TARAS SHEVCHENKO NATIONAL UNIVERSITY OF KYIV
FACULTY OF LAW
CIVIL LAW DEPARTMENT

MYKOLAS ROMERIS UNIVERSITY
MYKOLAS ROMERIS LAW SCHOOL
INSTITUTE OF PRIVATE LAW

DMYTRO MATVIEIENKO
Private law

SHAREHOLDERS' AGREEMENTS IN COMPANY LAW OF CONTINENTAL LAW AND COMMON LAW COUNTRIES

Master thesis

Supervisors:

Virginius Bite
Doctor of Juridical Sciences, Professor
of the Institute of Private Law at Mykolas Romeris Law School,
Mykolas Romeris University

Ivan Romashchenko
Candidate of Juridical Sciences, Associate Professor
of the Civil Law Department of the Law Faculty of
Taras Shevchenko National University of Kyiv

Vilnius – Kyiv, 2020

TABLE OF CONTENTS

INTRODUCTION…………………………………………………………………………………………,,,,. 4

1. GENESIS OF SHAREHOLDERS' AGREEMENTS………………………………………………...8

1.1. Genesis of Shareholders' Agreements in Common Law Countries ……………………................8

1.2. Genesis of Shareholders' Agreements in Continental Law countries……………………………………………………………………………………......13

2. RATIO BETWEEN SHAREHOLDERS' AGREEMENTS, ARTICLES OF ASSOCIATION AND MANDATORY RULES OF LAW…………………..19

2.1. Theoretical Aspects of the Ratio……………………………………………..………………19

2.2. Legal Status of Shareholders' Agreement in Common law Countries……………………………………………………………………………………..23

2.3. Legal Status of Shareholders' Agreement in Continental law Countries………………………………………………………...……………………………..29

3. TYPES of SHAREHOLDERS' AGREEMENTS……………………..34

3.1. Shareholders' Control Agreements…………………………………………………………..35

3.2. Shareholders' Agreements on Voting Rights………………………………..……..…………...38

3.2.1. Voting Agreements……………………………………………………………………………38

3.2.2. Voting Trusts………………………………………………..……………………….......42

3.2.3. Agreements on the Transfer of Voting Rights……………………………………..………42

3.4. Shareholders' Agreements on the Transfer of Shares……………………………………………..44

3.4.1. Agreements on Limitations of the Transferability of Shares……………………………………44

3.4.2. Agreements on the Deadlock Resolution…………...47

4. ENFORCEMENT OF SHAREHOLDERS' AGREEMENTS………………………………………50

4.1. Enforcement of Shareholders' Agreements in Common Law Countries…………………………………………………...…...……………………………50

4.2. Enforcement of Shareholders' Agreements in Continental Law Countries……………………………………………………………..………………………...52

5. MANDATORY REQUIREMENTS ON FORM AND CONFIDENTIALITY ...…..……………...59

5.1. Conclusion and Termination of Shareholders' Agreements……………………………….………59

5.2. Confidentiality of Shareholders' Agreements…………………………………..………………62

5.2.1 Confidentiality of Shareholders' Agreements in Common Law Countries…………………………………………………….....……………………….…..…62

5.2.1 Confidentiality of Shareholders' Agreements in Continental Law Countries…………………………………………………………………..……………..……..64

CONCLUSION…………………………………………………………..……………..……..68

RECOMMENDATIONS……………………………………………………………………..…70
LIST OF BIBLIOGRAPHY..73
ABSTRACT..80
SUMMARY...81
HONESTY DECLARATION...83

INTRODUCTION

Shareholders' agreement is a unique legal instrument that lies between contract and corporate law. While the subject matters of the shareholder' agreement are covered by corporate law, the specifics of concluding, amendment, and termination of shareholders' agreements are subject to the general terms of contract law. There are different approaches employed in legal families under the considerations. In common law jurisdiction there is a type of shareholders' agreements which are concluded under Company Act 2006 or section 7.32 of Modern Business Corporation Act which are regarded as a separate source of regulation or can serve as a ground for amendment of the articles. Continental jurisdictions do not provide such opportunities for shareholders.

It is **relevant** in this regard to research the practice of the application and regulation of shareholders' agreements in common and continental law jurisdictions, it gives an opportunity both to understand the legal nature of shareholders' agreements and to highlight the common and differing approaches used within these legal families to the determination of the legal nature of articles of association, to the concept of "public policy", corporate conflict of interest, to the legal nature of the resolution of the general meeting of shareholders and others.

The theoretical basis of the thesis is formed by the works of such authors as Paulius Miliauskas[1], Dmitry Stepanov, Vadim Vogel, Hans-Joachim Schramm[2], Sebastian Mock, Kristian Csach, Bohumil Havel[3], Michael Variushins[4].

The doctoral dissertation of Paulius Miliauskas "*Company law aspects of shareholders' agreements in listed companies*" is a comprehensive research in which the author, in addition to the theoretical part of the dissertation, analyses a significant number of real examples of shareholder' agreements concluded in listed companies. The author's point is to consider shareholders' agreements as an effective tool to mitigate corporate conflict of interest, which can be applied to the solution of agency

---

1 Miliauskas, Paulius. "Company law aspects of shareholders' agreements in listed companies." Doctoral dissertation, Vilnius University, Ghent University, 2014. http://talpykla.elaba.lt/elaba-fedora/objects/elaba:2121038/datastreams/MAIN/content.

2 Stepanov, Dmitriy, Vadim Vogel and Hans-Joachim Schramm. "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation". *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 22-69.

3 Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018). http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

4 Варюшин, Сергей М. "Гражданско-правовое регулирование корпоравтивных договоров: сравнительный анализ." диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015.

problems. The analysis was based on data from jurisdictions such as Lithuania, Great Britain, and Belgium.

In the dissertation of Michael Variushin "*Гражданско-правовое регулирование корпоравтивных договоров: сравнительный анализ*", there is provided an analysis of shareholders' agreements in a large number of jurisdictions. The author makes numerous recommendations to improve the legislation of Russia, based on the experience of other jurisdictions. It should be noted that the author has done a very qualitative analysis of the genesis of shareholders' agreements in both systems of law.

The next scientific work to highlight is "*International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis".* The main authors of this e-book are Sebastian Mock, Kristian Csach, Bohumil Havel.This e-book can be divided into two parts, in the first the articles are presented, which are devoted to certain aspects of regulation and legal nature of the agreements.

Among these papers, I would like to mention the article "*Shareholders' Agreements between Corporate and Contract Law*", written in co-authorship by Sebastian Mock, Kristian Csach, Bohumil Havel. The authors provided a deep analysis of the nature of shareholders' agreements in continental jurisdictions. Also, it is worth noting that the authors pointed out that the personal nature of the obligations imposed by shareholders' agreements, allows for the establishment of provisions in shareholders' agreement that, at the first glance, should be null and void as, since they directly contradict some specified rules of law.

The second part of this e-book contains national reports, which are dedicated to certain jurisdictions, among which I would like to mention the report on the UK, authored by Rafal Zakrzewski, the report on Germany written by Sebastian Mock, and reports on the USA and Ukraine, authored by Wulf A. Kaal and Anna Babych, respectively.

It is also necessary to note the paper of Dmitry Stepanov, Vadim Vogel, and Hans-Joachim Schramm "*Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation*", in which the authors carried out an in-depth comparative analysis of approaches to the regulation of shareholders' agreements in Russia and Germany. The authors not only analyze the current doctrine but also analyze key court decisions.

During the research, the author had analysed the jurisprudence and provisions of the law of such jurisdictions as the UK, the USA, Germany, France, the Republic of Lithuania, and Ukraine.

The United States of America and the United Kingdom were chosen because these jurisdictions are key to the common law system, in this jurisdictions shareholders' agreements first appeared, and are commonly used. Germany was chosen because it is a key jurisdiction in the Germanic subsystem of law,

and local doctrine on the shareholder' agreements is well developed and propose some unique solutions. France is a key jurisdiction of the Napoleonic subsystem of law. Inclusion of the Republic of Lithuania in the list of jurisdictions under consideration was due to the fact that the law of that state contained novelties within the continental system of law. Ukraine was chosen because the author, in addition to the main objective of the thesis, want to elaborate some recommendations to the legislation of the most familiar to him jurisdiction. In addition, the EU directives on the issues under the considerations were also examined.

Deep characteristic of shareholders' agreements on the basis of such criteria as the legal nature, purpose, and method of execution is the **scientific novelty** of the thesis.

The **practical significance** of the study is explained by the fact that the author made a comprehensive analysis of doctrine, jurisprudence, and legislation, which could be used as a theoretical basis for scientific research, drafting of a shareholders' agreement, and be of high interest for students, legal practitioners, legislators, and courts. Also, the author has made recommendations to amend certain aspects of regulation of shareholders' agreements in Ukraine.

The **aim** of the master thesis is to identify major differences and similarities between ordinary shareholders' agreements, which have contractual nature, and shareholders' agreements which can serve as a separate source of the regulation in the company or amend the articles of association.

The main **objectives** of the thesis are:

1. To establish the peculiarities of the genesis of the regulation of shareholders' agreements in common law and civil law jurisdictions.
2. To define the legal nature and possible subject matter of shareholder' agreements.
3. To define the types of shareholders' agreements and their main classification criteria.
4. To establish the main methods of protection and execution of shareholders' agreements.
5. To define the regime of confidentiality of shareholder' agreements.

The **defended statements** of the thesis are:

1. The shareholders' agreements which are concluded under section 7.32 of the MBCA or sections 29-30 of Company Act 2006 are subject to the same restrictions established in the mandatory law requirements as the articles. Other shareholders' agreements in both systems of law are valid, provided that the rights of the third persons are not violated.
2. The performance of the allocated type of shareholders' agreements concluded in common law countries takes place immediately after the adoption, unlike the other agreements, which can be enforced by "specific performance" in case of non-performance.

3. Shareholders' agreements which are concluded under section 7.32 of the MBCA or sections 29-30 of Company Act 2006 are subject to the same disclosure requirements as the articles of association.

During the research, the author applied the following methods: the **comparative** method was used in order to define differences in the legal nature of shareholders` agreements based on a comparison of law and jurisprudence in common-law and continental-law jurisdictions. The **historical** method was used during the research on the first attempts of shareholders' in both continental and common systems of law to conclude shareholders' agreements, in order to state that the principle of the "freedom of contract" is a ground of the agreements. The **synthesis** method was applied during the research on the regulation of the disclosure of agreements in the continental and common system of law, in order to conclude that type of the company is the main factor determining the scope of application of the provisions on disclosure.

The thesis is divided into five chapters.

The I chapter is devoted to the genesis of shareholdersto the genes. In this chapter, the main stages of the recognition of shareholders' agreements are reflected, on the basis of the analysis of the UKIs, USthis chapter, the main stages of the recognition of shareholders' agreements are reflected, on the basis of the analysisshareholdersected, on th in France, the Republic of Lithuania, and Ukraine.

In the II chapter, the author analyses the restrictions imposed on the shareholders' agreements by virtue of the law and legal nature of shareholders' agreements. In addition, the author analyses the possible outcome of the contradiction of shareholders' agreement, the articles and the law.

In the III chapter, the author's characterization of different types of shareholders' agreements is presented. It is possible to allocate shareholders' agreements into types and subtypes according to such criteria as legal nature, way of performance, and objective. The main types allocated in this chapter: "shareholders' control agreements", "shareholders' agreements' on the voting rights", "shareholders' agreements on the transfer of shares".

The IV chapter was devoted to the issues of enforcement and possible consequences of the breach of the agreements. The author analyses various approaches to the execution of shareholder agreements as a whole, and to the separate types of the agreements.

In the last V chapter, there was considered the regime of the confidentiality of shareholders′ agreements in different types of companies and shareholders′ agreements.

CHARTER 1. GENESIS OF SHAREHOLDERS' AGREEMENTS

1.1. Genesis of Shareholders' Agreements in Common law Countries

According to M. Varushin, in the UK in the 1840s, the term "shareholders' agreement" was defined as the foundation agreement of the joint-stock company, which authorizes the size of the authorized capital and the dividends to be distributed annually. Statutory regulation of the principle of limited liability of shareholders in the Limited Liability Act 1855 and the Joint Stock Companies Act 1856 led to a distinction in the English doctrine of the corporate relations between a joint-stock company and the shareholders, regulated by the constituent documents and the relations of shareholders between themselves, which are regulated by the means of a contract [5].

Since the Joint Stock Companies Act 1856 has defined the constituent documents of a joint stock company as, "Memorandum of association", concluded at the establishment of the company, the validity of which was independent, of the change in the composition of shareholders, and "Articles of association", approved by shareholders, if they wanted to change provisions of a model charter, shareholders' agreements have lost its' status as a constituent document and from that moment, shareholders' agreement was found as a contract, regulating relationships between shareholders[6].

There were already agreements between shareholders and a company, in English business practice, the validity of which remained in question until the end of the XX century. In the case of *Re Peveril Gold Mines Ltd.* [1898][7] it was recognized, that an agreement between a company and shareholders, could be reached in terms of establishing a contractual obligation not to liquidate a company, until certain conditions are met[8].

In the case of *Puddephat v. Leith* [1916][9], the Court ordered the shareholder to vote in the manner stipulated in the agreement[10]. It can be said, that from that moment "voting agreements" began

---

[5] Сергей М. Варюшин, "Генезис и эволюция корпоративных договоров в корпоративном праве Англии и США," *Законодательство и экономика,* 9 (2013): 63-65.
[6] Same as 5.
[7] *Re Peveril Gold Mines Ltd*. [1898] 1 Ch 122.
[8] Sealy L. and Worthington S., *Cases and Materials in Company Law* (London: Oxford University Press, 2007), 745-746, quoted in same as 5
[9] *Puddephat v Leith* [1916] 1 Ch. 200.
[10] Mads Andenas, "Shareholders'Agreements, Some EU and English Law Perspectives," *Tsukuba Law Journal,* 1 (2007): 114.

to be enforced, in the UK. Earlier in the case of *Greenwall v Porter* [1902][11], the Court used injunction with regard to the obligations, to abstain from actions provided in the agreement[12].

As for the other types of shareholders' agreements, such as "shareholders' control agreement", "voting trust" and "shareholders' agreements on the transfer of shares", the recognition of these types of agreements has been open for a long time in the UK, as evidenced by controversial courts' practice. Until the judgment in the case of *Northern Counties Securities Ltd. v. Jackson & Steeple Ltd.* [1974][13], the leading position of courts was, that voting rights always follow share ownership[14].

An important step towards the recognition of shareholders' agreements was taken in the case of *Russel v. Northern Bank Development Corporation Ltd.* [1992][15]. The House of Lords drew a distinction between the company's contractual obligation, limiting statutory power of the company to change the articles or increase the share capital, and the contract, under which shareholders would exercise their voting rights on shares in the way to achieve the same result, as those illegal limitations of the statutory powers[16].

In general, shareholders' agreements are not directly regulated by the laws[17], except for the shareholders' agreements which are treated as a constituent document of a company.

With the adoption of the updated Companies Act 2006[18], shareholders' agreement in private companies may contain provisions other than those set out in the articles of association, since a shareholders' agreement, concluded between all shareholders of a company, and deposited with the registration authority, is regarded as one of the constituent documents of a private company, as well as articles of association and resolutions[19].

It is not common to use shareholders' agreements in listed companies, in the UK. According to the study conducted by P. Miliauskas in 2011, it was found that only 6.6 percent of 303 companies listed

---

[11] Greenwall v Porter [1902] 1 Ch. 530.
[12] Suren Gomtsian "The Enforcement of Shareholders' Agreements. Comparative Analysis of English and Russian law" (master thesis, Tilburg Law School, 2012), 17, http://arno.uvt.nl/show.cgi?fid=128481.
[13] Northern Counties Securities, Ltd v Jackson & Steeple, Ltd [1974] 2 All ER 625 = [1974] 1 W.L.R. 1133.
[14] Leon Sealy, "Shareholders' agreement – an endorsement and a warning from the House of Lords," *The Cambridge Law Journal* 51, 03 (1992): 437.
[15] Russell v Northern Bank Development Corp Ltd [1992] 1 WLR 588.
[16] Eliis Ferran, "The Decision of the House of Lords in Russell v. Northern Bank Development Corporation Limited," *Cambridge Law Journal*, 53, 2 (1994): 344-347.
[17] It does not mean, that shareholders' agreements are free of any control, it mean, that the law does not contain any definition or classification of shareholders' agreements.
[18] Section 17, Section 29, Section 30, "Companies Act 2006," legislation.gov.uk, Accessed 4 April 2020, http://www.legislation.gov.uk/ukpga/2006/46/contents.
[19] Section 17, "Companies Act 2006", legislation.gov.uk, Accessed 4 April 2020, http://www.legislation.gov.uk/ukpga/2006/46/contents.

on the London stock exchange, had shareholder agreements, compare to an average of 8 percent in Europe[20].

Shareholders' agreements are useful for minority shareholders, this is especially evident in relation to "private companies", due to the lack of proper tools, for minority shareholders in this type of company, to influence the management of a company[21].

In the USA the first references to shareholders' agreements have been made in the 1850s. In the case of *Brown v. Pacific Mail Steamship Co.* [1867][22], the Federal Court stated, that although it is prohibited to change the mandatory corporate governance standards, shareholders may enter into agreements with each other, to exercise rights to vote on their shares, for example, to vote for certain candidates to board of directors, or to form a "voting trust", which trustees will vote for certain candidates at the general meeting. In the case of *A. Smith v. San Francisco N.P.Ry.Co.* [1897][23], the Court enforced the shareholders' agreement, which requires the parties to vote in accordance with the position previously established by the parties to the agreement, during special pre-meeting assembly[24].

However, the foregoing examples are more likely to be exceptional, in general, shareholders' agreements were met by courts with hostility. The main arguments for the non-recognition of shareholder agreements were: the idea of inadmissibility of separation of voting rights from shares; conflict of interest, which has raised in connection with the presumption, that shareholders should vote in the best interest of a corporation, not in their own interest of the fulfilling of a contractual obligation, during a general meeting of shareholders[25].

In the case of *Hafer v. N.Y.L.E. & W.R.R. Co.* [1885][26], the Court has declared the shareholder agreement null and void, because the agreement did provide the non-shareholder, with the control of the

[20] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 298, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[21] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 253, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[22] Brown v. Pacific Mail Steamship Co. 4 F. Cas. 420 (1867).

[23] Smith v. San Francisco & North Pacific Railway Co., 115 Cal. 584 (1897).

[24] Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров : сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 19.

[25] Molano Leon, "Shareholders' Agreements in Close Corporations and Their Enforcement." *LLM Theses and Essays,* 89 (2006): 11, https://digitalcommons.law.uga.edu/stu_llm/89/.

[26] Hafer v. N.Y.L.E. & W.R.R. Co. 19 Abb. N. C. 456. (1885).

shareholder's voting rights[27]. In the case of *Harvey v. The Linville Improvement Company* [1885] [28], the agreement on the establishment of the voting trust was invalidated by the Court, due to the fact, that voting rights are based on ownership of shares, and cannot be separated from it, even when transferring shares to a trust[29].

As it was noted by Y. Khamidullina, the trend started to change, from the case of *Ringling Bros.-Barnum & Bailey Com. Shows v. Ringling* [1947][30]. The Delaware Court recognized mutual promises, as a sufficient basis for the conclusion of a voting agreement. This decision eliminated the problem of the absence of a transaction basis[31]. According to M. Variushins, the validity of "voting trusts" was established only in 1950, when the Model Business Corporation Act[32] (hereinafter - "MBCA") was published. The MBCA model provisions adopted to some extent by most of the States, contained rules governing proxy voting and the procedure for establishing of voting trusts. After the implementation of the MBCA, "voting trust" and "voting agreements" were recognized in most States. The antagonism of the rule of "inadmissibility of substituting the interests of a corporation with the interests of shareholders" and the practice of conclusion of "shareholders' control agreements", was resolved with the emergence of the "closed corporation", as the legal form of doing business in the 40-60s. XX century[33].

The landmark judgment was given by the Supreme Court of the State of Illinois in the case of *Galler v. Galler* [1964][34]. The Court ruled, that shareholders' agreement may change a structure of management of a close corporation, provided that, it does not violate the direct prohibition set out in the law, rights of creditors are not violated and there are no signs of apparent fraud. The Court

---

[27] Yekaterina Khamidullina, "Application of shareholders' agreements: what lesson can be learned by Kazakhstan from USA." (Short thesis, Central European University, 2016), 13, https://sierra.ceu.edu/search/X?SEARCH=Khamidullina&Da=&Db=&m=v&submit.x=21&submit.y=14.

[28] Harvey v. Linville Improvement Company 24 S.E. 489, 699 (1896).

[29] Charles Burr, "The Validity of Voting Trust Provisions in Recent Railroad Reorganizations," *The American Law Register and Review* 35, 7 (1896): 424.

[30] Ringling Bros.-Barnum & Bailey Com. Shows v. Ringling 53 A.2d 441 (Del. 1947).

[31] Yekaterina Khamidullina, "Application of shareholders' agreements: what lesson can be learned by Kazakhstan from USA." (Short thesis, Central European University, 2016), 14,

[32] Section 7.30, Section 7.31, Section 7.32, "Model Business Corporation Act," americanbar.org, Accessed 15 March 2020, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf

[33] Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров : сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 24.

[34] Galler v. Galler - 32 Ill. 2d 16, 203 N.E.2d 577 (1964).

recognized the right of shareholders to concluded agreements, capable of addressing the subject matters, that could previously only be reflected in articles or a law[35].

A distinctive feature of the regulation of shareholders' agreements in the USA is the regulation of various types of shareholders' agreements in laws of the States. The author will primarily focus on provisions of the MBCA, because it is followed in many States, and the Delaware General Corporation Law[36] (hereinafter "DGCL"), due to the fact that Delaware is the most popular jurisdiction in the United States.

The MBCA explicitly defines "Shareholders' control agreement", "Voting Agreements", "Voting Trust"[37] . Section 6.27 explicitly indicates the possibility of providing for restriction on shares' transfer in the "an agreement amount shareholders" and "an agreement between shareholders and Corporation", specifying another type of shareholders' agreements[38]. In most of the States "voting agreements", "voting trusts", "agreements on limitation of transfer of shares" have been regulated at the statutory level[39]. In some States, shareholder agreements are referred to as "stockholders' agreements" as it is in Delaware[40].

In conclusion, even though common law jurisdictions are known for having been more influenced by the contractual theory of legal person than continental jurisdiction[41], shareholder agreements were not immediately accepted in these countries, they did face numerous obstacles. In the UK, shareholders' agreements, in general, have gained its modern characteristics faster than in the United States. The enforceability of shareholders' agreement was recognized at the beginning of the 20th century. The adoption of the new CA 2006 did not have a strong impact on the formation of this legal instrument, because only one type of shareholders' agreement was specifically addressed in this act, mentioned agreement concluded under sections 29,30 of the Company Act 2006. It is noteworthy that, in fact, the

[35] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 651, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[36] Section 350, Section 218, "Delaware General Corporation Law," delcode.delaware.gov, Accessed 15 March 2020, https://delcode.delaware.gov/title8/c001/.

[37] Sections 7.32,7.31,7.30, "Model Business Corporation Act," americanbar.org, Accessed 15 March 2020, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

[38] Section 6.27 (a), "Model Business Corporation Act," americanbar.org, Accessed 15 March 2020, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

[39] Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров : сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 25.

[40] Ruiz Xavier and Marta Garcia, "IBA Guide on Shareholders' Agreements (Delaware, New York and Florida, USA" 2018: 1, https://www.ibanet.org/Document/Default.aspx?DocumentUid=522B8594-AB41-444C-82B7-3CF6328C9049.

[41] Same as 39, 28.

provisions of the current CA 2006 returned to this type of agreements, the legal status of the constituent documents which the agreements had before the adoption of the Limited Liquidity Company Act 1855 and Joint Stock Companies Act 1856.

In the United States, shareholders' agreements appeared around the same time as in the United Kingdom. In general, their formation was completed in the 1960s, when courts[42] recognized the possibility of concluding shareholders' agreements, which directly acted as a source of regulation of the company's activities. The current regulation of the agreements is characterized by the specific regulation of different types of the agreements.

1.2. Genesis of Shareholders' Agreements in Continental law Countries

Attempts to conclude voting agreements between shareholders of limited liability companies have long been known to Western European law. In 1904, the German *Reichsgericht* (hereinafter "Imperial Court of Justice") [43] , considered one of the first disputes on the validity of shareholders' agreements. In this case, the Court refused to accept the voting agreement, indicating that the existence of such obligations is contrary to the idea of a company as such[44].

According to M. Roth, In 1923, the Imperial Court of Justice[45] decelerated voting agreement null and void, because of its' limiting effect on shareholder's ability to vote and substitution of the company's interests with those of shareholders. This practice was somewhat changed in 1931 by the decision of the Imperial Court of Justice, according to which a shareholders' agreement obliging shareholders to vote on a general meeting of shareholders is valid as an ordinary civil contract, and does not have any effect on the validity of decisions of a general meeting of shareholders. This decision was made in respect of the *Aktiengesellschaft* (hereinafter "German stock corporation"). In the 1960s, the

[42] *Galler v. Galler* - 32 Ill. 2d 16, 203 N.E.2d 577 (1964). as quoted in Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 651, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[43] RG, 16.3.1904, I 491/03, RGZ 57, 205, 208 as quoted in Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 6, http://dx.doi.org/10.2139/ssrn.2234348.

[44] Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров : сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 29.

[45] RG, 7.6.1908, II 632/07, RGZ 69, 134, 137. as quoted in Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 6-7, http://dx.doi.org/10.2139/ssrn.2234348.

validity of shareholders' agreements was confirmed in regard to the *Gesellschaft Mit beschränkter Haftung* (hereinafter "German close corporation")[46].

The most important characteristic of shareholders' agreements in Germany, is the recognition of shareholders' agreements as contracts while creating civil partnerships. This is referred to as "voting agreements", "shareholders' control agreements"[47].

Despite the fact, that shareholders' agreements are common in Germany, there is no specific statutory regulation on this subject in German law. In the scientific environment, different terms are us ed to refer shareholders' agreements: *Gesellschaftervereinbarungen* (shareholders' agreements), *satzun gsergänzende Nebenabreden* (supplementary agreement to the articles of association) or *schuldrechtliche Nebenabrede* (contractual supplementary agreement)[48].

In French business practice and legislation, shareholders' agreements appeared in the 1990's. French legislation hasn't any specific provisions addressing shareholders' agreement. Shareholders' agreements are treated in France as ordinary civil-law contracts binding only their participants, pursuant to the Article 1165 of the *Code civil*[49] (hereinafter "French Civil Code"). Article L. 233-3 of the *Code de commerce*[50] (hereinafter "French Commercial Code") provides for the possibility of establishing control over a company, by concluding an agreement. ArticleL233-11 establishes mandatory requirements, to disclose the fact of the conclusion of shareholders' agreement between shareholders of public companies[51].

Such subjects, as the formation of management bodies, financing of the company, exercise of the voting rights, are among the most common terms and conditions of shareholders' agreements concluded between shareholders of public companies in France. French law, as well as a business

---

[46] Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 5-6, http://dx.doi.org/10.2139/ssrn.2234348.

[47] Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation,". *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 28-29.

[48] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 279, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[49] Article 1165, "French Civil Code", trans-lex.org, Accessed 3 April 2020, https://www.trans-lex.org/601101/_/french-civil-code-2016/.

[50] Article 233-3, "French Commercial Code", legifrance.gouv.fr, Accessed 3 April 2020, https://www.legifrance.gouv.fr/Media/Traductions/English-en/code_commerce_part_L_EN_20130701.

[51] Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров : сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 35.

practice, is known for such of shareholders' agreements as voting agreements and agreements restricting the right to dispose of shares[52].

According to the research, based on the date collected in 2000-2005, a shareholders' agreement was concluded in 43.9% of the listed companies with complex ownership structures[53].

Adopted by the Law No. VIII-1864 of 18.07.2000, Civil Code of the Republic of Lithuania[54] has addressed voting agreements (art. 2.88), and agreement on the transfer of voting rights (art. 2.89). The regulation of the agreements on transfer of voting rights, on the level of Civil Code, was a novel in continental system of law[55].

For a long time, there was no special regulation of shareholders' agreements in Ukraine, they operated solely on the basis of the contract law. *Закон України "Про акціонерні товариства*[56]" (hereinafter "Law on Joint Stock Companies"), adopted in 2008, was the first act in which that issue was addressed. Under those provisions, a shareholders' agreement could be concluded only if articles of a company so provided. The subject matters of such an agreement could be additional responsibilities of shareholders, including the obligation to participate in the general meeting of shareholders.

Until 2008, shareholders' agreements were used quite rarely, due to the conservative practice of courts and conservative regulation, leaving few opportunities for shareholders to regulate activities of a company on their own[57]. Recommendations of the Supreme Court of Ukraine[58], at that time, expressly stated, that the agreements addressing subject matters, already regulated in law or articles of association, should be declared null and void. The recommendations explicitly exclude following subject matters: rules on the formation of a board of directors and supervisory board, the procedure of voting at a general meeting of shareholders, and others. Derogation from the provisions of the law was permitted, only in

---

[52] Frédéric Ichay "IBA Guide on Shareholders' Agreements: France", *Ichay&Mullenex* (2012): 5, https://www.ibanet.org/Document/Default.aspx?DocumentUid=F7E7F4B3-A308-498E-8218-BEB66C0F6B7E.

[53] François Belot, "Shareholder Agreements and Firm Value: Evidence from French Listed Firms", *SSRN Electronic Journal* (January, 2008): 5, http://dx.doi.org/10.2139/ssrn.1282144.

[54] Article 2.88, Article 2.89, "Civil Code of the Republic of Lithuania", https://e-seimas.lrs.lt, Accessed 10 March 2020, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495.

[55] Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров : сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 35-36.

[56] Article 29, Law of Ukraine on "Limited Liability and Additional Liability Companies", https://zakon.rada.gov.ua, Accessed 1 March 2020, https://zakon.rada.gov.ua/laws/show/514-17.

[57] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 623, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[58] Paragraph 9, "Постанова Пленуму Верховного Суду України від 24.10.2008 № 13 "Про практику розгляду судами корпоративних спорів*"*, https://zakon.rada.gov.ua, Accessed 10 March 2020, https://zakon.rada.gov.ua/laws/show/v0013700-08.

cases expressly provided for by the law[59]. Despite the absence of the direct ban on the conclusion of shareholders' agreements in the legal acts, the possibility of conclusion, was almost completely blocked by the Supreme Court of Ukraine.

The mentioned provisions of the Law on Joint Stock Companies, provided that a shareholders' agreement could be concluded, if it is provided for in articles of association. However, as A. Babych notes, these changes have failed to make shareholders' agreements effective, because all those, above-mentioned obstacles continued their existence. At the same time, it was common for shareholders to conclude shareholders' agreements governed by foreign law[60].

Since 2017, the state of affairs began to improve, when the amendments to the Law on Joint Stock Companies and to the *Закон України "Про господарські товариства"* (Law of Ukraine "On Economic companies"[61]) were adopted[62]. *Закон України "Про товариства з обмеженою та додатковою віповідальністю"* (hereinafter "Law on Limited Liability Company") was adopted next year[63]. Special provisions on shareholders' agreements were enacted for a *Товариство з обмеженою відповідальністю* (hereinafter "LLC")[64], a *Приватне акціонерне товариство* (hereinafter "Private JSC")[65] and a *Публічне акціонерне товариство* (hereinafter "Public JSC")[66]. The current provisions of the laws do not define types of shareholders' agreements, but clearly indicate the rather broad subject matter of the agreement. According to the provisions, shareholders of both types of business entities are able to conclude an agreement, which obliges shareholders to exercise their rights in a certain way or to abstain from execution. Shareholders can provide an event of a mandatory buy or sell of the shares, under specified conditions. It is also important to add, that irrevocable proxy is accepted in Ukrainian Law,

---

[59] Paragraph 9 "Постанова Пленуму Верховного Суду України від 24.10.2008 № 13 "Про практику розгляду судам и корпоративних спорів", https://zakon.rada.gov.ua, Accessed 10 March 2020, https://zakon.rada.gov.ua/laws/show/v0013700-08.

[60] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 624, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[61] This law temporally regulated shareholders' agreements in limited liability companies. It lost its' effect after the adaptation of the separate Law on Limited Liability and Additional Liability Companies.

[62] "Law № 1984-VIII, 23.03.2017", https://zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/1984-19.

[63] "Law № 2275 VIII, 06.02.2018", https://zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/ru/2275-19/ed20180206/sp:side:max15.

[64] Article 7 Law of Ukraine on "Limited Liability and Additional Liability Companies", https://zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/2275-19.

[65] This is type of corporation does not have obligation to be listed, this corporation is not subject to many requirements and restriction associated with involvement in securities market. The closest analogies are: "close corporation" in USA and UK' s "private company limited by shares".

[66] Article 26(1) Law of Ukraine on "Joint Stock Companies", https://zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

both for limited liability company[67] and joint stock companies[68]. In Ukraine, it is common for holdings to use shareholders' agreements to control subsidiaries[69].

As Anna Babych notes, the draft of laws that have introduced present regulation of shareholders' agreements in Ukraine was subject to criticism, because the agreements were not directly prohibited before[70]. However, the author considers that the adoption of the laws is justified, since, as previously stated, the shareholders' agreements were very limited before. However, the wording of part 1, para. 1, of article 26(1) of the Law on Joint-Stock Companies should be amended.

A shareholders' agreement is a tool that should give shareholders maximum freedom to regulate relations among themselves. The present formulation of the article 26(1) does not comply with the nature of shareholders' agreements. Direct regulation should be applied to types of the agreements that previously had no legal basis for existence. This can be model in the following way: if the shareholders in Germany wanted to conclude a "trust agreement", they would not be able to do so under the direct prohibition set out in the law[71], and it is in this situation that a special provision is needed to allow it directly. This is also confirmed by the example of "voting trusts" in the USA, which, as stated in the previous sub-chapter, was recognized following the establishment of the special provision.

In the author's opinion, the wording of article 26(1) of the Law on Joint Stock Companies, may be amended. Since there is no point in listing the possible items of a shareholders' agreement in the law, this does not extend or narrow the subject witch was already sufficiently defined:

> A shareholders' agreement of the company is an agreement, the subject of which is the exercise by shareholders – owners of ordinary and preferred shares of rights to shares and/or rights under the shares as provided by the law, charter and other internal documents of the company (herein after referred to as the shareholders' agreement). Under the shareholders' agreement, its parties undertake obligation to exercise their rights and/or refrain from the exercise of the rights subject to such agreement…[72]

---

[67] Article 8 Law of Ukraine on "Limited Liability and Additional Liability Companies", https://zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/2275-19.

[68] Article 26(2), Law of Ukraine on "Joint Stock Companies", https://zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

[69] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 631, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[70] Same as 69, 629.

[71] Section 8 subs.5 "Stock Corporation Act," http://www.gesetze-im-internet.de, Accessed 15 March 2020, http://www.gesetze-im-internet.de/englisch_aktg/.

[72] This translation was done by Anna Babych in same as 69, 633-634.

And after these provisions, the law additionally specifies the list of items of the agreement:

> …Under shareholders' agreement the parties may be obliged to vote in the manner prescribed by such agreement, at the general meeting of shareholders of the company, and to approve the acquisition or disposal of shares at a pre-determined price and/or in the event of the circumstances specified in the agreement, to refrain from disposal of shares until occurrence of the circumstances specified in the agreement, as well as undertake other actions related to the management of the company, its liquidation or spin off from it of a new company. The shareholders' agreement may stipulate conditions or a procedure for determining the conditions subject to which the shareholder - party to the agreement is entitled or obliged to purchase or sell company's shares and to determine in - stances (which may or may not depend from the actions of the parties) when such right or obligation arises.[73]

In the author's opinion, the subjects of shareholders' agreements are well defined by the first quote from the law, enumeration of items is contrary to the essence of shareholders' agreement which in aimed to provide shareholders' with the maximum of opportunities to regulate their relationships. Shareholders' agreement first of all are based on the principle of "freedom of contract". In addition, such formulation can threat legal certainty, because court can apply a restrictive approach to the issue of subjects of shareholders' agreements, because the law does not specifically indicate, that list is not exhaustive. For this reason, the author recommends that the excess enumeration of items should be removed.

In conclusion, in the initial period of the appearance of shareholders' agreements, in the continental jurisdictions, agreement acted only on the basis of the principle of "freedom of contract". That could be the reason, why case law was equally important, in the genesis of the agreements, both in common and continental jurisdiction.

There is no common approach to the regulations of shareholders' agreements among both continental and common law countries, since both legal families include jurisdictions that have established the concepts and legal nature of different types of shareholders' agreements in corporate law, as well as jurisdictions that have not done so, in this case agreements are regulated, mostly by the means of establishment of restriction on the possible legal consequences of the agreements.

[73] This translation was done by Anna Babych in Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 633-634, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

CHAPTER 2. RATIO BETWEEN SHAREHOLDERS' AGREEMENTS, ARTICLES OF ASSOCIATION AND MANDATORY RULES OF LAW

2.1. Theoretical Aspects of the Ratio Between Shareholders' Agreements, Articles of Association and law

Prior to reviewing specific practices in the application and regulation of shareholders' agreements, it is necessary to determine its' position among law (especially mandatory rules) and articles of association. It was already indicated that regulation of shareholders' agreements does not necessarily include special provisions on them, and even if such provisions are established, it often does not cover all types of shareholders' agreements that are used by shareholders.

The principle of freedom of contract endows legal entities and natural persons with the power to select with whom to conclude the contract, and to determine its' content. At the same time, in general, this power does not depend on the fact of existence or absence of permission to conclude such a contract, observance of mandatory rules or "public order" is the main condition for the contract to be valid[74].

For this reason, it is necessary to determine the degree of freedom, that shareholders own to regulate activities of a company, relationships among themselves by the means of either articles of association or a shareholders' agreement. The objective of this chapter is to define the framework of shareholders' agreements. More specific rules on different types of agreements shall be discussed in the next chapter.

It is possible to divide the provisions of law, governing activities of a company, or in a broad sense, relationships of shareholders and the company, and relationships among shareholders, into: 1) mandatory rules, derogation from which is prohibited, directly by law; 2) provisions which have default form in a law, but which could be changed at the will of shareholders in articles of association; 3) provisions which does not have a default form in law, and which are adopted in articles of association or shareholders agreements[75]. The first group of rules is mandatory by virtue of a direct reference of a

---

[74] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 159, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[75] This methodology was used by: 1) Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 5-6, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live; 2) Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation", *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 29-32; 3) Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров: сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение

law, such as the provision L. 242-9 of the French Commercial Code, which prohibits' voting in exchange for a benefit, or rules that have been formed in case of law, such as the nullification of the provision of shareholders' agreements imposing restrictions on the discretion of a court to convene a general meeting of shareholders[76].

It should be noted, that such forms of companies as "close corporation", "private limited company", "limited liability company" are subject to less mandatory regulation than listed companies, such as "public corporation", "public limited company", "*Aktiengesellschaft*" (German joint stock company)[77].

On the basis of the contractual nature of shareholders' agreements, such principles of contract law as good faith and fair dealing, the prohibition of abuse of rights, as well as corporate hard law, may be the reason for the quashing of an agreement by a court.

It is rather difficult to give unambiguous answer, as for the validity of shareholders' agreement, in certain situations. According to S. Mock, K. Csach, B. Havel[78] it is necessary to consider the reason for the existence of a specific mandatory rule. If the mandatory rule defines the fundamental basics of a company, such as a division of capital, the basis of the division of functions of a company's management bodies, such rules cannot be derogated from in shareholders' agreement. At the same time, it is possible to assume the validity of provisions, which at the first glance violate mandatory rules, provided that rights and interests of third parties, in particular of a company and creditors, will not be violated by the performance a shareholders' agreements, which imposes obligations of a personal character, as any ordinary contract[79].

P. Miliauskas points out that shareholders' agreement applies only to the parties of such agreement and may therefore even contain provisions that at the first glance are directly contrary to the company's essence, for example, the provision limiting transferability of shares in a public company. The company and shareholders are separate entities, the provisions of the law are binding on the

---

высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 79-81.

[76] *Union Music v Watson* [2003] 1 BCLC 453.

[77] Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation", Review of the Russian Supreme Arbitrazh Court, 10 (2012): 27.

[78] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 12-13, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[79] Same as 78, 12-13.

company, but shareholders can establish restrictions, provided that the legal consequences of their actions do not violate rights of third persons[80].

As far as the second and third groups of provisions are concerned, there may be a collision between articles of association and shareholders' agreement, as the objects of these acts may overlap, it can lead to a contradiction between them.

As noted, by S. Mock, K. Csach, B. Havel, any agreement concluded between shareholders regarding the realization of shareholders' rights can be regarded as "shareholders' agreement". The statute is a formalized agreement between shareholders, which is subject to separate regulation[81]. Shareholders' agreement may contain restrictions on the transferability of an individual class of shares, provided that there are no explicit indications of the absence of any of such restrictions in articles of association. In such a situation, provisions of shareholders' agreement are valid, as far as, they have an internal effect, but the transfer of ownership to the share will take place, due to the personal character of obligation stemming from the shareholders' agreement. The offending shareholder – party to the agreement, will incur contractual responsibility in the form of penalty[82]. This is the reason why it will be more effective to put restrictions on the transferability of shares in articles of association[83].

For most of the shareholders' agreements, the theses on the personal nature of the obligations are valid, at the same time in jurisdictions of both common law and continental law, there are provided shareholders' agreements, that may have a legal effect on third persons. For example, the Shareholder control agreement of a close corporation, which operates according to the Section 7.32 MBCA, or a voting agreement signed by all shareholders of a German close corporation, the violation of which could lead to the cancellation of a resolution of the general meeting of shareholders[84]. These exceptions will be further elaborated in subsequent chapters.

M. Varyushin notes, that articles of association prevail over shareholders' agreement in respect of subject matters which, by direct indication of law, should be reflected in articles. Thus, under section

---

[80] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 198, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[81] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 5, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[82] Same as 81, 25.

[83] Mathilde Laidin and Romain Souchon, "Do preemptive clauses work in shareholders' agreements? (France)" 2014, https://www.acc.com/resource-library/do-preemptive-clauses-work-shareholders-agreements-france.

[84] BGH NJW 1987, 1890. quated in Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation," *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 41.

3 of the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (hereinafter "Law on close corporation")[85], the amount of the share capital is a mandatory item of articles, which will prevail over the provisions of shareholders' agreements concerning a similar subject matter. With respect to the remaining subject matters, the newer document, covering a large number of shareholders, should prevail[86].

It seems, that this approach assumes, that articles of association are regarded as a contract, concluded between the shareholders, so there is a contradiction between two contracts, regarding the same subject matter. This statement is being true for common law countries, in which the contractual nature of articles was reflected in Corporate Acts[87] and jurisprudence, which allows amending of articles by means of an informal agreement reached between all shareholders of a company[88]. In continental jurisdictions articles of association are not considered as a contract, the law and jurisprudence do not provide shareholders with authority to armament it as a contract. In continental jurisdictions, it is not possible for shareholders to conclude an agreement that would prevail over the articles[89].

In conclusion, when determining the ratio between shareholders' agreements, articles of association and law, it is necessary to take into the account the type of the legal provision in question. Neither articles nor shareholders' agreement may contradict mandatory rules, with the exemption of agreement, giving internal legal effect. Shareholder agreement should not contradict articles in respect of a subject matter defined in law, as a subject-matter of articles. In this respect, the key characteristic that defines this state of affairs is that shareholder agreement, and it is applicable to most types of agreement, does not extend its' legal effect on third persons to an agreement.

[85] Section 3, "Law On Close Corporation", https://www.gesetze-im-internet.de/, Accessed 15 April 2020, https://www.gesetze-im-internet.de/englisch_gmbhg/englisch_gmbhg.html.

[86]Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров : сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 79-85.

[87]Section 140, Australian Company Act 2001: "Effect of constitution and replaceable rules: (1) A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract: (a) between the company and each member; and (b) between the company and each director and company secretary; and (c) between a member and each other member…"

[88] English so called "Duomatic principle".

[89] This issue will be further elaborated in following sub-chapters.

2.2. Legal Status of Shareholders' Agreements in Common law Countries.

In jurisdictions of common law, the contractual nature of articles of association is an important feature of the subject under the consideration. Rafal Zakrzewski states[90] that articles of association are an agreement, signed by all shareholders of a company, that extends its' legal force on future shareholders. Section 33 of the Company Act 2006 expressly indicates that provisions of articles have the same effect as the contract concluded between all shareholders and the company[91]. In case the shareholders haven't adopted in the articles of association provisions other than those of Company Act 2006, the Company Act 2006 provisions apply as a default[92]. Additional evidence that a company according to the English approach is considered as a "union of its' participants" may be found in section 172 of the Company Act 2006, which species: "director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its' members as a whole. [93]

The contractual nature of articles provides for a shareholders' agreement, which will not be inferior in force to articles. Shareholders' agreement to which all shareholders of the company are parties, is of the legal nature of the resolution of a general meeting of shareholders.[94] If this agreement overrides the provisions of the articles, it to be considered as a special resolution of the general meeting of shareholders[95]. According to the Company Act 2006, such shareholders' agreement is subject to registration and publication in a mandatory manner[96].

[90] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 306, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[91]Para 1, section 33, "Companies Act 2006," legislation.gov.uk, Accessed 4 April 2020, http://www.legislation.gov.uk/ukpga/2006/46/contents:
"(1) The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions".

[92] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 248, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[93] Same as 90, 306.

[94] Same as 90,344.
https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[95] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 255, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[96] Section 29, "Companies Act 2006," legislation.gov.uk, Accessed 4 April 2020, http://www.legislation.gov.uk/ukpga/2006/46/contents:
"(1) This Chapter applies to - (a)any special resolution; (b)any resolution or agreement agreed to by all the members of a company that, if not so agreed to, would not have been effective for its purpose unless passed as a special resolution…"; Section 30, CA 2006: "(1)A copy of every resolution or agreement to which this Chapter applies, or (in the case of a resolution or agreement that is not in writing) a written memorandum setting out its terms, must be forwarded to the registrar within 15 days after it is passed or made.

The competence of shareholders to enter into such agreements has resulted from, so called "Duomatic principle"[97]. As early as 1897, in the case of *Salomon v Salomon & Co Ltd* [1897], in one of the most important cases establishing the doctrine of "the piercing of corporate veil", D. Lodrom stated: "…the company is bound in a matter intra vires by the unanimous agreement of its' members."[98]

Duomatic principle takes its' name from the case of *Re Duomatic Ltd*. [1969], in which J. Buckley stated:

> "The fact that they did not take that formal step but that they nevertheless did apply their minds to the question of whether the drawings should be approved seems to lead to the conclusion that I ought to regard their consent as being tantamount to a resolution of a general meeting of the company. In other words, I proceed upon the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be." [99]

According to this principle, a resolution of the general meeting of shareholders', which was adopted by all shareholders, should not be considered invalid, in case of non-compliance with the formal requirements for the adoption of the resolution. Shareholders' agreement may be considered as a resolution adopted in a way that does not meet formal requirements.

As for the other shareholders' agreements that do not comply with the requirements of the Sections 29 and 30 of the Company Act 2006, they are contractually binding, provided that mandatory law and interests of minority shareholders are not violated[100].

In the case of *Welton v Saffery* [1897], the Court noted that the personal character of the obligation is one of the main characteristics of shareholders' agreements, Lord Davey:

> "Of course, individual shareholders may deal with their own interests by contract in such way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an exceptio personalis against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders"[101].

(c) any resolution or agreement agreed to by all the members of a class of shareholders that, if not so agreed to, would not have been effective for its purpose unless passed by some particular majority or otherwise in some particular manner…;"

[97] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 256, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[98] Salomon v Salomon & Co Ltd [1897] AC 22, 57.

[99] *Re Duomatic Ltd* [1969] 2 Ch 365.

[100] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 303, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[101] *Welton v. Saffery* [1897] AC 29.

However, the personal nature of obligations does not mean that only shareholders could be a party to the agreement.

The company's participation as a party to the agreement could be the ground for the application of agreements’ provisions to third persons, it takes place in the so-called "relationships agreements", the objective of which is to offer preferential terms of investment for potential shareholders[102].

In the case of *Russel v. Northern Bank Development Corporation Ltd*. [1992], the House of Lords drew a distinction between the contractual obligation of the company, which has limited the competence of the company to change its’ articles or increase the authorized capital, and the shareholders’ agreement, under which shareholders shall exercise their voting rights in a certain manner, if the item of the increase of authorized capital or amending the articles is put on the agenda of the meeting[103]. The first obligation is invalid as a restriction of the statutory powers of the company. Shareholders’ agreement, at least until it does not oblige future shareholders to adhere to such an agreement, was held valid. The case is an example of the application of mandatory rules to the shareholders’ agreement, which was previously applied to articles.

Prior to this decision, it was generally accepted in science that the company's obligation not to change articles does not prevent the company from doing so, breach of this obligation entails a fine on the company. However, this decision does not mean that company cannot be a party to shareholders’ agreements. In this case, the Court has made a reduction of the possible subjects of shareholders’ agreements[104].

In the American legal order, there is a type of shareholders’ agreement that legally binds third persons to contract and has similar characteristics with the English shareholders’ agreement, adopted by all shareholders of a company. In the United States, the MBCA provides for a mandatory list of subjects to be reflected in articles, as well as subjects that can be regulated by the articles in a different manner than it is provided for in the MBCA[105].

[102] This type of shareholders’ agreement will be dealt with in more detail in the next chapter.
[103]Russell v Northern Bank Development Corp Ltd [1992] 1 WLR 588 :“while a provision in a company’s articles which restricts its statutory power to alter those articles is invalid an agreement dehorns the articles between shareholders as to how they shall exercise their voting rights ... is not necessarily so”.
[104] Mads Andenas, “Shareholders’Agreements, Some EU and English Law Perspectives,” *Tsukuba Law Journal*, 1 (2007): 135-152.
[105] Section 2.02, “Model Business Corporation Act”, americanbar.org, Accessed 15 March 2020, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

The power of agreement to address certain subjects is strongly affected by the type of the corporation in question. Section 350 of the DGCL indicates that only shareholders of a close corporation are capable of redistributing of the board of directors' statutory powers[106].

Shareholders' agreement concluded under section 7.32 of the MBCA are valid only in a close corporation. Section sets out a not exhaustive list of subject matters that could be addressed in an agreement in a way that would be contrary to the MBCA[107]. Paragraph 8 outlines that shareholders' agreement may be limited on the basis of "public policy". According to the official comment[108], the concept of the "public policy" includes core principles of public policy with respect to corporate affairs, such as Standards of Conduct for Directors, the total exclusion of which by the means of shareholders' agreement would be unequivocally contrary to "public policy", along with adopting provision for the exclusion of the responsibility of directors, in a more extensive way than stated in the section 2.02 (b) (4). Shareholders' agreements are subject to the same provision, determining the extent of the possible derogation from the provisions of the MBCA, with respect to such subjects like, the purpose for which the company is organized, restrictions on the rights of the board of directors and shareholders, and others provided for in sections 2.02 (b) (2) [109].

[106] Section 350, "Delaware General Corporation Law," delcode.delaware.gov, Accessed 15 March 2020, https://delcode.delaware.gov/title8/c001/: "A written agreement among the stockholders of a close corporation holding a majority of the outstanding stock entitled to vote, whether solely among themselves or with a party not a stockholder, is not invalid, as between the parties to the agreement, on the ground that it so relates to the conduct of the business and affairs of the corporation as to restrict or interfere with the discretion or powers of the board of directors…"

[107] Model Business Corporation Act, (a), Section 7.32:

"a) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this Act in that it:

(1) eliminates the board of directors or restricts the discretion or powers of the board of directors;

(2) governs the authorization or making of distributions, regardless of whether they are in proportion to ownership of shares, subject to the limitations in section 6.40;

(3) establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;

(4) governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

(5) establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;

(6) transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;

(7) requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency;

(8) otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy."

[108] "Model Business Corporation Act", americanbar.org, Accessed 15 March 2020, 142, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

[109] Same as 108, 142.

American legal doctrine takes into account various factors, when applying the concept of "public policy". Restatement (Second) of Contract[110] specifies the following factors: i) the parties' justified expectations; ii) the loss resulting from non-enforcement; iii) public interest in enforcing the provision of contact; iv) the strength of the policy against enforcement; v) the likeliness that a non-enforcement of the contract will enhance the policy; vi) the significance and deliberateness of the violation; and vii) the proximity of connection between the violation and the provision of the contract[111].

In the case of *Omnicare, Inc. v. NCS Healthcare, Inc.* (2003), the Court has quashed the shareholders' agreement that was concluded between two major shareholders - directors and prospective buyer of the company. Agreement imposed on the parties' obligation to omit a "fiduciary out", and not to consider merge offers, except offers of the company with which shareholders' agreement was concluded[112]. The jurisprudence[113] of some States denotes that a company is subject to the legal effect of the shareholders' agreement concluded by all shareholders of the company[114].

Pursuant to the official comment of the MBCA, shareholders' agreements, in general, have no legal effect on third persons, but agreement entered into between all shareholders' of the company effects the company, violation of the agreement may lead to the annulment of the resolution of the general meeting of shareholders, or the decision was taken by the directors, provided that the interests of the creditors are not adversely affected[115].

Majority shareholders are subject to the obligation to comply with the interest of the minority shareholders and the company, as such, when concluding shareholders' agreements. In the case of *Perlman v. Feldmann* [1955] [116], the Court found that the director and majority shareholder owe a fiduciary duty towards the company and minority shareholders as beneficiaries. In the case of *Coleman v. Taub* [1981] [117], the Court held that a merger transaction, establishing that minority shareholders must

[110] Section 178, American law institute, "RESTATEMENT (SECOND) OF CONTRACTS" (1981).
[111] Molano Leon, "Shareholders' Agreements in Close Corporations and Their Enforcement." *LLM Theses and Essays,* 89 (2006): 36, https://digitalcommons.law.uga.edu/stu_llm/89/.
[112] Omnicare, Inc. v. NCS Healthcare, Inc. - 818 A.2d 914 (Del. 2003).
[113] Moss v. Waytz ,4 Ill. App. 2d 296 ,124 N.E.2d 91 (1st Dist .1955), Illinois State; Nordin v. Kaldenbaugh ,7 Ariz. App. 9, 435P.2d 740(1967); Arizona. quoted in Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 653, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.
[114] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 653, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.
[115] Molano Leon, "Shareholders' Agreements in Close Corporations and Their Enforcement." *LLM Theses and Essays,* 89 (2006): 10, https://digitalcommons.law.uga.edu/stu_llm/89/.
[116] Perlman v. Feldmann ,219 F2d 173(2d Cir 1955).
[117] Coleman v. Taub ,638 F.2d 628(3d Cir .1981).

sell their shares, not being able to challenge the transaction itself, violated the rights of minority shareholders[118].

According to M. Duffy, shareholders' agreement must not derogate from the law and articles, even though articles are of contractual nature and are referred to as "statutory contract". Shareholders' agreement is valid to the extent that it does not contradict the articles of association and the law[119]. Thus, in the decision of *Cordiant Communications (Australia) Pty Ltd V the Communications Group Holdings Pty Ltd* (2005), the Court has affirmed the priority of the provisions of law and articles over the shareholders' agreement. In the present case, the plaintiff, being the shareholder of the respondent company, an agreement was concluded between the parties, which obligated the plaintiff to transfer voting rights by means of power of attorney, issued by the plaintiff. General meeting of the shareholders was personally attended by the representative of Cordiant Communications (the plaintiff) who voted against the defendant's propose, thus infringing the agreement. Chairman of the meeting counted Cordiant's votes in the favour of the resolution, reasoning that the respondent had the power of attorney to manage votes of Cordiant. Plaintiff claimed to invalidate the resolution of the general meeting of the shareholders.

The Court ruled the resolution invalid, due to the provisions of the law allowing a trustor to suspend the legal force of a power of attorney if the trustor decides to represent himself in person or assign another representative. Beyond that, the Court found that the plaintiff's actions violated the provisions of the agreement, and an injunction was granted prohibiting the plaintiff from sending representatives on the general meeting of the shareholders or issuing new powers of attorney.

The Court specifies in paragraph 135 that there would be no legal basis of the invalidation of the resolution if the only legal source to consider was the agreement, but the plaintiff had the right to assign representative, provided by the law and the articles:

"I conclude that such a declaration should not be made for the reasons which I have given in paragraphs 94 to 101 above, which may be summarized thus: it may be just and equitable to make the validating order if one were to give consideration only to clause 16.9 of the Shareholders Agreement but the Court must consider primarily the rights of the parties under the Corporations Act and TCGH's constitution; [120]"

---

[118] Same as 144, 656.

[119] Michael Duffy, "Shareholders Agreements and Shareholders' Remedies - Contract Versus Statute?," *Bond Law Review* 20, 2 (2008): 8-9, https://ssrn.com/abstract=3192206.

[120] *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185.

The plaintiff acted within the law, violating the contract (as paradoxical as it sounds), the defendant violated the law, acting in accordance with the contract. This decision precisely illustrates the ratio of the law, articles of association, and the shareholder agreement.

In conclusion, the legal order of common law countries provides for shareholders with the competence to conclude shareholders' agreements which could: amend articles, prevail over default rules of law and extend its' legal force on third parties to the agreement. Other shareholders' agreements are valid, provided that the rights of third persons are not violated.

2.2. Legal Status of Shareholders' Agreements in Continental law Countries

In Germany, the competence of the shareholders to modify the statutory regime is limited by the so-called *Satzungsstrenge* doctrine. Shareholders of a stock corporation are allowed to derogate from default provisions of *Aktiengesetz* (hereinafter "Stock Corporation Act") only if it is directly allowed[121]. This doctrine is not applied to the articles of the close corporations, but it has a similar effect with respect to the shareholders' agreements of the close corporation. An agreement cannot contradict articles in respect of subjects to be settled by it[122]. Articles of a close corporation must include the name of the company, size of the authorized capital, initial distribution of the share in the authorized capital[123]. If these provisions are not in place, the articles of the company concerned is null and void, even if these subjects were reflected in the agreement concluded among shareholders.

Rules on the convocation and holding of the general meeting of the shareholders and, in particular provisions on the determination of the majority of shareholders, are mandatory, derogations from these provisions, by the means of articles of association or shareholders' agreement are prohibited. These are critical to protecting the rights of minority shareholders.

[121] Subsection 5, section 23, "Stock Corporation Act," http://www.gesetze-im-internet.de, Accessed 15 March 2020, http://www.gesetze-im-internet.de/englisch_aktg/:
"The articles may contain different provisions from the provisions of this Act only if this Act explicitly so permits. The articles may contain additional provisions, except as to matters that are conclusively dealt with in this Act".
[122] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 278, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.
[123] Section 3, "Law On Close Corporation", https://www.gesetze-im-internet.de, Accessed 15 April 2020, https://www.gesetze-im-internet.de/englisch_gmbhg/englisch_gmbhg.html.

Provisions governing the operations of the bodies of the stock corporation are also mandatory. Thus, the agreement authorizing shareholders to carry out certain statutory powers of the board of directors is invalid[124].

A more liberal approach is adopted to close corporations, shareholders' agreements which redistribute authorities of the corporations' bodies are acceptable, provided that agreement is incorporated in the articles[125].

However, there is an exception, so-called "Satzungsduchbrechung" (piercing of the articles of association), that allow shareholders to amend articles by the means of a shareholders' agreement. Mandatory condition of this exception is a manifest of an intention to change articles in the future[126].

There is no common understanding in the jurisprudence and among German scholars as to how to resolve the contradiction between the provisions of articles and an agreement with respect to subjects which may be settled by the agreement. In respect of breaches of the articles, the general principle provides that an act violating the articles and having consequences only in internal corporate relations does not violate the rights of future shareholders, and it is not considered as an infringement of the law[127].

Jurisprudence in this regard is rather contradictory. In the case of NZG 2015,482ff, the provisions of the shareholders' agreement amending the procedure for payment of dividends established in the articles were declared invalid[128]. The *Bundesgerichtshof*[129] (hereinafter "Federal Court of Justice") ruled that provisions of the shareholders' agreement may be regarded as provisions of the articles which have not been included in it. The provisions in question regulated the procedure for depriving of a shareholder of the right to act independently on behalf of the company[130].

One of the main limitations of the scope of the agreements is the concept of "duty of loyalty", which applies to all types of shareholders' agreements in Germany. Early on, the Imperial Court of Justice[131] has stated that shareholders may derogate from their contractual obligations to vote in a certain

---

[124] Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation," *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 31.

[125] Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров : сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 84.

[126] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 26, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[127] Same as 126, 286.

[128] Same as 126, 286.

[129] BGH, NJW 1983, 1910; 1987, 1890.

[130] Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation," *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 43.

[131] RGZ 133, 90, 96.

way if the shareholders have reasonable grounds to believe that the director, for whom they should vote, is incompetent[132].

Shareholders' agreements should not contradict the interests of the company and "good morals". By the decision of the Federal Court of Justice[133], the shareholders' agreement was declared invalid, on the basis that it established low, non-market price of the shares, to be bought when exercising the right of first refusal[134].

Shareholders shall not, at least intentionally, infringe the interests of the company and other shareholders. Judicial review of the relevant agreement is carried out through a process in which the party to the agreement makes claims based on such an agreement. In this case, the court in the course of the proceedings checks the validity of the agreement, violation of the articles or mandatory rules or general principles of civil law entails the recognition of the agreement as null and void[135].

The shareholders' agreement, to which the third person is a party, may be valid if the agreement does not provide for the third person with the authority to completely control the company. Such shareholders' agreement will create relationships of the agency or trust[136]. A violation of shareholders' agreement, that has been concluded between all the shareholders of the company, is a reason to render a resolution of the general meeting void[137].

In France, shareholders' agreements should not contradict law and articles[138]. Shareholders' agreements are treated as ordinary private contracts, violation of which cannot serve as grounds for invalidation of decisions of the company's management bodies (board of directors or resolution of the general meeting) [139]. Article 1165 of the French Civil Code establishes that contracts cannot have adverse legal effects on third parties.

---

[132] Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 9, http://dx.doi.org/10.2139/ssrn.2234348.
[133] BGH NJW 1994.
[134] Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров : сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 49.
[135] Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation," *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 31.
[136] Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 9, http://dx.doi.org/10.2139/ssrn.2234348.
[137] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 29, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.
[138] Frédéric Ichay, "IBA Guide on Shareholders' Agreements: France" 2012: 1, https://www.ibanet.org/Document/Default.aspx?DocumentUid=F7E7F4B3-A308-498E-8218-BEB66C0F6B7E.
[139] François Belot, "Shareholder Agreements and Firm Value: Evidence from French Listed Firms," *SSRN Electronic Journal* (January, 2008): 9, http://dx.doi.org/10.2139/ssrn.1282144.

In Ukraine, the ratio of imperative and dispositive regulation has similarities with German regulation. Provisions of the law are most often being of imperative nature and derogations are possible in cases expressly provided for in the law, this applies both to limited liability company and joint-stock companies, which in turn are divided into private and public. This statement was confirmed by the Supreme Court of Ukraine[140].

Mandatory provisions are found in a large number of acts, such as *Цивільний кодекс* (Civil Code)[141], *Господарський кодекс* (Commercial Code)[142], as well as specific laws providing for a regulation on the certain types of companies, such as *Закон України про "Акціонерні товариства*" (Law on joint-stock companies)[143] *Закон України про "Про товариства з обмеженою та додатковою відповідальністю"* (hereinafter "Law on Limited Liability Company).[144] In addition to these acts, there are still many mandatory provisions found in other laws and by-laws that regulate certain aspects of the company's activities, for example, *Закон України "Про цінні папери та фондовий ринок*" (Law on securities and stock market)[145].

As a general rule, shareholders' agreements must not contradict articles of association. Shareholder agreements do not have legal force on third persons, violation of the agreement cannot be the basis for invalidating of the decisions of company management bodies[146]. Direct permission to conclude shareholder agreements between the company's creditors and shareholders is a feature of the legal regulation of agreements in Ukraine[147].

In conclusion, certain shareholder agreements provided for in the legal order of common law countries have characteristics that are not common to contract, in general, these agreements are capable

---

[140] Paragraph 9 "Постанова Пленуму Верховного Суду України від 24.10.2008 № 13 "Про практику розгляду судам и корпоративних спорів*,"* zakon.rada.gov.ua, Accessed 10 March 2020, https://zakon.rada.gov.ua/laws/show/v0013700-08.

[141] E.g. Article 92 (Legal capacity of a legal entity), "Civil Code of Ukraine", Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/435-15.

[142] E.g. Article 164 (Terms and procedure of securities issue by economic entities), "Commercial code of Ukraine", Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/436-15.

[143] E.g. Article 17 (Reserve capital), Law of Ukraine on "Joint Stock Companies", Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

[144] E.g. Article 55 (Protection of creditors' rights during the separation and dissolution of a company), Law of Ukraine on "Limited Liability and Additional Liability Companies", Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/2275-19.

[145] E.g. Article 39 (Disclosure of regulated information), Law of Ukraine on "Securities and Stock Market", Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/3480-15.

[146] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 631, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[147] Para 8, Article 26(1), Law of Ukraine on "Joint Stock Companies," zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

of amending the articles or are regarded as a constituted document of the company. These agreements have an external legal effect on both the company and future shareholders. In continental jurisdictions, such shareholder agreements are not recognized. Agreements which do not have the characteristics of a " second articles", in their legal status of a contract do not differ, in principle, from similar agreements in the continental legal system, violation of which has only an internal effect, as an ordinary contract.

There are some exceptions in Germany in respect of the agreement concluded among all the shareholders of the company, nevertheless, it would not change the fact that shareholders' agreements in continental jurisdictions are complete of contractual nature.

Both continental and common law legal orders impose restrictions on possible subjects of shareholders' agreements, it is done by direct indication of the provisions, from which derogation is prohibited, it applies both to articles and agreement. Shareholders' agreement must not contradict the articles in respect of subjects which, by virtue of law, are to be reflected in the articles, this statement is true for both legal families. Mandatory rules, based on the finitary character of the relationships among shareholders and a company, apply to agreements in both systems.

CHARTER 3. TYPES OF SHAREHOLDERS' AGREEMENTS

There is no generally accepted approach to the classification of a such comprehensive legal instrument as a shareholders' agreement. This can be explained by the absence of the common approach to regulation of shareholders' agreements, and the multiplicity of the subject matters addressed in the agreements.

Only the laws of the USA and the Republic of Lithuania, among the jurisdictions under the consideration, contains a classification of the different types of shareholders' agreements. However, in accordance with the principle of "freedom of contract", shareholders of these jurisdictions are able to enter into the shareholders' agreements, which are not prescribed in the law. It is not possible to create a comprehensive classification based on differentiation provided for in law. Classification carried out in accordance with the type of a company (close corporations and stock corporations in consideration) is generally relevant but does not reflect the whole variety of the legal relationships which may be addressed in shareholders' agreements.

Classification reflected in this chapter is based on such criteria as objective and subject matter. This is the most common approach[148].

The first type is defined as "shareholders control agreement". The benchmark of this type is the "shareholders' agreement", stipulated in section 7.32 of the MBCA. The specific objective of the agreement is the establishment of rules for the regulation of the company's activities. " Shareholders' agreement on the constitution of a corporation" is an identical kind of shareholders' agreement, devoted by other authors[149].

The second type of agreements has been identified as "Shareholders' agreement on voting rights". This type includes such sub-types as "voting agreements", "voting trust", "agreements on the transfer of voting rights". The objective of these agreements is to establish control over a company by the means of the control over the voting rights of shareholders at the general meeting of shareholders. Voting rights is the subject matter of such agreements.

[148] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 194, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US; Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018). 261-263; 293-294, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[149] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 269; 294. http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

The main objectives of the agreement, defined as "Shareholders' agreement on the transfer of shares", are stability of the company's shareholders composition and resolution of the deadlocks. Subjective matter - obligations of shareholders to buy or sell shares on the specified conditions, restriction of the transferability of shares.

This classification is quite conditional, because there may be a shareholders' agreement that will combine all three types of subject matters, identified by the author.

In addition to the above-mentioned types of agreements, other authors highlight specific types of shareholders' agreements, such as "shareholders' agreements in insolvency situation"[150], "shareholders' agreements on the funding of the company"[151], "joint venture agreements"[152].

3.1. Shareholders' Control Agreements

This type of shareholders' agreement provides shareholders with the authority to regulate the widest scope of legal relationships. The objective of this agreement is to establish regulations, governing the activities of the company.

Such type of agreements as "shareholder's agreements on the funding of the company", highlighted by other authors, may be included in the type of agreements, under the consideration, due to the fact that performance of this type is often accompanied by the amendment of articles.

The performance of shareholders' control agreements can take two forms. Provisions of a shareholder agreement may, directly, upon the due concussion of the agreement, bind a company and all shareholders. That form is accepted only in common law jurisdiction. According to the second form of the performance, the agreement imposes an obligation on shareholders to amend articles or bylaws, such a contractual obligation may arise in both jurisdictions.

As already stated, the shareholders' agreement listed in Section 7.32 of the MBCA is a good example of this type of agreement. Shareholders' agreement concluded under section 7.32 of the MBCA is valid only in a close corporation. By the means of this agreement, shareholders may: identify specific persons to be elected to the governing bodies; remove the board of directors or limit its powers; delegate

---

[150]Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 270 http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[151] Same as 150, 36.

[152] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 202, *https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.*

to one or more shareholders, other persons the authority to carry out the current management of the company, conduct business on behalf of the company; establish a disproportionate number of shares owned by the shareholder the scope of the rights of management; restrict the authority to conclude contracts on the management of a company's property; etc.

The existence of the agreement must be expressly marked on the front or back of each share certificate or on the information sheet required. It is also important to add, that redistribution of authority made by the means of the agreement is followed by redistribution of responsibility, pursuant to para (c) of section 7.32 of the MBCA[153].

Imposing on directors of the obligation to directly follow the instruction of shareholders, despite the interests of the company, carries certain risks. It would be considered as a bridge of directors' duties to the company[154].

As it was already stated in the previous chapter, in the UK, shareholders of a private limited company have the competency to amend articles of association or to adopt a special resolution by the means of a shareholders' agreement. In continental jurisdictions, there are no analogy of such shareholders' agreements.

The second type of shareholders' control agreements, which have no direct effect on the regulation of the company, instead obliging shareholders' to amend the articles or to adopt new bylaws, is available to shareholders of both systems of law, since neither in common nor continental jurisdiction, the law does not provide for the prohibition of concluding the type of agreements in question.

There are two views on the legal nature of these agreements. Under the most common position, contractual obligation to establish some sort of regulation in the company is seen as a "simple contract"[155]. According to the second approach, the conclusion of shareholders' agreements results in the establishment of a "non-commercial partnership". In Germany and Switzerland, this approach applies both to "shareholders' control agreements" and "voting agreements"[156].

---

[153] "Model Business Corporation Act", americanbar.org, Accessed 15 March 2020, 139-145, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

[154] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 655-656, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[155] Same as 154, 258.

[156] Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров : сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 48.

Two types of partnerships, *Handelsgesellschaften*[157] (commercial partnerships) and *Gesellschaft bürgerlichen Rechts*[158] (non-commercial partnership) are distinguished in the German law. Shareholders' agreements are considered as a non-commercial partnership[159].

The contract of a partnership presupposes the existence of a common objective of the parties, contributions of the parties, and obligation to act together to achieve the common objective. Amending of the constitution of a company is the objective of a shareholders' control agreement. It is to be achieved via voting on the general meeting of the shareholders[160].

The fact of recognizing a shareholders' agreement as a non-commercial partnership is of big importance. If parties to the agreement did not specify the terms on termination of the agreement, each shareholder has the right to terminate it unilaterally, at any time[161]. Also, it is necessary to specify that, in default, the action of parties of the partnership must be approved by participants of this association[162].

Parties may provide for a simple majority to the decisions making process in a non-commercial partnership. The rule of simple majority is also extended, during the pre-meeting on which parties decide on how they will vote, to those corporate issues that require a qualified majority, pursuant to the law. Thus, for example, a shareholder cannot refuse to vote in accordance with the decision of the preliminary meeting of shareholders - parties to the agreement, adopted by a simple majority of shareholders parties to a partnership, with regard to the amendments to the articles, to be adopted by a qualified majority. This position was supported by the German Supreme Federal Court[163].

P. Miliauskas identifies[164] such type of shareholders' agreement as "relationships agreements", this is an agreement between the company and the majority shareholder. The provisions of such

[157] Section 105, "German Commercial Code," https://www.gesetze-im-internet.de, Accessed 15 March 2020, http://www.gesetze-im-internet.de/englisch_hgb/.
[158] Section 705, "German Civil Code," https://www.gesetze-im-internet.de, Accessed 15 March 2020, https://www.gesetze-im-internet.de/englisch_bgb/.
[159] Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 10, http://dx.doi.org/10.2139/ssrn.2234348.
[160]Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation," *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 29.
[161] Section 723, "German Civil Code," https://www.gesetze-im-internet.de, Accessed 15 March 2020, https://www.gesetze-im-internet.de/englisch_bgb/.
[162] Section 709, "German Civil Code," https://www.gesetze-im-internet.de, Accessed 15 March 2020, https://www.gesetze-im-internet.de/englisch_bgb/:
"(1) The partners are jointly entitled to manage the business of the partnership; for each transaction the approval of all partners is required.
(2) If, under the partnership agreement, the majority of votes decides, then in case of doubt a majority is calculated in relation to the number of partners."
[163] Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 10-11, http://dx.doi.org/10.2139/ssrn.2234348.
[164] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 200,

agreement may provide for the obligation of the majority shareholder: to appoint an independent director; to impose restrictions on the commercial activities of the director or related companies or persons associated with the companies; to be guided by a certain Corporate Code; to not compete with the company, etc. Such agreements may provide different guarantees that the majority shareholder will not abuse its dominant position in the company to the detriment of the minority. The objective of the conclusion of such an agreement is to attract additional investors to the company. This type of shareholders' agreement is common in the UK[165].

There are no apparent obstacles to conclude such contracts in other jurisdictions, as the treaty does not violate the principle of the personal nature of the obligations. In this contract, the potential shareholders act as beneficiaries, not parties[166]. The author placed this agreement into the "shareholders' control agreement" category of the agreements, because it is to be performed through the establishment of certain provisions, regulating the activity of a company.

3.2. Shareholders' Agreements on Voting Rights

Such types of shareholders' agreements as "voting agreements", "voting trusts", and "agreements on the transfer of voting rights" were integrated within the same type, as these agreements have the common subject matter – voting rights.

3.2.1. Voting Agreements

In accordance with the voting agreement, shareholders may assume the obligation to vote in a certain way on defined matters to be voted upon, or the agreement may provide for certain voting principles: revision of the original ratio of the shareholder 's voting power to the number of shares held by the shareholder, or advance decision-making, made on the special pre-meetings, etc[167].

---

https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[165] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 200, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[166] Same as 165, 200.

[167] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 262, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

Shareholders may provide for various forms of contractual regulation of the voting process at the general meeting of shareholder. An example of a classification of voting agreements is given by P. Miliauskas:

> Voting agreements are classified into : 1) agreements to vote in a particular way; 2) agreements limiting the power to vote; 3) agreements whereby parties agree on appointment rights of the members of the management board; 4) agreements requiring approval of certain decisions by the contracting shareholders; 5) agreements providing for rules on how to vote for distribution of profit; 6) agreements providing restrictions on removal of certain members of the management body; 7) agreements relating to the management of the company[168].

A distinctive feature of the regulation of voting agreements in the UK is the initial absence of default fiduciary obligations. Since the relationship between shareholders in the UK is addressed in a contract paradigm, that does not include such concepts as the "good faith". Restrictions on the voting of the majority shareholders were established in case law[169].

According to the rules established in the jurisprudence as early as the late 19th and early 20th century, the majority shareholder should take into account not only his interests, but also the interests of minority shareholders and the company as such. This rule also applies to the situation when the shareholder obtains control over the company as a result of the conclusion of a shareholders' agreement. In the case of *Brown v. The British Abrasive Wheel Company Limited* [1919][170], the Court ruled that the voting agreement to change the articles of the company to the detriment of minority shareholders is invalid[171].

Shareholders should not agree on a vote, that is intended to limit minority shareholders' rights or to cause damage to the company. In the UK, there is no ban on voting under the instruction of the company's bodies, in the majority of other jurisdictions such restrictions are stipulated in the law. This can be explained by the fact that, initially, in line with the provisions of Company Act 2006, there is no distribution of powers between a management body and shareholders of a company[172].

Voting agreements, under the provisions of MBCA § 7.31 and DGCL § 218, may either provide for a shareholder's duty to vote in a certain way or determine voting power disproportionate to the number

---

[168]Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 197, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[169] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 259, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[170] Brown v British Abrasive Wheel Co [1919] 1 Ch 290.

[171] Same as 168, 303.

[172] Same as 168, 307.

of shares. The MBCA explicitly indicates that these agreements are not subject to the "voting trust" provisions, the agreements are operated and enforced like ordinary contracts. “Voting agreement” concluded under section 7.31, may be enforced via the issuance of a special proxy, that could be irrevocable. These agreements shall be concluded by two or more shareholders in one signed copy of the document[173]. In the USA, the term “pooling agreements” may be applied to “voting agreements”[174].

An important feature of the American approach to “voting agreements” is the absence of the prohibition to vote for a remuneration. So called “*vote-buying* agreements”, are agreements under which the shareholder undertakes to exercise its right to vote in the manner specified in the agreement for a certain remuneration.

In 1982, The Delaware Court of Chancery ruled that such agreements should not have a presumption of illegality, stating that the agreements may carry certain risks of deception or scam, which should be taken into account:

> Thus, under our present law, an agreement involving the transfer of stock voting rights without the transfer of ownership is not necessarily illegal and each arrangement must be examined in light of its object or purpose. To hold otherwise would be to exalt form over substance. As indicated in *Oceanic* more than the mere form of an agreement relating to voting must be considered and voting agreements in whatever form, therefore, should not be considered to be illegal *per se* unless the object or purpose is to defraud or in some way disenfranchise the other stockholders. This is not to say, however, that vote-buying accomplished for some laudible purpose is automatically free from challenge. Because vote-buying is so easily susceptible of abuse it must be viewed as a voidable transaction subject to a test for intrinsic fairness[175].

Voting agreements are recognized in Germany. Obligation of parties to vote in a certain way or to abstain from voting is called “*Entherrschungsvertrag*”, that can be translated as “de-powering treaty”[176]. Pursuant to Section 136 of the German Stock Corporation Act, any agreement is null and void, if it obliges shareholders to vote according to the instruction or under the guidance of the management board, the supervisory board or holding company. The conclusion of the agreement may have consequences in the form of establishment of corporate control in accordance with the provisions of the German Stock Corporation Act. This may lead to the recognition of the company as a controlled

[173] “Model Business Corporation Act”, americanbar.org, Accessed 15 March 2020, 139 https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.
[174] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 651, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.
[175] *Schreiber v. Carney*, 447 A.2d 17, 25-26 (Del. Ch. 1982).
[176] Marcus Roth, “Shareholders’ Agreements in Listed Companies: Germany,” *Social Science Research Network* (2013): 3, http://dx.doi.org/10.2139/ssrn.2234348.

entity[177]. It implies a variety of consequences, including the possible liability of the controlling entity for losses incurred due to the miscalculations made by the controlling entity, various audit implications, and so on[178].

Pursuant to article 2.88 of the Civil Code of the Republic of Lithuania shareholders are able to conclude an agreement on voting at a general meeting of shareholders. The agreement may be supplemented by the issuance of a special authorization to a third person to vote at the general meeting. According to paras 1-3 of the article, a shareholders' agreement shall be null and void, if it obliges parties to an agreement or third person, exercising the right to vote on shares on the behalf of the parties, to vote in accordance with the instructions of the management bodies, or to vote or abstain from voting for a certain remuneration.

In Ukraine, shareholders are directly authorized by the law to conclude voting agreements[179]. The Law on joint stock companies prohibits voting under the instruction of the management bodies, except when a shareholder is a member of this body[180]. The same restriction is prescribed in the Law on Limited Liability Company[181]. Shareholders are authorized to use irrevocable proxies to enforce the agreements[182]. In addition, it worth mentioned, that para 1, article 7 of the Law on Limited Liability Company, expressly emphasizes that shareholder' agreements are to be non-paid, otherwise they would be regarded as null and void, the author supposes, that by such a clause prohibits conclusion of the agreements and voting for the remuneration, author suppose, that restriction as justified, because voting for remuneration undermines fiduciary relationships between shareholders.

In conclusion, this type of shareholders' agreement is equally available for shareholders in both legal systems. The competence to issue a proxy, to enforce the agreement is provided in both systems. Voting for a remuneration is prohibited in most jurisdictions, exceptions can be found in the US. It is also important to note that common law jurisdictions do not expressly prohibit voting in accordance with instructions of company's governing bodies.

---

[177] Section 17, "Stock Corporation Act," http://www.gesetze-im-internet.de, Accessed 15 March 2020, http://www.gesetze-im-internet.de/englisch_aktg/

[178] Alexander Scheuch, "An Overview of the German Regulation of Corporate Groups and Resulting Liability Issues," *University of Oslo Faculty of Law Research Paper* 13, 5 (2016): 191-193.

[179] Para 1 article 26(1) Law of Ukraine "Joint Stock Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

[180] Para 2, article 26(1), Law of Ukraine "Joint Stock Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

[181] Para 4, article 7, Law of Ukraine on "Limited Liability and Additional Liability Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/2275-19.

[182] Article 8, Law on LLC; Article 26(2), Law of Ukraine on "Limited Liability and Additional Liability Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

3.2.2. Voting Trusts

Under section 218 of the DGCL, two or more shareholders can establish a voting trust by the transfer of shares in their ownership to a trustee. Shareholders receive trust certificates, in retort to the transfer. After the trust agreement is signed, the trustee must submit the list, which contains the information on all beneficial owners and the class and number of shares transferred and a copy of the agreement to the corporations' main office. The duration of a voting trust is not set.

A trustee exercises voting rights, as well as performs other acts in accordance with the terms of the agreement. Shareholders receive a legal title of a beneficiary, this means that they are entitled to receive economic benefits from the shares, but they do not possess shares and do not exercise the right to vote on them[183].

The right to possess the voting rights can be transferred to other persons by the means of a certificate, issued by a trustor. The agreement itself is a sufficient legal basis to manage voting rights, the additional issue of the power of attorney is not mandatory[184].

Shareholders' agreements of this type may be entered into only within the jurisdictions of the Anglo-Saxon system of law, as such legal construct as trust is not recognized within the continental system. In Germany, it is not possible to separate votes from the ownership of shares or to transfer due to the direct prohibition[185].

The most similar legal relationships to a trust, may be established in power of attorney that may be employed by shareholders of some continental jurisdictions and in the Lithuanian shareholders' agreement, named as "Transfer of a Voting Right" agreement.

3.2.3. Agreements on the Transfer of Voting Rights

Among the jurisdiction, under consideration, the Republic of Lithuania is the only state, among the continental jurisdictions, to establish this type of shareholders' agreements. By the means of this agreement, a shareholder transfers his right to vote at the general meeting of shareholders to another

[183] Section 218, "Delaware General Corporation Law," delcode.delaware.gov, Accessed 15 March 2020, https://delcode.delaware.gov/title8/c001/.

[184] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), Page 668, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[185] Section 8 subs.5 "Stock Corporation Act," http://www.gesetze-im-internet.de, Accessed 15 March 2020, http://www.gesetze-im-internet.de/englisch_aktg/.

person or entity. The procedure of the voting to be specified in the agreement. An agreement enters into force following the submission of information on the parties of the agreement, the number of transferred votes, grounds for entitlement to voting right and duration of an agreement. The maximum term of an agreement is 10 years[186].

As a result of conclusion of the agreement, the right to vote, as well as co-empty information rights, are transferred, but the ownership of shares is preserved. The main feature of this agreement is not even that shareholders are able to alienate voting rights, but that the person who acquired the voting rights is given corporate legal capacity, for example, in terms of obtaining information on holding general meetings of shareholders[187].

According to P. Miliauskas, the provisions of the articles 4.236-4.252 of the Lithuanian Civil Code on the management of someone else's property apply to relations on the exercise of voting rights by a third party by virtue of the agreement on the transfer of voting rights[188].

"Securities lending agreement", allocated by P. Miliauskas, gives rise to the effect similar to the transfer of voting right. These agreements are common in the UK, where there is no way to separate voting rights from ownership[189]. At the first glance, securities lending agreement is a tool used by participants of the securities market to benefit from changing of prices. The agreement consists of two separate purchases. During the first purchase, a "borrower" buys shares of a "lender". After a short period of time a "borrower" sells shares back to a "lender". However, in addition to the opportunity of earning, a borrower receives a right to vote on a general meeting of shareholders, during the period of time between the deals[190].

---

[186] Article 2.89, "Civil Code of the Republic of Lithuania," https://e-seimas.lrs.lt, Accessed 10 March 2020, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495.

[187] Сергей М. Варюшин, "Гражданско-правовое регулирование корпоративных договоров : сравнительный анализ" (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 37.

[188] Paulius, Miliauskas. 2014. " COMPANY LAW ASPECTS OF SHAREHOLDERS' AGREEMENTS IN LISTED COMPANIES" Doctoral dissertation, Vilnius University, Ghent University, 303, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[189] Same as 188, 313-316.

[190] Same as 188, 313-316.

3.3. Shareholders' Agreements on the Transfer of Shares

This type of shareholders' agreement imposes on shareholders an obligation to sell or buy shares, subject to special conditions or terms, or limits the transferability of shares, either through a special procedure (e.g. right of first offer) or through the complete exclusion of the transfer.

"Agreements on the limitation of the transferability of shares" and "Agreements on the deadlock resolution" are concluded by shareholders for different purposes, while the essence of the obligations imposed by these agreements is common.

3.3.1. Agreements on Limitations of the Transferability of Shares

In the, author's view the primary role of this type of agreement is to ensure that parties will fulfil other obligations. A shareholder who has concluded a voting agreement may avoid fulfilling his obligations by simply selling shares before the general meeting of shareholders took its place.

In general, according to Rafal Zakrzewski, transferability of shares may be excluded entirely, or for a fixed period of time, or up to the occurrence of the event specified in the contract. Shareholders may stipulate a list of persons to whom shares could be sold. Shareholders may provide "pre-emptive" rights in the form of "right of first refusal" or "right of first offer"[191]. The difference between these restrictions is that the "right of first refusal" implies that shareholders have the opportunity to interrupt a transaction with an already identified buyer, and buy offered shares, while, according to the "right of first offer" shareholder, who is willing to sell its shares, must make first offers to other shareholders, and then, if no one accepts, the shareholder receives a certain period of time to sell its shares on usual terms[192].

Shareholders may indicate that the sale of shares is subject to the authorization of a board of directors or a general meeting of shareholders, shareholders may stipulate "call option" and "put option". Pursuant to the call option shareholder gains the right to buy a share, while put option authorizes right to sell a share[193].

---

[191] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 269, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[192] The Corporation Law Committee of the Association of the Bar of the City of New York, "The Enforceability and Effectiveness of Typical Shareholders Agreement Provisions," *The Business Lawyer* 65, 4 2010: 1178.

[193] Same as 191, 269.

Shareholders may also provide for tag-along rights in a shareholders' agreement. This provision allows minority shareholders to join the sale of shares by the majority shareholder on the same terms as the majority shareholder. This option is attractive to the minority because it allows it to sell its shares at the same price as the majority shareholder, the price for each unit of the shares of the control package will have a higher price. Drag-along right provisions have a counter-effect, the provision empowers a seller to compel other shareholders to sell shares with him, under the same conditions[194].

In the UK, stipulation of the restrictions in articles of association of a listed company is prohibited[195]. But, as noted by P. Miliauskas, it is possible to prescribe such restrictions in the shareholders' agreement, due to agreements' personal character of obligations and the fact that shareholders are not obliged to comply with the listing rules, the company is subject to this rules[196]. In a private limited company, restrictions may be addressed either in articles or a shareholders' agreement. Placement in the articles will be more effective due to the mentioned personal character of obligations[197].

Pursuant to the provision of the Universal Commercial Code[198], restrictions on the transferability of shares are ineffective against a person, that was not aware of their existence. In Delaware, restrictions could be imposed in articles, bylaws or a shareholders' agreement and must be noted on the certificate representing the shares[199].

Section 202 of the DGCL specifically addresses permitted types of the restriction: 1) provisions that oblige shareholders to make an offer to other shareholders, corporation, prior to other entities (e.g. rights of first refusal, right of first offer, tag-along right); 2) provisions requiring a shareholder or a company to buy or sell shares; 3) provisions which empower shareholders or a company with the right of prior approval of a transaction; 4) provisions stipulation automatic sale or transfer, of restricted shares, to a company, shareholders or other person or entity; 5) provisions prohibiting a transfer of shares to designated persons or entities. Restrictions must have a justified reason, it may be a tax regime,

---

[194] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 657, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[195] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 329-331, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[196] Same as 196, 329-331

[197] Same as 194, 267.

[198] Section 8-204, "Universal Commercial Code," https://www.law.cornell.edu, Accessed 15 March 2020, https://www.law.cornell.edu/ucc/8/8-204.

[199] Section 202(b), "Delaware General Corporation Law," delcode.delaware.gov, Accessed 15 March 2020, https://delcode.delaware.gov/title8/c001/.

maintenance of any legislative or regulatory benefits, conformity with the status of a small enterprise or a real estate investment trust, the list is not exhaustive.

According to established case law, restrictions on transferability are presumed to be valid, the burden of proof lies on a person challenging the reasonableness of the restriction[200]. The provisions of the MBCA[201] are almost identical to those of the DGCL.

In Germany, shareholder agreements that oblige shareholders not only to vote in a certain way, but also to maintain a certain number of shares in the ownership, are called *Poolvertrag*. Under such agreements, shareholders often form special committees which shall authorize the purchase or sale of shares of shareholders parties to the poll[202].

According to the German legal doctrine, shareholders' agreements on limitation of the transferability of shares are regarded as "mere agreements", while the rest are treated as "civil partnerships"[203]. Pursuant to section 68 of the Stock Corporation Act, the restriction could be imposed on registered shares. However, most shares of German stock corporations are bearer shares, whose transfer must not be restricted[204].

In the case of a close corporation, the transferability of shares may be excluded or limited, provided that such provisions are reflected in articles[205]. The restriction provided for in an agreement amount shareholder will have contractual effect, binding only on the parties to such an agreement[206].

In Ukraine, provisions of a shareholders' agreement limiting the transferability of shares are expressly authorized[207]. The right of first refusal is applicable by the default to shares of the limited liability company, shareholders may exclude the application of the restriction in the articles[208]. It is

---

[200] The Corporation Law Committee of the Association of the Bar of the City of New York, "The Enforceability and Effectiveness of Typical Shareholders Agreement Provisions," *The Business Lawyer* 65, 4 2010: 1174.

[201] Section 6.27, "Model Business Corporation Act", americanbar.org, Accessed 15 March 2020, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

[202] Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 3-4, http://dx.doi.org/10.2139/ssrn.2234348.

Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 283, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[204] Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation," *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 32.

[205] Para 5, Article 15, "Law On Close Corporation", https://www.gesetze-im-internet.de, Accessed 15 April 2020, https://www.gesetze-im-internet.de/englisch_gmbhg/englisch_gmbhg.html.

[206] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 25, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[207] Article 26(1) Law of Ukraine on "Joint Stock Companies,"zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

[208] Article 20, Law of Ukraine on "Limited Liability and Additional Liability Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/2275-19.

directly prohibited in the law to provide articles of the public joint stock company with provisions on pre-emptive rights, articles of the private joint stock company, which has no more than 100 shareholders, are not subject to this restriction[209].

Obligations arising from such an agreement have a contractual nature, except in a situation when provisions restrictions are incorporated in the "shareholders' agreement" under 7.32 MBCA, or in an agreement amending articles. Infringement of such restrictions can lead to the invalidations of the contract only if the buyer new of their existence, this basis principle of contract law applies in both systems. In general, the legal nature of limitations on the transferability of shares provided for in shareholders' agreements does not differ between common law and civil law systems.

It should be noted that MBCA and DGCL provide guarantees that a prospective buyer will be aware of the existence of restrictions. This is a guarantee that breach of the restrictions may result in the cancellation of the transaction.

In both systems, the type of a company in which shareholders enter into such agreement is of great importance. Often, the law directly forbids the establishment of restrictions on shares of listed companies. Some authors argue[210] that, shareholders have the option to include such provisions in agreements. The author suggests that, in this case, there is a high risk of consideration such a provision as contrary to "public policy", because restrictions on shares in public companies undermine the very essence of these companies, which were designed to attract additional shareholders and investors.

3.3.2. Agreement on the Deadlock Resolution

Deadlock can be defined as a situation of a serious corporative conflict among the major shareholders when no one has the majority of votes to adopt a decision or to assign a director.

An agreement could provide for the creation by the parties of a special elected body for the settlement of the conflict, the use of mediation procedure, the involvement of an independent expert[211].

---

[209] Paras 1-2, article 7, Law of Ukraine on "Joint Stock Companies,"zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

[210] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 198, https://virtualibiblioteka.vu.lt/primoexplore/search?vid=VU&lang=en_US ; Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 25, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[211] The Corporation Law Committee of the Association of the Bar of the City of New York, "The Enforceability and Effectiveness of Typical Shareholders Agreement Provisions," *The Business Lawyer* 65, 4 2010: 1197.

Shareholders can stipulate provisions on the assignment of one of the shareholders, as a Chairman, who will have the casting vote[212].

The second way is the so-called “Shotgun conditions” or “buy/sell provisions”. These conditions may include various ways of the resolution of a deadlock.

«Russian roulette»: in case of a deadlock, a party to a contract sends an irrevocable offer to another shareholder, offering to sell shares at a certain price and under certain conditions. The party receiving the offer is required to accept it or to make an irrevocable offer to another party, offering to buy its shares on the identical terms to those of the original offer.

«Texas shoot-out: each party to agreement sends to an independent mediator a sealed offer, indicating the price, at which shareholders intend to buy shares of the other party. The envelopes are opened simultaneously, and a bid, which stipulates the highest price wins. The offeror of this bid must buy the shares, another party has an obligation to sell them[213].

“Dutch auction”: parties to an agreement indicate in offers a minimum price, under which they are ready to sell their shares. The offeror of the highest price is entitled to buy shares from another party.

“Deterrence approach”: in order to prevent a deadlock, one of the parties to a shareholders’ agreement has the right to declare a “deadlock”. From this moment on, the shareholder is obliged to acquire shares of another party or parties at the price 25% above the market or to sell his share with a decrease of up to 75% of the market value[214].

According to H. Fleischer and S. Schneider, in Germany, there is no jurisprudence in respect of “shotgun conditions”, nevertheless legal science does not found the conditions as contrary to the public policy, with exception to the situation, when “weaker” shareholder is unable to benefit from the clause, due to few financial resources. In such a case, it can be regarded as a breach of fiduciary duties among the shareholders. In France, buy-sell provisions are used and, pursuant to the jurisprudence[215], does not consider as a prohibited corporate sanction[216].

---

[212] Murray Thornhill, “What to include in a shareholders' agreement,” *Governance Directions*, 67, 5 (2015); 291- 294, https://search.informit.com.au/documentSummary;dn=257418628347764.

[213] Yuriy Zhornokui, Olha Burlaka, and Valentyna Zhornokui., "SHAREHOLDERS AGREEMENT: COMPARATIVE AND LEGAL ANALYSIS OF THE LEGISLATION AND LEGAL DOCTRINE OF UKRAINE, EU COUNTRIES AND USA," *Baltic Journal of Economic Studies* 4, 2 (2018): 294.

[214] Сергей М. Варюшин, “Гражданско правовое регулирование корпоративных договоров : сравнительный анализ” (диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015), 123.

[215] CA Paris, 15 December 2006, Rev. trim. dr. comm. 2007, 169, 170.

[216] Holger Fleischer and Schneider Stephan, “Shoot-Out Clauses in Partnerships and Close Corporations – An Approach from Comparative Law and Economic Theory,” *European Company and Financial Law Review (ECFR)* 9, 1 (2012): 45-50.

Pursuant to para 3, Article 26(1) of the Ukrainian Law on Joint Stock Companies, parties to a shareholders' agreement may prescribe terms or procedures for determining the condition on which parties are entitled or obliged to buy or sell shares[217]. Author is of opinion, that there is no need to specially prescribe,

In conclusion, shareholders' agreements on the deadlock resolution cover different ways of the resolution of the deadlock, from non-mandatory arbitration to sell-buy condition. The clauses are used in both legal families. In certain cases, the agreement may trigger "public policy" clause.

[217] Para 3, Article 26(1), Law of Ukraine on "Joint Stock Companies," zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

CHAPTER 4. ENFORCEMENT OF SHAREHOLDERS' AGREEMENTS

4.1. Enforcement of Shareholders' Agreements in Common law Countries

English scholars and jurisprudence recognize the use of specific performance to the enforcement of voting agreements, this applies both to the duty to vote in a certain way and duty to abstain from voting. The resolution of the general meeting of shareholders is presumed to be valid[218].

According to R. Zakrzewski, a non-breaching party could claim damages for breach of a shareholders' agreement. Courts use the doctrine of legal expectations in such cases. In such proceeding a court's objective is to put parties in the position they would have been in if an agreement had been performed. A resolution of the general meeting of shareholders cannot be quashed on the basis of a breach of a shareholders' agreement[219].

Violation of a shareholders' agreement may lead to the liquidation of the company on the "just and equitable" ground under the provisions of the Insolvency Act 1862[220]. Shareholders' are entitled to claim the indemnification on the basis of "unfairly prejudicial conduct", under section 994 of the Companies Act 2006[221]. Parties to a shareholders' agreement are empowered to provide the agreement with its mechanism of enforcement, for example pre-emptive right or penalty[222].

In the case of *Cavendish Square Holding BV v Talal El Makdessi* [2015] [223], the Supreme Court of the United Kingdom found the provisions of the shareholders' agreement, which oblige a breaching party to sell its shares at a low price, to be valid. The decision was unexpected because in general contractual penalties are prohibited in the English contract law, nevertheless, the Court held that in this case legitimate interest justifies such a penalty[224].

According to M. Duffy, shareholders in Australia are able to employ different types of means to protect contractual rights. The first group of means includes contractual means of protection, such as

---

[218] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 312, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[219] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 272-274, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[220] Section 122(1)(g) "Insolvency Act 1986," legislation.gov.uk, Accessed 4 April 2020, http://www.legislation.gov.uk/ukpga/1986/45/contents.

[221] Section 994, "Companies Act 2006," legislation.gov.uk, Accessed 4 April 2020, http://www.legislation.gov.uk/ukpga/2006/46/contents.

[222] Same as 219, 272-274.

[223] Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67.

[224] Same as 219, 272-274.

"specific performance", induction, right to claim reimbursement, the right to unilaterally terminate the contract in case of violation of its essential terms. The second group includes means of protection prescribed in the company law, such as "oppression remedy"[225] - the concept that encompasses a wide range of remedies available to shareholder courts in defence of their rights violated by the company, directors or majority shareholders. Additionally, shareholders can use derivative claims in the protection of rights and legitimate interests of a company[226].

Shareholders' agreements are enforced in the United States, in the same way as other agreements. The special feature is that courts are more likely to employ specific performance than damages because it is difficult to determine the amount of damages, incurred by a breach of a shareholders' agreement. Shareholders may independently challenge the breach of the agreement or make a claim through a derivative action, which is especially relevant if the offender is a director, which often takes place, in case of a close corporation[227].

The plain language of the MBCA explicitly states that "voting agreements" are specifically enforceable. Shareholders may use a proxy or provide for the other manner of the enforcement of an agreement. If shareholders haven't provided the agreement with a method of execution, a court may order the cast of votes in accordance with the content of an agreement[228].

Most of the states provide for "specific performance" of shareholders' agreement in the laws. In the USA, shareholders' agreement often contains provisions obliging shareholders to resolve disputes caused by the violation of the agreement, through arbitration. In some cases, the arbitrator is entitled to cast the votes or to make a decision on administrative matters[229].

[225] Section 232, "Australian Company Act 2001," https://www.legislation.gov.au, Accessed 4 April, https://www.legislation.gov.au/Details/C2018C00031:
"The Court may make an order under section 233 if: (a) the conduct of a company's affairs; or (b) an actual or proposed act or omission by or on behalf of a company; or (c) a resolution, or a proposed resolution, of members or a class of members of a company; is either: (d) contrary to the interests of the members as a whole; or (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.
For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company."

[226] Michael Duffy, "Shareholders Agreements and Shareholders' Remedies - Contract Versus Statute?," *Bond Law Review* 20, 2 (2008): 12-23, https://ssrn.com/abstract=3192206.

[228] Section 7.31, "Model Business Corporation Act", americanbar.org, Accessed 15 March 2020, 139, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

[229] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 663, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

It is also important to take into account that courts prefer to enforce the shareholders' agreements that have been concluded among all shareholders, since even the potential risk of infringement of the rights of other shareholders may be a ground for non-enforcement[230].

In the author's view, shareholders' control agreements, which were concluded between all shareholders of a company and were forwarded to the register, in accordance with sections 29 and 30 of the Company Act 2006, are performed, since the conclusion of this agreement. It also applies to shareholders' agreements concluded under section 7.32 of the MBCA. The agreements don't impose any obligation on the parties, such agreements establish a new regulation of the activities of a company and relationships between shareholders. The remaining shareholders' control agreements are enforced in the same manner as voting agreements because these types of agreements are performed through the exercise of shareholders' voting rights.

4.2. Enforcement of Shareholders' Agreements in Continental law Countries

As already stated in one of the preceding chapters, in Germany, initially, courts did not find shareholders agreements enforceable. One argument was that shareholders who agreed to vote in advance did not have the opportunity to make decisions on the results of the discussion during the general meeting of shareholders. This fact did undermine the "duty of loyalty" of shareholders to the company. This position was revised only in 1967, by the decision of the Supreme Federal Court of Germany[231]. The Court indicated that shareholders already, in most cases, before the meeting make a decision on how they will vote during the meeting[232].

In general, shareholders' agreements are enforced in the same manner as declarations of intent, the procedure regulated in section 894 of the Civil Procedure Code[233]. According to this rule, the expression of will is considered to be complete from the moment of entry into the force of the court decision. The decision supersedes the need to express the will but does not preclude the need for a decision of the general meeting[234].

---

[230] Molano Leon, "Shareholders' Agreements in Close Corporations and Their Enforcement." *LLM Theses and Essays,* 89 (2006): 36, https://digitalcommons.law.uga.edu/stu_llm/89/.
[231] BGHZ 48, 163, 171. quoted in Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 12, http://dx.doi.org/10.2139/ssrn.2234348.
[232] Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 11, http://dx.doi.org/10.2139/ssrn.2234348.
[233] Same as 232, 11.
[234]Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation," *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 54,

According to the general approach, violation of provisions of a shareholders' agreement cannot be a ground for declaring a resolution of the general meeting of shareholders invalid. The vote cast in breach of the agreement is regarded as valid[235]. The exemplary judgment was given by the Supreme Federal Court of Germany[236]. In this case, the shareholder refused to vote in accordance with the position, adopted between the parties to the shareholders' agreement. The position was adopted by the simple majority of shareholders, pursuant to the provisions of the shareholders' agreement. The violator of the agreement indicated that the decision is to be adopted by a qualified majority of shareholders (3/4), under the provisions of the Joint-Stock Company Act. The Supreme Court of Germany considered such a vote at the general meeting to be valid since the participant of the meeting was not bound by the agreement, but also indicated that the agreement on the voting right was also valid, and therefore the shareholder, who voted at the meeting contrary to his obligation, is subject to civil liability, due to the violation of the agreement[237].

There is, however, an exception to the general rule. The Federal Court of Justice[238] indicated that if all shareholders are parties to a shareholders' agreement, the company is also considered a party to the agreement. A breach of such a shareholder agreement may be the reason to invalidate a resolution of the general meeting of shareholders[239].

In addition, another feature of the German approach to the enforcement of shareholders' agreements is the application of prior security. However, there is no list of precise criteria for the introduction of such preliminary measures, stipulated in the legal doctrine or jurisprudence. It depends on the circumstances of the particular case and court's assessment of the pros and cons of the application of preliminary measures in the particular case[240].

---

[235]Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 300, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[236] BGH NJW 2009, 669. quoted in Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation," *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 41.

[237] Same as 234, 41.

[238] Federal Court of Justice as of 27.10.1986 – II ZR 240 /85, NJW 198 7, 1890 ,1892, quoted in Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 300, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[239] Same as 235, 300.

[240] Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation," *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 35.

According to the decision of the Federal Court of Justice[241], arbitration tribunals are authorized to annul resolutions of the general meetings of shareholders. The Court established criteria for arbitration to have the competence to annul the resolution and enforce the agreement. All shareholders of the company must be a party to the agreement and arbitration proceedings, there must be provided guarantees of the independence of members of a tribunal, the arbitration clause must exclude the possibility of opening paralegal court proceedings, and the company must be a party to this shareholders' agreement[242].

According to German law, in the event of a breach of obligations arising from the agreement, the non-breaching party can claim damages[243] or penalty, if provided for in the agreement[244]. A claimant must prove the occurrence of losses. If this is not possible, a court has the right to assess the amount of damage[245]. Assessment of the damage is rather problematic. A penalty was often used by shareholders, before the courts recognized the application of specific performance to the agreements, now it is not used so often as it was used[246].

Specific performance of shareholders' agreement on the limitation of the transferability of share is allowed, only if it is provided in the agreement. Shareholders' control agreements cannot be enforced through the specific performance, violation of this agreement may lead to the termination, compensation, or penalty if provided[247].

Generally, the application of specific performance to shareholders' agreement in France is limited, the main means of protection are penalties and compensation of damages[248]. Pursuant to the

---

[241] German Federal Supreme Court ,supra note 57 (Schiedsfähigkeit III). quoted in Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 44, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[242] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 43-44, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[243] Section 280, "German Civil Code," https://www.gesetze-im-internet.de, Accessed 15 March 2020, https://www.gesetze-im-internet.de/englisch_bgb/.

[244] Section 339, "German Civil Code". https://www.gesetze-im-internet.de, Accessed 15 March 2020, https://www.gesetze-im-internet.de/englisch_bgb/.

[245] Section 287, "German Code of Civil Procedure," https://www.gesetze-im-internet.de, Accessed 15 March 2020, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

[246]Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 12, http://dx.doi.org/10.2139/ssrn.2234348.

[247] Same as 242, 302.

[248] François Belot, "Shareholder Agreements and Firm Value: Evidence from French Listed Firms," *SSRN Electronic Journal* (January, 2008): 9, http://dx.doi.org/10.2139/ssrn.1282144.

general rule established in article 1165 of the French Civil Code, shareholders' agreement is binding only for its participants[249].

As noted, by M. Laidin and R. Souchon, specific performance of pre-emptive clause is possible, if the third party knew about the existing limitations and was aware, those other shareholders will exercise pre-emptive right, in other words – it is to be shown, that third party was acting with intention of fraud. Shareholders' should prescribe that they will always exercise pre-emptive right, in order to increase the chance of the agreement being effectively enforced[250].

Under French law, in the case of a breach of pre-emptive right, it is possible to claim damages from both the infringing shareholder and the third party, provided that the third party knew of the existence of the restrictions. As in other jurisdictions in France, there is a difficulty in determining the damage infiltrated. Pursuant to the jurisprudence of the violation of the pre-emptive clause, it causes material damage and non-material damage. Shareholders are able to provide a special penalty clause, which is not capable of solving the issue of uncertain damage caused by the breach of the agreement, because courts are able to reduce the penalty, on the basis of an assessment of damage, pursuant to article 1152 of the French Civil Code[251].

Pursuant to para 4, of article 2.88 of the Civil Code of Republic of Lithuania, a court is entitled to recount votes, cast in violation of the agreement, in accordance with a claim of an injured party, or to declare the resolution of the general meeting of shareholders, taken in contradiction with terms of the agreement, null and void[252].

There are two positions in the legal science of Lithuania, on the ratio between the two above-mentioned methods of enforcement of the agreement. According to the first position, the plaintiff is given the right to choose one of two ways of protection. According to the second, the court itself, on the plaintiff 's claim, decides on the method of protection, a recount of votes is carried out only if the voting in violation of provisions of an agreement, became decisive for the adoption or non-adoption of resolution by the general meeting of shareholders. In practice, the first model of enforcement applies only in the case of clear and understandable terms of the agreement on the procedure of voting[253].

---

[249] Article 1165, "French Civil Code", trans-lex.org, Accessed 3 April 2020, https://www.trans-lex.org/601101/_/french-civil-code-2016/.
[250] Mathilde Laidin and Romain Souchon, "Do preemptive clauses work in shareholders' agreements? (France)" 2014, https://www.acc.com/resource-library/do-preemptive-clauses-work-shareholders-agreements-france.
[251] Same as 250
[252] Para 4, article 2.88, "Civil Code of the Republic of Lithuania," https://e-seimas.lrs.lt, Accessed 10 March 2020, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495.
[253] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 233-235,

In Ukraine, a shareholders' agreement may provide for methods of enforcement and measures of civil liability for violators, these provisions are subject to judicial protection[254]. There is already jurisprudence in this regard. The Court enforced the provisions of the shareholders' agreements obliging the breaching party to transfer its share in the statutory capital of the company, to the non-breaching party[255].

The Law on Joint Stock Companies expressly provides that a breach of a shareholders' agreement may not be a ground for invalidating of a resolution of the general meeting decision of shareholders. There is no such provision in respect of a limited liability company, it is therefore not possible to give an exact answer at this time. Shareholders can use irrevocable proxy in order to reliably protect their rights[256].

As for the enforcement of shareholders' agreements on restrictions on the transfer of shares, the law expressly stipulates that a contract entered into in violation of the agreement, may be declared invalid, provided that the third party, knew or could know that such restrictions are existing[257]. Parties to the agreements authorized to claim indemnification of damages or penalty, if provided for in the agreement. A court may reduce the amount of penalty, it significantly exceeds the amount of the damages incurred[258].

The assessment of the damage caused by a breach of a shareholders' agreement is problematic, in view of the fact that in accordance with the classical fault-based approach to civil liability, set out in article 614 of the Civil Code of Ukraine, it is hard to prove a cause and effect between the breach of an agreement and adverse consequences infiltrated by non-breaching parties[259].

Authority of shareholders to stipulate a penalty in shareholders' agreement is specially provided for in the Law on Joint-Stock Companies.[260]

---

https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[254] Para 6-7, Article 26(1), "Law on Joint Stock Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

[255] Economic Court of Odessa region, 28.11.2019, Case № 86175401.

[256] Article 8," Law on Limited Liability Company," zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/227519 ; Article 26(2), "Law on Joint Stock Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

[257] Para 6, article 7, Law of Ukraine on "Limited Liability and Additional Liability Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/2275-19.

[258] Article 551, "Civil Code of Ukraine", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/435-15.

[259] Yuriy Zhornokui, Olha Burlaka, and Valentyna Zhornokui., "SHAREHOLDERS AGREEMENT: COMPARATIVE AND LEGAL ANALYSIS OF THE LEGISLATION AND LEGAL DOCTRINE OF UKRAINE, EU COUNTRIES AND USA.," *Baltic Journal of Economic Studies* 4, 2 (2018): 297.

[260] Para 7, article 26(1), "Law on Joint Stock Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

In the authors' view it is unreasonable to stipulate in the Ukrainian Law on Joint Stock Companies that shareholders' agreements are not subject to the specific performance. Because, parties conclude agreements in order to have it performed, and not to get the indemnification or to trigger a penalty, that is stipulated in the contract. At the same moment, it must be noted, that specific performance of the agreement may be considered as a way of application of contracts' provisions on the third parties, that effect must be excluded.

The author considers that, in this case, the balanced approach which is used in Germany should be applied in Ukraine. Under this approach specific performance of shareholder's agreements is applied if all shareholders are parties to such an agreement. This approach is the most appropriate one, because it gives shareholders access to specific performance, while the rights of third parties (shareholders not party to the contract) can't be infringed.

At the same time, it is necessary to exclude the possibility of specific performance of "shareholders' control agreements", indicating that special execution relates only to voting duties. The proposed amends should not allow shareholders to create the "second articles" that would not be subject to mandatory disclosure to other shareholders, creditors, potential investors, and others.

In addition, it worth to add, that such amendments will be in line with the Article 13 of the European Convention on Human Rights, thus providing shareholders with the effective remedy[261].

For these reasons, the author recommends amending para 3, article 26(1) of the Law on Joint Stock Companies, and to add para 7 in article 7 of the Law on Limited Liability Company, in such way:

Present provision of para 3, article 26(1) the Law on Joint Stock Companies:

"Violation of the shareholders' agreement shall not be the basis for the invalidation of decisions of the governing bodies of the company"[262]/" Порушення договору між акціонерами не може бути підставою для визнання недійсними рішень органів товариства."

Recommended amends to para 3, article 26(1) of the Law on Joint Stock Companies:

"Violation of shareholder's agreement, under which the parties assume the obligation to realize their voting rights in a certain manner, can result in invalidation of the decision of the governing bodies of the company, if all shareholders of this company are party to the agreement." / "Порушення договору між акціонерами, згідно з яким акціонери приймають на себе обов'язок по реалізації свого права

---

[261] Article 13, "European Convention of Human Rights," https://www.echr.coe.int, Assessed 1 May 2020, https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=.

[262] This translation was done by Anna Babych in Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 635, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

голосу у певний, передбачений, договором спосіб, може бути підставою для визнання недійсними рішень органів товариства, якщо всі акціонери цього товариства, являються сторонами цього договору.”

Recommended to add para 7 in article 7 of the Law on Limited Liability Company in following version:

“Violation of shareholder’s agreement, under which the parties assume the obligation to realize their voting rights in a certain manner, can result in invalidation of the decision of the governing bodies of the company, if all shareholders of this company are party to the agreement.”/ “Порушення корпоративного договору, згідно з яким учасники товариства приймають на себе обов'язок по реалізації свого права голосу у певний, передбачений, договором спосіб, може бути підставою для визнання недійсними рішень органів товариства, якщо всі учасники цього товариства, являються сторонами цього договору.”

In conclusion, in both legal systems, the prevailing approach is that violation of a shareholders’ agreement is not regarded as a sufficient ground for invalidation a decision of the general meeting of shareholders, the exceptions can be found in Germany, with respect to agreements concluded between all shareholders and the Republic of Lithuania. Specific performance of agreements, which are performed through the voting, is common in common law jurisdiction. There is no common approach to this issue in the continental jurisdictions. Legal orders of Germany and the Republic of Lithuania apply specific performance, while Ukrainian and French laws do not. Preliminary security of shareholders’ agreements is allowed in Germany.

Violation of the provisions of shareholders’ agreements on limitations of the transferability of shares cannot be a ground to quash a transaction if the third party was not aware of such limitations. In continental jurisdictions, the non-breaching party can use such means of protection, as indemnification of damages and penalties. In common law countries, shareholders are able to benefit from some of the instruments provided for in corporate law, such as liquidation, in addition to means of protection provided in contract law.

As for shareholders’ agreements, which directly establish new regulations of the company’s activities and relations between shareholders, such agreements can be considered as performed from the moment of their adoption and the conduct of mandatory registration procedures, in compliance with the law.

CHAPTER 5. MANDATORY REQUIREMENTS ON FORM AND CONFIDENTIALITY

5.1. Conclusion and Termination of Shareholders' Agreements

According to Y. Zhornokui, O. Burlaka, and V Zhornokui, in most cases shareholders' agreements in the UK are not subject to any particular requirement as to the form in which they are concluded, modified, or terminated in accordance with the principle of freedom of contract. Shareholders' agreements as a default are modified by the decision of all parties to the contract, except as otherwise provided in the contract. In practice, there are two main forms simple written form and "deed". If the company is a party to a shareholders' agreement, the signatories on behalf of the company may be persons specifically authorized by the constituent documents[263].

Pursuant to the general provisions of English contract law, shareholders' agreement must have certain consideration, and parties must expressly indicate their intention to be bound by the term of the agreement[264]. Consideration in terms of English contract law means that each party gets some sort of benefit from the performance of the contract. The new shareholder of the company does not simultaneously enter into the shareholders' agreement, it is possible by the voluntary signing of an accession treaty "deed of adherence" [265].

An agreement may be terminated pursuant to a term of the contract by a unilateral waiver in case of breach of the contract by the other party. English law does not contain provisions that limit the duration of the joint-stock agreement.

The grounds for the amendments and termination of the agreements are provided for in English contract law, inter alia, it should be noted, that an agreement may be terminated under the agreements' terms and by the unilateral waiver of obligations, in case of breach of the agreement by the other party. English law does not stipulate provisions that would limit the duration of a shareholders' agreement[266].

---

[263] Yuriy Zhornokui, Olha Burlaka, and Valentyna Zhornokui., "SHAREHOLDERS AGREEMENT: COMPARATIVE AND LEGAL ANALYSIS OF THE LEGISLATION AND LEGAL DOCTRINE OF UKRAINE, EU COUNTRIES AND USA.," *Baltic Journal of Economic Studies* 4, 2 (2018): 293-294.

[264] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 321, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[265] Same as 263, 293-294.

[266] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 258-259, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

It is also important to note that the Duomatic principle is applied to the amendments of shareholders' agreements. As P. Miliauskas points out, in the case of *Monecor (London) Limited v. Euro Brokers Holdings Limited* [2003][267], the Court has stated that the parties to the agreement may avoid the formal requirements of the agreement, in order to take certain actions to perform or modify it[268].

According to W. Kaal, in the United States, shareholders' agreement can be incorporated into articles of association or bylaws. The authority of shareholders to determine the procedure of amending of the agreement, differs from the complex procedure in relation to the articles, that require united action to be taken by both shareholders and board of directors. Corporate laws in some States require shareholders to include shareholders' control agreements into the articles. This most often results in the inability to enforce such shareholders' agreement, although there are exceptions, in the jurisdiction of the State of New York[269].

As noted, shareholders' control agreement concluded under section 7.32 of the MBCA, must be concluded among all shareholders of the company. In default, the agreement may be amended only by all existing shareholders, unless agreement prescribes otherwise[270]. The board of directors is authorized to amend articles, that contained a shareholders' agreement if the agreement ceases to be valid[271]. The MBCA does not limit the duration of a "shareholders' agreement" and "voting trust"[272].

It is important to point out that in accordance with the official comment to MBCA, in the absence of special provisions, stipulated in an agreement, in the event of the death of a shareholder, the agreement will apply to the new shareholder.[273]

As it was noted, in previous chapters, in Germany, shareholders' control agreement and voting agreement are regarded as non-commercial partnerships, as for the agreements on limitations of the transferability of shares that type is regarded as "mere agreements".

---

[267] *Euro Brokers Holdings Ltd v Monecor* (*London*) *Ltd* [2003] 1 BCLC 506.

[268] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 322-323, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[269] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 662, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[270] Section 7.32 (B), "Model Business Corporation Act", americanbar.org, Accessed 15 March 2020, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

[271] Section 7.32 (D), "Model Business Corporation Act", americanbar.org, Accessed 15 March 2020, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

[272]Section 7.30 (B), Section 7.32 (H), "Model Business Corporation Act", americanbar.org, Accessed 15 March 2020 https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

[273] "Model Business Corporation Act", americanbar.org, Accessed 15 March 2020, 143, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

According to S. Mock shareholders' agreements in Germany are not subject to specific regulation on the form of agreements. Parties are authorized to terminate the agreement at any moment, if parties to the agreement, have not provided for the duration of the agreement,[274] in other case partnerships can be terminated by parties only through winding-up[275]. It applies to non-commercial partnerships. It is necessary to specify that by default, the action of a partnership must be approved by all participants of this association[276]. An agreement may be included in the articles[277].

As noted by D. Stepanov, V. Vogel, H. Schamm[278], agreements on limitations of the transferability of shares concluded in a close corporation must be notarized, other types of the agreements, are not subject to this requirement, in accordance with the court decision[279]. Although it is possible to conclude shareholders' agreements orally, in the legal practice these agreements are usually done in writing.[280]

In France, terms on conclusion and termination of shareholders' agreements are subject to the general provisions of the French contract law. Pursuant to the general requirements of Article 1108 of the French Civil Code, contract to be concluded by explicit intend of parties, with the legal capacity to contract, to be bound by the terms of the contract[281]. In accordance with current jurisprudence, a shareholders' agreement that does not have a certain validity period may be unilaterally terminated by either party, provided that an advance warning was complete[282].

---

[274]Section 723, subsection 1, "German Civil Code". https://www.gesetze-im-internet.de, Accessed 15 March 2020. https://www.gesetze-im-internet.de/englisch_bgb/.

[275] Section 738, "German Civil Code". https://www.gesetze-im-internet.de, Accessed 15 March 2020. https://www.gesetze-im-internet.de/englisch_bgb/.

[276] Section 709, "German Civil Code". https://www.gesetze-im-internet.de, Accessed 15 March 2020. https://www.gesetze-im-internet.de/englisch_bgb/.

[277] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 283, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[278] Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation," *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 63-65.

[279] OLG Köln GmbHR 2003, 416 (LS). quoted in Dmitry I. Stepanov, Vadim A. Vogel and Hans-Joachim Schramm, "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation," *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 64.

[280]Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 282, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

[281] Frédéric Ichay, "IBA Guide on Shareholders' Agreements: France" 2012: 1-2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=F7E7F4B3-A308-498E-8218-BEB66C0F6B7E.

[282] Frédéric Ichay, "IBA Guide on Shareholders' Agreements: France" 2012: 1-2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=F7E7F4B3-A308-498E-8218-BEB66C0F6B7E.

The maximum duration of a "shareholders' agreement on the transfer of voting rights" is 10 years[283]. There is no special registration procedure on both types of agreements, regulated in the law[284].

Pursuant to para 1, article 26(1) of the Ukrainian Law on Joint Stock Companies, shareholders' agreement must be concluded in whiten form. There are no restrictions on the duration of the agreement[285]. The same applies to limited liability companies[286]. Registration requirements are provided only for irrevocable proxy, that must be notarized[287].

In conclusion, such issues, as form, conclusion, termination, and amendment of shareholders' agreements are subject to the general regulation of the contract law in the respective jurisdiction of both legal families. By the default, the agreement to be amended by the decision of all parties, terms on the termination may be addressed by shareholders. According to the approach applied in all jurisdiction, under the consideration, the duration of the agreement is unlimited, except for the agreement on the transfer of voting right. There is no prohibition to include the agreements into the articles of bylaws, in case of shareholders' control agreements, there are some jurisdictions in which inclusion is mandatory.

5.2. Confidentiality of Shareholders' Agreements

5.2.1. Confidentiality of Shareholders' Agreements in Common law Countries

Pursuant to articles 29 and 30 of the Company Act 2006, shareholders' agreement that was concluded between all shareholders, is subject to the same disclosure requirements as articles of association. In accordance with the mentioned articles, any special resolution, any agreement entered among all shareholders, which affects companies' constitutions[288] must be sent within 15 days to the register, shareholders' agreement has no legal effect until this requirement will be fulfilled.

---

[283] Para 4, Article 2.89, "Civil Code of the Republic of Lithuania," https://e-seimas.lrs.lt/, Accessed 10 March 2020, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495.

[284] Paulius, Miliauskas. "Company law aspects of shareholders' agreements in listed companies." (Doctoral dissertation, Vilnius University, Ghent University, 2014), 181, https://virtualibiblioteka.vu.lt/primo-explore/search?vid=VU&lang=en_US.

[285] Para 1, article 26(1), Law of Ukraine on "Joint Stock Companies,"zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

[286] Paras 1,2, article 7, Law of Ukraine on "Limited Liability and Additional Liability Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/2275-19.

[287] Para 4, article 8, Law of Ukraine on "Limited Liability and Additional Liability Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/227519;
Para 3, article 26(2), Law of Ukraine on "Joint Stock Companies,"zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.

[288]Article 29, "Companies Act 2006", legislation.gov.uk, Accessed 4 April 2020, http://www.legislation.gov.uk/ukpga/2006/46/contents.

Additionally, non-compliance with the provision leads to the penalty, that applies both on the company and any officer who is in charge (according to paras 2 and 3 of article 30). Article 26, which stipulates the procedure of the registration of amends to an article, contains an identical provision to article 30, that regulate special resolutions and shareholders' agreements[289].

R. Zakrzewski indicates, that these registration and publication requirements can be avoided if it is stated in the shareholders' agreement that it will be performed by means of voting for amendment of the articles.[290] It is also worth noting, that obligations on the disclosure of shareholders' agreement may arise in connection with provision stipulated in Part 21A of the Company Act 2006. This part is devoted to the disclosure of beneficial owners. The company is obliged to disclose its beneficial owner and to include in the special report every person that exercises indirect control over a minimum of 5% of votes or shares. In addition, a shareholders' agreement may be subject to disclosure under the provisions of the City Code on Takeovers and Merges[291].

Pursuant to para c of section 7.32 the MBCA, the existence of the agreement must be expressly marked on the front or back of each share certificate or on the information sheet required. A buyer who has not been informed of the existence and content of the shareholder agreement is entitled to nullify the purchase and to compensation for the damage caused. If shareholders' have complied with the mentioned requirements, a buyer is presumed to be properly informed[292].

---

[289]Article 26, "Companies Act 2006", legislation.gov.uk, Accessed 4 April 2020, http://www.legislation.gov.uk/ukpga/2006/46/contents:
"Registrar to be sent copy of amended articles
(1) Where a company amends its articles it must send to the registrar a copy of the articles as amended not later than 15 days after the amendment takes effect. (2) This section does not require a company to set out in its articles any provisions of model articles that — (a)are applied by the articles, or (b)apply by virtue of section 20 (default application of model articles). (3)If a company fails to comply with this section an offence is committed by—(a)the company, and
(b) every officer of the company who is in default. (4)A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale."
Article 30, "Companies Act 2006", legislation.gov.uk, Accessed 4 April 2020, http://www.legislation.gov.uk/ukpga/2006/46/contents:
"Copies of resolutions or agreements to be forwarded to registrar
(1) A copy of every resolution or agreement to which this Chapter applies, or (in the case of a resolution or agreement that is not in writing) a written memorandum setting out its terms, must be forwarded to the registrar within 15 days after it is passed or made. (2) If a company fails to comply with this section, an offence is committed by— (a) the company, and (b) every officer of it who is in default. (3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale. (4) For the purposes of this section, a liquidator of the company is treated as an officer of it."
[290] Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 256, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.
[291] Same as 290, 256;253.
[292]Section 7.32 (C) "Model Business Corporation Act", americanbar.org, Accessed 15 March 2020, https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

Under para 1 of section 218 of the DGCL, after the trust agreement is signed, the trustee must submit the list, which contains the information on all beneficial owners and the class and number of shares transferred and a copy of the agreement to the corporations' main office. The same applies to any amends of the agreement. Pursuant to para b of section 7.30 of the MBCA, voting trust becomes effective after the disclosure of a list that contains names, addresses of beneficial owners to the company.

5.2.2. Confidentiality of Shareholders' Agreements in Continental law Countries

First all it is important to consider EU Directives that play a significant role in the regulation of the disclosure of shareholder' agreement in EU countries. The basis of the European Union is the common market, which includes the stock market it can solve as an explanation of the EU's regulation of this sphere,

Directive 2004/25/EC of the European Parliament and the Council of 21 April 2004 on takeover bids includes provisions[293] that oblige all listed public companies to disclose in annual reports details of any terms and conditions of shareholder' agreements that relate to the structure of corporate governance, capital structures, restrictions on the transfer of shares, the granting of special rights to individual shareholders, voting procedures at a general meeting[294]. Additionally, it is important to note article 11, of the Directive, under the consideration, that establish a breakthrough rule on any shareholders' agreement, during the voting on the bid[295]. According to para 1 of article 9 of the Directive 2004/109/EC

---

[293] Paras 1- 2, article 10, "Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids," https://eur-lex.europa.eu/. Accessed 10 March 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0025.

[294] Mads Andenas, "Shareholders'Agreements, Some EU and English Law Perspectives," *Tsukuba Law Journal*, 1 (2007): 141-142.

[295] Pars 2 and 3, article 11, "Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids," https://eur-lex.europa.eu/. Accessed 10 March 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0025:

"2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid laid down in Article 7(1).

Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of this Directive, shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid laid down in Article 7(1).

3. Restrictions on voting rights provided for in the articles of association of the offeree company shall not have effect at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

Restrictions on voting rights provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of this Directive, shall not have effect at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

Multiple-vote securities shall carry only one vote each at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9."

of the European Parliament and of the Council of 15 December 2004, shareholders of listed companies must inform the issuer when it gained the control over 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75% of the voting rights[296]. Clause (d) of para 1 of article 20 of the Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013, establishes reporting obligation for medium and large enterprises[297].

In Germany, shareholders' agreements are subject to mandatory disclosure. According to section 20 of the German Stock Corporation Act[298], a company that acquired, including through the conclusion of a shareholders' agreement, more than a quarter of the votes on shares of another company, must notify the latter. However, as noted by R. Markus[299], this obligation only affects the acquisition of corporate control through the conclusion of a shareholders' agreement, it does not cover the text of the agreement itself and the information about its participants.

With regard to stock corporations, section 33 of the *Wertpapierhandelsgesetz* (Securities Trading Act), provides for the obligation of a shareholder to disclose, within four days, to a company and the securities market regulator, information on the shares are not owned by the shareholder, but have concluded an agreement on voting. This obligation arises when the thresholds are crossed at 3, 5, 10, 15, 20, 25, 30, 50 and 75% of the votes on shares of the stock corporation[300]. Disclosure of the fact of

---

[296] Para 1, article 9, "Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC," https://eur-lex.europa.eu/. Accessed 10 March 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0109:
"1. The home Member State shall ensure that, where a shareholder acquires or disposes of shares of an issuer whose shares are admitted to trading on a regulated market and to which voting rights are attached, such shareholder notifies the issuer of the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5 %, 10 %, 15 %, 20 %, 25 %, 30 %, 50 % and 75 %."
[297] There is a reference to the list prescribed in article 10 of the Directive 2004/25/EC.
[298] Para 1, section 20, "Stock Corporation Act," http://www.gesetze-im-internet.de, Accessed 15 March 2020, http://www.gesetze-im-internet.de/englisch_aktg/:
"1) As soon as more than one quarter of the shares in a stock corporation having its seat in Germany belongs to an enterprise, said enterprise is to notify the company of this fact without undue delay and in writing. Section 16 subsection (2), first sentence, and subsection (4) shall apply in establishing whether more than one quarter of the shares of stock belongs to an enterprise."
[299] Marcus Roth, "Shareholders' Agreements in Listed Companies: Germany," *Social Science Research Network* (2013): 14, http://dx.doi.org/10.2139/ssrn.2234348.
[300] Para 1, section 33, "German Securities Trading Act". https://www.bafin.de, Accessed 15 March 2020. https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html:
"(1) 1Any party (the party subject to the notification requirement) whose shareholding in an issuer whose home country is the Federal Republic of Germany reaches, exceeds or falls below 3 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent or 75 per cent of the voting rights attaching to shares belonging to that party by purchase, sale or other means must notify this to the issuer and simultaneously to BaFin without undue delay, and at the latest within four trading days, in compliance with section 34 (1) and" .

conclusion of an agreement and the number of controlled votes, may also occur under the *Wertpapiererwerbs- und Übernahmegesetz* (Securities Acquisition and Takeover Act) [301].

The French Commercial Code contains an obligation to disclose clauses of the agreement, which specify preferential terms on the acquisition of the shares. This requirement applies to agreement, which applies to at least 0.5% of the shares allowed to be publicly traded on the regulated market. Such agreements shall be sent, within five days from the conclusion of the agreements, to the company and the administration of the securities market[302]. After this *The Autorité des Marchés Financiers* (French governmental body, which governs Anti-money laundering policy) will disclose the mentioned information[303].

According to article 2.89 of the Civil Code of the Republic of Lithuania, shareholders' agreement on the transfer of voting right enters into the legal force after the disclosure of information on the agreement to other shareholders. Special note must include: number of votes transferred; the term for which the votes were transferred; the grounds on which the authority arose; date on authorized person and a person transferring voting rights from his shares. After this, the company shall, during the next general meeting of shareholders, notify the parties to agreement, that it has obtained the notification. In this way, the agreement is disclosed to other shareholders[304].

In Ukraine, there is no special provision on the disclosure of the agreements in a limited liability company, except for the companies with the government or local authority as owner of 25% of the

---

[301] Section 20, subsection 2, "Securities Acquisition and Takeover Act," https://www.bafin.de/, Accessed 4 April 2020, https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpUEG_en.html:
"(2) Any voting rights attached to shares in the target company which belong to a third party shall also be attributed to the offeror in full if the offeror or his subsidiary coordinates, on the basis of an agreement or in another manner, his conduct with such third party in respect of the target company; agreements in individual cases shall be excluded. Coordinated conduct requires that the offeror or his subsidiary and the third party reach a consensus on the exercise of voting rights or collaborate in another manner with the aim of bringing about a permanent and material change in the target company's business strategy."

[302] Article L233-11, "French Commercial Code," legifrance.gouv.fr, Accessed 3 April 2020, https://www.legifrance.gouv.fr/Media/Traductions/English-en/code_commerce_part_L_EN_20130701:
"Any clause in an agreement which allows preferential terms and conditions to be applied to the sale and purchase of shares which are quoted on a regulated stock market and which amount to at least 0.5% of the capital or voting rights of the company which issued those shares must be submitted within five trading days of the signing of the agreement or of the addendum containing the clause concerned to the company and to the Financial Markets Authority. Failing such submission, the effects of that clause are suspended, and the parties are released from their undertakings while any public offer of sale is in progress…"

[303] Article 223 - 18, "GENERAL REGULATION OFT HE *AUTORITÉDES MARCHÉS FINANCIERS,*" https://reglement-general.amf-france.org/, Accessed 4 April 2020, https://reglement-general.amf-france.org/eli/fr/aai/amf/rg/20161218/en.pdf:
"The AMF shall publicly disclose the information mentioned in Article L. 233-11 of the Commercial Code. The AMF shall specify an instruction how such information is to be transmitted to it."

[304] Pars 2-3, article 2.89, "Civil Code of the Republic of Lithuania," https://e-seimas.lrs.lt/, Accessed 10 March 2020, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495.

capital. In such cases, the agreements are to be disclosed on the e-page of the authority, owning the company, in terms of 10 days after the conclusion[305].

As for joint stock companies, the law prescribes, that a person who, pursuant to an agreement between shareholders, has acquired the right to determine the option of voting at the general meeting of shareholders, is obliged to notify the company of the acquisition of such a right if, as a result of such agreement, that person either directly or jointly with his affiliates or indirectly, obtains the opportunity to control of more than 10, 25, 50 or 75 percent of the votes. Notification, must include the date of conclusion and the date of entry into force of the agreement, the date of the decision to amend the agreement, the date of termination of the agreement between the shareholders, and the number of shares owned by the persons who concluded the agreement. Notification must be made in terms of 5 days[306].

At the same time, O. Paplik specifies that the legislator has deprived shareholders, who are not parties to an agreement, in private joint stock company of the right to be aware of the conclusion of an agreement. This is due to the fact that the obligation to disclose the aforementioned information in the manner established to disclose specific information about the issuer rests solely with the public limited company[307]. The author considers that this state of affairs is well-founded and in line with international practice, since private joint stock company can be regarded as a "close corporation", because this is a type of corporation that does not have the right to be listed on securities market, and in "close corporation" shareholders have no responsibility to disclose its "voting agreements", or "agreements on the transfer of shares"[308].

In conclusion, shareholders' control agreements in common law jurisdiction are subject to the same treatment as articles. Their content is publicly available for both the other shareholders and third parties. Voting trust and agreement on the transfer of voting rights are disclosed to the other shareholders in mandatory order. The issue of the disclosure of voting agreement is hardly related to the type of company, in question. In both legal families voting agreement concluded among shareholders in a publicly-traded company, are subject to disclosure in various degrees. Continental law jurisdictions, except for Ukraine, complies with EU directives, which address disclosure of voting agreement in publicly traded companies.

[305] Para 3, article 26(1), "Law on Joint Stock Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/514-17.
[306] Para 5, article 7, Law of Ukraine on "Limited Liability and Additional Liability Companies", zakon.rada.gov.ua, Accessed 1 April 2020, https://zakon.rada.gov.ua/laws/show/227519.
[307] Ольга Паплик, " Договір між акціонерами товариства як спосіб здійснення корпоративних прав," *Цивільне право і процес,* 3 (2018): 22.
[308] The author has mentioned these types, because other are not available in Ukraine.

CONCLUSIONS

1. At the very beginning of the application of shareholders' agreements in common law and continental law jurisdictions, the agreements were concluded only on the basis of the principle of "freedom of contract". Recognition of the shareholders' agreements under which shareholders are authorized to directly establish new regulation or amend the articles, resulted from the amendment of the law, which directly provides for the permission to conclude such agreements.

2. While the shareholders' agreement which can serve as a separate source of regulation or amend the articles can address the same issues as articles and are subject to the same restrictions, other shareholders' agreements can't contradict the articles in respect of a subject matter defined in law, as the subject-matter of articles. Shareholders' agreements must not have an adverse effect on the third parties, agreements are valid, provided that the rights of third persons are not violated. Both types of shareholder' agreements must not derogate from provisions, that are directly prescribed as mandatory.

3. It is possible to define such types as "shareholders' control agreements", "shareholders' agreements on voting rights", "shareholders' agreements on the transfer of share" depending on their legal nature, objective, subject matter, and way of performance. The objective of the first type is to provide new regulations on the activities of a company. This type can be further separated, on the basis of criteria of legal nature, into agreements which directly affect the regulation of the company and agreement which impose an obligation on shareholders to amend the articles. The second types unite such sub-types as "voting agreements", "voting trust", and "agreements on the transfer of voting rights", these agreements have the common subject matter – voting rights. "Voting trust" does not recognize in continental jurisdiction, the most similar legal relationship may be imposed by the effect of "Shareholder' agreement on the transfer of voting rights", under that voting rights are transferred under the terms applied to the management of someone else's property.

4. The competence of shareholders to enter in shareholders' agreement of specific type is strongly affected by the type of the company. It is possible to conclude shareholders' agreements, which directly establish new regulations only in a close corporation. Possibility to prescribe specific restrictions on the transferability of shares is restricted in regard to publicly traded companies.

5. In both legal systems, the prevailing approach is that violation of a shareholders' agreement is not regarded as a sufficient ground for invalidation a decision of the general meeting of shareholders, the exceptions can be found in Germany, with respect to agreements concluded between all shareholders and the Republic of Lithuania. Specific performance of agreements, which are performed through the

voting, is more common in common law jurisdiction. Legal orders of Ukraine and France do not apply specific performance, among the jurisdiction under consideration. Preliminary security of shareholders' agreements is allowed in Germany.

6. In continental jurisdictions, the non-breaching party can use such means of protection, as indemnification of damages and penalties. In common law countries, shareholders are able to protect to benefit from some of the instruments provided for in corporate law, such as liquidation, in addition to means of protection provided in contract law.

7. Shareholders' agreements in common law jurisdictions are subject to the same treatment as articles. Their content is publicly available for both the other shareholders and third parties. Voting trust and agreement on the transfer of voting rights are mandatory disclosed to the other shareholders. The issue of the disclosure of voting agreement is hardly related to the type of company, in question.

RECOMMENDATIONS

1. In the author's opinion, the wording of article 26(1) of the Law on Joint Stock Companies, may be amended. Since there is no point in listing the possible items of a shareholders' agreement in the law, this does not extend or narrow the subject which was already sufficiently defined as: ". *A shareholders' agreement of the company is an agreement, the subject of which is the exercise by shareholders – owners of ordinary and preferred shares of rights to shares and/or rights under the shares as provided by the law, charter and other internal documents of the company (herein after referred to as the shareholders' agreement). Under the shareholders' agreement, its parties undertake obligation to exercise their rights and/or refrain from the exercise of the rights subject to such agreement."*

In the author's opinion, the subjects of shareholders' agreements are well defined by the first quote from the Law, enumeration of items is contrary to the essence of shareholders' agreement which in aimed to provide shareholders' with the maximum of opportunities to regulate their relationships. In shareholders' agreements parties have authority to stipulate everything that is not directly prohibited, because the main ground for the existence of the agreements is principle of "freedom of contract". Addition, present formulation can threat legal certainty, because court can apply a restrictive approach to the issue of subjects of shareholders' agreements. For this reason, the author recommends that the excess enumeration of items should be removed.

Recommended version of the part 1, para 1, article 26(1) of the Law on Joint Stock Companies: "*1. A shareholders' agreement of the company is an agreement, the subject of which is the exercise by shareholders – owners of ordinary and preferred shares of rights to shares and/or rights under the shares as provided by the law, charter and other internal documents of the company (herein after referred to as the shareholders' agreement). Under the shareholders' agreement, its parties undertake obligation to exercise their rights and/or refrain from the exercise of the rights subject to such agreement.* ~~*Under shareholders' agreement the parties may be obliged to vote in the manner prescribed by such agreement, at the general meeting of shareholders of the company, and to approve the acquisition or disposal of shares at a pre-determined price and/or in the event of the circumstances specified in the agreement, to refrain from disposal of shares until occurrence of the circumstances specified in the agreement, as well as undertake other actions related to the management of the company, its liquidation or spin off from it of a new company. The shareholders' agreement may stipulate conditions or a procedure for determining the conditions subject to which the shareholder -party to the*~~

~~*agreement is entitled or obliged to purchase or sell company's shares and to determine in- stances (which may or may not depend from the actions of the parties) when such right or obligation arises.*~~[309] *"/ "Договір між акціонерами товариства - це договір, предметом якого є реалізація акціонерами - власниками простих та привілейованих акцій прав на акції та/або прав за акціями, передбачених законодавством, статутом та іншими внутрішніми документами товариства (далі - договір між акціонерами). За договором між акціонерами його сторони зобов'язуються реалізувати у спосіб, передбачений таким договором, свої права та/або утримуватися від реалізації зазначених прав.* ~~*Договором між акціонерами може бути передбачено обов'язок його сторін голосувати у спосіб, передбачений таким договором, на загальних зборах акціонерів товариства, погоджувати придбання або відчуження акцій за заздалегідь визначеною ціною та/або у разі настання визначених у договорі обставин, утримуватися від відчуження акцій до настання визначених у договорі обставин, а також вчиняти інші дії, пов'язані з управлінням товариством, його припиненням або виділом з нього нового товариства. Договір між акціонерами може передбачати умови або порядок визначення умов, на яких акціонер - сторона договору вправі або зобов'язаний придбати або продати акції товариства, та визначати випадки (які можуть залежати чи не залежати від дій сторін), коли таке право або обов'язок виникає*~~."

2. In the authors' view it is unreasonable to stipulate in the Ukrainian Law on Joint Stock Companies that shareholders' agreements are not subject to the specific performance. Parties conclude agreements in order to have it performed. The author considers that, in this case, it is possible to recommend the balanced approach which is used in Germany. Under this approach specific performance of shareholder's agreements is applied if all shareholders are parties to such an agreement. This approach gives shareholders access to specific performance, while the rights of third parties (shareholders not party to the contract) can't be infringed. In addition, it worth to add, that such amendments will be in line with the Article 13 of the European Convention on Human Rights, thus providing shareholders with the effective remedy.

2.1. Present provision of the para. 3 article 26(1) of the Law on Joint Stock Companies: "*Violation of the shareholders' agreement shall not be the basis for the invalidation of decisions of the*

---

[309] This translation was done by Anna Babych in Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 633-634, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

governing bodies of the company"[310]*/" Порушення договору між акціонерами не може бути підставою для визнання недійсними рішень органів товариства*."

2.2. Recommended version of part 4, para. 3 article 26(1) of the Law on Joint Stock Companies:

"*Violation of shareholder's agreement, under which the parties assume the obligation to realize their voting rights in a certain manner, can result in invalidation of the decision of the governing bodies of the company, if all shareholders of this company are party to the agreement."/ "Порушення договору між акціонерами, згідно з яким акціонери приймають на себе обов'язок по реалізації свого права голосу у певний, передбачений, договором спосіб, може бути підставою для визнання недійсними рішень органів товариства, якщо всі акціонери цього товариства, являються сторонами цього договору*."

2.3. Recommended to add para. 7 to article 7 of the Law of Limited Liability Company:

"*Violation of shareholder's agreement, under which the parties assume the obligation to realize their voting rights in a certain manner, can result in invalidation of the decision of the governing bodies of the company, if all shareholders of this company are party to the agreement."/ "Порушення корпоративного договору, згідно з яким учасники товариства приймають на себе обов'язок по реалізації свого права голосу у певний, передбачений, договором спосіб, може бути підставою для визнання недійсними рішень органів товариства, якщо всі учасники цього товариства, являються сторонами цього договору*."

[310] This translation was done by Anna Babych. Sebastian, Mock, Kristian Csach, and Bohumil Havel, *International Handbook on Shareholders´ Agreements: Regulation, Practice and Comparative Analysis* (Berlin: De Gruyter, 2018), 635, http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

LIST OF BIBLIOGRAPHY

Legislation

The United Kingdom

1. "Companies Act 2006". legislation.gov.uk. Accessed 4 April 2020. http://www.legislation.gov.uk/ukpga/2006/46/contents.
2. "Insolvency Act 1986". legislation.gov.uk. Accessed 4 April 2020. http://www.legislation.gov.uk/ukpga/1986/45/contents.

United States of America

1. "Delaware General Corporation Law". delcode.delaware.gov. Accessed 15 March 2020. https://delcode.delaware.gov/title8/c001/.

Australia

1. "Australian Company Act 2001". https://www.legislation.gov.au. Accessed 4 April. https://www.legislation.gov.au/Details/C2018C00031

Germany

1. "Stock Corporation Act". http://www.gesetze-im-internet.de. Accessed 15 March 2020. http://www.gesetze-im-internet.de/englisch_aktg/.
2. "German Securities Trading Act". https://www.bafin.de. Accessed 15 March 2020. https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html.
3. "Law On Close Corporation". https://www.gesetze-im-internet.de. Accessed 15 April 2020. https://www.gesetze-im-internet.de/englisch_gmbhg/englisch_gmbhg.html.
4. "German Civil Code". https://www.gesetze-im-internet.de. Accessed 15 March 2020. https://www.gesetze-im-internet.de/englisch_bgb/.
5. "German Code of Civil Procedure". https://www.gesetze-im-internet.de. Accessed 15 March 2020. https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.
6. "Securities Acquisition and Takeover Act". https://www.bafin.de. Accessed 4 April 2020.

https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpUEG_en.html.

7. "German Commercial Code". https://www.gesetze-im-internet.de. Accessed 15 March 2020. http://www.gesetze-im-internet.de/englisch_hgb/.

France

1. "French Civil Code". trans-lex.org. Accessed 3 April 2020. https://www.trans-lex.org/601101/_/french-civil-code-2016/.
2. "French Commercial Code". legifrance.gouv.fr. Accessed 3 April 2020. https://www.legifrance.gouv.fr/Media/Traductions/English-en/code_commerce_part_L_EN_20130701.
3. "GENERAL REGULATION OFT HE *AUTORITÉDES MARCHÉS FINANCIERS*". https://reglement-general.amf-france.org. Accessed 4 April 2020. https://reglement-general.amf-france.org/eli/fr/aai/amf/rg/20161218/en.pdf.

The Republic of Lithuania

1. "Civil Code of the Republic of Lithuania". https://e-seimas.lrs.lt. Accessed 10 March 2020. https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495.

Ukraine

1. "Civil Code of Ukraine". zakon.rada.gov.ua. Accessed 1 April 2020. https://zakon.rada.gov.ua/laws/show/435-15.
2. "Commercial code of Ukraine." zakon.rada.gov.ua, Accessed 1 April 2020. https://zakon.rada.gov.ua/laws/show/436-15.
3. Law of Ukraine on "Limited Liability and Additional Liability Companies". zakon.rada.gov.ua, Accessed 1 April 2020. https://zakon.rada.gov.ua/laws/show/2275-19.
4. Law of Ukraine on "Joint Stock Companies". zakon.rada.gov.ua. Accessed 1 April 2020. https://zakon.rada.gov.ua/laws/show/514-17.
5. Law of Ukraine on "Securities and Stock Market." zakon.rada.gov.ua. Accessed 1 April 2020. https://zakon.rada.gov.ua/laws/show/3480-15.
6. "Law № 1984-VIII, 23.03.2017". zakon.rada.gov.ua. Accessed 1 April 2020. https://zakon.rada.gov.ua/laws/show/1984-19
7. "Law № 2275-VIII, 06.02.2018". zakon.rada.gov.ua. Accessed 1 April 2020. https://zakon.rada.gov.ua/laws/show/ru/2275-19/ed20180206.

EU Law

1. "Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids." https://eur-lex.europa.eu. Accessed 10 March 2020. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0025.
2. "Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC". https://eur-lex.europa.eu. Accessed 10 March 2020. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0109.
3. "Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC," https://eur-lex.europa.eu. Accessed 10 March 2020. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0034.

Case law

The United Kingdom

1. Salomon v Salomon & Co Ltd [1897] AC 22, 57.
2. Re Peveril Gold Mines Ltd. [1898] 1 Ch 122.
3. Welton v Saffery [1897] AC 29.
4. Greenwall v Porter [1902] 1 Ch. 530.
5. Puddephat v Leith [1916] 1 Ch. 200.
6. Brown v British Abrasive Wheel Co [1919] 1 Ch 290.
7. Re Duomatic Ltd [1969] 2 Ch 365.
8. Russell v Northern Bank Development Corp Ltd [1992] 1 WLR 588.
9. *Euro Brokers Holdings Ltd v Monecor (London) Ltd* [2003] 1 BCLC 506.
10. Union Music v Watson [2003] 1 BCLC 453.
11. Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67.

The United States of America

1. Brown v. Pacific Mail Steamship Co. 4 F. Cas. 420 (1867).
2. Hafer v. N.Y.L.E. & W.R.R. Co. 19 Abb. N. C. 456. (1885).

3. Harvey v. Linville Improvement Company 24 S.E. 489, 699 (1896).
4. Smith v. San Francisco & North Pacific Railway Co., 115 Cal. 584 (1897).
5. Ringling Bros.-Barnum & Bailey Com. Shows v. Ringling 53 A.2d 441 (Del. 1947).
6. Perlman v. Feldmann ,219 F2d 173(2d Cir 1955).
7. Galler v. Galler - 32 Ill. 2d 16, 203 N.E.2d 577 (1964).
8. Coleman v. Taub ,638 F.2d 628(3d Cir .1981).
9. Schreiber v. Carney, 447 A.2d 17, 25-26 (Del. Ch. 1982).
10. Omnicare, Inc. v. NCS Healthcare, Inc. - 818 A.2d 914 (Del. 2003).

Australia

1. Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd (2005) 55 ACSR 185.

Germany

1. German Federal Supreme Court, supra note 57 (Schiedsfähigkeit III).
2. BGH NJW 1994.
3. RGZ 133, 90, 96.
4. BGH, NJW 1983, 1910; 1987, 1890.
5. BGHZ 48, 163, 171.
6. BGH NJW 2009, 669.
7. OLG Köln GmbHR 2003, 416 (LS).

France

1. CA Paris, 15 December 2006, Rev. trim. dr. comm. 2007, 169, 170.

Ukraine

1. Economic Court of Odessa region, 28.11.2019, Case № 86175401.
2. “Постанова Пленуму Верховного Суду України від 24.10.2008 № 13 “Про практику розгляду судами корпоративних спорів”. zakon.rada.gov.ua. Accessed 10 March 2020. https://zakon.rada.gov.ua/laws/show/v0013700-08.

International treaties

1. “European Convention of Human Rights.” https://www.echr.coe.int. Assessed 1 May 2020. https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=.

Soft law

1. “Model Business Corporation Act.” americanbar.org.
   Accessed 15 March 2020.
   https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.
2. “Universal Commercial Code.” https://www.law.cornell.edu.
   Accessed 15 March 2020. https://www.law.cornell.edu/ucc/8/8-204.

Books

1. Sealy, Leon and Sarah Worthington. *Cases and Materials in Company Law*. London: Oxford University Press, 2007.
2. Mock, Sebastian, Kristian Csach, and Bohumil Havel. 2018. *International Handbook on Share holders´ Agreements : Regulation, Practice and Comparative Analysis*. Berlin: De Gruyte, 201 8. http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=1818350&site=ehost-live.

Thesis’s and dissertations

1. Miliauskas, Paulius. “Company law aspects of shareholders’ agreements in listed companies.” Doctoral dissertation, Vilnius University, Ghent University, 2014. http://talpykla.elaba.lt/elaba-fedora/objects/elaba:2121038/datastreams/MAIN/content.
2. Gomtsian, Suren. “The Enforcement of Shareholders’ Agreements. Comparative Analysis of English and Russian law.” Master thesis, Tilburg Law School, 2012.
   http://arno.uvt.nl/show.cgi?fid=128481.
3. Khamidullina, Yekaterina. “Application of shareholders’ agreements: what lesson can be learned by Kazakhstan from USA.” Short thesis, Central European University, 2016.
   https://sierra.ceu.edu/search/X?SEARCH=Khamidullina&Da=&Db=&m=v&submit.x=21&submit.y=14.
4. Варюшин, Сергей М. “Гражданско-правовое регулирование корпоративных договоров: сравнительный анализ.” диссертация кандидата юридических наук, Федеральное государственное бюджетное образовательное учреждение высшего профессионального образования «Российская правовая академия министерства юстиции российской федерации», 2015.

Legal Articles

1. The Corporation Law Committee of the Association of the Bar of the City of New York. "The Enforceability and Effectiveness of Typical Shareholders Agreement Provisions". *The Business Lawyer* 65, 4 2010: 1153-1203.
2. Zhornokui, Yuriy, Olha Burlaka, and Valentyna Zhornokui. "SHAREHOLDERS AGREEMENT: COMPARATIVE AND LEGAL ANALYSIS OF THE LEGISLATION AND LEGAL DOCTRINE OF UKRAINE, EU COUNTRIES AND USA". Baltic Journal of Economic Studies 4, 2 (2018): 288-300.
3. Andenas, Mads. "Shareholders'Agreements: Some EU and English Law Perspectives". *Tsukuba Law Journal,* 1 (2007): 135-152.
4. Sealy, Leon. "Shareholders' agreement – an endorsement and a warning from the House of Lords." *The Cambridge Law Journal* 51, 03 (1992): 437-439.
5. Ferran, Ellis. "The Decision of the House of Lords in Russell v. Northern Bank Development Corporation Limited," *Cambridge Law Journal* 53, 2 (1994): 343-366.
6. Fleischer, Holger and Schneider, Stephan. "Shoot-Out Clauses in Partnerships and Close Corporations – An Approach from Comparative Law and Economic Theory". *European Company and Financial Law Review (ECFR)* 9, 1 (2012): 35-50.
7. Scheuch, Alexander. "An Overview of the German Regulation of Corporate Groups and Resulting Liability Issues". *University of Oslo Faculty of Law Research Paper* 13, 5 (2016): 191-198.
8. Stepanov, Dmitriy, Vadim Vogel and Hans-Joachim Schramm. "Shareholders Agreement: Approaches of Russian and German Law to Certain Issues of Regulation". *Review of the Russian Supreme Arbitrazh Court*, 10 (2012): 22-69.
9. Burr, Charles, "The Validity of Voting Trust Provisions in Recent Railroad Reorganizations." *The American Law Register and Review* 35, 7 (1896): 413-443.
10. Duffy, Michael, "Shareholders Agreements and Shareholders' Remedies - Contract Versus Statute?". *Bond Law Review* 20, 2 (2008): 1-27. https://ssrn.com/abstract=3192206.
11. Morano, Leon. "Shareholders' Agreements in Close Corporations and Their Enforcement." LLM Theses and Essays 89, (2006): 1-43. https://digitalcommons.law.uga.edu/stu_llm/89.
12. Roth, Marcus. "Shareholders' Agreements in Listed Companies: Germany." *Social Science Research Network* (2013). http://dx.doi.org/10.2139/ssrn.2234348.

13. Belot, François. “Shareholder Agreements and Firm Value: Evidence from French Listed Firms.” *SSRN Electronic Journal* (January, 2008). http://dx.doi.org/10.2139/ssrn.1282144.
14. Laidin, Mathilde and Romain Souchon, “Do preemptive clauses work in shareholders’ agreements? (France)” 2014. https://www.acc.com/resource-library/do-preemptive-clauses-work-shareholders-agreements-france.
15. Ichay, Frédéric, “IBA Guide on Shareholders’ Agreements: France” 2012: https://www.ibanet.org/Document/Default.aspx?DocumentUid=F7E7F4B3-A308-498E-8218-BEB66C0F6B7E.
16. Xavier, Ruiz and Marta Garcia. “IBA Guide on Shareholders’ Agreements (Delaware, New York and Florida, USA.” (2018). https://www.ibanet.org/Document/Default.aspx?DocumentUid=522B8594-AB41-444C-82B7-3CF6328C9049.
17. Паплик, Ольга “ Договір між акціонерами товариства як спосіб здійснення корпоративних прав,” *Цивільне право і процес,* 3 (2018): 19-24.
18. Сергей М. Варюшин. “Генезис и эволюция корпоративных договоров в корпоративном праве Англии и США.” *Законодательство и экономика,* 9 (2013): 63-69.

ABSTRACT

The author conducted extensive comparative-legal research of shareholders′ agreements in common and continental law jurisdictions. The author analyses the main approaches to the regulation of legal nature, restrictions, execution, classification, and disclosure of shareholders′ agreements.

The study was based on the doctrine, legislation, and case law of such jurisdictions as the UK, the USA, Germany, France, Lithuania, and Ukraine.

Keywords – shareholders′ agreements, articles of association, specific performance, corporate relations, disclosure.

SUMMARY

SHAREHOLDERS' AGREEMENTS IN COMPANY LAW OF CONTINENTAL LAW AND COMMON LAW COUNTRIES

Shareholders' agreement is a unique legal instrument that is applied in the field of both contract and corporate law. The legal nature of this legal instrument is of big interest.

The research was made on the basis of legal doctrine, jurisprudence, and provisions of the laws of such jurisdictions as the UK, the USA, Germany, France, the Republic of Lithuania. The **aim** of the thesis is to indemnify similarities and differences between shareholders' agreements which can serve as a separate source of regulations or amend the articles and other shareholders' agreements. This aim requires the following **objectives** to be performed one by one:

- to establish main stages of the genesis of shareholders' agreements
- to define the legal nature of corporate contracts;
- to define the types of shareholders' agreements and their main classification criteria;
- to establish the main methods of execution and protection of shareholders' agreements

In the I chapter, it was found that the principle of "freedom of contract" is a legal ground for the most types of shareholders' agreements.

In the II chapter, it was stated, that possibility of shareholders' agreement to effectively address some subject matters is strongly dependent on the type of legal provision. A shareholders' agreement should not contradict mandatory rules of law and articles in respect of a subject matter defined in law, as the subject-matter of articles. In common law countries shareholders are able to conclude shareholders' agreements which could amend the articles or serve as a separate source of regulation.

In the III chapter, shareholders' agreements were classified. The first type – "shareholders' control agreement" the objective of this type is to provide new regulations on the activities of a company. The second type "shareholders' agreements on voting rights" unites such sub-types as "voting agreements", "voting trust", and "agreements on the transfer of voting rights". The last type - "shareholders' agreements on the transfer of shares".

In the IV chapter, shareholders' agreements which can serve as a separate source of regulation or amend the articles are performed after their due adoption. Specific performance is more frequently applied in the countries of Anglo-Saxon law. As a general rule, a breach of shareholders' agreements

cannot serve as a legal ground for the invalidation of a resolution of the general meeting of shareholders, the main consequences of the violation are penalties and indemnification of damage.

In the V chapter, if was found, that shareholders' agreements that have which can serve as a separate source of regulation or amend the articles are subject to the same terms of the disclosure as the articles. The other agreements are subject to more intensive regulation in this regard, depending on the type of a company in with the respective agreement was concluded.

HONESTY DECLARATION
29/04/2020
Vilnius

I, Dmytro Matvieienko student of
(name, surname)

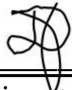
Mykolas Romeris University (hereinafter referred to University),
Mykolas Romeris Law School, Institute of Private Law, Joint Study Master degree programme
in Private Law at Mykolas Romeris University, 2019/2020.
(Faculty /Institute, Programme title)

confirm that the Bachelor / Master thesis titled

" SHAREHOLDERS' AGREEMETNS IN COMPANY LAW OF CONTINENTAL LAW AND COMMON LAW COUNTRIES " :

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.



(signature)

Dmytro Matvieienko
(name, surname)