Published by the decision of the Scientific Council
of Khachatur Abovian
Armenian State Pedagogical University

Department of Philosophy and Logic
named after Academician Georg Brutian

W I S D O M

4(28), 2023

ASPU Publication

YEREVAN – 2023

DOI: 10.24234/wisdom.v28i4.1008

SHAREHOLDERS' AGREEMENT IN THE CROSSROADS OF PHILOSOPHY OF LAW

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Abstract: This article is devoted to the identification and analysis of the essence and content of shareholders' agreements as innovative tools in the context of philosophy of law, as well as legal consequences and liability measures arising in case of violation of a shareholders' agreement.

The article deals with the issues of conclusion, execution of a shareholders' agreement, enforcement, termination of obligations, as well as liability arising from violation of a shareholders' agreement.

Referring to the experience of foreign countries, it was proposed to introduce a number of liability measures under the legislation of the Republic of Armenia: options, "default", "bad leaver", "discount", etc.

On the other hand, exploring the features of a shareholders' agreement in venture joint-stock companies, we have proposed to legislate the mechanism of an investment and/or shareholders' agreement.

Keywords: shareholders' agreement, liability, venture joint stock company, venture investor, investment and shareholders' agreement.

Introduction

In the light of current philosophy of law, measures of legal regulation in corporate relations can be divided into two groups: normative (centralized regulation) and individual (sub-normative, local legal regulation) (Gribkova, 2011, p. 105), which are often applied in parallel and agreed way.

Currently, in legal and philosophical terms, it is ambiguous what place and role shareholders' agreement have in corporations in general, and in venture joint-stock companies in particular. Therefore, the purpose of this article is to study such agreements, as well as liability measures applied in case of their violations.

The shareholders' agreement has been widely distributed among the measures of individual legal regulation, with the help of which the participants regulate the corporate relations between them. Thus, it is necessary to clarify the nature of the shareholders' agreement, in particular, figure out whether it is exclusively a civil-legal agreement, or another, special type of contract with its characteristic features.

In English law, a shareholders' agreement is understood as a contract between shareholders or shareholders and the company defining the pro-

cedure of exercising the rights of the company, according to which the shareholders minimize the possibility of the conflict formation (Inozemtsev, 2017, p, 59; Thomas et al., 2007, p. 1; Clashfern, 2013).

In the American legal system, shareholders' agreements are considered closed (confidential) contracts, and allow to solve all problems in practice, including the decision of the company's management structure, by taking into account the subjective composition while concluding an agreement (Hamilton, 2000, pp. 114-115).

Under French legislation**,** the shareholders' agreement is a contract between all shareholders or a part of them, which is aimed at the formation and organization of effective control over the company (Inozemtsev, 2017, p. 59; Belot, 2008).

In Germany and Switzerland shareholders' agreement is not considered to be an independent type of contract, but as an agreement regulating the relationship between shareholders or their group (Trubina, 2015, pp. 65-66; Mayer, 2006, p. 281).

The provisions of Article 38. 1 (1) of the RA Law on Joint Stock Companies (hereinafter referred to as "JSC Law") gives the concept of a shareholders' agreement, according to which the shareholders' agreement is an agreement on the peculiarities of exercising the rights verified by shares and/or exercising the rights over the shares. By the shareholders' agreement, the parties undertake to implement the rights certified by shares in a certain manner and/or the rights to shares, or refrain from the exercise of those rights.

From the given definition, it follows that the shareholders' agreement has a special subject, which is the procedure for exercising (or refraining from) the rights attested in stocks. Thus, the range of issues within the scope of its regulation is outlined under the law.

The material object of the shareholders' agreement is the shares belonging to its party and providing complex property and non-property rights, and the legal object is the obligation to realize or refrain from the exercising of certain rights (Trubina, 2015, pp. 104-105).

It can be argued that the shareholders' agreement has a dual legal nature; on the one hand, it regulates property relations, and on the other hand, it is connected with the regulation of participation or management of corporate relations within corporate organizations (Inozemtsev, 2017, pp. 55-56).

At the same time, the same article of JSC Law stipulates that the following can be provided under the shareholders' agreement:

1. voting in the manner prescribed under the agreement at the general meeting of shareholders, arranging the voting procedure or coordinating voting with other persons, voting by other persons' instructions,
2. to acquire and/or alienate the stocks at a predetermined price and (or) upon the appearance of the circumstances defined under the agreement and (or) to refrain from alienating the stocks until the appearance of the circumstances under the agreement,
3. obligation to take other coordinated actions regarding the management, operation, reorganization and liquidation of a joint-stock company.

The above-mentioned implies that the law envisages a non-exhaustive list of issues (exercise of rights) regulated by the shareholders' agreement, listing also their main manifestations (voting, acquisition / alienation of shares, etc.).

At the same time, the issue of publicity/confidentiality of shareholders' agreements is of special importance.

Note that Article 38.1 of the JSC Law does not give an answer to the aforementioned question and it is not clear whether such agreements are subject to disclosure (to the company, other shareholders and/or third parties), publication, state registration, other procedures or not.

In the English law shareholders' agreements are not subject to installation in public sources and their parties/participants have the right to keep any information concerning such agreements confidential. In other words, they refer to shareholders and are not subject to publication.

The exceptions to the mentioned rule shall be the cases when its provisions 1) differ to one extent or another from the founding documents (articles of association) and essentially make changes to it or 2) relate to the issues, for which decision-making requires a special protocol under the law (for example, non-application of the condition of right to preference, etc.) (Ovcharova, 2009).

The science believes that the company and third parties should be notified about the fact of concluding shareholders' agreements and/or

about a certain content of it (Gribkova, 2011, p. 187).

We agree with the approach according to which the shareholders of the joint-stock company, which have signed a shareholders' agreement, are obliged to notify the company within 15 days upon the execution of the agreement (Serobyan & Soghomonyan, 2021, p. 55), which gives the company an opportunity to be informed about existing (executed) agreements.

At the same time, we believe that the shareholders are also obliged to notify the competent body about the fact (but not the content) of the shareholders' agreement. This is due to the fact that potential investors should be informed about the existence of such agreements when acquiring the share(s), but the content can be acquainted with upon the consent of its shareholders.

Signing of Shareholders' Agreement

The Article 38.1 (2) of the JSC law stipulates that the shareholders' agreement is signed in writing, the parties to which may be the company, the shareholders, as well as persons who subscribe to the company's stocks. By virtue of section 4 of the same article, the shareholders' agreement is mandatory only for the parties of the agreement.

In practice, it is interesting what happens to the shareholders' agreement, when during the validity period of the agreement the stocks of the shareholder changes, whether the agreement can be concluded only with regard to the shares of the shareholder at the time of its signing, and is not applicable to the shares to be acquired in the future or not.

T. Gribkova (2011) considers it permissible to mention in the shareholders' agreement that it is signed towards all the shares, both in relation to the shares belonging to the shareholder at the time of the signing, and regarding the shares acquired in the future during the validity period of the shareholders' agreement (pp. 145-146).

In general, we also agree with the presented view, at the same time, in our opinion, the parties of the shareholders' agreement have the right to envisage that the provisions of the agreement apply to the shares of the parties at the moment of execution of the agreement and / or to the shares to be acquired in the future.

The Article 38.1 (2) of the JSC Law stipulates that the parties of the agreement may be the company, the shareholders, as well as persons who subscribe to the company's stocks. In case the company is a party to the shareholders' agreement, the execution of such a shareholders' agreement is carried out taking into account also the provisions of Chapter 9 (interest in the company's transactions) of the JSC Law.

In connection with the agreement executed between shareholders and third parties, there is a point of view according to which such agreement has a mixed nature (it may contain elements of other agreements) (Trubina, 2015, pp. 133-135).

According to definitions of Y. Sukhanov (2014), if third parties participate in the corporate agreement, it ceases to be a corporate agreement and becomes a special contract created by the model of a corporate agreement (p. 5).

And, for example, in English law, individual third parties (e.g., the guarantor) can also be a party of a shareholders' agreement (Hewitt, 2011, p. 124).

Taking into account that the provisions of the Civil Code of RA apply to the shareholders' agreement, we think that if it also contains elements typical of other types of contracts and not regulated under the JSC Law, they will be regulated under the provisions of the Civil Code of RA.

In practice, the issue of the joint stock company's being a party to the agreement is controversial, which is stipulated under the Article 38.1 (2) of the JSC Law. The joint stock company may not be a party to the shareholders' agreement, as it cannot exercise its rights verified by its own shares.

Article 38.1 (2) of the JSC Law stipulates that the obligation of parties to a shareholders' agreement to vote according to the instructions of the board or the executive body of the company cannot be a subject of a shareholders' agreement. Whereas, when the shares belong to the company, the latter cannot dispose them otherwise than by the board or through the general meeting.

In addition, in any case, the company will be aware of the existence and content of a shareholders' agreement, as well as the actions of other participants within its framework, violating the principle of confidentiality of such agreement.

On the other hand, the participation of the company together with the shareholders may

result an increase in the risk of holding them accountable for the company's obligations. Therefore, taking into account the mentioned circumstances, the scientists think that the company should be excluded from the list of parties to the agreement (Gribkova, 2011, pp. 158-159).

The question of whether the shareholders' agreement applies to the new shareholders of the company and whether they are obliged to become a party to such agreement is also interesting**.**

JSC Law does not in any way oblige or compel the new shareholders of the company to become a party to the shareholders' agreement, at the same time it cannot apply to entities that are not a party to it, including new shareholders. The mentioned, however, does not exclude or restrict the right of new shareholders to become a party to the agreement or to conclude such other agreement.

Implementation of the Shareholders' Agreement

Fulfillment of shareholders' agreement implies the fulfillment of the rights and obligations of the parties to the agreement, which are stipulated under Article 38.1 (1) of the JSC Law. The following obligations are particularly notable:

1. The obligation to vote in a certain way

It is disputable in terms of the discussed obligation whether the agreement can be limited only to the determination of general standards or principles, the goals of the company's activities and business problems, on the basis of which the management of the company should be carried out, or whether it is necessary to agree on a joint position for voting on a specific issue on the agenda.

The more detailed it is described what actions must be performed or refrained from which, the higher the probability of avoiding conflicts related to voting in the future is. At the same time, when concluding the agreement, it is not always possible to thoroughly regulate the voting issues and to imagine the whole range of issues and questions.

Therefore, the approach put forward in the science seems reasonable and acceptable, according to which it is expedient not only to define concrete rules on the procedure of the voting, but also to envisage provisions containing general principles, problems and goals that should be realized by the parties of the agreement (Gribkova, 2011, pp. 166-167).

2. Prohibition of the obligation to vote according to the instructions of the company's management bodies

Article 38.1 (3) of the JSC Law stipulates that the obligation of the parties to vote according to the instructions of the company's board or executive body may not be subject to shareholders' agreement.

We believe that voting of the parties of the shareholders' agreement at the discretion of the company's governing bodies can endanger the rights and interests of the participants of the agreement, and the discussed ban is logical and expedient.

At the same time, Article 38.1 (1) of the JSC law stipulates that the number of votes sufficient for the adoption of decisions at the company's general meeting, provided under JSC Law or the charter based on the mentioned law, cannot be changed by a shareholders' agreement, which, in our opinion, is also justified.

3. Exercising the rights to stocks

Under the obligation in question are understood, among others, the obligation to acquire and/or alienate the stocks at a predetermined price and (or) upon the appearance of the circumstances defined by the contract, to refrain from alienating the stock until the appearance of the circumstances under the agreement.

In general, in this case it refers to stocks' transactions, and in practice it is proposed to also include mechanisms (Russian Roulette, Texas Shoot-out, Fire-side chat, Multi-choice procedure, Cooling-off/Mediation, Deterrence approach, One cut, The other choose, Tossed coin and etc.) to solve "deadlock" situations (deadlock resolution) (Gribkova, 2011, pp. 171-174).

4. An obligation to refrain from exercising rights

With respect to this obligation, the specialists of the sector face the following problem: they can refrain from exercising material rights only or it also includes procedural rights (for example, filing lawsuits to the management bodies of the company or refraining from challenging the decisions of the company's governing bodies).

Our approach is that the shareholders of a shareholders' agreement are free to define an obligation to refrain from both material and pro-

cedural rights, moreover, the JSC Law does not envisage a ban on an obligation to refrain from the exercise of this or that right.

5. The obligation to take agreed activities related to the management, operation, reorganization and liquidation of the company

Given that the mentioned provision is rather comprehensive, according to scientists, it is subject to broad interpretation, which may include the right to demand information from the company, to buy the shares, to refuse to participate in the meeting and other rights.

In this regard, the question arises: under which conditions the actions can be considered agreed, in particular, whether the consent of all the participants of the agreement is required, or whether the approval of a part of them is enough.

The JSC Law does not regulate the issue, therefore, in our opinion, the shareholders' agreement should also define the necessity of approval of all or the corresponding number of participants to the agreement to consider the actions agreed.

Termination of Shareholders' Agreement

In JSC Law there are no provisions on the term and procedure for termination of shareholders' agreements, therefore the parties may define its validity period, which expires on the basis of termination, as well as foresee circumstances that lead to its automatic termination (e.g. liquidation of the company, reorganization, bankruptcy, etc.).

In addition, the agreement may be terminated by the consent of the parties or by the request of one of the parties in judicial procedure (in cases prescribed under law or agreement).

It should be noted that shareholders' agreements in Italy may be signed for a period not exceeding 5 years, and if no deadline is set, they are valid for 5 years. At the same time, the party who wishes to withdraw from the agreement must announce at least 6 months before the withdrawal.

Shareholders' agreements in Switzerland cannot be signed for an indefinite period ("eternal"), and notification of their intention to solve should be sent in advance, 6 months ago.

It is acceptable that the parties should be free to define the terms of the shareholders' agreement (for a certain period or termless). In addition, it is advisable to envisage in law or in the agreement the procedure and conditions for withdrawal from the agreement or termination thereof (for example, by notifying/informing in advance within the established period) (Trubina, 2015, pp. 119-121, 126-127).

Ensuring the Fulfillment of Obligations Arising from the Shareholders' Agreement

Article 38.1 (6) of the JSC Law stipulates that the shareholders' agreement may provide measures of ensuring the fulfillment of obligations arising therefrom, as well as of civil liability for non-fulfillment or improper fulfillment of obligations envisaged therein.

At the same time, pursuant to Article 368 (1) of the Civil Code of RA, the fulfillment of obligations may be ensured through collateral, penalty, withholding of the debtor's property, guarantee, prepayment and other methods provided under the law or agreement.

This implies that the parties of the agreement are free to choose, at their own will and discretion, the means provided under the law and the agreement, which ensures the fulfillment of the obligations arising from the shareholders' agreement, or to refrain from them.

Referring to the international experience, O. Arter, F. Jörg (2007, pp. 475-476) and R. Müller (n.d., p. 14) distinguish the following measures ensuring the fulfillment of obligations arising from shareholders' agreements:

1. joint depositing, including the sequestration of shares;
2. transfer of powers relating to the exercise of the rights of shareholders to the authorized person or to another third person, which must exercise the powers of the representative of the rights and stocks certified by the concluded shareholders' agreement;
3. the consent on penalty in case the agreement is violated;
4. transfer of party's shares of the shareholders' agreement to the common property of all shareholders;
5. investing the shares in a holding company, where all the shareholders authorized under the agreement are participating;
6. fiduciary transfer of shares to a third party

carrying out trust management of shares;
7. transfer of the right to use in case of violation of the agreement,
8. the transfer of the conditional right to sell if the agreement is violated.

In our opinion, the above-mentioned measures can be implemented in the RA legislation as well, because they are aimed at ensuring the fulfillment of the obligations arising from the shareholders' agreements.

It is quite possible to use a combination of means ensuring the fulfillment of obligations envisaged under the Civil Code of RA, including penalty, guarantee, pledge, etc. When choosing this or that measure, it should be taken into account to what extent it enables to effectively guarantee proper fulfillment of obligations.

Legal Consequences of Breach of Shareholders' Agreement (Applied Sanctions)

In case of its violation the realization of the rights and obligations stipulated under the shareholders' agreement should be guaranteed and secured with the opportunity to create adverse consequences for the party, who made the violation (to bring him to liability).

The ground for liability for the breach of the provisions of the shareholders' agreement is non-fulfillment or improper fulfillment (violation) of obligations arising from that agreement, and the subjects for liability are the participants of the agreement (Kudelin, 2009, pp. 8-9).

Breach of the shareholders' agreement is possible in two cases:
1. through execution or non-execution of this or that transaction, e.g. alienation of shares contrary to the prohibition established under the agreement (*proprietary component*),
2. through the exercise of the right to manage the company, e.g. voting at the general meeting of shareholders contrary to the terms of the shareholders' agreement (*organizational-administrative component*) (Gribkova, 2011, p. 177).

In fact, in case of violation of shareholders' agreement, the methods for the protection of civil (including corporate) rights as prescribed under Article 14 of the Civil Code of RA shall apply.

S. Stepkin (2011) believes that in case of breach of shareholders' agreements, material liability can be classified as the loss of the right to vote, the loss of the right to participate in the distribution of profits in that financial year, the obligation to sell its share in the charter capital at a certain price or the obligation to buy the share of the remaining participants of the agreement at a certain price, to recognize invalid the transaction by violation of the conditions of the shareholders' agreement, forcing to fulfill the obligation in material way (p. 11).

In Anglo-American legal system the structure of options (put option and call option) is widely used, which envisages right of one of the parties to demand the purchase of his/her shares from the other party in the event of certain circumstances, or, conversely, the obligation to purchase the package of shares of the other shareholder at a specified price (Gribkova, 2011, pp. 220, 222).

In the legal system of England and Wales damage compensation ("contractual damages"), default, forced termination of the power ("bad leaver") and discount are provided as measures of liability.

As a result of bad leaver the shareholder leaves the company's shareholder list, if he/she has violated the provisions of the shareholders' agreement, and in case of the discount, the share price of the shareholder who has violated the provisions of the shareholders' agreement is reduced.

As for the default, in case of violation of the shareholders' agreement, the sale of shares of the innocent party can be provided at a higher price than the market price (Kostina et al., 2011, p. 29).

We believe that both individual and combined application of the above-mentioned sanctions can contribute to a strict and complete fulfillment of obligations under shareholders' agreements, ensuring a balance of interests of all parties thereto.

In addition, it should be emphasized that agreements equivalent to the shareholders' agreement can be signed in other corporations as well, and the above is also applicable to them, taking into account their specifics.

Referring to the conclusion and specifics of the shareholders' agreements of the venture joint stock companies (hereinafter "VJSC") (Meliksetyan, 2022), it should be noted that due to the participation of venture investors, they are

quite common, sometimes investment and shareholders' agreements are signed simultaneously.

In the investment agreement (in case of one investment and shareholder's agreement - in the relevant part) the parties determine the terms and conditions of capital investment, additional financing details (amount, goals), assurances and guarantees, liability measures, the scope of damage, circumstances excluding liability, the thresholds, etc..

The agreements provide that the shareholder's liability cannot be excluded or limited in case of willful misconduct, at the same time the investor is deprived of the right to demand compensation if:

- at the time of signing the investment agreement the investor knew about the circumstances underlying the claim or such circumstances were dsiclosed to the investor or relevant documents were provided;
- the relevant circumstance has been taken into account as a deduction in the initial pre-investment evaluation (pre-money valuation) period;
- the damages occurred due to the change of legislation following the day of execution of the agreement (Greulich., 2018, pp. 24, 41-47).

Conclusion

Considering the above-mentioned, *we propose to introduce a number of liability measures, widespread in international practice, in the legislation of the Republic of Armenia: options, "default", "bad leaver", "discount", etc.*

It can be stated that unlike joint-stock companies, VJSCs have a single model of investment and shareholder's agreement, which gives an opportunity to regulate the relations between venture investors and company (as well as shareholders) more comprehensively.

Therefore, *we propose to legislatively envisage the introduction of the investment agreement (or investment and shareholder's agreement) in VJSCs, allowing venture investors to clearly regulate the subject (procedure, conditions of investment, means of liability, other interrelations) they are interested in.*

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