DÜNDAR SIR
LAW FIRM

BRIEF NOTE ON
ANNULMENT OF SHAREHOLDERS MEETING'S RESOLUTIONS

In this brief note, we will summarize the annulment process of general assembly (or shareholders meeting's) resolutions in joint stock companies ("**JSC**") (*Anonim Şirket or A.Ş. in Turkish*) incorporated under Turkish Commercial Code No. 6102 ("**TCC**").

1. General Assembly Meetings under the TCC

In accordance with the TCC, a JSC basically has 2 mandatory organs, namely **(i)** the general assembly, which is the decision-making body composed of the shareholders, and **(ii)** the board of directors ("**BoD**"), which is the executive and representation body, whose members are appointed by the general assembly. Pursuant to Article 409 of the TCC, the general assembly convenes **(i)** ordinarily once a year within three (3) months from the end of each fiscal year or **(ii)** anytime deemed necessary (referred as extraordinary general assembly meetings under the TCC).

General assembly usually has resolutions on matters related to the relevant fiscal year, the evaluation of the annual report and financial statements, capital increase, dividend distribution, release of the BoD members, selection of an independent auditor (if applicable) and the appointment of a new BoD member to replace an expiring or resigning BoD member.

Since this Brief Note aims to explain the annulment processes of general assembly resolutions, it is important to highlight that whether the general assembly is ordinary or extraordinary has no bearing on the annulment process of general assembly resolutions.

2. Annulment of the General Assembly Resolutions

2.1. Reasons for Annulment

The Article 445 of the TCC defines the reasons for the annulment of the general assembly resolutions as resolutions that are "*contrary to the provisions of the law or the articles of association and especially the rule of good faith*". At first glance, this description seems too wide. To elaborate and exemplify this description:

- **A breach of the law** means a breach of provisions of the TCC (i.e. breach of the provision of TCC regulating pre-emptive rights of the shareholders),
- **A breach of the articles of association** means a breach of provision of the articles of association (i.e. a breach of a provision of articles of association regulating the privileged shares), and
- **A breach of the rule of good faith** does not come directly from TCC; it must be determined by the court in each case. A standard example would be the failure to distribute any profit at all in a JSC that regularly makes a profit.

2.2. Parties who may Request Annulment

Under Article 446 of the TCC, **(i)** shareholders who attended the general assembly meeting voted against the resolution, and recorded his opposition in the minutes, **(ii)** shareholders who (irrespective of their attendance or opposition) claim that the call for the meeting was irregular, that the announcement of the agenda was irregular, that persons who were not entitled to attend the general assembly attended and voted, that their voting rights were unfairly restricted, and that these irregularities were instrumental in the adoption of the resolution, **(iii)** the BoD, and **(iv)** each

individual BoD member - provided that the execution of the resolutions would result in personal liability - may file a lawsuit for annulment of the general assembly resolution.

2.3. Other mechanisms for the invalidation of a general assembly resolution

It should be noted that annulment is not the sole mechanism of objection to the general assembly resolutions. Turkish law also regulates **(i)** nullity of the general assembly resolutions and **(ii)** absence of the general assembly resolutions. Under Article 447 of the TCC, nullity is the lack of validity of the decision. For instance, the general assembly resolutions limiting the shareholder's right to obtain information are considered null. Absence, on the other hand, means that a legal act is deemed to have never been born. For instance, a general assembly resolution that does not comply with the quorum required in TCC is considered absent.

3. Lawsuit Process for the Annulment

The lawsuit for the annulment of a general assembly resolution must be filed before the commercial courts, where the company headquarters is located, within three months from the date of the resolution. The lawsuit is a declaratory action *(tespit davası in Turkish)*, whose aim is to determine its annulment, nullity or absence before the Turkish courts. Additionally, in accordance with the majority view in doctrine and case-law, general assembly annulment cases are deemed as not susceptible to mediation.

Even if a general assembly resolution may be invalidated by nullity or absence as well, in practice attorneys follow the annulment procedure, and request all three from the courts. Therefore, even though some are not reasons for annulment (but nullity or absence), annulment proceedings usually involve issues such as **(i)** the procedure for convening the general assembly **(ii)** quorums for meetings and resolutions **(iii)** distribution of profits **(iv)** release of BoD members.

It is also common in practice for attorneys to bring an annulment claim against all resolutions in a general assembly meeting, even though only one or more of the resolutions in a general assembly meeting may be subject to annulment. This method may be particularly useful in the annulment of ordinary general assembly resolutions. Indeed, there is an organic link between some resolutions resolved in ordinary general meetings, and in some instances the annulment of one resolution may affect the other resolution(s) resolved (i.e., an incorrect and misleading annual activity report prepared by the BoD may affect the release of the same BoD members).

Since the lawsuit is a declaratory action without monetary value, under Turkish procedural law, it is possible to file both in a first-degree appeal *(istinaf in Turkish)* then in a second-degree appeal *(temyiz in Turkish)* to the higher courts, against the decisions of the court of first instance.

Finally, the lawsuit lasts for close to a year in the first instance court alone. Therefore, it is necessary to wait several years for a final judgment in these lawsuits. As a result, injunction orders are often requested from the courts, which are rarely granted (as our case law experiences) after the BoD members are heard before the court under Article 449 of the TCC.

Should you have any inquiries regarding this brief note, please do not hesitate to contact us.

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