

Section: Law

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CONFLICTS AND GAPS OF UKRAINIAN LEGISLATION CONCERNING CONCLUSION AND EXECUTION OF CORPORATE AGREEMENTS

One of the urgent problems is the lack of a legal norm that would provide the possibility of using foreign law to regulate legal relations in corporate agreements in limited liability companies or shareholders' agreements in joint-stock companies. Most investors establish a foreign holding, transfer 100% of shares of the Ukrainian company in the ownership of the mentioned holding and conclude a shareholder agreement regarding this holding. As a result, investments do not come to Ukraine [1]. The Supreme Court of Ukraine summed up in the Plenary Resolution dated 24.10.2008 №13 “On the practice of corporate disputes” that if a contract applies the law of another state to regulate relations between shareholders or between shareholders and a joint stock (limited liability) company concerning corporate governance and the activities of this company, such contract is considered void. According to A. Dowgert, in connection with the provisions of Article 46 of the Law "On IPL" connecting factor to the personal law of the legal entity applies only to the memorandum of association, which is a constituent document in limited and general partnerships, so the participants of the mentioned companies are deprived of the opportunity to choose foreign law in corporate agreements [2]. The Resolution of the Plenum of the Supreme Court of Ukraine concludes on the nullity of the corporate agreement, which uses the principle of autonomy of the parties in

determining foreign law on the activities of the company, referring to Article 10 of the Law “On IPL” about the circumvention of the law. A. Dowgert appeals that the application of the rules of circumvention of the law in the mentioned Resolution is erroneous, because circumvention of the law within the meaning of Article 10 of the Law “On IPL” focuses only on the intentional creation of artificial conflicts through the introduction of a foreign element in a purely national relationship [2]. I agree with A. Dowgert that the provisions of the Resolution of the Plenum of the Supreme Court of Ukraine concerning international private law aspects of agreements between shareholders are contrary to law and are the result of misinterpretation by the court of legal norms.

The next problem is the lack of a direct rule that the content of the corporate agreement should not contradict the content of the constituent documents, so the relationship between the charter and such type of contract is quite vague. In this context, it is worth paying attention to the following relationship between the provisions of the Law “On Limited Liability Companies and Additional Liability Companies” (hereafter – “On LLCs and ALCs”). Part 3 of Article 7 of this law states that a corporate agreement may specify the conditions or procedure for determining the conditions under which a participant may voluntarily or compulsorily buy or sell a share or part of a share in the authorized capital of the company, as well as establish cases where this right or obligation arises. At the same time in Parts 6, 8 of Article 20 of this Law, which regulate the procedure for exercising the preemptive right of a member of the company to purchase a share in the share capital, stipulate that the charter may fix another procedure for exercising the preemptive right of the participant of the LLC, moreover in general during the alienation of corporate rights. These rules suggest that the parties to a corporate agreement may reach an agreement on how to exercise the rights of the participant, even if the

provisions of the corporate agreement do not comply with the provisions of the company's charter [3].

To prevent possible corporate conflicts, despite Article 6 of the Civil Code of Ukraine, which enshrines the freedom of contract, it is extremely important to outline restrictions on contractual freedom in certain subjects of the corporate agreement. It is necessary to implement a legal norm that would directly determine that the corporate agreement should not contradict the legislation and the company's charter [3].

The rule on the nullity of corporate (shareholders’) agreement which provides voting of members of the company or shareholders in accordance with the instructions of the company's management was created to prevent manipulation of the company's management processes and ensure the participant's right to participate in the company on an equal footing with other members. I agree with O. Sukhanov that it is necessary to reformulate this law provision, because currently the emphasis in this rule is placed only on the instructions of the governing bodies of the company, not any other bodies or persons [4].

Legal norms of the Law “On LLCs and ALCs” and the Law “On Joint-Stock Companies” (hereafter – “On JSCs”) regarding the parties of a corporate (shareholders’) agreement are formed rather vaguely and ambiguously. If the Law "On JSCs" does not disclose the list of persons who may act as third parties except for creditors, the Law "On LLCs and ALCs" does not contain any permission or prohibition for the participation of such third parties in corporate agreements, because third parties are not mentioned at all in the text of this Law. This is in fact a violation of the principle of legal certainty as an element of the rule of law. Paragraphs 41 and 46 of the Rule of Law Report prepared by the European Commission for Democracy through Law (Venice Commission) state that legal certainty as a component of the rule of law imposes on the legislator the obligation to create clear and precise rules aimed at ensuring constant

predictability of situational aspects of legal relations [5]. This is not fully complied with in the legislation on corporate agreements at present.

The draft Law “On Joint-Stock Companies” (hereafter - “On JSCs”) registered in the Verkhovna Rada № 2493 dated 25.11.2019 plans terminological harmonization of the concepts of “shareholders’ agreement” as defined by the current Law “On JSCs” and “corporate agreement” in accordance with the Law “On LLCs and ALCs”. Thus, Article 29 of the draft Law “On JSCs” is called "Corporate Agreement" and provides the replacement of Article 26-1 "Agreement between shareholders" which is included in the current valid Law “On JSCs” to achieve harmonization with the agreement between the participants of the LLC in the legal definitions. I believe that this legal approach of the legislator is correct, because the agreements between shareholders as well as between members of the limited liability company are essentially corporate, have the same legal nature with the peculiarities of their types of companies.

I propose to improve the definition of the subject of the corporate agreement in both the JSCs and the LLCs, indicating that such agreement provides the realization or withholding of the realization of corporate rights. This remark seems quite logical, because it shows the legal status of a shareholder or member of a limited liability company, since it exists on the basis of ownership of corporate rights and allows such a person to conclude a corporate (shareholders’) agreement in a particular type of company.

Practitioners also focus on the next legal gap. Legislation does not provide an answer to the question of what happens to the obligations under a corporate agreement, when the participant alienates not the entire share, but part of the share. The legislation must include the legal norm which stipulates whether the obligations are kept in a proportionately reduced version, whether the contract terminates completely for this participant or for all its parties at once. There is a legal gap regarding the legal force of a corporate agreement, if one of its parties

decides to withdraw from the company in the manner prescribed by law or completely alienate its share to third parties. If the relevant condition is not included in the content of the corporate agreement, then as a general rule, the obligation will terminate in the event of withdrawal of one of the parties, if succession is impossible.

I can conclude that corporate law requires the implementation of clear rules to provide unambiguous answers to questions in the field of the subject of the corporate agreement, foreign law, conflict of laws, the legal force of the agreement in case of alienation of shares (part of shares), legal definitions of corporate agreements in JSCs and LLCs, as well as the adaptation of corporate legislation of Ukraine to the requirements of European Union law. In the context of increasing the level of corporate governance in JSCs and LLCs, I propose to adopt a separate law “On Corporate Agreements”, taking into account the insufficient legislative regulation of the procedures for concluding and executing these agreements, namely - Article 7 of the Law "On LLCs and ALCs" and Article 26-1 of the Law "On JSCs".

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