PREREQUISITES FOR THE PROVIDING OF CONTRACTUAL REGULATION OF CORPORATE RELATIONS IN UKRAINE: ANALYSIS OF THE LEGAL FRAMEWORK AND JURISPRUDENCE

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Наукова праця присвячена аналізу передумов становлення інституту договірного регулювання корпоративних відносин в Україні. Проаналізовано становище інституту корпоративних договорів до його формалізації на законодавчому рівні. Автором досліджено судову практику щодо питання дійсності корпоративних договорів за часів відсутності необхідного правового підґрунтя їх укладання.
Ключові слова: корпоративні відносини, договірне регулювання, корпоративний договір.

Научная работа посвящена анализу предпосылок становления института договорного регулирования корпоративных отношений в Украине. Проанализированы положение института корпоративных договоров до его формализации на законодательном уровне. Автором исследована судебная практика относительно вопроса действительности корпоративных договоров во времена отсутствия необходимого правового основания их заключения.
Keywords: corporate relations, contractual regulation, corporate agreement.

The latest history of corporatization in Ukraine began with the adoption of the Laws of Ukraine, «On Enterprises in Ukraine», «On Entrepreneurship», «On Property»in 1991, as well as special ones for the corporate sector - «On Business Associations» and «On Securities and stock exchange «. These regulations became the foundation of market relations, defining the pluralism of ownership, proclaiming its equality, establishing the legal basis for entrepreneurial and corporate activities in Ukraine. By the end of the 1990s, the practice of applying this legislation has

revealed the main shortcomings of the corporate system (abusing of rights of members and powers of the governing bodies, imbalance of interests between them and among them, etc.) and required new approaches to regulate both corporate and contractual relations. But despite the growing array of special legislation and formalization of corporate relations in an independent sub-sector of law (primarily due to the adoption of the Commercial and Civil Codes of Ukraine), corporate governance issues, as one of the most acute in the corporate sector, were the most unsolved. It actualized the interest of the participants of the companies (primary - joint-stock companies) to the application of contractual mechanisms for the regulation of relations on corporate governance. In the absence of a legal basis for the conclusion of corporate agreements, the founders and participants of domestic business entities have most often concluded these agreements within the framework of foreign jurisdictions, considering disputes in foreign commercial arbitration courts.

Separate attempts to conclude corporate agreements within the domestic legal system met with negative for the parties judicial practice. The courts interpreted the corporate law in favor of the imperative of its provisions and provisions of the charter, which in fact flat out the legal nature of the corporate agreement. Its conclusion was meaningless, because such an agreement would essentially duplicate the provisions of the law or the charter, otherwise it invalidate the agreement.

The contentious case of shareholders of Kyivstar JSC in 2007 is interesting for our research.The decision of Kyiv Commercial Court of Appeal invalidate the shareholder agreement of stockholdersin May, 2006 . The said agreement contained an arbitration clause regarding the settlement of disputes relating to this agreement through arbitration in accordance with the rules of UNCITRAL in New York, and one of the shareholders win an argument arising from the terms of a shareholder agreement in New York State, USA. Pechersk District Court of Kyiv refused to recognize and enforce the decision of the International Commercial Arbitration, stating that this decision is not legally valid, because the agreement was invalidated by the aforementioned decisions of the Kyiv Commercial Court of Appeal.

The prevalence of the described practice has led to the fact that the resolution of the Plenum of the Supreme Court of Ukraine «On the practice

of consideration of corporate disputes by the courts» dated October 24, 2008 № 13 and the recommendations of the Presidium of the Supreme Commercial Court «On the practice of the application of legislation in considiration cases arising on corporate relations» dated April, 24, 2007 № 04-5/14 make impossible to conclude corporate (share) agreements within the domestic legal system.

The analysis of paragraph 9 of the above-mentioned resolution makes it possible to highlight key positions regarding the attitude of the time-lag court practice to the interpretation of certain aspects of the legal regulation of corporate relations in general and to the institution of a corporate agreement in particular, among them:

A) Establishing the monopoly of imperative regulation of corporate relations exclusively by laws and other regulatory legal acts of Ukraine. Such relations arising from the activities of joint-stock companies registered in Ukraine, relations between the company and shareholders concerning with its activities, as well as issues of corporate governance. The relations between the founders (participants) of the economic partnership regarding the formation of its bodies, the definition of their competence, the procedure for convening a general meeting and the definition of the procedure for decision-making at meetings should be regulated by the provisions of the Civil Code and the Law of Ukraine «On Business Associations». Failure to comply with the mandatory regulations of these acts, in the opinion of the Supreme Court of Ukraine, violated public order.

Without going into a detailed study of the category of «public order», we should note that the diversity of doctrinal definitions and the lack of a legislative definition of this concept causes ambiguity in its use in legal circles, undermining the effectiveness of the use of this principle. In particular, in accordance with the provisions of Art. 34 of the Law «On International Commercial Arbitration» violations of the public order of Ukraine is the ground for the court to annul the decision of a foreign court. The use of the concept of «public order», which is not legally defined, has always been the basis for its speculative application in the context of non-recognition of decisions of foreign courts.

Similarly to the recognition of the transaction as invalid in accordance with Art. 228 of the Civil Code of Ukraine, according to the provision

such a transaction violates public order. The latter should be understood as a transaction aimed at: (a) violating the constitutional rights and freedoms of man and citizen, (b) destruction, damage to property of a natural or legal person, state, Autonomous Republic of Crimea, territorial community.

The interpretation of the use of this article is contained in paragraph 18 of the Resolution of the Plenum of the Supreme Court «On the judicial practice of reviewing civil cases regarding the recognition of invalid transaction», which states that the act that violate public order should be understood as infringing on the social, economic and social bases of the state , in particular: aimed at illegal alienation or illegal possession, use, disposal of objects of property rights of the Ukrainian people; transactions concerning the alienation of stolen property; transactions that violate the legal regime of withdrawn or circumscribed objects of civil law, etc. All other transactions aimed at violating other objects of law, provided by other public law, are not violate public order. Establishment of different or complementary to the statutory rules of formation of the company bodies, determination of its competence, procedure of convening general meetings and determination of the order of decision-making at the meeting can not be considered as violation of public order, because described questions of corporate management are not inherently part of public order, and so the use of this category in this context is inconsistent. The above-mentioned position of the Supreme Court of Ukraine, in our opinion, was unjustified and did not contribute to the formation of an effective practice of applying corporate law, but exaggerated the significance of the coercive nature of certain corporate provisions, giving them a status of imperative. Due to mentioned position corporate agreements were actually declared invalid, if they contained provisions different from the CivilCode and the Law on «On Business Entities» (Art. 215, p. 2 of the Civil Code of Ukraine). Although it concludied for the specification and detail the provisions of corporate law and company statute and should have been aimed at ensuring more effective activities of the latter.

B) Establishment of a monopoly of domestic legislation on the regulation of corporate relations, which, make it impossible to conclude corporate agreements within the framework of foreign jurisdictions

and in the absence of a legal framework for regulating relations with the conclusion of corporate agreements, makes the conclusion of such agreements hopeless and meaningless. Thus, in the case of the conclusion of agreements by foreign shareholders on subordination of theirs relations, as well as the relations between them and a joint-stock company concerning the company's activity, to foreign law, such transaction is null and void under the Art. 10 of the Law of Ukraine «On International Private Law» dated of June 23 2005 No. 2709-IV .

C) Establishing a monopoly of domestic court jurisdiction for the consideration of corporate disputes arising from corporate governance and related to the activities of economic entities registered in Ukraine. Parties to such conflicts - members of business entities - irrespective of the subjectivity of shareholders couldn't subordinate consideration of such disputes to international commercial arbitration courts.

Summing up the above-mentioned, we believe that such an approach to understanding the essence of the institution of a corporate contract was biased and unjustified. A corporate (share) contract was considered as a mechanism for circumventing domestic corporate law and a means of subordinating certain corporate relationships to foreign jurisdictions. The judicial practice of that time have been recognized its invalidity, deprived participants of corporate relations of an effective mechanism for regulating relations on corporate governance.

The first steps towards legalization of a corporate agreement were made in 2008 with the adoption of the Law on Joint-Stock Companies, Art. 29 determined that the charter of a joint-stock company may provide for the possibility of concluding an agreement between shareholders, under which the latter enters additional obligations, including the obligation to participate in general meetings, and provides for liability for non-compliance. But we couldn't declare the beginning of the development of the institution of a corporate contract in Ukraine, because the abovementioned provision was «dead» in practice, because it did not allow shareholders to exercise their corporate rights, providing for them only the establishment of additional responsibilities. As for limited liability companies, the possibility of contractual regulation of corporate relations between their participants at this stage was not anticipated at all.

Despite the fact that the realities of corporate governance have long been indicate the need to update domestic legislation, this issue actualized in 2017, when the draft Law on Corporate Contracts was adopted on 23.03.2017 and came into force on February 18, 2018.This law, for the first time in nearly 30 years of domestic corporatization, formalized the institute of corporate contracts in Ukraine, consolidating and defining: (a) two types of corporate agreements, depending on the type of companies in which they are concluded: 1) an agreement on the exercise of the rights of the participants (founders) of the partnership with limited liability and 2) an agreement between the shareholders of the joint-stock company; (b) the concept, subject, subjective composition of the specified types of contracts, as well as individual consequences of its violation, etc .; (c) the possibility for the shareholders of JSC to issue an irrevocable power of attorney for corporate rights in order to fulfill or secure the fulfillment of the obligations of the participants of the LLC / shareholders of the JSC.

On February 6, 2018, the Law «On Companies with Limited and Additional Liability» No. 2275-VIII was adopted, which became the next step of improving the legal regulation of corporate relations in limited liability and additional liability companies. From June, 17, 2018 (the date of entry into force of the said Law) the provisions of the Law «On Business Entities», which regulated the procedure for the conclusion of corporate agreements in limited liability companies, ceased to be in force, because the rules of the special law on LLC started to regulate this issue. At present time, the institution of a corporate contract in Ukraine is in the stage of its formation and requires the development of law enforcement experience, but obviously the laws adopted in the framework of corporate reform have formed the minimum ground for the formation of corporate and judicial practice and actualized the legal research of this institution of corporate law, updated scientific and practical tasks, among which: (a) establishing the legal nature of the corporate agreement and its place in the domestic contractual system; (b) determining the place of the corporate agreement in the system of regulation of corporate relations; (c) the legal characterization of a corporate agreement; (d) analysis of the totality of corporate interests of the parties to the investigated agreement, establishing their balance for effective management of a business partnership and others.