing with corporate governance in general and that of shareholders' meetings in particular.[130] The Commercial Code recognizes three statutory governance bodies; namely, the General meeting of shareholders, Board of Directors and managers.[131] These three governance organs are empowered with their own respective governance powers and duties in accordance with which each may pass decisions deemed pertinent.

[130] Commercial Code, Supra Note 1, Book two, Title six, Chapter Four, from Article 347 to 428

[131] Id, Art.347

Nevertheless, all decisions made by the three governing bodies do not constitute company resolutions. Corporate resolution is all about the decisions relating to corporate governance matters that are beyond the normal day to day running of the business. The theories as well as the practical aspects of corporate governance evidence that the main governance matters largely remain in the hands of the two governing bodies; namely Board of Directors and the shareholders'. The Commercial Code of Ethiopia is not an exception to this reality. The closer examination of the sections of the Commercial Code dealing with corporate governance and management reveal that the major corporate governance role is given to shareholders' and the Board of Directors' whereas the managers are entrusted with the mandate to run the day to day activities of a company.

It's these two governing bodies; namely, the shareholders' meetings and the Board of Directors' that are mandated to pass company resolutions in the Commercial Code of Ethiopia. The general matters of Board of Directors' governance roles are dealt with in Book II, Title IV, Chapter IV, Section I, from Article 347 to 367 of the Commercial Code, and specifically the matter of Board of Directors' resolutions is regulated by Article 356 and 358 of the same Code.

3.1.2. Legal Framework for Nullification of Company Resolutions

Basically matters of nullification of company resolutions are regulated in Article 416 of the Commercial Code. Sub Article 1 of this provision lays down the general principle that resolution adopted by a meeting in accordance with the law and company constitutive documents shall bind all members, including those who were not present or dissented. Yet, resolutions adopted contrary to the law or company constitutive documents are susceptible to challenge before the court of law. It's the challenging measure taken to set aside company resolutions and the resultant decision of a court of law to nullify a company resolution that is technically called "Nullification of Company Resolutions".

The legal provision meant to govern nullification of company resolutions under the Commercial Code can be treated from substantive as well as procedural aspects. From substantive point of view, the provision provides the grounds for nullification and the party/parties entitled to institute/submit a petition for nullification. Accordingly, Article 416(2) of the Commercial Code clearly provides three grounds that may trigger nullification of company resolutions. These are where the resolution; 1/ violates the law, 2/ contrary to the memorandum of association or 3/ contrary to Articles of association of a company. Yet, the extent of such violation, particularly the violation of law is not clearly provided for. Or to put it in a more clear way, whether the violation of the law or the constitutive documents includes the legality of the subject matter of the meetings or limited to the manner and conducts of the meeting is not clearly provided for. Some writers tend to limit the violation only to the manner and conduct of the meetings. For instance, Fekadu Petros, in his book named "የኢትዮጵያ የኩባንያ ሕግ" asserted that the violation described under Article 416(2) of the Commercial Code relates only to the manner of calling and conduct of shareholders' general meetings.[132]

In lee way of this, the author raised a question as to whether the majority shareholders in properly called and conducted meetings can deliberately pass a resolution that apparently suppresses the rights of the minority shareholders. As a reflection on the question, the author tends to see the situation in light of the statute of limitation provided under the article for taking an action for nullity. Accordingly, because of the fact that the nature of the right mentioned is something that relate with the inherent shareholder right prescribed under Article 389 of the Commercial Code, it follows that the time provided is not sufficient enough for an action to safeguard such rights and that the matters shall be treated differently.[133] It's based on this founding premise that the author end up with the aforementioned assertion.

Nevertheless, the writer of this thesis has the conviction that the extent of the violation of the law and the constitutive documents prescribed in Article 416(2) of the Commercial Code shall not be limited and related only with the manner and conducts of the meetings. Rather, the violation of the law in particular shall be understood and interpreted in such a way to include the legality of the objects of the resolutions; such as where the objects of the resolution contravene the general policy matters. It's so, for one reason that the legal framework governing the notion of nullity of company resolution under the Commercial Code is only regulated under Article 416. And that there's no reason and legal way to hold few nullity actions by virtue of this article while

[132] Supra Note 86, P.214
[133] Ibid, P.214-215

preserving some others to be treated under other legal regimes. Here, the writer opts to touch upon the matter of minority shareholders' right raised by the author named above as a simple example and put it in an interrogation. If the said minority shareholders' are precluded from taking actions of nullity in Article 416, owing to the fact that there's no violations of the law or the constitutive documents as regards the manner of calling and conducting of the meetings that deliberately suppressed their rights, what other legal actions could they take to restore and safeguard the violated rights? In addition, let us say the general meeting passed a resolution that's apparently inconsistent with the general policy matters or that clearly violates provisions of other legal regimes such as the Criminal Code. Then, what other tenable legal measures than questing for the nullity of the resolution could be taken so as to restore the situation?

Basically, closer examinations of different literature as well as related practices in other jurisdictions discussed in the preceding chapters evidence that the recognition of actions for nullity of company resolutions is the principal defense weapon that minority shareholders' are entitled to counter the abuse of majority shareholders. Majority rights may be abused without violation of the rules set for calling and conduct of meetings by simply violating the voting behavior set for by the rules or standards of conduct for the shareholders', which potentially leads to adopting resolutions without considering the minority shareholder's input.

Besides, the practices in relatively developed jurisdictions show that they assumed the probability of adopting resolutions which may contravene the mandatory rules, public order or morality and general policy matters. In such a situation, the jurisdiction entitled any party showing an interest to take an action for nullity, the probable effect of which is setting aside the resolution as void ab intio.

The stand reflected in Commercial Code of Ethiopia is not an exception to this. The entire readings of the provisions of the Code, particularly the section dealing with corporate governance, reveals that it has much to do with the issue of minority shareholders' and accorded some sorts of protections to them. Few of such protections include the cumulative voting or proportional representation provided under Article 352, the principle of one share one voted accorded under Article 407, the pre-emptive rights of the shareholders to buy the newly issued shares in proportion to their shareholding provided under Article 345(4) and 470(1) and the right to take actions against shareholders' general meeting resolutions provided under Article 416(2-

5). The majority shareholders' may adopt resolutions that supersede these principal rights under the cover and pretext of casting majority vote at the meeting. In such a situation, the only mechanisms via which minority shareholders' rights are safeguarded would be by instituting nullification petition before an independent court. The case of a resolution that contravenes mandatory rules, public order and the general policy matters shall be understood in similar fashion and given the same footage.

Of course, the sufficiency or otherwise of three months period provided for nullity action under Article 416(2) of the Commercial Code needs proper consideration. But, such consideration need not preclude the aggrieved shareholder or any party showing an interest from taking nullity action under Article 416(2) of the Commercial Code. Rather, other alternative legal framework needs to be designed and developed through the machinery of legal interpretations. One such alternative is interpreting the provision of Article 416(2) of the Commercial Code in such a way to make a distinction between the time needed for nullity action based on the violation of the rules for calling and conduct of the meetings and that which is based on the violation of the inherent rights one has as a shareholder or the general policy matters.

Accordingly, Article 1677(1) of the Civil Code of Ethiopia[134] (here after called the "Civil Code") provides that the relevant provisions of the Code dealing with contracts in general shall apply to obligations notwithstanding that they do not arise out of contract. One such general provision of the Code dealing with contract is Article 1845 of the Civil Code which regulates the period of limitations. This Article provides that unless otherwise provided by law, the action for performance of a contract, actions based on the non- performance of a contract and actions for the invalidation of a contract shall be barred if not brought within ten years.

The Commercial Code did not provide for shorter period of time within which an action for nullity of company resolution that supersedes the inherent rights shareholders' can be brought. On the other hand, it looks unjust to ban the exercise of this right within three months period provided under Article 416 of the Commercial Code. So, having regards to the nature and the dimension of the inherent rights of shareholders' and in accordance with the provision of Article

[134] Civil Code of the Empire of Ethiopia ,Negaret Gazeta, Proclamation No.165, of 1960

1677(1) the Civil Code, the statute of period to bring nullity action under the Commercial Code can be made the ten years general time frame provided under Article 1845 of the Civil Code.

The other substantive aspect of the legal regime governing nullity action under the Commercial Code relates to the party/parties entitled to bring the action. In this regard, there's some sort of discrepancy between the Amharic and the English versions of the Code. The Amharic version clearly provides that any party showing an interest thereon; or so to use the words of the version, "… ማናቸውም ባለጥቅም", may bring nullity action. Yet, the English version is not clear as to who may bring an action except recognizing the possibility that the resolution may be challenged.

The 1995 Constitution of the Federal Democratic Republic of Ethiopia,[135] under Article 5(2) stipulates that Amharic shall be the working language of the Federal Government. The matters of Commerce fall under the exclusive legislative jurisdiction of the Federal Government in accordance with Article 55(4) of the Constitution. The existing laws of the country that are not clearly repealed and still in force need to be interpreted and applied in conformity with the Constitution. So, without the prejudice of the subsequent specific discussion on the title, it can be concluded from the wordings of the Amharic version of the Code that any interested party/parties are entitled to bring an action of nullity under the Commercial Code of Ethiopia. And the designation "any party" may include, as the case may be, shareholders, the Board of Directors and each member of the Board, auditors, creditors of the company, and prosecutors (in the interest of the public where the violation relates with mandatory provisions of the law).

On the other hand, the procedural aspect deals with certain requirements and procedures to be fulfilled. In this regard, Article 416(2) only provides for the time frame within which the action for nullity shall be brought. As the discussions under the preceding chapters of this thesis shows the practices in relatively more developed jurisdictions reveal that sort of pre-requirements that need to be met and procedures to be adhered to for taking nullity action.[136] Some of these include complying with the minimum ownership threshold, where the claimant is a shareholder who

[135] The Constitution of the Federal democratic Republic of Ethiopia, Proclamation No.1/1995

[136] Particularly see the discussion under sub-section 2.3.2 of this thesis.

attended the relevant meeting the requirement of casting negative votes and putting dissenting opinions stated in the meeting minutes and the rule of influence.

The Commercial Code does not put any minimum ownership threshold requirements to bring nullity action. Rather, it clearly entitles any party/parties showing an interest thereon, including an owner of one share to bring the action. In light of the theoretical underpinnings of nullity claim, one of which is to safeguard the interests of minority shareholders, the position of the Commercial Code seems to be tenable.

In fact, the Commercial Code did not provide for the requirement of "influence rule" in Article 416. The notion of "Rule of Influence" is dealt with only in Article 409(2) of the Commercial Code which cross refers the effect thereof to Article 416(2) of the same Code. In the former article, it's provided that a resolution prejudicial to the interest of a company, in which a member having conflict of interest takes part and exercised his/her voting right, shall only be set aside on the ground of failure to comply with the rule of conflict of interests set in the Article where it is found that the resolution would not have been adopted had the vote of the member with conflict of interest not existed.

Literature on the theoretical underpinnings of "Influence Rule" reveal that it's a tool against excessive litigation, in the sense that it prevents small minority shareholders from challenging corporate resolution due to small irregularities that only concern themselves.[137]

So, taking a lesson from the literature as regards the importance of the "Influence Rule" particularly in maintaining corporate stability and the concept provided under Article 409(2) of the Commercial Code, the writer is convicted that the "Rule of Influence" has to be a procedural pre-requisite in brining nullity action under Article 416(2) of the Commercial Code.

The last and the most important procedural requirement worth dealing with is the voting role the person bringing the action exhibited in the meeting that adopted the contested resolution. In this regard, the Commercial Code has nothing to offer. Article 416(1) of the Commercial Code provides that properly conducted and adopted company resolution binds all the members, regardless of whether they did not attend the meeting or dissented, in the sense that it conveys

[137] Supra Note 119

the common will of the shareholders aimed to fulfill both their purpose and the company's purpose.

The prime relevance and importance of recognition for the right to bring nullity action against corporate resolution is to provide the legal mechanisms through which shareholders could oppose disagreeable resolutions. If a shareholder attends a meeting and voted in favor of the resolution adopted, there could not be any rational to let him/her contest his/her own decision. Based on this grounding principle, it's imperative to conclude that shareholder who attended the meeting needs to clearly show his opposition to the resolution by casting negative vote and putting his/her dissenting opinions on the minutes of the meeting, to bring nullity action.

The Commercial Code could not be an exception to the above mentioned ground. Hence, the requirement as regards the voting role the person bringing the action exhibited at the meeting that adopted the contested resolution needs to be set as a procedural requirement for nullity action under Article 416 of the Commercial Code.

3.1.3. The Right to Contest Corporate Resolutions

Under the discussion made above regarding the substantive requirements for an action for nullity, it's generally settled that the Commercial Code entitles any party/parties showing an interest to contest corporate resolution. Besides, the preceding discussion on the mandate to pass corporate resolution ended up with the conclusion that the ultimate power rests in the hands of two governing bodies; i.e., the shareholders' and the Board of Directors'. Hence, the subsequent discussions try to look in to the dimensions of the rights accorded to any party/parties showing interest to bring nullity action in light of nature of the corporate resolution and the organ that passed the resolution.

The question as to who can challenge shareholders' general meetings resolution is not as such a headache. Related practices in other jurisdictions exhibit that in almost all jurisdictions discussed; including Ethiopia, the general meeting's resolutions are made susceptible to challenges from various corners.

What's worth discussing here is the case of Board of Director's Resolutions. As can be gathered from the preceding discussion on the organs entitled to challenge corporate resolutions the practice as regards recognizing organs to contest Board Resolution varies across jurisdictions. Some entitle shareholders to challenge Board resolution in certain specified conditions, whereas others maintain the right as belonging only to dissenting members of the Board.[138]

In this respect, the position of the Commercial Code is not clear. The legal regime governing action for nullity under the Code talks only about "Resolutions" in general term. So, to understand the party/parties entitled to challenge resolution of Board of Directors', one needs to look in to the nature and convenience of the meetings of the Board of Directors' that amounts to adoption of a resolution.

Accordingly, whereas the powers of the Board of Directors' emanate from the law, memorandum of association and resolutions of the general assembly, the manner and conduct of Board meetings is largely regulated by the respective constitutive documents of the companies. But, what should be vivid from the outset is that only members of the Board that can attend for the meetings. So, non-Board member shareholders' may not know the date, time and agenda of the meeting as well as whether the tabled agenda is within the ambit of the power accorded to the Board of Directors'. The likely means through which shareholders' could be aware of the agenda tabled for discussion as well as the resolution adopted is on the forum of shareholders' meetings.

In fact, one of the mandates of shareholders' meetings is hearing the business activities reports of the Board of Directors'. In lee way of this, shareholders' have an inherent right to approve or reject the Board of Directors resolutions. In addition, as discussed earlier individual shareholders are entitled to challenge the general meeting's resolutions which may include the one that approves the resolutions of the Board of Directors'. So, if shareholders' are furnished with such multiple forums to contest the Board resolution, there's no need to entitle them to take action for nullity in the meantime of the company's business activity. One likely reason to be mentioned here may be not to disrupt the smooth business running of the company.

Yet, the respective rights of each member of the Board need to be treated differently. As it's members of the Board of Directors' that closely know the regular business activities of the

[138] See the discussion under sub-section 2.3.2 above

company, it seems just to entitle them to object to and challenge any Board resolution that he/she believes violated the law or the constitutive documents.

In line with this view, the writer is convinced that the right accorded to challenge general meetings' resolution vests on any party/parties showing an interest thereon, including each member of Board of Directors', while the right to contest Board resolution rests only on the members of the Board who cast negative vote at the Board meetings.

3.1.4. Effects of Nullification

The rules governing the effects of nullification of company resolutions are contained in Article 416(4-6), and in particular in Sub-Articles 5 and 6 of the same provision. As the provision of Article 416(4) of the Code shows, the primary effect that nullity action results in is the suspension of the resolution until the final verdict on petition for nullity is rendered. Actually, suspension of the resolution is not an automatic effect that petition for nullity bring about. Rather, it's a pro-tempore (temporary) order given up on the satisfaction of certain requirements. In the first place, there has to be a request to that effect from the petitioner. Secondly, the petitioner has to produce good reasons to pray for an order of suspension of the execution of the resolution prior to the rendering of the final verdict over the petition. Next, the directors and auditors shall be heard on the claim.

Regarding the final verdict on nullity petition, as the term "Nullification" is self-explanatory, the probable effect thereof will be setting aside the contested resolution; or to put it otherwise, rendering it not to entail any effect as if it was not made. With this respect, the Amharic version used the term "ፈረሰ", whereas the English version used term "Set aside" to denote the effect of nullification verdict.[139] The expression used in the English version seems not to that problematic as it's more or less proximate to the theoretical notion thereabout.

Yet, what's worth discussing here would be the expression used in the Amharic version. In fact, the term "ፈረሰ" is contractual term largely used in contract laws. The Civil Code of Ethiopia,

[139] Commercial Code, Supra Note 1, Art.416(5)

under the section dealing with "Invalidation and Cancellation of Contracts", [140] equivocally used the term "ፈራሽ" to denote both invalidation and cancellation of contracts. Doctrinal writings on the area reveal that, the notion "Invalidation" and "Cancellation" bear different scenarios and effects particularly in contract law.[141] Nevertheless, a closer examination of the concept expressed in the term "ፈራሽ" under contract laws of Ethiopia depicts that it's likely used to denote "Voidable Contracts".[142] Generally, the effect of voidable Contract is dependent on the will of the party entitled to request for invalidation of the contract. Until such an action arises, the effects of the contract keep on entailing results. It's because of this peculiar feature that sometimes the notion is expressed as "Relative Nullity".[143]

But it should be noted that voidable contract relates with formation defects, which may include, among others defect as to the object of the contract. For a contract to be valid and entail effect, its object, among others shall be lawful and moral.[144] Failure to comply with this object requirement results in making the contract effect less from the beginning; or to use the legal jargon, void *ab initio*.[145] Based on this, it can be concluded that the expression "ፈራሽ" is used to describe both "voidable" and "void ab initio" contracts in the Civil Code.

In relation to this, one thing that needs to be vivid is that even if the term "voidable" and "void ab initio", are largely known and used in contract laws, their concept and effects is not limited to contract law only; rather, apply to all juridical acts.[146] Accordingly, the expression "ፈራሽ" under Article 416(5) of the Commercial Code shall be understood to include both voidable and void ab initio company resolutions, depending on the nature of the alleged violation that the resolution is tainted with. Where the violation of the law or constitutive documents relates to the convocation

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[140] Civil Code, Supra Note 134, Art.1808 to 1818

[141] Tilahun Teshome, *Basic Principles of Ethiopian Contract law*, Federal Supreme Court Research and Publication Department, (1996), P.148

[142] Id, P.151

[143] Ibid

[144] Civil Code, Art.1716

[145] Ibid

[146] Supra Note 141, P.148 and 151

or conduct of the meetings the probable effect of nullity action shall be invalidation of the resolution, having regard to the rule of influence discussed earlier. On the other hand, where the violation relates to mandatory rules of the law, public order or morality the effect shall be verdict of void ab initio, in which case consideration as to the rules of influence may not be necessary.

Article 416(5) provides that the verdict as to the effect of nullity action is binding on all shareholders and the directors are duty bound to take all measures necessary to implement the decision of the court. Nevertheless, the third party rights acquired in good faith while the resolution was effective are recognized and maintained as per the provision of Article 416(6) of the same Code.

3.2. The Practical Handling of Nullification Petitions by Ethiopian Courts: Analysis of Selected Cases rendered by Federal Courts.

Preliminary Remarks:

As already reasoned out under the proposal of this thesis dealing with the scope of the study, the practical analysis will be devoted to selected decided cases by the Federal Courts. To avoid any question that may arise concerning the representativeness of the research, the study specifically deals with cases decided at the regular Appellate and Cassation Benches of the Federal Supreme Court. To this end, in all possible ways, the writer exerted as much effort as possible to access all disposed cases directly related to nullity action in the two benches. However, only seven Cassation Bench, (two of which came from regional High Courts), and two cases submitted to the Federal Supreme Court by way of appeal have been found. The subsequent analysis, therefore, relates to these cases. For proper handling of the topic, the writer opted to make separate treatment of the cases in light of the founding discussions and analytical representations in the preceding chapters.

3.2.1. Case one: Federal Supreme Court Cassation Bench's Decision in File No. 52269

The case between applicants Ato Kedir Haj Husen and Lucy Collage Share Company and respondent Ato Juhar Aliy was decided on Tikimt 17/2003 E.C. The process commenced with the statement of claim the Cassation Respondent instituted at Federal First Instance Court against the Cassation Applicants. Particulars of the claim show that the plaintiff, as a founding member of the second defendant share company (Lucy Collage Sh.co), had paid up Birr 195,000(one Hundred Ninety-Five Thousand Birr) share capital representing the value of 39 shares. Despite these facts, at an ordinary meeting conducted in his absence on 02/13/1997 E.C. the defendants, with intent to cause harm to him, had deliberately reduced and registered in the minutes of the meeting as if he purchased only 10 shares and the paid-up capital is only Birr 50,000(Fifty Thousand) and passed a resolution to that effect. As relief, he sought for nullification of the resolution, and an order to reinstate him to his actual shareholding and paid-up capital as indicated on the share certificates the defendants issued to him.

The Federal First Instance Court, after receiving the defendants' statement of defense and after hearing both sides', pronounced a verdict that set aside the resolution and reinstate the plaintiff back to the shareholding status he had prior to the resolution.

The Cassation Applicants took the case on appeal to the Federal High Court. One prominent ground for an appeal stated that the preliminary objection they raised concerning the statute of limitation provided under Article 416(2) of the Commercial Code was improperly overruled by the lower court; and that as the plaintiff's action for the nullity of the resolution was brought after the lapse of three months, it should have been rejected.

The High Court on its part, after hearing both parties' appeal arguments, reasoned out that the reduction of the plaintiff's shareholdings, as well as the amount of paid-up capital, has factually been proved. A shareholder's right one has as a member of a share company is an inherent right that shall not be reduced against his/her will by the general shareholders' meeting resolutions or by the Board resolutions. As the plaintiff's claim is an objection to the restriction made on his shareholding rights and the relief sought relates with inherent shareholding rights he has as a shareholder, it should not be said that the claim relates only with the nullification of the resolution. As result, the court overruled the objection and affirmed the lower court's decision.

The Cassation Bench, in the file number stated in caption, reasoned out almost in a similar way as the High Court did and affirmed the High Court's interpretation just asserting that claims concerning inherent shareholding right shall not be covered and barred under Article 416(2) of the Commercial Code.

Comment:

It is obvious that the challenged resolution restricted the inherent shareholding right that the Cassation Respondent had as a shareholder. As the High Court unequivocally stated, the relief sought by the respondent directly relates to this inherent shareholding rights and should not be taken as a simple objection made to set aside the resolution. In the preceding discussion made in relation to the scope of application of the statute of limitation provided under Article 416(2) of the Commercial Code, it's settled that the statute of limitation concerning the action for nullity based on the violation of shareholders' inherent right shall be the general ten years provided under Article 1845 of the Civil Code and that the three months period shall be interpreted in such a way to apply only to actions of nullity brought based on the violation of convocation process or conduct of shareholders' meetings.

Even if both the High Court and the Cassation Bench did not provide as to which statute of limitation should apply on claims of nullity based on the violation of inherent shareholders' right, they asserted that the claim shall not be banned with the three months period provided under Article 416(2) of the Commercial Code. In this respect, the interpretation and application made by the two courts can be said is proper and within the spirit of the law.

Nevertheless, the proper message the Cassation Bench wanted to convey with the expression ***"… claims in relation to the inherent shareholding right shall not be covered and barred under Article 416(2) of the Commercial Code"*** needs careful attention. In the majority of court cases decided after this decision, the Cassation Bench's decision is cited as precedent that limits the scope of application of Article 416 only on nullity actions that arise from violations of rules governing convocation processes or conduct of meetings. The writer has a conviction that the trend does not seem proper. This is because of the fact that, as can be seen in subsequent case analysis, few cases decided by the Cassation Bench after this case evidence that there's a tendency to encompass additional grounds of nullity under Article 416(2). So, one had better understand as if the expression is meant to limit only the application of the statute of limitations provided under Article 416(2) of the Commercial Code.

3.2.2. Case Two: Federal Supreme Court Cassation Bench's Decision in File No. 90235

The case was decided between Applicants' Ato Kebede Wolde and 8 other persons and Respondent Sunshine Chemical S.C. on Meskereme 29/2007 E.C. This case also relates to the application of the statute of limitation under Article 416(2). The Cassation Applicants', in the statement of claim dated Miyazia 26th 2004 E.C, instituted a claim at Federal First Instance Court requesting for nullification of shareholders' meeting resolution adopted on Tir 27th, 2004 E.C and Yekatit 11th, 2004 E.C. The grounds for nullity action basically relate to the convocation process and conducts of meetings that passed the challenged resolutions. The Cassation Respondent raised a preliminary objection that the claim was not brought within three months after the adoption of the resolutions and that the claim shall be struck out.

The Court of First Instance maintained the objection and struck out the claim on the ground that while the challenged resolution was adopted on Tir 27th, 2004 E.C and Yekatit 11th, 2004 E.C., the claim of nullity was brought after the lapse of the three months period on Miyazia 29th 2004 E.C. The High Court affirmed this decision.

The Cassation Bench, in the file number stated in caption, entertained the case in light of the legal regime governing the manner of calculation of periods provided under the Civil Code. Accordingly, the Bench asserted that even if the First Instance Court noted as if the applicants' action of nullity was brought on Miyazia 29th, 2004 E.C., the registered documents in the lower court's file show that the claim was brought to the court on Miyazia 26th 2004 E.C. in which case it cannot be said that the claim was brought after the lapse of the three months period. As a result, the Cassation Bench reversed the lowers courts judgments and remands the case to the First Instance Court to hear and decide on the merit of the case.

Comment:

The grounds for the action of nullity relate to the convocation and conduct of the meetings that resulted in the adoption of the contested resolutions. The three months statute of limitations provided under Article 416(2) of the Commercial Code clearly regulates actions of nullity brought based on these grounds. Besides, the calculation of the period shall be conducted in a manner provided under Article 1848 of the Civil Code and reasoned out by the Cassation Bench. Hence, the related practice in this regard shows no disparity from the law.

3.2.3. Case Three: Federal Supreme Court Cassation Bench's Decision in File No. 137340

The case was decided between Applicants' Ato Endalkachew Tesfa and Respondent Tesfa G/selase the Behere Bulga PLC S.C. on Miyazia 03/2009 E.C. The litigation commenced with a statement of claim the Cassation Respondent brought against the Cassation applicant at Federal First Instance Court. The Cassation Applicant, along with his statement of defense, instituted a counterclaim for nullification of the plaintiff's shareholders'' meeting resolution that removed him from the general manager post. The grounds for the alleged nullity action stated that the meeting was not called by the appropriate body entitled to do the same under the Article of association; he was not called to the meeting; the resolution was passed without the fulfillment of the requirements set by the Commercial Code as well as the Article of Association to remove the general manager and to amend the Article of Association; a shareholder representing 50% of the total share of the company did not take part in the meeting; persons who took part in the meeting in the name of this shareholder did not have appropriate power of attorney and that the legitimate agent of the said shareholder is only the nullity claimant.

The Federal First Instance Court rejected the Cassation applicant's nullity claim on the ground that the grounds for nullity claims directly relate with the convocation process and conduct of the meeting and that the convocation, as well as the conduct of the shareholders' meeting, did not exhibit any violation of the law and the constitutive documents. The Federal High Court affirmed the decision.

The Cassation Bench, in the file number stated in caption, entertained the case and affirmed the lower courts' decisions.

Comment:

Violation of the rules governing the convocation process and conduct of the meeting is one noticeable ground that amounts to nullification of company resolution. Whether the rules are violated or not is a matter of fact that needs to be proved with the relevant pieces of evidence. Both the trial court and appellate court, with their judicial power to entertain factual matters, are satisfied that no rules of convocation, as well as the conduct of the meeting, were violated. As the Cassation Bench is mandated to entertain only basic error of laws, it took the factually proven facts and affirmed the lower courts' decision. Hence, the writer does not notice any practical divergence from the laws.

3.2.4. Case Four: Federal Supreme Court Cassation Bench's Decision in File No.142716

The case was between Applicant Hirmata Minch Real Estate S. Company's 25 shareholders' and Respondents' the Company's Board of Directors'. The case commenced with the nullity claim Cassation Applicants' instituted against Cassation Respondents' at Oromia National Regional State Jimma Zone High Court. The claim requested for nullification of the resolution of the 12th shareholders' meeting of the company. Particulars of the claim state various grounds for the nullity of the resolution. Two of which, worth analyzed here are 1/ the shareholder meeting, in violation of the constitutive documents and without sufficiently proving that the defendants' really saved the company from unnecessary expenses worth 38,778, 370.00, adopted the resolution that entitled the defendants to earn 12% of the saved expenses in the form of award. 2/ the shareholder meeting unlawfully removed the 5th plaintiff from the company's membership.

The High Court, after hearing both sides' arguments pronounced a verdict that set aside only part of the resolution that removed the 5th plaintiff from the company's membership. In rejecting the first ground of nullity stated above for analysis, the Court reasoned out that the payment accorded to the defendants in the form of an award is a kind of remuneration that defendants' are legally entitled to receive as per Article 351(1) of the Commercial Code. When such entitlement is adopted by shareholders' meeting, it shall not be brought to the court in accordance with Article 416 of the Commercial Code. The Oromia Supreme Court dismissed Cassation Applicants' appeal without calling the respondents.

The Federal Supreme Court Cassation Bench, in the file number stated in caption, entertained the case and affirmed the lower courts' decisions by four to one majority vote. In so doing, the majority vote reasoned out in two ways. One is that the existence of any violation of the law or company constitutive documents in relation to the convocation and conducts of the meeting is neither claimed nor proved by the applicants. Second, whether the resolution of the shareholders' meeting is against the interest of the company or that of shareholders' has neither been claimed nor proved by the applicants.

Comment:

The Cassation Bench analysis recognized additional grounds for action of nullification of company resolutions. That is "where the resolution of the shareholders' meeting is against the interest of the company or shareholders". This evidences that the grounds of nullity under Article 416(2) of the Commercial Code are not limited to those related to the convocation and conducts of the meeting, which is also the analytical conclusion of this study. So, the way the grounds of nullity action contained under Article 416(2) of the Commercial Code are understood as well as the relative practical application in this case shows no paradox of the law and the practice.

3.2.5. Case Five: Federal Supreme Court Cassation Bench's Decision in File No.152636

The case is decided between Applicant Atenet Trading Sh.C. and Respondents the Company's thirteen Shareholders'. The case was initiated via the statement of claim, dated Meskerem 24th 2006 E.C., Cassation Respondents' instituted against Cassation applicant at Hawassa City High Court for nullification of the shareholders' meeting resolution adopted on Sene 08/2005 E.C. and in 1999 regarding the manner of distribution of the company's Commercial shops among its shareholders; and if this could not possible for the dissolution of the Company.

The High Court set aside the resolution adopted on Sene 08/2005 E.C. Yet, this was reversed by the Federal Supreme Court Cassation Bench and the case was remanded to Hawassa Court to be heard and decided again along with facts that need to be clarified. Accordingly, the High Court entertained the case and set aside both resolutions on the ground that the manner of distribution of commercial shops adopted by both resolutions disregard the interests of majority shareholders'; and that they are designed in such a way to create unfair share distribution differences among the shareholders', which in effect is unjust and against the objectives of the Commercial Code. The decision was affirmed by the appellate as well as the Cassation Bench of the Regional Supreme Court.

The Federal Supreme Court Cassation Bench, in the file number stated in caption, entertained the case and affirmed the lower courts' decisions.

Comment:

The noticeable ground because of which Regional Courts nullify shareholders' meetings resolutions states that the resolutions disregard interests of majority shareholders and that they are unjust. The Cassation Bench unequivocally used the same reasoning and affirmed the lower courts' decisions. This decision too, adds additional grounds of nullity to the one provided for by Article 416(2) of the Commercial Code. So, the decision can be said is one step forward in recognizing and applying the spirit of the law.

3.2.6. Case Six: Federal Supreme Court Cassation Bench's Decision in File No.164553

The case was decided between applicants Civil Work Consultant Engineers' PLC and two other Persons (Manager and Deputy Manager of the PLC) and Respondents Ato Ermiyas Abate and two other persons. The case was initiated with a statement of claim Cassation Respondents' instituted against Cassation Applicants and one other person at the Federal First Instance Court. The claim requests for nullification of shareholders' meeting resolution adopted on Tahisas 27/2007 E.C. regarding the remuneration of the second and third Cassation Applicants'(Manager and Deputy Manager of the PLC respectively) and business area of the company. The ground for the action of nullity stated that the manager and deputy manager of the PLC, being the party having conflict of interest and in violation of the rules governing conflict of interest cast vote and decided on their matters.

The court set aside the resolution passed on remuneration on the ground that the manager and deputy manager being members having a conflict of interest took part and exercised their voting rights. The Federal High Court rejected the appeal brought by both parties and affirmed the lower court's decision.

The Federal Cassation Bench, on the file number mentioned in caption, entertained the case and affirmed the lower court's decisions. In so doing, the bench raised the issue of influence rule and entertained in light of the minimum shareholders' vote set by the Commercial Code and constitutive documents to adopt the resolution. And in conclusion, it criticized the adoption of the resolution on the ground that it violated not only the rules governing conflict of interests but also those rules governing the minimum shareholders' vote required to adopt the resolution.

Comment:

Violation of the rules governing conflict of interest is one ground that amounts to the nullity of company resolution. Yet, the influence the alleged violation has on the adoption of the resolution needs to be carefully examined. The Cassation Bench raised this in its reasoning. Hence, the related practice in this regard can be said is within the realm of the law.

3.2.7. Case Seven: Federal Supreme Court Cassation Bench's Decision in File No.166953

The case was between Applicants Ato Said Adem and Ato Teshome Aweke vs Addis Abeba Commercial Center Merkato Share Company. The case began with a statement of claim Cassation Applicants filed against Cassation Respondent at the Federal First Instance Court. The claim requested for nullification of extra-ordinary shareholders' meetings resolution adopted on Ginbot 08/2007 E.C. Particulars of the claim stated the grounds for nullity as follow: the previously adopted shareholders' meeting resolution accorded priority right to lease one additional commercial shop from the company's commercial complex building to each shareholder. As per this resolution, the majority of shareholders made use of their rights. However, an extra-ordinary shareholders' meeting was called and in violation of the existing shareholders' resolution, the law, and the constitutive documents, passed a resolution revoking their priority rights.

The Federal First Instance Court rejected the nullity claim on the ground that the conduct of the meeting did not exhibit any violation of the law as well as the constitutive documents.

The Federal High Court reversed the lower court's decision and set aside the resolution. In so doing, the Court reasoned out that the latter resolution disregarded the right to equality and equitable utilization of the building among shareholders. The Federal Supreme Court's Appellate Bench in its turn reversed the High Court's decision and affirmed the Federal First Instance Court's decision.

The Federal Supreme Court Cassation Bench, in the file number stated in caption, entertained the case and affirmed the Supreme Court's decision. In so doing, the Bench added that the priority right adopted by the shareholders' meeting's resolution was accorded to majority shareholders only and not to all shareholders including the applicants'. In the absence of this, the applicants' claim as if the resolution of extraordinary meeting waved their priority right is baseless. Whether the resolution violates the law or the constitutive documents was not factually proved in the lower Courts. Hence, there is no reason to nullify the resolution.

Comment:

The Cassation Bench asserted that the priority right accorded to shareholders' in the shareholders' meeting resolution did not include the applicants. Because of which they can't claim nullity of the resolution on the ground that it revoked their rights. The writer wants to stress on the message that the contrary reading of the assertion conveys and put it in an interrogation. What if the fact stated by the Cassation Bench had been proved? Would it amount to a ground for nullity action as per article 416(2) of the Commercial Code? If not, why the Cassation Bench concerned with the legality of the objects of the resolution instead of just entertaining the case only in light of the convocation and conduct of the meeting?

Based on the question raised above, the writer is convinced that the assertion of the Cassation Bench implies that the legality of the object of the meeting could be one ground for nullity action. In this respect, the practice in the Federal Supreme Court Cassation Bench can be said is within the demesnes of the law analytically reached on in the preceding discussions.

3.2.8. Case Eight: Federal Supreme Court Appellate Bench's Decision in File No.170831

The case was decided between Appellants' Ato Jemal Bediru and three other persons (Shareholders' of Nehekir Real Estate Mall Sh.C) and Respondents Ato Umer Biru and three other Persons (Members of Board of Director of the Company). The case began with a statement of claim the appellants instituted against the respondents at the Federal First Instance Court. The claim requested for nullification of Board resolution adopted on Miyazia 20/2009 E.C. on the ground that it was adopted in violation of the law and the constitutive documents. The particular grounds of nullity stated, among others; 1/ the plaintiffs were not notified of and called upon to attend the meeting. 2/ Matters of increasing shareholders' capital investments in the company as well as the issuance of shares to the public were made agenda items and resolutions passed on them in their absence. 3/ the spouse of the Chairperson of the Board without buying shares and paying the share price thereof has been registered as a shareholder.

The Federal First Instance Court, after hearing both sides' arguments, nullified the resolution based on all the alleged grounds for nullity stated in the Statement of Claim. The Federal High Court reversed this decision on the ground that the Board's Resolution was passed within the power conferred on the Board of Directors' by the Article of Association of the company.

The Federal Supreme Court Appellate Bench, in the file number stated in the caption, modified the lower courts' decisions and nullified only part of the resolution that recognized the spouse of the Chairperson of the Board as a shareholder and affirmed the rest. In so doing the court reasoned out: 1/ As the action for nullity was brought against Board resolution and as appellants are not members of the Board of Directors' they can't claim nullity of the resolution on the ground of convocation process. 2/ The Board's resolution is only an executive resolution passed to execute the previously adopted shareholders' meeting resolution decided in relation to increasing capital investment of the company and issuance of shares to the public. The court criticized the High Court's assertion (the assertion that the business conduct of deciding on matters of increasing capital investment of the company and issuance of shares to the public fall within the power accorded to the Board of Directors by the article of association) for violating the mandatory provision of Article 425(2(b)) of the Commercial Code that vest the same power in the meeting of shareholders.

Comments:

As can be vividly understood from the case, action for nullity of the Board's resolution was brought by shareholders. The Supreme Court recognized this allegation and partially nullified the Board's resolution. Yet, in the preceding discussion made as regards who may challenge Board resolution, the writer has analytically drawn the conclusion that the right to contest Board resolution shall only be reserved to members of the Board who voted against at Board's meetings. So, the Supreme Court's decision seems to be against this conclusion.

3.2.9. Case Nine: Federal Supreme Court Appellate Bench's Decision in File No.175530

The case was decided between Appellant Ato Yohanes Samuel vs Respondents' Gesha Village Coffee Estate and two other persons. The case began with the filing of a statement of claim, dated Tikimt 13/2010 E.C., the applicant instituted against the respondents at the Federal High

Court. The claim requested for nullification of the resolution adopted at the shareholders meeting on Yekatit 21/2008 E.C. One of the grounds for the claim of nullity stated that the shareholders' meeting adopted the resolution for the allocation of shares to an outsider in violation of his pre-emptive right to allotment of cash share issued by way of an increase of capital in proportion to his shareholding.

The defendants raised a preliminary objection that the claim shall be barred by the statute of limitations as it was not brought within three months of the adoption of the resolution per Article 416(2) of the Commercial Code.

The Federal High Court, after hearing both sides' arguments on the issue of preliminary objection, rejected the claim on the ground that it was not brought within three months of the adoption of the contested resolution. The applicant took an appeal to the Supreme Court. One ground of the appeal stated that his claim relates to the inherent pre-emptive right he has as a shareholder. The Federal Supreme Court Cassation Bench in F.No.52269 gave a binding legal interpretation to the effect that claim relating to inherent shareholding rights shall not be barred by the statute of limitation contained in Article 416(2) of the Commercial Code. So, in light of the binding interpretation his claim should not have been rejected.

The Federal Supreme Court Appellate Bench, in the file number noted above, entertained the case and affirmed the High Court's decision. In so doing, the court reasoned out that the said Cassation Bench's precedent relates to the actually established shareholding right one has as a shareholder while the applicant's claim relates with undue priority right to buy the newly issued shares. The Federal Supreme Court Cassation decision shall be precedent on the subsequent cases only where there exist the same fact and same question of law as between the two cases in accordance with Proclamation 454/2005, Article 2(1). Because of this, the said Cassation Bench decision is not relevant to the applicant's claim.

Comment:

The binding interpretation given in Cassation F.No.52269 relates to the inherent rights one has as a shareholder. One such inherent shareholder’s right includes the pre-emptive right of subscription of a new cash share in proportion to the number of share one held as per the provision of Article 389(2), 345(4), and 470(1) of the Commercial Code. The applicant's claim is directly related to the violation of this pre-emptive right accorded to him by the law. If that is the case, in accordance with the analytical conclusion reached on above and the binding interpretation given by the Cassation Bench, the statute of limitation contained in Article 416(2) of the Commercial Code should not have been applied to the applicant's claim. In this regard, the way the two courts' understood and entertained the case can be said is beyond the realm of the law.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

The legal regime governing the rules of nullification of company resolutions are contained in Article 416 of the Commercial Code. These rules can best be treated from substantive as well as procedural requirements set for actions for nullity. From the substantive point of view, the provision laid down the grounds for nullification and the party/parties entitled to institute claim for nullification. One noticeable ground of nullity provided is where the resolution is contrary to the law, Memorandum of association or Articles of association.

The general understanding as to the extent of the violation of the law and the constitutive documents tends to limit the violation only on matters of the convocation and the conduct of the meeting. Yet, it should not be limited to that, rather the violation of the law in particular shall be understood and interpreted in such a way to include the legality of the objects of the resolutions; such as where the objects of the resolution contravene mandatory rules, public order or morality and the general policy matters. As regards the substantive requirements as to who may challenge company resolution, the Commercial Code unequivocally entitles any party/parties showing an interest to contest corporate resolution. The expression “any part” may include, as the case may be shareholders, the Board of Directors and each member of the Board, auditors, creditors of the company, and prosecutors. Nevertheless, the right to contest Board resolution shall only be accorded to the members of the Board who cast negative vote on the Board’s meetings.

From the procedural requirements, the Commercial Code clearly provides only the time frame within which the action for nullity could be taken. Yet, it shall be understood and interpreted to include the requirements of influence rule and the voting role the claimant exhibited in the meeting that adopted the contested resolution. That is to say, where the claimant is that attended the meeting he/she needs to clearly show his/her opposition to the resolution by casting negative votes and putting his/her dissenting opinions on the minutes of the meeting.

As regards the practical handling of nullity cases, the analysis of certain selected Federal court cases show that the practice in understanding the scope of application of grounds of nullification of company resolutions in general can be said is within the analytical demesnes of the law. Yet in few decided court cases, the practice as regards who may challenge the Board resolution as well as the scope of application of the rules governing the statute of limitation under Article 416(2) of the Commercial Code depict series divergence from the analytical spirit of the law. With this respect, court case eight and nine analyzed above can be cited as indicators.

4.2. Recommendations

In light of the stated grounding conclusions, the writer would like to recommend the following few points.

- The grounds for nullification of Company Resolution contained in Article 416(2) of the Commercial Code shall have to be understood and interpreted in such way that in includes the legality of the objects of the challenged resolution;
- Having regard to the multiple conveyance alternatives the shareholders' have to contest and reject the resolution of Board of Directors' and not to disrupt the smooth business running of a company in the meantime, the right to challenge Board resolution shall only be reserved for members of the Board who casted negative on the Board meeting,
- Having regard to the importance the "Influence Rule" has, particularly on maintaining corporate stability and the concept provided under Article 409(2) of the Commercial Code, the "Rule of Influence" needs to be set as a procedural pre-requisite in taking nullity action by virtue of Article 416(2) of the Commercial Code. In addition to this, where the claimant of nullity action is one that attended a meeting which passed the contested resolution, the right to challenge the resolution shall be maintained for those who voted against the resolution and had their voting "No" registered in the minutes of the meeting.
- The rule governing statute of limitation contained in Article 416(2) of the Commercial Code shall be understood and interpreted in such way to govern only nullity action taken as a result of violation of the law or constitutive documents as regards the convocation and conducts of the meeting.
- Where the claim of nullification of Company resolution arises from the violation of the law or the constitutive documents other than those relating to the convocation and

conducts of the meeting, general period of limitation provided for in Article 1845 of the Civil Code shall be applied to bring nullity action under the Commercial Code.

- The forthcoming Commercial Code should take in to consideration the controversy surrounding the application of the provision of Article 416(2) of the Commercial Code and the Article has to be amended accordingly.

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Annexes

1. Federal Supreme Court Cassation Bench's Decision in File No. 52269 and Federal High Court Decision in File No. 04026

2. Federal Supreme Court Cassation Bench's Decision in File No. 90235

3. Federal Supreme Court Cassation Bench's Decision in File No. 137340

4. Federal Supreme Court Cassation Bench's Decision in File No.142716

5. Federal Supreme Court Cassation Bench's Decision in File No.152636

6. Federal Supreme Court Cassation Bench's Decision in File No.164553

7. Federal Supreme Court Cassation Bench's Decision in File No.166953

8. Federal Supreme Court Appellate Bench's Decision in File No.170831

9. Federal Supreme Court Appellate Bench's Decision in File No.175530