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CORPORATE AGREEMENTS:
DOCTRINE OF THE INSTITUTE AND PRACTICE OF APPLICABILITY

Master thesis

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LIST OF ABBREVIATIONS

the UK – the United Kingdom

SHA – a shareholders' agreement

CA – a corporate agreement[1] (used in relation to Ukraine only)

GmbH – a limited liability company (abbreviation from German *die Gesellschaft mit beschränkter Haftung*)

AG – a joint stock company in Germany (abbreviation from German *die Aktiengesellschaft*)

LLC – a limited liability company (according to legislation of Ukraine)

JSC – a joint stock company (according to legislation of Ukraine)

the CA – the Companies Act 2006 (in the United Kingdom)

BGB – Civil Code of Germany (abbreviation from German *das Bürgerliches Gesetzbuch*)

AG Act – Stock Corporation Act of Germany (abbreviation from German *das Aktiengesetz*)

the Law on LLCs – the Law of Ukraine "On limited liability and additional liability companies"

the Law on JSCs – the Law of Ukraine "On joint stock companies"

the Law on CAs – the Law of Ukraine "On amendments to legislative acts of Ukraine on corporate agreements"

the RG – the supreme criminal and civil court in the German Reich from 1879 to 1945 (from German – *das Reichsgericht*)

the BGH – the Federal Court of Justice of Germany (from German – *der Bundesgerichtshof*)

GPM/GSM – General Participants' Meeting/General Shareholders' Meeting

[1] The term "a corporate agreement" is a synonym with the term "a shareholders' agreement". The meaning of the term, its peculiarities and usage will be presented in the first chapter of the thesis.

INTRODUCTION

Researched problem. At the end of the second millennium the former World Bank president James D. Wolfensohn stated that "[t]he governance of the corporation is now as important to world economy as the government of countries".[2] The declared statement absolutely clearly supports the widely perceived viewpoint that the world economy (i.e. the economy of each particular country) will be a developed and a successful one, or at least will be in a condition of a persistent, stable and permanent growth, attractive to investors' encouragement, only if all the possible conditions and tools for effective governance and, consequently, functioning of its major participants – companies – are created and implemented.

That is why the formation of such a practically effective and useful regulative field for shareholders should be one of the leading purposes of the country intending to fulfill its economic potential. That definitely is a one for Ukraine – the country which is on its way to the European Union, the country full of inspiration for development, changes and step forward to its better future. The period from 2016 until today has been the utter breakthrough for Ukrainian corporate legislation as its reform finally started – new legislative acts with effective legal tools and mechanisms were introduced. One of them is the institute of a corporate agreement/ shareholders' agreement (hereinafter – a/an "CA/SHA") – the analogue of the CA that had existed before the reform had been tremendously far from such efficient tool as SHA as it is in such developed countries as the United Kingdom (hereinafter – "the UK") and Germany.

The primary attention will be paid to the analysis of peculiarities of the institute introduced, to the disadvantages of legislative provisions that regulate existence and usage of a CA, to the prognosis of possible obstacles that can be faced with the introduction and usage of the vehicle both due to the cons of regulative provisions and to total absence of previous practice of applicability of a CA under Ukrainian legislation and judicial practice in the field. This will be carried due to the investigation and comparison of the institute of SHAs in the UK and in Germany with the one in Ukraine. Particularly these countries have been taken for analysis due to the following: the UK is the country in which such a tool was actually founded, i.e. nothing can be a better pattern than the country where the legal instrument gained its roots; and Germany is an impressive instance of the country of the European Union that belongs to a civil law system, which legal doctrine is consequently closer to the Ukrainian one.

[2] Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014, 13, https://epublications.vu.lt/object/elaba:2121038/ cited from: Global Corporate Governance Forum, First Review 2003 [interactive]. [Accessed on 2012-06-19] Available online at: <http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Forum_Review_2003/$FILE/GCGF_Annual_Review.pdf>, 5.

As the number of private companies is predominant in Ukraine[3] – limited liability companies (hereinafter – LLCs)[4] – the major attention will be paid to the analysis of CAs/SHAs as an instrument of improvement of corporate governance particularly in these companies. Though CAs/SHAs in joint stock companies (hereinafter – "JSCs")[5] will also be, to some extent, examined. CAs/SHAs to which the state, local authority, state company or a company in which the state or state company owns directly or indirectly 25 or more percent of the share capital will not be researched in this master thesis.

Relevance of the master thesis. To the author's strongest belief, it is absolutely necessary to explore and discuss the topic. The new legal acts have been adopted: the Law of Ukraine "On amendments to legislative acts of Ukraine on corporate agreements" (hereinafter – "the Law on CAs") and the Law of Ukraine "On limited liability and additional liability companies" (hereinafter – "the Law on LLCs") the provisions of which are also, to some extent, devoted to CAs.

The next noteworthy issue is that, on the one side, there is already an inconsistency between these new legal acts, on the other side, there is the other more serious drawback. The Law on CAs came into force on 18 February 2018 and spread its provisions both at LLCs and JSCs as it makes amendments to the Law of Ukraine "On joint stock companies" (hereinafter – "the Law on JSCs") and to the Law of Ukraine "On economic companies", by which LLCs are mostly regulated. The separate Law on LLCs which also touches upon CAs is coming into force on 17 June 2018, and it is stated in its Final and transitional provisions that the Law of Ukraine "On economic companies" (i.e. already together with the provisions of the new Law on CAs) loses its force in the part devoted to LLCs and additional liability companies. Obviously, the legislator's intent had not included the option to make the provisions of the Law on CAs unenforceable in this part, but the result is as described.

The outcome cannot be predicted, as there are some initiatives devoted to improvement of this legislative defect, that is why, both the provisions of the Law on LLCs and of the Law on CAs will be analysed in the thesis: each of them separately and in a comparative perspective.

To outline, a new instrument, a lack of scientific knowledge about it, no existing relevant case law, disadvantages of legislation prove that there is a perfectly vivid need of legal practitioners and entrepreneurs to have the full scope of information how CAs shall be used with

[3] In particular, in Ukraine the number of LLCs is 548 693 companies, while the number of JSCs is 14 992 companies. The relevant data can be observed on the web-site of the State Statistics Service of Ukraine in the report "The number of legal entities of different organizational-legal forms" as of June 1, 2017, http://www.ukrstat.gov.ua/edrpoy/ukr/EDRPU_2017/ks_opfg/ks_opfg_0617.htm

[4] The closest analogous structure in the UK – private companies limited by shares; in Germany – die *Gesellschaft mit beschränkter Haftung*.

[5] The closest analogous structure in the UK – public limited companies, in Germany – *Aktiengesellschaft*.

all the possible efficiency. So, this investigation shall be carried without delay, because it is much more effective to foresee the possible obstacles and to be ready with several solutions than to try to find a key to the problem post factum.

Novelty of the master thesis. The search of material regarding SHAs in the UK and in Germany proved that the number of doctrinal researches regarding the topic is not an excessive one in these countries. The scientific findings and researches of Paulius Miliauskas[6], Mads Andenas[7], Markus Roth[8], Rita Cheung[9], Rainer Kulms[10], Suren Gomtsian[11], Erika Kindsvater[12], IBA (Guides)[13], and others were used in order to gain information how the institute of SHAs operates in the UK and Germany. Though, as improvement of Ukrainian legal field is one of the leading objectives of this research, the major attention will be paid to the analysis of the field of sources in Ukraine.

To the author's best knowledge, there are very few researches devoted to the topic in Ukraine. Noteworthy, explorations of Russian scientists have been a great base for those Ukrainian researches that exist.[14]

The period before the reform can be characterized with a number of scientific articles devoted to the predecessor of CAs written by O. Vinnyk, I. Spasybo-Fatieieva, T. Shtym. T. Shtym also dedicated a part of the dissertation to the analysis of agreements between shareholders in JSCs in Ukraine and foreign countries.[15] O. Vinnyk carried the comparison of

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[6]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014, 595), https://epublications.vu.lt/object/elaba:2121038/

[7]Mads Andenas, "Shareholders' Agreements: Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 135-154.
https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[8]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 24, http://ssrn.com/abstract=2234348

[9]Rita Cheung "Shareholders' Contractual Freedom in Company Law", *Journal of Business Law Issue*, 2012, No. 6, 504-530.

[10]Rainer Kulms, "A shareholder's freedom of contract in close corporations - shareholder agreements in the USA and Germany", *European Business Organization Law Review*, E.B.O.R. 2001, 2(3/4), 685-701.

[11]Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law", *JCL* 7:11, 115-146.

[12]Erika Kindsvater, "Shareholder agreement: draft CCRF (Article 67.2) as compared to the German law and court practice", http://yust.ru/eng/press-center/publication/shareholder_agreement_draft_ccrf_article_67_2_as_compared_to_the_german_law_and_court_practice/

[13]Chris Owen, Manches, IBA Guide on Shareholders' Agreements (England and Wales), 8, https://www.ibanet.org/Document/Default.aspx?DocumentUid=CD3FB209-112A-4678-91D2-CED421DD8A53
Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 5.

[14] Researches of T. Hrybkova, R. Ibrahimov, A. Zhavoronkov, O. Molotnikov, S. Stiepkin, I. Shytkina can be mentioned. For instance, Shtym Tetyana cited them in the scientific article "Legal nature of an agreement between shareholders" (from Ukrainian "Правова природа акціонерної угоди"; *European perspectives*, No.1, 2013), 146.

[15]Shtym Tetyana, "Agreements between shareholders, interested party transactions and significant transactions in joint stock companies" (from Ukrainian "Акціонерні угоди, правочини із заінтересованістю та

Ukrainian legislation with those of the Russian Federation, Switzerland and the USA.[16] The analysis of differences in Ukrainian and American legal fields was also made by M. Polishchuk.[17] The highly mentioned researches were devoted to exploration of the nature of that agreement, improvement of legislative provisions regulating the agreement, defining the parties to it, its possible content, as the legislative provisions were extremely scarce on the subject.

Not all the named researches are actual and can be implemented in a contemporary situation after the reform. That is, the contemporary situation can also be featured with just a few reports and articles of legal practitioners: V. Ptashnyk (analyses the definition of a CA, advantages of a CA, its terms, legal consequences of legislative drawbacks leading to the contradiction of two new legislative acts)[18], Leonid Antonenko (analyses the aspect of parties to CAs, confidentiality and disclosure of CAs)[19], Yurii Popov (analyses the possible terms of a CA, its definition, correlation of a CA with a charter, difference in regulation of the topic by two new legal acts)[20]. That is, the topic is not prior highlighted in a proper extensive way.

Though, the highly mentioned articles were taken into account by the author, at some points the author presented a different attitude to the question (for instance, the understanding of definitions of CAs, the issue of correlation of a CA and a charter of a company, the issue of necessity of disclosure of a CA).

Moreover, the comparison of Ukrainian legislation with the British and German one in the field has not been prior conducted. In addition to the highly mentioned issues, the author presented in a comparative perspective the analysis of definitions used to name such agreements, disadvantages of such agreements, the process of historical developments of CAs in the three

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значні правочини в акціонерних товариствах" (dissertation, Taras Shevchenko National university of Kyiv, 2015), https://mydisser.com/ru/catalog/view/37278.html

[16]Vinnyk Oksana, "Agreements of shareholders" (from Ukrainian "Акціонерні угоди"; *Lawyer. Library of scientific legal periodicals*), http://www.pravnuk.info/urukrain/1532-akcionerni-ugodi.html

[17]M. Polishchuk, "The agreement between shareholders as a mean of resolving the conflict of interests in the company (the example of the USA)" (from Ukrainian "Акціонерна угода як засіб розв'язання конфлікту інтересів у товаристві (на прикладі США)")// Actual issues of state formation in Ukraine: materials of All-Ukrainian scientific-practical conference of students, graduate students and young scientists (April 24, 2013). Taras Shevchenko National University named after Taras Shevchenko, Law faculty. Kyiv: Print Service, 2014, 260-262.

[18]Viktoriia Ptashnyk "Future destiny of the Law of Ukraine on corporate agreements: not everything happened as it has been expected" (from Ukrainian "Майбутня доля Закону про корпоративні договори: не все так сталося, як гадалося"), *LegalNewspaperOnline*, February 23, 2018, http://yur-gazeta.com/publications/practice/inshe/maybutnya-dolya-zakonu-pro-korporativni-dogovori-ne-vse-tak-stalosya-yak-gadalosya.html

Viktoriia Ptashnyk "Law vs. Law or details of a legislative murder" (from Ukrainian "Закон проти Закону або тонкощі законодавчого вбивства"), *Business Censor*, March 13, 2018, https://biz.censor.net.ua/columns/3055164/zakon_proti_zakonu_abo_tonkosch_zakonodavchogo_vbivstva

[19]Leonid Antonenko, "The Law on limited liability companies – a step to offshoring of Ukraine" (from Russian – "Закон об ООО – шаг к офшоризации Украины"), *LigaBusiness*, April 20, 2018, http://biz.liga.net/ekonomika/all/opinion/zakon-ob-ooo---shag-k-offshorizatsii-ukrainy

[20]Yurii Popov, "Corporate agreements: future development in the Law on limited liability companies" (from Ukrainian "Корпоративні договори: подальший розвиток у Законі "Про товариства з обмеженою та додатковою відповідальністю", *LegalNewspaprerOnline*, March 7, 2018, http://yur-gazeta.com/publications/practice/korporativne-pravo-ma/korporativni-dogovori.html

countries. The author expressed her personal understanding of the situation, problems and their solutions. No new tools or methods of research have been invented in the process of undertaking a study.

Level of the analysis of a researched problem of the master thesis. To the author's best knowledge, very are no deep fundamental doctrinal researches devoted to the CAs after the implementation of the latter into the Ukrainian legal field. However, there are several articles of legal practitioners and deputies named above.

Significance of the master thesis. To the author's strongest belief, taking all the above mentioned into consideration, this scientific research will be tremendously important for the development of corporate law in Ukraine, for building of a strong ground for effective corporate governance of companies and, consequently, for rapid growth of Ukrainian economy and making it more attractive to foreign investors. The results of the research will be both theoretically and practically applicable and useful as they could be implemented by the legislator in case of appearance of the problems with the application of CAs in Ukraine, by representatives of the judicial branch of power while forming a stable judicial practice, and just by ordinary lawyers in ordinary companies while drafting CAs. The way how developed countries faced and dealt with analogous problems will be presented and analyzed, the way how positive or negative foreign experience can be adopted and implemented in Ukraine with its effective adjustment to Ukrainian reality will also be proposed.

Originality of the master thesis. The research is original and written independently, as it is a result of the author's personal intellectual, creative and scientific activity. Both the master thesis itself and its results are novel.

Aim of research. The purpose of the Master thesis is to conduct the theoretically and practically effective and useful research, results of which in the form of critical observations of drawbacks of the field and suggestions for the latter's solutions could be implemented into future amendments to the Ukrainian legislation or, at least, be a useful guide for the practitioners and judges.

Objectives of research. The research is carried with intention to:

- gain deep theoretical knowledge regarding the doctrine of SHAs in the UK and in Germany and data concerning their applicability in these countries;

- analyse the new institute of CAs in Ukraine;

- juxtapose the more successful and developed institutes of SHAs in the UK and in Germany with the new one implemented in Ukraine;

- define, analyse and evaluate in a complex manner the advantages and drawbacks of the institute of CAs in Ukraine;

- make suggestions regarding the actions that can be taken, paying attention to the Germany's and the UK's experience that can be adopted and implemented in Ukraine, in order to mitigate the possible risks, to resolve the problems of Ukrainian legislation in the field for this new tool to be used efficiently.

Research methodology. While conducting the investigation qualitative methods have been predominantly used: the method of collection and compilation of data; the method of analysis and critical perception; the historical method (while analyzing the process of development of the doctrine of SHAs in the UK, Germany and Ukraine); the method of grammatical, logical, historical, systematical ways of interpretation (mostly used in interpreting the provisions of legislative acts); the comparative method (used while juxtaposing legislation, practice and development of the institute in the three countries); the empirical method (e.g. defining the most effective and frequently included provisions of SHAs). Quantitative methods have also been applied as statistical data have been used.

Structure of research. The body text of the master thesis consists of 2 main chapters. The first one comprises 4 sub-chapters and is devoted to separate description of the main aspects of the doctrine of CAs/SHAs: the most wide-spread definitions used, the understanding of pros and cons of CAs/SHAs, the history of judicial attitude to the recognition of CAs/SHAs in the UK, Germany and Ukraine, the process of development of the doctrine of CAs/SHAs in these countries, the place of CAs/SHAs among other statutory documents of the company.

The second chapter also consists of 4 sub-chapters which define formal requirements to such agreements (form, necessity of registration or disclosure of CAs/SHAs), parties to it, terms that are generally included in the agreements, discretion in defining the terms of such agreements, and relevant restrictions and prohibitions.

The presentation of the material throughout the whole thesis will be carried in a comparative perspective. It will comprise the data regarding SHAs in the UK and Germany together with the analysis of new legislation of Ukraine. The issues which exist in the UK and Germany but have not been taken into account by Ukrainian legislator, which will be found out due to comparative analysis, will be pointed out. After circling the scope of such problematic issues, the possible solutions of their improvement or avoidance will be suggested. They will be also outlined in the conclusions and recommendations.

Defense statements. The research is aimed to defend the following notions:

- CAs (SHAs) are one of the most important instruments of corporate governance, the exploration of which shall gain the respective attention in the legal field of a country, that intends to develop its economy and attract foreign investments, though there are also some disadvantages in the use of SHAs/CAs which shall be foreseen;

- the study of relevant experience of foreign countries in the field can be in use with a high level of probability in the intention to build the effective practice of application of the tool, though it shall not be blindly implemented but just with the proper adaptation to the field, practice and state of affairs of the perceiving country;
- in order for a CA to be effectively implemented in the field of practice and, consequently, to have legal base to be properly enforced generally or protected in case of judicial claims, the appropriate attention shall be paid to the CA as to the constituent of the whole system of the internal documents of the company (the company's charter/articles of association, resolutions/minutes of General Participants' Meeting/General Shareholders' Meeting (hereinafter – "GPM/GSM"));
- the special regulation shall be prescribed for a CA, to which all the participants/shareholders are the parties to;
- conclusion of a CA, prescription of its provisions, including a company as a party to it shall always be carried out with a substantial regard to the influence of such a CA on the other participants/shareholders, a company itself, interests of third parties, norms of public order, as even the content of such a dispositive discretional instrument has its reasonable boundaries and restrictions violation of which can become the ground for judicial disputes and its recognition as null and void;
- requirements of the disclosure of a CA shall not be treated as a favor to the protection of interests of third parties and the market itself but also as a mean of protection of a CA as an important part of a company's regulations.

1. LEGAL NATURE OF THE INSTRUMENT IN A COMPARATIVE PERSPECTIVE

1.1 Definitions Used

Each of these three analyzed countries (the UK, Germany and Ukraine) represents its unique attitude to the understanding of a CA/SHA, its place in the legal field, which is to the great extent the aftermath of the legal doctrine of company law and contract law that was formed during the whole period of development and foundation of each of these legal fields.

The researches and analysis of the UK law in the field prove that SHAs are not paid a lot of attention in the case law and doctrine. Just handbooks of legal practitioners contain useful information on applicability and peculiarities of SHAs.[21]

Perhaps, that is a consequence of a fact that the UK common law perceives an SHA as a commercial contract between the persons who are parties to it and which is enforceable in accordance with normal contractual principles, i.e. without qualifying it as a specific form of a contract meriting special legal rules.[22]

While stating this, it is usually meant that it is an agreement either between shareholders (all or some of them) or between shareholders and the company. The former does not raise disputes more or less: SHAs which only have shareholders as parties are not questionable as an instrument representing contractual freedom and party autonomy.[23] But the latter is regarded controversial. The views among English company law scholars have differed between a restrictive and a liberal view accepting a contractual freedom between shareholders and the company as a party to agreements with and between them.[24] The disputes still exist, but the judicial practice has outlined its position to the issue, which will be analyzed further.

Nevertheless, it is worth noting, that the Companies Act 2006 (hereinafter – "the CA 2006") comprises articles devoted to SHAs. Though the commonly applied definition is the "shareholders' agreement", it is not mentioned as such in the document. Instead just the term "agreements affecting the company's constitution" in p. 17 Chapter 1 Part 3 of the CA 2006 can

[21]Mads Andenas, "Shareholders' Agreements: Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 137, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[22]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 309, https://epublications.vu.lt/object/elaba:2121038/

[23]Mads Andenas, "Shareholders' Agreements: Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 143, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[24]Mads Andenas, "Shareholders' Agreements: Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 137, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

be mentioned.[25] Though this term is not related to all the possible SHAs concluded, as not all of them will be affecting the company's constitution. Nevertheless, the research shows that such limited scope of legal regulation of the tool is not a substantial obstacle to its effective practical usage.

Turning to Germany, it should be mentioned that German legislation also does not contain general provisions regarding SHAs. German scholars and legal practitioners just name it differently depending on the predominant terms of the agreement, i.e. voting agreement, transfer of shares agreement etc.

Under such conditions the question of a legal nature of such agreements may be reasonably raised. Judges have found the legislative provisions that are more appropriate and suitable for the description and display of the nature of SHAs and decided to apply them.

"The Federal Court of German Reich (hereinafter – 'the BGH') treated SHAs as private law partnerships or a non-incorporated association (*author's note* predominantly supporting the former). […] Since in the case of SHAs, the shareholders themselves vote in the general meeting, the BGH treated an SHA as an internal (non-disclosed) partnership and held that SHAs in most cases are internal partnerships."[26] So, "an SHA as a partnership acts as a 'firm in the firm'."[27]

That is, dealing with German SHAs provisions of Sections 705 – 740 of the German Civil Code (hereinafter – "BGB") shall not be omitted. The common purpose required for a partnership, in the case of an SHA the scientists explain as, for instance, the uniform voting in the GPM. Of course, such a position may be tremendously confusing for the researcher from the other country, but German scholars explain the mechanism in the way, that the ultimate consequence would be to apply the German law for groups of companies also to SHAs.[28]

While analyzing the issue of definitions naming such agreements in Ukrainian corporate legislation, the attention shall be paid both to the provisions of the Law on CAs and of the Law on LLCs. Though the Law on CAs has the term "CAs" in its wording itself, there is no mentioning of such in the text of the document, it rather provides with the understanding of terms and types of such new agreements, in particular, the agreement on realization of participants' (founders') of LLCs rights and the SHA in JSCs[29]. While at the same time the Law

[25]The Companies Act 2006, http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf

[26]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 9, http://ssrn.com/abstract=2234348

[27]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 10, http://ssrn.com/abstract=2234348

[28]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 9, http://ssrn.com/abstract=2234348

[29]The Law of Ukraine "On amendments to some legislative acts of Ukraine regarding corporate agreements" No. 1984-VIII as of 23 March 2017, http://zakon2.rada.gov.ua/laws/show/1984-19

on LLCs uses just the term "CA" in Art. 7[30]. Formalistic approach to definitions shall not be used in this aspect, just a contextual one. It shall be understandable to every competent lawyer that though the Law on LLCs uses the term "CA" these regulations on CAs are relevant just in relation to such agreements in LLCs and cannot be used in relation to JSCs.

To the author's belief, the existence of these several definitions shall not lead to misconfusion – it will be more efficient to stick to the position that the legislator used the term "CA" in the provisions of the Law on CAs as the general one for the agreement on realization of participants' (founders') of LLCs rights and the SHA in JSCs just relying on technical reasons to avoid an overly massive name of the legislative act. The existence of this range of terms can be explained as the outcome of the fact that the term "participants" is used regarding LLCs and the term "shareholders" – regarding JSCs, respectively. That is why the term SHA cannot be used in Ukraine regarding these both forms of legal entities. In the same time, why the creators of the Law on LLCs have not taken the necessity to juxtapose all the definitions into account is also the question. Possibly, that is simply the aftermath of drafting of two such tightly related documents by different groups of scholars, lawyers and deputies.

So, the drawback with definitions is not such a sufficient one, as is not supposed to influence negatively on the development of general practice of CAs' applicability and judicial practice of their perception in particular. Of course, the term "CA" is not common for foreign investors, as they are mostly familiar with the term "SHA", but it will be more correct to use particularly it in the legislative frame in respect of the peculiarities of legal entities as it had already been mentioned. Besides the translation of a term "CA" as an "SHA" for foreign participants of such agreements will not constitute any violation of legislation.

The next issue that would be also reasonable to note is that the Law on CAs does not envisage the definition explaining these agreements, but prescribes the terms that may be included into them in details[31], while the provisions of the Law on LLCs, in their turn, comprise the definition of the CA. The analysis of these differences (in particular, together with betaking to different interpretation of the provisions of these laws) may lead to the conclusion that this already can cause number of problems when applying the provisions of these laws. So, the author should note that everything is clear with a CA in JSCs, but the controversies can be raised in LLCs.

Particularly, a CA is defined by the legislator in the Law on LLCs as simply "an agreement by which the participants of the company are obliged to exercise their rights and

[30]The Law of Ukraine "On limited liability and additional liability companies" No. 2275-VIII as of 06 February 2018, http://zakon3.rada.gov.ua/laws/show/2275-19/print1509634575243058

[31]The Law of Ukraine "On amendments to some legislative acts of Ukraine regarding corporate agreements" No. 1984-VIII as of 23 March 2017, http://zakon2.rada.gov.ua/laws/show/1984-19

authorities in a certain way or to refrain from their fulfillment."[32] But the norms of the Law on CAs clearly prescribe a wide range of rights and issues that can be subject to CAs' regulation both in LLCs and in JSCs. So, the aspect is clear in JSCs, but a controversial one in LLCs.

"The method of interpretation of the former provisions tremendously influences on the understanding of the scope of rights which participants are legally authorized to define in such agreements according to this Law."[33]

"The first method, which is broader, will stipulate that the parties to the CA may agree on the implementation of any rights or refrain from their implementation, including the obligation to vote in the GPM in a certain way, the obligation to refrain from alienating their shares for a certain period of time and duty, on the contrary, to alienate their shares in the event of specific circumstances, etc. Such logic was laid down by the legislator at the time of the adoption of the more specialized Law on CAs."[34]

"The second way, which is narrow, will provide the right of the parties to the CA to agree to exercise their rights of participants or refrain from their implementation only in part that does not contradict the norms of the law and the charter. That is, in the context of such an interpretation it will be impossible to enroll in a corporate agreement, for example, the party's obligation to vote at a general meeting of participants in a certain way […]. This logic was definitely not laid by the initiators of the Law on CAs and the Law on LLCs."[35]

So, in case the provisions of the Law on LLCs will be used, the hope can be referred to the judicial branch of power that in its practice will choose the essential broad approach instead of a wide formalistic one. Though, to the author's viewpoint, if the misconfusion with Final and transitional provisions of the Law on LLCs will not be resolved, it will be necessary to make amendments to the Law on LLCs, in particular, to its article 7 and to add the wide scope of terms which can be included into such an agreement according to the provisions of the Law on CAs in order to avoid the possible narrow interpretation of the terms of such agreements by the judges.

However, it cannot be omitted that there is a viewpoint that the construction of Art. 7 of the Law on LLCs vice versa presents the higher level of legislative technique.[36]

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[32]The Law of Ukraine "On limited liability and additional liability companies" No. 2275-VIII as of 06 February 2018, http://zakon3.rada.gov.ua/laws/show/2275-19/print1509634575243058

[33]Viktoriia Ptashnyk, "Future destiny of the Law of Ukraine on corporate agreements: not everything happened as it has been expected" (from Ukrainian "Майбутня доля Закону про корпоративні договори: не все так сталося, як гадалося"; *LegalNewspaperOnline*, February 23, 2018), http://yur-gazeta.com/publications/practice/inshe/maybutnya-dolya-zakonu-pro-korporativni-dogovori-ne-vse-tak-stalosya-yak-gadalosya.html

[34]Ibid.

[35]Ibid.

[36]Yurii Popov, "Corporate agreements: future development in the Law on limited liability companies" (from Ukrainian "Корпоративні договори: подальший розвиток у Законі "Про товариства з обмеженою та

Speaking about Ukrainian CAs, the issue of their nature is also one of the most controversial and problematic. Though the researches that exist are devoted mostly to the nature of shareholders' deals that existed prior to the reform of corporate legislation, the author considers that they can be definitely useful in relation to the new instrument, as the legal nature of modern CAs can be presumed to be almost the same as of their predecessor.

There has always been a dispute between scientists-representatives of civil law and commercial law branches concerning the issue which branch of these two the corporate law shall be included into, and such a controversy has not omitted such aspect of corporate law as CAs and their nature. Each of these groups of scholars has its own seeing and attitude to the place of CAs in the legal field, and, respectively, subjects them to different rules and classifications.

So, according to the first viewpoint, the legal regulation of corporate relations (including when concluding CAs) is subject to the rules of civil law. A. Zhavoronkov, for example, argues that today "a new type of civil law agreement has been formed - an agreement between shareholders".[37]

The representatives of commercial law reckon that CAs are subject to commercial law due to the complex nature of corporate relations in general (O. M. Vinnik, V. S. Shcherbyna). They define them as a special type of commercial agreements, which define both property and organizational relations, but predominantly the latter.

The next group of scholars considers CAs so specific, that they […] can be presented as a special type (I. S. Shitkin, T. V. Kashanina, O. O. Makarov, O. B. Serdyuk and others). I.S. Shitkin asserts that such agreements have a double corporate and the obligatory nature of law, due to the deep peculiarities of corporate relations, including those associated with the presence of a managerial element in them. V. O. Gureev considers such an agreement as a kind of agreement on joint activity.[38]

However, some scholars have precautions to widening the provisions of contract law on the sphere of corporate law. The point is that the imperativeness of the norms governing corporate relations is considered to exclude the possibility of applying a discretionary mechanism for the regulation of relations - the agreement. Such scientists believe that it is necessary to avoid parallel regulation, substitution of corporate canons by contractual

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додатковою відповідальністю", *LegalNewspaprerOnline*, March 7, 2018, http://yur-gazeta.com/publications/practice/korporativne-pravo-ma/korporativni-dogovori.html

[37]Shtym Tetyana, "Legal nature of an agreement between shareholders" (from Ukrainian "Правова природа акціонерної угоди"; *European perspectives*, No.1, 2013), 148.

[38]Shtym Tetyana, "Legal nature of an agreement between shareholders" (from Ukrainian "Правова природа акціонерної угоди"; *European perspectives*, No.1, 2013), 149.

mechanisms and insist that the mixing of corporate and contractual relations shall not be permitted.[39]

The author, in her turn, supports the viewpoint that in this context it is more reasonable to perceive participants/shareholders as independent elements of civil turnover, who/that have their participants'/shareholders' rights as civil rights and realize them according to Art. 12 of the Civil Code of Ukraine ("freely at their own discretion"[40]). That is, the conclusion of this contract regarding voluntary commitment to exercise a right (e.g., making it an obligation to attend GPM/GSM) is already the exercise of a right, not an infringement of it, i.e. the mandatory provisions of corporate law devoted to the protection of rights of a wicker party (minority participants/shareholders) will not be violated.

Of course, if a participant or shareholder is a legal entity, it is predictable that such a position will raise some difficulties due to the civilistic perception of a company as an object of legal rights, but not as a full-fledged participant (as a Commercial Code of Ukraine does). But the author reckons that such doctrinal disputes shall not be the obstacles on the way to shareholders' effective realization of their corporate rights and, consequently, to sufficient development and progress of Ukrainian economy due to such a sufficient tool as CAs.

That is, as it can be observed, the issue is not such an unambiguous one for Ukrainian scholars. Moreover, the Law on CAs contains provisions stating that in case of infringement of CAs means of civil liability for non-performance or non-proper performance may be used, which can be understood as a confirmation of a civil nature of CAs. But at the same time it shall not be forgotten that the major scope of issues in the sphere, and regarding CAs in particular, is regulated by the special legal acts, and the judicial disputes regarding CAs are subordinated to commercial courts.

To outline, Ukraine is the only country among these three that has a special legal act devoted to such an agreement and accurate mentions of it in the legislation. Though it does not mean that due to this Ukrainian CAs have more preconditions to be used more effectively than SHAs in the UK and Germany.

All the countries present utterly different attitude to SHAs/CAs even in such basic aspects as understanding of the legal nature of the instrument: England perceives it as a simple contract that sometimes influences the constitution of the corporation according to the cases prescribed in the CA 2006, in Germany legal nature of SHAs is not exactly defined by the legislator, but German scholars and judges are reluctant to spreading the principal of freedom of

[39]Shtym Tetyana, "Legal nature of an agreement between shareholders" (from Ukrainian "Правова природа акціонерної угоди"; *European perspectives*, No.1, 2013), 149.

[40] Civil Code of Ukraine, No. 435-IV, as of January 16, 2003, http://zakon0.rada.gov.ua/laws/show/435-

contract to SHAs – the courts stick to a position that the legal regime of partnerships is more suitable for them. That is, Ukrainian legal nature of CAs is closer to the British one, but not to German, as it could be expected. So, though the exact nature of a CA as a contract is disputable in Ukraine, it is definitely not perceived as a partnership, as it is in Germany.

1.2 Advantages and Disadvantages of a Corporate (Shareholders') Agreement

CA/SHA is a very effective tool, so there may be a plenty of reasons for its conclusion. Though, to the authors' belief, each country has its peculiarities in regulation, terms of SHAs, correlation with statutory documents of a company that is why some of the reasons are more actual in each country in comparison with the others, which as a matter of fact can be proved by the data in relevant sources.

Obviously, the main advantage of SHAs/CAs is the possibility to flexibly and confidentially define the main aspects that are not usually prescribed in the articles of corporation/charter of a company. So, the "key motives for executing SHAs in the UK are to manage the expectations of shareholders by preventing misunderstandings between the parties in relation to such issues as corporate governance, rights on transfer of shares and shareholders' obligations etc. In addition, there are often good commercial reasons to insert key provisions in a private contractual document."[41]

Nevertheless, Paulius Miliauskas presented the result of the research insisting on the fact that in the UK where "the ownership structure is scattered, in order to reassure minority shareholders to invest and maintain their investment in the company the majority shareholder is compelled to contractually limit his/her influence over the company (and in this way protect the interests of the minority shareholders)"[42]. Consequently, the data is presented, that due to the latter 95 per cent of SHAs in England are concluded in order to protect the minorities and just 5 per cent are aimed at concentration of control.[43]

For Germany "the important motive is that these agreements, in contrast to the content of the company's articles of association, do not have to be disclosed to the public or filed with the Commercial Register (*author's note* which is not a general rule, there are important exceptions). Therefore, they often contain provisions which the parties wish to keep

[41]Chris Owen, Manches, IBA Guide on Shareholders' Agreements (England and Wales), 1, https://www.ibanet.org/Document/Default.aspx?DocumentUid=CD3FB209-112A-4678-91D2-CED421DD8A53

[42]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 388, https://epublications.vu.lt/object/elaba:2121038/

[43]Ibid.

confidential."[44] It is worth noting that the same advantage of confidentiality is relevant in relation to Ukraine, as a charter of a company is a publicly accessed document, while a CA is confidential, unless otherwise is prescribed by law or mentioned in a CA itself.

Turning to Germany, the next advantage of an SHA is that as "the articles of a German AG (from German *Aktiengesellschaft*, hereinafter – 'AG') may not stipulate provisions regarding call or put options, rights of first refusal, relations between the shareholders"[45], the possibility of their provision in a separate agreement is undoubtedly useful.

"Also, SHAs are more flexible than the articles, as changes or amendments do not have to comply with particular form requirements other than those determined in the agreement itself. But a further motive for executing an SHA is tax driven: bundling their individual shareholdings by way of an SHA may allow private individuals to mitigate or completely avoid German donation tax or inheritance tax in case that a shareholder transfers his shares for free or the shares of a late shareholder are transferred to his heirs."[46]

So, those representatives of Ukrainian legal field who consider that CAs are ineffective and not useful shall keep such possible future advantages in mind. Though, the disadvantages also shall not be rejected. For instance, enforceability, that is frequently mentioned by some scholars as a substantial advantage of SHAs is, to the author's viewpoint, not such an unambiguous plus that can be referred to each of these three countries, as, in Ukraine, for instance, the provisions of the Law on CAs in some aspects actually level all the prescribed civil law contractual means of protection and enforceability of CAs. So, the effective rapid enforcement does not derive simply from the contractual nature of the instrument, but depends on a number of other prescribed mechanisms and tools.

The other positive side of such mentioned advantage as confidentiality is that "the privacy of a shareholders' agreement may give a shareholder control over the majority of votes without others knowing. It is obvious how this potentially creates a tension in relation to the needs of a public market."[47] Moreover, sometimes they can be used as tools for groups of shareholders to circumvent the normal scheme of the mandatory provisions of legislation or the provisions of a company's articles/charter.

[44]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 1, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

[45]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 1, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

[46]Ibid.

[47]Mads Andenas, "Shareholders' Agreements : Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 146, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

The next inconvenience or drawback of SHAs that can be mentioned is difficulties (or even impossibility) to make the CA/SHA binding for the new participants/shareholders and the need to conclude the agreement with each new shareholder. Consequently, if the future shareholder does not agree with the provisions of such an agreement, either he/she/it does not a priori have a chance to become a shareholder, as the others will not sell him/her/it the share, or simply will not let the intending shareholder to do it by fulfilling others preemptive rights. If, he/she/it despite that became a shareholder, the participants/shareholders will have to start the negotiation process again, which, of course, is quite burdensome.

To sum up, in order to define the pros and cons of the instrument the complex look shall be made at the tool in the context if each particular country. The research presented that each country has its own peculiarities, i.e. the thing that can be perceived as an advantage in one country is seen as a substantial drawback in the other one. This again proves that introduction of a new instrument, in this case, CAs, shall also be carried out with taking into account the special features of the country-recipient, blind adoption leads to no efficiency.

1.3 Historical Development of the Institute of Corporate (Shareholders') Agreements[48]

The highly analyzed peculiarities of the UK, Germany and Ukraine prove that each country has its own unique attitude to CAs/SHAs, which is to a great extent the result of a history of development of the instrument, in particular, history of its judicial acceptance and recognition.

In the UK, the first mention of SHAs can be found in the judgments of the English courts held in the 40's of the XIX century. Though such agreements were used by the companies, "the issue of their recognition has remained open for a long time, as contradictory judicial practice testifies. Before the judgment in the case Northern Counties Securities Ltd. v. Jackson & Steeple Ltd. in 1974, it was considered that the right to vote always follows the ownership of shares."[49]

[48]The data presented in this sub-chapter regarding the UK and Germany was used as the material for the scientific article "History of shareholders' agreements' formation in the United Kingdom and Germany: usefulness of experience for Ukraine" by Nataliia Berbat, submitted to the 4th edition of the scientific journal *Business, Economy and Law* (from Ukrainian *Підприємництво, господарство і право*). The publication of the edition is planned to be carried in May, 2018.

[49]USAID, Commercial law centre, "Foreign models of corporate agreements" (from Ukrainian "Зарубіжні моделі корпоративних договорів"), 3.

"Later the House of Lords judgment in Russell v. Northern Bank Development Corporation Ltd. in 1992 went far in accepting SHAs."[50] "The relevant facts were as follows: the five shareholders in Tyrone Bricks Limited and the company itself entered into agreement under which each undertook that the terms of the agreement should have precedence between the shareholders over the articles of association and that no further share capital shall be created or issued without the written consent of each of the parties hereto".[51] "Some years later the board of Tyrone Bricks Limited gave notice of an extraordinary general meeting at which it was proposed to move a resolution that the share capital be increased from £ 1,000 to £ 4,000,000. Mr. Russell, who was one of the shareholders, applied to the High Court of Northern Ireland for an injunction to restrain the other shareholders from considering or voting on the proposed resolution."[52]

"The Court held that a company cannot itself be a party to an agreement which would restrict its powers as they are required by companies' legislation"[53], i.e. such an obligation is contrary to the law as a limitation of statutory powers of a company and is consequently void. But such an SHA, in its turn, at least as long as it is not intended to oblige future shareholders to adhere to it, is valid[54], "as the highly mentioned limitations relating to the company do not utterly bar SHAs with the same effect from being enforceable by the courts"[55]. However, the doctrine has an obvious drawback, because "it allows the use of private agreements to avoid statutory corporate provisions. It raises a difficult question of principles: the conflict between shareholders' contractual freedom and the primacy of mandatory legal rules"[56].

[50]Mads Andenas, "Shareholders' Agreements : Some EU and English Law Perspectives", (筑波ロー・ジャーナル創刊号（2007：3)), 140, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[51]Mads Andenas, "Shareholders' Agreements: Some EU and English Law Perspectives", (筑波ロー・ジャーナル創刊号（2007：3)), 146, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[52]Mads Andenas, "Shareholders' Agreements: Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 147, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[53]Mads Andenas, "Shareholders' Agreements: Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 140, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[54]USAID, Commercial law centre, "Foreign models of corporate agreements" (from Ukrainian "Зарубіжні моделі корпоративних договорів"), 3.

[55]Mads Andenas, "Shareholders' Agreements: Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 140, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[56]Rita Cheung, "Shareholders' Agreements: Shareholders' Contractual Freedom in Company Law" (*Reprinted from Journal of Business Law, Sweet & Maxwell,* Issue 6, 2012), 504, http://ssrn.com/abstract=2606645

Nevertheless, the judgment is tremendously important, so it will be analyzed further in such aspects, as correlation between an SHA and statutory documents of a company and a company as a party to an agreement. Shortly speaking its contribution to legal thought regarding SHAs is that it "became a precedent, in which the House of Lords distinguished a contractual obligation of a company that has restricted its legal capacity to change the charter or increase the authorized capital, and an SHA, under the terms of which the shareholders will exercise their rights to vote in shares in a certain way, if the issue of increasing the authorized capital or changing the charter will be raised on the agenda of the general meeting."[57]

"There has been a serious debate regarding the extent to which shareholders can, by private agreement, modify company law rules, and the English courts have been far from unanimous in accepting the principles recognized in Russell. Against this background, it is not surprising that English courts have followed a frustratingly unpredictable path, producing irreconcilable and inconsistent case law."[58]

Moreover, "SHAs have not attracted much attention in the company law reform."[59] Nevertheless, with adoption of the updated CA 2006 situation changed as it envisaged the opportunity for an SHA in closed companies to contain provisions that are different from the provisions of the charter, moreover, to include the provision regarding the superiority of contractual terms over the charter. Such a contract has to be concluded by all the shareholders, and also kept in the authorized registrar body.[60]

So, "after a decade of uncertainty after Russell, despite the existing authorities' confusion on the enforcement of SHA in England, English courts are yet to grapple properly with this issue. Moreover, there is a discernible trend in recent authorities towards allowing greater latitude to shareholder private contracting."[61]

It is worth noting that despite the fact that British SHAs have a rather long history of formation and development, and their recognition as a separate powerful valid tool of corporate governance is not such a sharp problematic issue already, nowadays SHAs "are usual especially where there are complicated shareholder structures, where there is a differential in the treatment

[57]USAID, Commercial law centre, "Foreign models of corporate agreements" (from Ukrainian "Зарубіжні моделі корпоративних договорів"), 3.

[58]Rita Cheung, "Shareholders' Agreements: Shareholders' Contractual Freedom in Company Law" (*Reprinted from Journal of Business Law*, *Sweet & Maxwell*, Issue 6, 2012), 505, http://ssrn.com/abstract=2606645

[59]Mads Andenas, "Shareholders' Agreements: Some EU and English Law Perspectives", (筑波ロー・ジャーナル創刊号（2007：3)), 140, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[60]USAID, Commercial law centre, "Foreign models of corporate agreements" (from Ukrainian "Зарубіжні моделі корпоративних договорів"), 4.

[61]Rita Cheung, "Shareholders' Agreements: Shareholders' Contractual Freedom in Company Law" (*Reprinted from Journal of Business Law*, Sweet & Maxwell, Issue 6, 2012), 528, http://ssrn.com/abstract=2606645

of different shareholders or where the SHAs amount to a quasi-partnership (i. e. small partnerships of a limited number of individuals which, although operate as a limited company, are in practical terms run as if they were a partnership between those individuals in control. […].”[62]

“However, it is not uncommon for companies to solely rely on their articles of association to regulate the affairs of the company and its shareholders especially if they are small owner-managed private companies”[63].

It should also be mentioned that nowadays “the impact of SHAs […] may be stronger in private companies”[64]. This fact is confirmed by Paulius Miliauskas in a dissertation “Company law aspects of shareholders’ agreements in listed companies”, in which the scientist presents the data that only 6.6 per cent of the listed UK companies have an SHA and it is lower than the EU average (which is 8 per cent)[65] and comes to a conclusion “that shareholders in the UK are not active in entering into shareholders’ agreements in order to protect their rights. This might be the reasons why most of the UK company law scholars claim that SHAs in listed companies are a rarity. […] it is unlikely that small shareholders are willing and able to use SHAs in order to protect their interest or establish control over the company”[66].

In Germany SHAs also have a long tradition: they are accepted by the courts since almost hundred years, but it shall be mentioned that the path to such an acceptance was not an easy one, but comprising a lot of controversial disputable issues.

“In 1884 the German government presented a reform bill on stock corporations to parliament. The official report on the preparatory works […] cautioned against extending individual shareholders’ rights as this would endanger ‘the organization and healthy functioning of the corporation’. Gierke who had investigated the ‘spheres of corporative life’ of co-operatives […] provided the intellectual underpinnings for stock corporations: stock corporations were built on a social concept of organizing the individual wills of their member-shareholders

[62]Chris Owen, Manches, IBA Guide on Shareholders’ Agreements (England and Wales), 1, https://www.ibanet.org/Document/Default.aspx?DocumentUid=CD3FB209-112A-4678-91D2-CED421DD8A53

[63]Ibid.

[64]Mads Andenas, “Shareholders’ Agreements : Some EU and English Law Perspectives” (筑波ロー・ジャーナル創刊号（2007：3)), 154, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[65]Paulius Miliauskas, “Company law aspects of shareholders’ agreements in listed companies” (doctoral dissertation, Vilnius University, Ghent University, 2014), 298, https://epublications.vu.lt/object/elaba:2121038/

[66]Paulius Miliauskas, “Company law aspects of shareholders’ agreements in listed companies” (doctoral dissertation, Vilnius University, Ghent University, 2014), 364, https://epublications.vu.lt/object/elaba:2121038/

[…]. Shareholders could ask for the protection of the 'sphere of corporative life' and challenge any attempt to wipe out their investment."[67]

"In 1892 the German parliament passed the law on close corporations (*authors' note* – *die Gesellschaft mit beschränkter Haftung* – hereinafter "GmbHs"). This new type of business organization was designed to address the needs of enterprises where a limited group of shareholders would be prepared to make an investment. The official report on the 1892 law put considerable faith in the personal ties among shareholders. They were described as more willing to inject additional money should business necessities so dictate. The stock of a GmbH […] was freely tradable. But, in fact the German GmbH was quite remote from traditional capital market influences. The official report on the 1892 law makes it clear that 'membership' […] in a GmbH is expected to be of a long-term nature."[68] So, though, SHAs restricting the transferability of stock are quite common nowadays – it was not the same during that period of time.

The same judicial rejection could be observed about attempts of shareholders to define the exercise of their voting rights. So, although the GmbH was on the statute book before the turn of the last century and the directors were subject to the instructions of the shareholders, the German Supreme Court, the *Reichsgericht* (*authors note* hereinafter – "RG"), was hostile to shareholder voting agreements […].[69] In a number of decisions "in the first years of the 20th century the RG rejected SHAs"[70]. For instance, "in a decision concerning an SHA in which two lineages in a family-owned GmbH controlled the composition of the supervisory board, the RG declared that allowing legal binding rules concerning the voting in the general meeting was contrary to the idea of the corporation. Moreover, this was contrary to legal practice and already the majority view in academia at that time. In another decision the RG was not quite so strict in formulating an overall rule, but still found it not acceptable to bind the will to a third party trying to buy a share if the company does not give its consent required by its articles of association"[71].

"The RG […] also held that SHAs are unenforceable. According to the first decision of the RG concerning SHAs, an enforceable duty to comply with the SHA would infringe on the decision-making process of the general meeting and is therefore not acceptable. The general meeting gives the possibility to discuss and exchange arguments, giving the resolutions a better

[67]Rainer Kulms, "A shareholder's freedom of contract in close corporations - shareholder agreements in the USA and Germany" (*European Business Organization Law Review*, E.B.O.R. 2001, 2(3/4)), 688.

[68]Ibid.

[69]Ibid.

[70]Markus Roth, "Shareholders' Agreements in Listed Companies: Germany", University of Marburg, 5, http://ssrn.com/abstract=2234348

[71]Ibid.

foundation: freedom for the shareholders in the voting secures a factual review of the agenda items."[72]

"Academics in the Weimar Republic argued that the shareholder had to have the possibility to encounter also the arguments made during the discussion of the GPM and that the company is not affected by a dispute on an SHA and its execution. It would be against the structure of the general meeting that in lieu of the shareholder, a 'stony guest' with the voting verdict in its hands sits at the table."[73]

So, "the RG felt such an agreement as incompatible with public policy and the core functions of a corporation. It recited arguments that the individual shareholder is not entitled to restrict his freedom to vote stock by an act of contractual arbitrariness. With respect to a vote in a shareholders' meeting such an agreement would deprive him of the opportunity to freely exercise his judgment on what was in the best interest of the corporation. The judicial hostility was motivated by the fear that voting agreements might work to the detriment of minorities"[74].

The attitude of the RG to SHAs, particularly, voting agreements, changed from the 1923 year with "the ruling of 19 June, 1923, which was not marked by an outspoken awareness of capital market issues or an appreciation of shareholder investment behavior. Instead, the RG described a voting agreement as a special obligation separate from the articles of association. As to legal doctrine the RG striked a balance between a shareholder's freedom of contract and established principles of corporation law. The shareholder's position as a member of a corporation does not affect his right to enter into a voting agreement to be exclusively construed in accordance with the law of obligations. In refusing the specific enforcement of a voting agreement, the RG shew a preference for corporative procedures for ascertaining the 'will' of the corporation […]. It is unclear whether this approach was motivated by corporate efficiency considerations or a somewhat diffuse notion of minority protection"[75].

"The RG cases on SHAs did not differentiate between corporations with publicly traded stock (*author's note* AGs) and GmbHs. The court remained faithful to Gierke's idea of the 'sphere of corporative life' […] of a corporation where the social concept of organizing the individual wills of their members […] mattered more than shareholder investment interests. Moreover, the RG would not have subscribed […] that shareholders may unite to make their

[72]Markus Roth, "Shareholders' Agreements in Listed Companies: Germany", University of Marburg, 11, http://ssrn.com/abstract=2234348

[73]Markus Roth, "Shareholders' Agreements in Listed Companies: Germany", University of Marburg, 11-12, http://ssrn.com/abstract=2234348

[74]Rainer Kulms, "A shareholder's freedom of contract in close corporations - shareholder agreements in the USA and Germany" (*European Business Organization Law Review*, E.B.O.R. 2001, 2(3/4)), 688.

[75]Ibid.

power felt. In spite of the judicial verdicts the issue lingered on whether the legal regime for a corporation did not, in fact, consist of both, corporative rules and SHAs fleshing them out."[76]

It is worth noting that despite the highly mentioned, in the early Weimar Republic, the RG nevertheless "accepted SHA in a decision concerning a stock corporation (*author's note* AG). Besides giving up the old rule of law, this case was remarkable in another respect: besides the shareholder, the company itself was party to the contract, and the shareholder should be bound if the management board and the supervisory board take the same position in its resolutions. According to some, the acceptance of such bound shares could be explained by early attempts to prohibit or, rather limit, foreign infiltration due to capital shortage"[77].

"It allowed shares for which votes were to be executed under the direction of the AG itself, i. e. while legally the shareholder was bound by the agreement with the company, the phrasing hinted at the share to be bound. The report of the management board had to provide information on voting under the direction of the company. […] an explicit or implicit agreement in favor of the company, a dependent company or a company within the group of companies to use the right of the share had to be disclosed in the annual report."[78]

"The courts accepted bound shares, as did the majority view in academia and the commentaries. The minority view was that there should be at least no voting right. Contrary to the general understanding, it was accepted that there was no enforcement of the SHAs by the company, but only a damages claim."[79]

"In the late Weimar Republic, the RG generally accepted SHAs and stated that agreements between shareholders, in which the shareholders bind themselves to vote in a special resolution, or generally in a certain way, are lawful. They constitute a contractual obligation between the parties of the SHA by which the voting at the general meeting is not affected."[80]

It also cannot be omitted that some scholars share the opinion that the post-war period particularly can be called as a final period of acceptance of SHAs, especially voting agreements in GmbHs. "The BGH began to move away from the RG doctrine when it addressed the particular problems of voting agreements in GmbHs. The BGH's ruling of 29 May 1967 finally

[76]Rainer Kulms, "A shareholder's freedom of contract in close corporations - shareholder agreements in the USA and Germany" (*European Business Organization Law Review*, E.B.O.R. 2001, 2(3/4)), 688.

[77]Markus Roth, "Shareholders' Agreements in Listed Companies: Germany", University of Marburg, 5, http://ssrn.com/abstract=2234348

[78]Markus Roth, "Shareholders' Agreements in Listed Companies: Germany", University of Marburg, 6, http://ssrn.com/abstract=2234348

[79]Ibid.

[80]Ibid.

authorized the specific enforcement of shareholders' voting agreements. The court expressly recognized that SHAs may constitute a breach of the articles of association […]."[81]

"Nonetheless, SHAs initiated without observing the established procedures for an amendment of the articles are deemed to be lawful as long as they do not change the organizational structure of the GmbH. Subsequent holdings have confirmed this approach. In validating voting agreements the BGH honored shareholders' attempts to unite to make their power felt and to pursue particular investment strategies."[82]

"Besides, the BGH in 1967 also reviewed those arguments (*author's note* supporting the position against SHAs) in a decision concerning a GmbH and ruled that the decisions of the RG were tempting to a breach of contract. Although it is desirable that the shareholders decide in the light of the arguments exchanged in the general meeting, it was admitted that a lot of shareholders had already been determined."[83]

"The enforceability does not infringe the free will of the general meeting since only the shareholder is bound by the SHA. The BGH declared SHAs to be enforceable according to the rules on enforcements of declarations of intent […], not on actions […]".[84]

So, as it can be vividly observed, German judicial branch faced the same disputable issue as the British one: which is more predominant – a contractual freedom or mandatory provisions of corporate law. In contrast to the British one, it made a choice mostly in favor of the latter.

"The other important point is that (*author's note* in Germany) SHAs are mostly found in privately owned companies, but they are also in place between stockholders of public companies."[85] So, the same as in England: SHAs are more applicable in private companies, i. e. GmbHs.

That is a rather interesting observation that even despite such a long history of development, rejection, acceptance and recognition there are still some doubts regarding the efficiency of such an instrument in German legal field, as in the UK. That serves as evidence that the problematic issues and controversial questions have not become utterly exhausted and resolved. As it is mentioned by the scholars themselves, "it is doubtful whether present German case law may be read as to condone SHAs as a device for optimizing a corporation through private incentive and renegotiation mechanisms. Legal writing promises a spirited debate on any

[81]Rainer Kulms, "A shareholder's freedom of contract in close corporations - shareholder agreements in the USA and Germany" (*European Business Organization Law Review*, E.B.O.R. 2001, 2(3/4)), 689.

[82]Ibid.

[83]Markus Roth, "Shareholders' Agreements in Listed Companies: Germany", University of Marburg, 12, http://ssrn.com/abstract=2234348

[84]Ibid.

[85]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 1, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

such attempt. Courts are likely to be ill-prepared to apply capital market standards once an SHA and a GmbH break apart."[86]

"Moreover, a major obstacle to incorporating extensive private contracting into GmbHs appears to be the enshrined principle that a corporation is 'wholly separate and distinct' from its shareholders. But then, the question is whether this is an adequate description of GmbHs where shareholders contract for partnership-like arrangements in the absence of capital market influences."[87]

The process of development of CAs (SHAs) in Ukraine is totally different from the previously analyzed experiences of Germany and the UK. This is, undoubtedly, the outcome of the fact that Ukraine is a very young country. Such instrument of corporate governance as SHAs was absolutely foreign and unknown to the Ukrainian legal field until 2008. "While with the development of corporate relations in the direction of improving the self-regulation process by the Law of Ukraine 'On Joint-Stock Companies'[88] a new contractual form of shareholders' relations regulation – so called shareholders' deal (or agreement between shareholders) was established."[89]

To the author's viewpoint, it will be relevant to pay attention to the notions of "agreements between shareholders", "shareholders' deals" and "SHAs". These definitions are regarded as synonyms in the studies of a substantial number of scientists. The point is that the terms "agreements between shareholders" and "shareholders' deals" are used in this subchapter in accordance with the provisions of Art. 29 of the Law on JSCs[90] (outdated version), particularly with consideration of a literary translation of these terms. Though, they are regarded as synonyms, unfortunately, that agreement does not essentially correspond to an SHA as it is, for instance, in the UK, so in order to avoid the confusion of the essence of the SHA in the UK, of a CA that was introduced into the Ukrainian legal field in 2018 with the predecessor that had existed prior to the reform of corporate legislation, those terms corresponding to the literal translation of agreements existing at the relevant period of time will be used.

Turning to the predecessor of the modern model of the CA, the legal act that introduced a shareholders' deal simply prescribed the opportunity to conclude such an agreement between

[86]Rainer Kulms, "A shareholder's freedom of contract in close corporations - shareholder agreements in the USA and Germany" (*European Business Organization Law Review*, E.B.O.R. 2001, 2(3/4)), 689.

[87]Ibid.

[88]The Law of Ukraine "On Joint-Stock Companies" No. 514-VI, adopted in September 17, 2008, http://zakon2.rada.gov.ua/laws/show/514-17/print1512609833098945

[89]Shtym Tetyana, "Agreements between shareholders, interested party transactions and significant transactions in joint stock companies" (from Ukrainian "Акціонерні угоди, правочини із заінтересованістю та значні правочини в акціонерних товариствах"; Taras Shevchenko National university of Kyiv, 2015), https://mydisser.com/ru/catalog/view/37278.html

[90]The Law of Ukraine "On joint stock companies" No. 514-VI as of 17.09.2008, http://zakon2.rada.gov.ua/laws/show/514-17

shareholders due to a rather laconic provision that the charter of a company may proclaim the possibility of concluding an agreement between shareholders, according to which the additional responsibilities of shareholders may be prescribed, including the duty to participate in GSM, and the liability for an infringement of such a duty (part 1 Art. 29). "Such a provision neither provides with the clear understanding what the agreement between shareholders is, nor defines the possibilities of such an agreement."[91] "Moreover, the attention was not paid to a number of other important issues that arise in the process of concluding such agreements (in particular, such as: the parties, the subject of the agreement, the procedure of concluding, liability for non-performance of such agreements, etc.)."[92]

Except for such a declarative provision in the Law, the position of the higher courts reflected in the relevant Resolutions was also not helpful at all, even vice versa. In the outdated Resolution of the Highest Commercial Court of Ukraine "On practice of applicability of legislation in consideration of cases that appear from corporate relations" as of 2007 the following provisions were contained: "the activity of a JSC, registered as a legal entity in Ukraine, relations between the JSC and its shareholders, between shareholders themselves regarding the activity of the company are defined exclusively by the laws and other legislative acts of Ukraine; the agreement on the subordination of relations between shareholders, as well as between shareholders and a JSC on the company's activities, to a foreign law, is considered null and void, as it violates the public order; all the relations between the founders (participants) of the company regarding its foundation, formation and composition of its bodies, the procedures on convocation of general meetings, the process of making decisions at the meetings are regulated by the provisions of the Civil Code of Ukraine and the Law of Ukraine "On economic companies", infringement of such provisions violates the public order as they are imperative norms" (p. 6.1).[93] Absolutely identical provisions are contained in the Resolution of the Supreme Court of Ukraine "On practice of judicial consideration of corporate disputes"[94] as of 2008 No. 13.

[91]Shtym Tetyana, "Legal nature of an agreement between shareholders" (from Ukrainian "Правова природа акціонерної угоди"; *European perspectives*, No.1, 2013), 146.

[92]Shtym Tetyana, "Agreements between shareholders, interested party transactions and significant transactions in joint stock companies" (from Ukrainian "Акціонерні угоди, правочини із заінтересованістю та значні правочини в акціонерних товариствах"; Taras Shevchenko National university of Kyiv, 2015), https://mydisser.com/ru/catalog/view/37278.html

[93]Resolution of the Highest Commercial Court of Ukraine "On practice of applicability of legislation in consideration of cases that appear from corporate relations" (from Ukrainian "Про практику застосування законодавства у розгляді справ, що виникають з корпоративних відносин") dated December 28, 2007 No. 04-5/14, http://zakon3.rada.gov.ua/laws/show/v5_14600-07

[94]Resolution of the Supreme Court of Ukraine "On practice of judicial consideration of corporate disputes" (from Ukrainian – "Про практику розгляду судами корпоративних спорів") dated October 10, 2008 No. 13, http://zakon5.rada.gov.ua/laws/show/v0013700-08

A rather interesting aspect is that the highly mentioned Resolution of the Highest Commercial Court of Ukraine was supplemented according to the Resolution of the Highest Commercial Court of Ukraine dated 18 June 2009 No. 04-06/83 with the following provisions: "the relations between shareholders, between shareholders and a JSC concerning governance of the company are regulated exclusively by the laws of Ukraine, other legislative acts of Ukraine and a charter of a company; issues of corporate governance can be defined by a shareholders' deal only in the cases strictly defined by the legislative acts of Ukraine; agreements between shareholders (members of companies) cannot change the rules of the law and the charter of the company, restrict the rights of other shareholders (participants) of the company, otherwise they may be defined as void" (p. 6.4). The majority of such restrictions regarded the leading issues of corporate governance, i.e. rules on voting, order of making decisions at a general meeting, rules on formation of the main bodies of a company. The issue the author would like to point out is that such an amendment to the Resolution was made after the introduction of such an instrument as shareholders' deals into Ukrainian corporate legislation. Either because the provisions of the Law were so inferior and raw, or basing its position on other arguments, the judicial branch of power clearly outlined its reluctance to accept and recognize agreements between shareholders.

Later the Resolution of 2007 was replaced with the Resolution of the Highest Commercial Court of Ukraine "On some aspects of resolving of disputes arising from corporate relations" as of 2016 No. 4[95] that does not contain such provisions, while, at the same time the Resolution of the Supreme Court of Ukraine as of 2008 is still in force. This can definitely raise a number of controversies, especially in the light of the legislative act on CAs as of 2018.

That is why it is quite understandable that the highly mentioned "challenged such agreements as a legal tool […]. All that did not have the best effect on the economy of the country[96]".

Moreover, analyzing the institute of such agreements generally, it can be easily concluded that there was not even a prescribed possibility to conclude such for founders (participants) in LLCs. And "consequently, it became more complicated, and sometimes even impossible to apply shareholders' deals in practice. In the aftermath neither shareholders of JSCs

[95]Resolution of the Highest Commercial Court of Ukraine "On some aspects of resolving of disputes arising from corporate relations" (from Ukrainian "Про деякі питання практики вирішення спорів, що виникають з корпоративних правовідносин") No. 4 dated February 25, 2016, http://zakon.rada.gov.ua/go/v0004600-16

[96]Vinnyk Oksana, "Agreements of shareholders" (from Ukrainian "Акціонерні угоди"; Lawyer. Library of scientific legal periodicals), http://www.pravnuk.info/urukrain/1532-akcionerni-ugodi.html

nor, all the more, members of LLCs did not want to take the risk of entering into corporate agreements at the Ukrainian level."[97]

To outline, the situation definitely needed reforms and changes. That is why the new Law on CAs adopted in March 23, 2017 and signed by the President of Ukraine on February 15, 2018 was such a long-awaited one.

The result of such a reform is the following: a CA in JSCs gained much more opportunities and became better regulated than its predecessor – but, nevertheless, even now a number of questions regarding the effectiveness of its applicability and enforcement may be raised. At the same time, the CA in LLCs is a tremendously disputable instrument, as it was mentioned earlier.

To outline, "the research confirmed the wide-known fact that the UK can be called 'the mother of SHAs', as according to the judicial practice they had already existed in the 40-s of the XIX century, while German legal thought can present their appearance approximately 60-70 years later. That nevertheless can lead to a conclusion that both countries have a rather substantial history of formation of SHAs – approximately 160 and 110 years respectively."[98]

"That is, a quite interesting fact which was noted during the research both in the UK and in Germany is that though SHAs have been a mean of regulation of shareholders' relations for some reasonable period of time in the practical field, the issue of their recognition and enforcement was not such an undoubtful, uncontroversial and unambiguous for a judicial branch of power. Both countries reflected a gradual and progressive judicial acceptance of the instrument."[99]

"In particular, the most tough issues that the courts have dealt with were the following: the question of priority of interests of a company or personal interests of shareholders, the question of possibility of a company to be a party of an SHA and the influence of some provisions restricting legal rights of a company on the agreement's validity and its enforcement, the aspect of differentiation of a simple definition of shareholders' rights and their restrictions and limitations to the detriment of the interests of the company (especially which concerned the voting rights of shareholders), "if the statutory rights are inalienable or they are rights that can be removed by contract, if private agreements can prevail over the statutory remedies found in the corporate statutes, if shareholders can contract out of the minority protection provisions of the

[97]Dmytro Symbiriiov, "Introduction of corporate agreements – what are the changes for the business?" (from Ukrainian "Запровадження корпоративних договорів – які зміни для бізнесу?"; *Yurydychna Gazeta online*), http://yur-gazeta.com/publications/practice/korporativne-pravo-ma/zaprovadzhennya-korporativnih-dogovoriv--yaki-zmini-dlya-biznesu.html

[98]Nataliia Berbat, "History of shareholders' agreements' formation in the United Kingdom and Germany: usefulness of experience for Ukraine", *Business, Economy and Law* (from Ukrainian *Підприємництво, господарство і право*), No. 4, 2018.

[99]Ibid.

company law".[100] Undoubtedly, the questions can be regarded as essential as they straightly influenced the issues of nullity and voidness of SHAs, their recognition as a tool, their enforcement as a way of additional protection of the instrument. That is, Ukrainian scholars, legal practitioners and judges shall be ready to deal with such issues in the nearest future."[101]

"The rather stunning point is that, unfortunately, SHAs are not so widespread and popular among shareholders as they could be in order to implement all their possible efficiency into the corporate governance of companies in the UK. […] There are also still problematic issues of usage of SHAs which constrain their applicability in Germany, which leads to the conclusion that even a hundred years history of development cannot make the issue the one of a clear understanding. […] So, despite unquestionable efficiency of SHAs, while introducing them into the legal field, there shall be an indispensable readiness to bear all the difficulties."[102]

1.4 Correlation of the Agreement with Provisions of a Company's Charter/Articles of Association

"One of the main controversial issues that SHAs give rise to and which is closely connected with the understanding of the nature of SHAs and their legal force is the correlation between company legislation, company's articles and SHAs."[103]

The research presents that both the British path of formation of its special approach and the approach itself are the most complicated among three analyzed countries. So, two sides of the issue have to be described: the correlation of the provisions of SHAs and the internal documents of the company and the correspondence of provisions of SHAs and the mandatory rules of company legislation.

To start with the first issue, it is important to point out that the solution to this controversy depends tremendously on the attitude to the corporation and its perception. The latter also is not so unambiguous and differs among British scholars. When articles of association are regarded as a binding contract, the problematic issue is the determination of the parties of

[100]Rita Cheung, "Shareholders' Contractual Freedom in Company Law", *Journal of Business Law Issue*., 2012, No. 6, 504-530.

[101]Nataliia Berbat, "History of shareholders' agreements' formation in the United Kingdom and Germany: usefulness of experience for Ukraine", *Business, Economy and Law* (from Ukrainian *Підприємництво, господарство і право*), No. 4, 2018.

[102]Nataliia Berbat, "History of shareholders' agreements' formation in the United Kingdom and Germany: usefulness of experience for Ukraine", *Business, Economy and Law* (from Ukrainian *Підприємництво, господарство і право*), No. 4, 2018.

[103]Mads Andenas, "Shareholders' Agreements: Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 137, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

such a contract, either it is one between a company and its members, or just between its members directly. The scholars came to a conclusion that the articles constitute a contract just between a company and its members, in particular, between the company and a member in respect of his/her/its rights and liabilities as a shareholder, but it is important to differentiate that the articles do not constitute a contract between the company and a member in respect of rights and liabilities which he/she/it has in a capacity other than that of member, whether he/she/it was a member originally or later becomes one.[104]

And the fact that individual SHAs, made by only some of the shareholders, create personal obligations between themselves only is not subject to any doubts.[105] But, at the same time, it cannot be stated that SHAs made by all shareholders do not become a regulation of the company (in the way that the provisions of the Articles are). "An example of a case where the court gave priority to the contractual obligations over the articles of association is British Murac Syndicate Ltd. v. Alperton Rubber Company Ltd (1915). According to the agreement between the plaintiff and the defendant, as long as the plaintiff held a certain number of shares in the defendant, it would have the right to appoint two directors. A similar provision was included in the articles of association of the defendant company."[106]

"After the defendant refused to accept the nomination of the plaintiff and intended to alter the articles to remove the right of nomination, the court granted an injunction to restrain the alteration of the articles of association for the purpose of committing the breach of the contractual obligations."[107]

"Later cases in effect changed this approach – in Southern Foundries (1926) Ltd. v. Shirlaw the court held that alterations of the articles of association did not constitute a breach of the contractual obligations of the company, but the exercise of the power under the altered articles, in contravention of the terms of the contractual obligations, did constitute a breach."[108]

"Therefore, no injunction could be granted to prevent the alteration of the articles of association. This approach implied that by its contractual obligations a company did not undertake to refrain from altering its articles, but rather to pay damages in a case where the

[104]Mads Andenas, "Shareholders' Agreements: Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)),138, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[105]Mads Andenas, "Shareholders' Agreements : Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 139, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[106]Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law" (*JCL* 7:11), 123.

[107]Ibid.

[108]Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law" (*JCL* 7:11), 124.

articles were altered. The articles of association were entrenched indirectly by placing a financial premium on their alteration."[109]

"However, in Russell v. Northern Bank Development Corporation Ltd. the House of Lords established a different rule. Any contractual obligation undertaken by a company not to alter its articles is invalid. As the House of Lords did not make any reference to the dicta in Southern Foundries (1926) Ltd. v. Shirlaw, it can be presumed that the case is overruled."[110] The Russell judgment, to the author's belief, is closely connected with the issue of correlation of the provisions of SHAs with the norms of imperative legislation.

But still, it is also noteworthy to mention regarding the correlation of SHAs with the articles of association. While carrying the analysis of previous judicial practice in the field the inclusion of relevant provisions to the CA 2006 should be taken into account. In particular, it is prescribed that in some cases such agreements together with resolutions and the company's charter relate to the company's constitution. Particularly, these relates to agreements 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; agreements 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; agreements that effectively bind all members of a class of shareholders though not agreed to by all those members.[111] So, exactly in these prescribed cases SHAs are considered as those which influence the company's constitution, are a part of it and have the same legal force as articles of association, i. e. in these prescribed cases, SHAs can be more predominant than the articles.

"That is why the usual recommendation of legal advisers is to adjust the provisions of the articles of association with the provisions of an SHA. Sometimes SHAs provide the obligation for the parties to amend the articles of association in line with the provisions of the agreement. In such cases SHAs in effect describe in more detail the mechanisms of the realization of the rights and liabilities provided in the company's articles. These detailed provisions are less vulnerable from the perspective of their enforcement in courts. Moreover, in addition to contractual remedies they entitle the use of corporate law remedies – such as the invalidation of corporate resolutions. Some agreements also establish their precedence for the shareholders over the articles of association."[112]

[109]Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law" (*JCL* 7:11), 124.

[110]Ibid.

[111]The Companies Act 2006, http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf

[112]Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law" (*JCL* 7:11), 123.

Turning to the correlation between the provisions of SHAs and mandatory norms of companies' legislation, the author would like to determine that the correspondence of these norms is not so accurately defined. The example that can be submitted in favour of predominance of mandatory rules of companies' legislation above provisions of SHAs is that "the contractual arrangements of directors who own shares of a company cannot fetter their statutory general duties in the capacity of the company directors (for example, the duty to promote the success of the company, duty to exercise independent judgment). In Kregor v. Hollins the court established a rule that directors must not fetter their discretion (independent judgment). For example, a director cannot agree in an SHA to vote in a particular way in the interests of a creditor or other shareholder."[113]

And one of the most vivid instances of such correlation is the highly mentioned fact from Russell judgment that a provision in a company's articles of association which restricts the company's statutory power to alter the articles or its share capital by a special resolution or a formal undertaking by the company to that effect would be invalid. For instance, the articles cannot provide for a unanimous vote by shareholders in such cases, when special resolutions require only a 75% majority vote. Such provisions will also be invalid in relation to the company. Though at the same time an agreement outside the articles between shareholders as to how they are to exercise their voting rights on a resolution to alter the articles would not necessarily be invalid. This may lead to the deduction that recognition of such an SHA in that particular part as invalid is no more than following the formalities. Moreover, this opens up for agreements that changes, or even distorts, the system of the articles.[114] Nevertheless, it can be assessed from the other angle, specifically as that "such contradictions between the provisions of SHAs and articles of associations do not invalidate the former, but at least lead to the obligation of the defaulting party to compensate damages"[115].

Moreover, such a state of affairs can be regarded that "voting agreements can be viewed as exceptions that actually can alter the statutory provisions on the required minimum voting thresholds."[116]However, the scholars also claim that a viewpoint that "voting agreements can alter imperative statutory rules is probably too ambitious."[117]

But Bushell v. Faith case cannot be left without attention as it also, to some extent, presents the exceptional viewpoint: "the House of Lords considered valid a provision of the

[113]Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law" (*JCL* 7:11), 124.

[114]Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law" (*JCL* 7:11), 125.

[115]Ibid.

[116]Ibid.

[117]Ibid.

articles of association that in effect prevented the removal of a director without his consent, although statutory rules provided for the right of a company to remove a director by a simple majority vote, 'notwithstanding anything in its articles' (Companies Act 1948, Section 184)."[118]

In this context, taking into consideration all the relevant changes, the author would like to outline the position this way: if the provisions of the SHA with all shareholders parties to it, or just with majority shareholders parties to it contradict the provisions of articles of association but do not infringe the imperative norms of company legislation, they will be predominant. But the question of predominance of an agreement with all shareholders parties to it over articles of association and company legislation in case it contradicts the provisions of articles of association and at the same time infringes the imperative norms of company legislation is a controversial issue.

Some scholars mention that it is even possible for minority shareholders and will be considered valid to derogate from some of the protective provisions and abandon their rights, for instance, restriction or removal of members' statutory rights to petition for unfair prejudice and/or just and equitable winding up, as the leading principle is the principle of a freedom of contract and if a shareholder in a sound mind concluded an agreement limiting his/her/its rights in comparison with legislative provisions, he/she/it is absolutely free to do that.[119]

Others, on the other hand, support the position that such an omnipotence of SHAs is not so boundless as it may seem in the country with precedential system of law and such a predominance in these conditions is possible only in exceptional limited numbers of cases, e.g. with changing of voting thresholds, as it was highlighted earlier.[120]

Germany is more simple and rectilinear regarding the issue. "The German doctrine of corporate law differentiates the conditions, necessarily or optionally enshrined in the charter, and the conditions that are included in the charter to be further properly developed by concluding an SHA. As a general rule, an SHA cannot contradict to or change the provisions of the charter. Otherwise it will be considered null and void."[121]

But at the same time regarding some issues such strictness can be avoided and the provisions of SHAs "may deviate from the articles of association. For example, the parties to an SHA may agree to exercise their voting rights in the shareholders' meetings of the company

[118] Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law" (*JCL* 7:11), 125.

[119] Cheung Rita, "Shareholders' Contractual Freedom in Company Law" (*Journal of Business Law Issue*, 2012, No. 6), 506-507.

[120] Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law" (*JCL* 7:11), 125.

[121] M.S. Variushin, "A charter and a shareholders' agreement in the system of regulation of corporate relations: a comparative perspective" (from Russian "Устав и корпоративный договор в системе регулирования корпоративных отношений: сравнительно-правовой аспект"), http://xn----7sbbaj7auwnffhk.xn--p1ai/article/1145

always unanimously, based on the results of an internal pre-voting amongst the parties to the SHA. For this pre-voting, they may stipulate a higher or lower majority than stipulated in the articles for the respective shareholders' resolution."[122]

"However, as is noted by D. Stepanov in the study, in recent decisions the BGH pointed out that, despite the consolidation of the provision not in the charter, but in the SHA, since the latter was concluded by all the participants/shareholders, the decision of the general meeting in violation of or in contradiction to an SHA, can be challenged. This proves a gradual recognition of the SHA as an additional and weighty source of corporate law."[123] For instance, such a "special (*author's note* mote ensured to enforcement) form of an SHA exists in the form of pool treaties, in which all shareholders become parties to the agreement. These are referred to as consortium agreement *(Konsortialvertrag)*. Special rules apply to these agreements, for instance, that resolutions at the general meeting which conflict with prior resolutions in the consortium agreement are voidable."[124]

Also the case considered by BGH as of 20 January 1983 can be a vivid confirmation of the highly mentioned. "The plaintiff claimed that the shareholders' resolution passed at the GPM was void since it constituted a violation of the contractual agreement among the shareholders. […] The court granted the claim and declared the shareholder resolution void. […] Sec. 243 German Stock Corporation Law stated that a shareholders' resolution is void when it violates a provision of the charter of the corporation or of the AG Act. Although the shareholders' resolution of the 1979 general meeting did not meet these requirements, it nevertheless had to be declared void."[125]

"Generally shareholders of a corporation have the contractual freedom to bind each other to vote at the shareholders' meeting in a certain way. […] The violation of such a contractual agreement of the shareholders generally does not entitle the other shareholders to challenge the shareholders' meeting resolution passed in violation of such an agreement, since the violation affects only the contractual relation among the shareholders and does not concern the corporation."[126]

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[122]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 3, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

[123]M.S. Variushin, "A charter and a shareholders' agreement in the system of regulation of corporatrelations: comparative perspective" (from Russian "Устав и корпоративный договор в системе регулирования корпоративных отношений: сравнительно-правовой аспект"), http://xn----7sbbaj7auwnffhk.xn--p1ai/article/1145

[124]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 4, http://ssrn.com/abstract=2234348

[125]Ventoruzzo, Marco, Conac, Pierre-Henri, Gotō, Gen, Mock, Sebastian, Notari, Mario, and Resiberg, Arad, *"Comparative Corporate Law"* (2015), 459.

[126]Ibid.

"However, the right of a shareholder to challenge a shareholders' meeting resolution passed in violation of an SHA has to be recognized when all shareholders are parties to the SHA. In this case the agreement must be considered binding for the corporation although the corporation is not a party to the agreement and the SHA is not a part of a corporate charter."[127]

"It would constitute an unnecessary formality to force the shareholders to sue the shareholder violating the SHA in order to enforce the SHA and to pass another shareholders' resolution in which the shareholders' originally violating the agreement vote in accordance with it. Instead the other shareholders can challenge the shareholders' meeting resolution directly."[128]

Unfortunately, the attitude to essentiality of SHAs and their place in the system of other sources of regulation of corporate relations in Ukraine is not like in England and Germany. There are no provisions devoted to equality of a CA with a charter as, for instance, prescribed in the CA 2006 in England (when all shareholders are the parties), and no modernized judicial practice that starts to perceive such agreements at the same level as a charter.

The established Ukrainian judicial practice confirms the author's understanding that provisions of CAs have absolutely no chances to be more preferable than imperative provisions of corporate legislation. Freedom of contract will not be so widely interpreted and perceived as in England, as it would be argumented that there shall be a reasonable balance between a freedom of contract and a protection of a public order, public interests and, consequently, the norms devoted to the protection of the weaker party – minorities. So, participants/shareholders can exercise their discretion just within the boundaries of discretion defined by the legislator.

Nevertheless, the issue of correlation of the provisions of CAs with those of the charter is also not so unambiguous. Turning to provisions of the Laws it shall be outlined that there is a substantial number of norms prescribing a great level of discretion of participants in a number of issues. Though, it shall be pointed out that the situation is absolutely different in LLCs and JSCs.

In particular, the Law on LLCs prescribes that the participants can, by making regarding this the unanimous decision of all the participants of the company at the GPM where all the participants were present, introduce, change or exclude provisions in the charter regarding: the other term for making their contributions after the state registration of an LLC than the one envisaged in the law (6 months); the form of the payment of dividends to the participants of the company (monetary payments or not); other number of votes, which is needed for making decisions on the questions of the agenda, except for the issues that shall be decided unanimously; the limitations concerning the change of the correlation between the shares of the participants;

[127] Ventoruzzo, Marco, Conac, Pierre-Henri, Gotō, Gen, Mock, Sebastian, Notari, Mario, and Resiberg, Arad, *"Comparative Corporate Law"* (2015), 459.

[128] Ibid.

other terms for the additional contributions – may be prescribed the possibility to make additional contributions not pro rata to the participants' shares in the charter or the right of just some of the participants to make additional contributions, or the step of making additional contributions just by those of the participants who have a preemptive right can be excluded; the fact that the participants do not have a preemptive right, or the obligation of the participants who intent to sell their shares to a third person, to negotiate its sale with the other participants.[129]

Discretion on other issues can be realized without fulfillment of such strict demands as a unanimous decision of the participants of an LLC at a GPM where all the participants are present, but just by prescribing in the charter the terms other than those that are envisaged in the relevant Law within the boundaries of permitted, for instance: to define the period during which the consent for a withdrawal of a participant shall be provided, the period for which the dividends are paid, the principle of correlation of votes of participants to their shares in the charter of the company, the terms in the process of convocation of the GMP at the initiative of the participants, some peculiarities of organization before convocation of GPM, the person responsible for payment for convocation and holding of GPM, the way of voting and making decisions at GPM, the order of realization of a preemptive right, distribution of the share alienated among other participants, rejection of the realization of the preemptive right of the participants.[130]

JSCs are provided with discretion in relation to a narrower scope of questions: the order of informing of other shareholders regarding the intention of one of them to sell his/her/its shares, calculation of votes under the preferred shares, some competences of main bodies of the company, e.g. in case of absence of a supervisory board – the choice of appointment of the auditor, his/her remuneration, the transfer of his/her competences to the competence of the executive body or otherwise, the opportunity to be present at the meeting of the collegial executive body.[131]

So, the provisions of the Law on LLCs envisage that such a discretion may be fulfilled in the charter of companies either as a result of an ordinary decision-making process of participants/shareholders at the GPM/GSM or in the charters of companies as a result of unanimous decisions of participants/shareholders at GPM/GSM with all members present. No place in such discretion in exact articles is devoted to CAs, except for the possibility to prescribe

[129]The Law of Ukraine "On limited liability and additional liability companies" No. 2275-VIII as of 06 February 2018, http://zakon3.rada.gov.ua/laws/show/2275-19/print1509634575243058

[130]The Law of Ukraine "On limited liability and additional liability companies" No. 2275-VIII as of 06 February 2018, http://zakon3.rada.gov.ua/laws/show/2275-19/print1509634575243058

[131]The Law of Ukraine "On joint stock companies" No. 514-VI as of 17.09.2008, http://zakon2.rada.gov.ua/laws/show/514-17

in the CA to which a participant is a party that his/her/its preemptive right is not applied (concerns LLCs).

So, the difficulty is added with the fact that Art. 7 of the Law on LLCs regarding CAs does not clearly prescribe the scope of issues that can be referred to a CA's discretion (the narrow understanding of the term of a CA under this Law has been analyzed earlier). The provisions of the Law on CAs in part related to LLCs that could clearly define the issue, most probably, will not have legal force.

In JSCs the state of affairs differs, as even despite the fact that the Law does not contain provisions that prescribe a discretion regarding the majority of issues, the Law on CAs makes relevant amendments to the Law on JSCs and outlines the scope of questions that can be reflected in such agreements, which makes CAs much more effective in this aspect in JSCs than in LLCs.

Though the author has some doubts that envisaging of all the possible issues of corporate governance will be utterly perceived by the Ukrainian judicial branch of power, as it may be considered as a violation of a public order in some aspects taking into consideration the public nature of public JSCs.

So, because of the described state of affairs in LLCs the following issue can be raised: why is it not prescribed that CAs with all the participants parties to it can be equated to a charter in some issues or even can prevail above the charter if a CA is concluded later than a charter by all the participants as parties to it? So, the question of predominance of provisions of a CA above the charter one's is not even raised. Of course, it cannot be so if it is a CA with some participants parties to it but it would be a reasonable option if all the shareholders/participants were parties to it. As far as the author is concerned, there will be a higher level of expression of personal interests of participants in a unanimous CA than in provisions of the charter created as a result of an ordinary decision-making process of participants'/shareholders'.

The latter analysis raises the next issue that would be a good point in helping CAs – to consider legal nature of CAs in relation to minutes/resolution of GPM/GSM. To the author's strongest belief, that will be a great opportunity for protection of CAs, if they will be equated to unanimous decisions of participants at GPM/GSM with all members present, as it was held in the UK and in Germany. That is called a "duomatic principle, which takes its name from the decision of Buckley J. in Re Duomatic Ltd. [1969], in which his Lordship stated 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".[132]

Moreover, taking into account the provision of the Law on CAs that "the violation of the agreement cannot be the reason for recognition of the decisions of the bodies of the company null", it can be presumed that even if a CA is unanimous, the further decision of participants at GPM/GSM (even not unanimous) will reverse it, unless a CA will be equated to minutes of GPM/GSM or such a provision will be excluded from the Law. Sure, the decision of the body of the company cannot be considered null if it violates the agreement between some of the participants of the company, as obviously, the decision of one of the bodies of the company has the wider scope of influence than the agreement between just some of the participants (founders)/shareholders. But prescription of such a possibility in relation to unanimous CAs will be a great advantage.

So, this provision will definitely relate to JSCs, but its relation to LLCs is not so obvious yet, as the Law on LLCs in contrast to the Law on CAs does not prescribe such a rule.

To outline, the number of problematical issues can already be revealed. Unless the relevant provisions of the Laws are changed legal practitioners will try to search for mechanisms to protect CAs in such cases, to make them effective and enforceable. One of the opportunities that the practitioners can turn to is to prescribe in the charter that the issue is regulated by the unanimous CA and provide a reference to such a CA in relation to those questions where the discretion in the charter is possible according to legislation. But, to author's mind, in such a case, the CA will be considered as a part of a charter, so it will have to be disclosed and one of the greatest pros of CAs as confidentiality will be reversed. Nevertheless, the participants/shareholders will have to decide what their prevailing interest is.

The next opportunity is to make a unanimous CA with necessary provisions and to make relevant amendments to a charter regarding these particular provisions with a unanimous decision of all the participants/shareholders present at the GPM/GSM – it will definitely protect such provisions, though the question of confidentiality can be raised again. Though, just in relation to the latter as all the rest norms of CAs will be left confidential.

The next possibility is to use one of the tools implemented by the Law on CAs – an option. In particular, to prescribe in the CA that if a participant/shareholder disagrees to fulfill his/her/its right in the order, envisaged by the CA, he/she/it is obliged to sell his/her/its part to other participants/shareholders pro rata to their shares. In such a case it is better if an irrevocable

[132]Elena Balbekova, "Shareholders'Agreements: common law vs. Ukrainian law", Voropaev&Partners Law Firm, Kiev, Ukraine, http://uba.ua/documents/text/voropaev_2010.pdf

power of attorney for conclusion of such an action will be provided for all of the potential purchasers.

So, of course, legal practitioners can seek to find the best ways to implement CAs effectively into the Ukrainian legal reality, it will be much better if judicial practice will go the most effective way regarding the issue. As otherwise the meaningfulness of CAs in Ukraine will be reversed.

To conclude, the issue of correspondence of provisions of SHAs/CAs with imperative corporate legislation or company's charter or articles of association also differs among these countries. In the UK the state of affairs can be described as follows: if the provisions of the SHA with all shareholders parties to it contradict to the provisions of articles of association but do not infringe the imperative norms of companies' legislation, they will be predominant; if the provisions of SHAs/CAs contradict to the provisions of articles of association and at the same time infringe the imperative norms of company legislation the issue of their predominance is disputable. It is decided by the judges on the case by case basis, but except for some rare cases, the judges do not consider such SHAs as a predominant document.

Some scholars mention that it is even possible to fetter on members' statutory rights and even abandon them, to derogate from some of the protective provisions, as the leading principle is the principle of a freedom of contract. Others, on the other hand, support the position that such an omnipotence of SHAs is not so boundless and such a predominance in these conditions is possible only in exceptional limited numbers of cases, e.g. with changing of voting thresholds.

The position in Germany is simpler: a decision of the general meeting in violation of or in contradiction to SHA with all shareholders parties to it, can be challenged, though there is no possibility for an SHA to be fulfilled if its provisions violate the imperative norms of legislation.

In Ukraine, unfortunately, such straightforwardness cannot be observed, as no priority of CAs above the charter or minutes of GPM/GSM with all shareholders parties to it was prescribed by the legislator, so the predominance of CAs above the provisions of the charter is a very disputable one. Legal practitioners can stick to some means of protecting provisions of CAs, though mostly with such drawbacks as loss of their confidentiality. Prevailing of CAs above the imperative provisions of laws cannot even be a subject of discussion or maneuver.

2. **MODERN PECULIARITIES OF THE INSTITUTE IN A COMPARATIVE PERSPECTIVE**

2.1 Requirements to the Form of the Agreement and Related Formalities

As it can be observed from the analysis of sources regarding the UK and Germany on the issue, this question is not a problematic one and is not paid a substantial attention among legal scholars in these countries.

In the UK the requirements to such agreements do not differ from the ones to ordinary agreements and contracts. Though the attention shall be paid to some certain elements regarding the validity of a contract, which can be considered as a characteristic feature of this common law country and absolutely a non-understandable for the representatives of the European countries (the similar thing (cause) that existed in France was cancelled in 2016 in the process of a reform).

So, these requirements are mostly related to the terms of the agreement, not to its form: there shall be a consideration – an objective reason for each of the parties to a contract to enter into such an agreement and the intent of each of the parties to make it a legally binding agreement. So, either there is an obligatory demand for the consideration or it can be concluded in the special form of a deed (in which witness signatures are required). The absence of consideration in the latter will not make the agreement null and void. And usually the simple written form is considered as sufficient.

Other formalities regarding such SHAs are also not burdensome, as "SHAs as private documents between the shareholders, in the vast majority of cases, do not have to be filed at Companies House (the public register of companies in England and Wales). The exception to this is where an SHA is specifically mentioned in the articles of association or if the SHA contains terms which would otherwise affect the company's constitution (as the terms of the articles of association of a company are made available for public inspection)."[133]

Turning to Germany, "SHAs by themselves are not subject to any formal requirements. They are, however, for documentation purposes normally executed in writing. A formal requirement may be applied if statutory law prescribes a specific form for some content of the SHA (e.g. an obligation to transfer shares in an LLC). Apart from that, the conclusion of an SHA in relation to a public company (*author's note* AG) may trigger notification duties of the parties involved towards that company and, if listed, to the German Federal Financial Supervisory

[133]Chris Owen, Manches, IBA Guide on Shareholders' Agreements (England and Wales), 1, https://www.ibanet.org/Document/Default.aspx?DocumentUid=CD3FB209-112A-4678-91D2-CED421DD8A53

Authority (BaFin)."[134] "In Germany, notarization is required if there is an agreement to alienate the owned share and in the case of the agreement of transfer of property title to a land plot (for example, as payment for a share of the charter capital)."[135]

Unfortunately, in Ukraine the issue is not so uncontroversial. According to the provisions of the Law on CAs strict demands in relation to the form of the agreement are required (a written form with the signatures certified in the special order, i.e. by notaries).[136] That is, everything is understandable with requirements to the form of such agreements in JSCs – a written form with the signatures certified by notaries.

But such provisions of the Law on CAs, in some point, contradict to the Law on LLCs that demands just a written form of the agreement without mentioning the signatures at all.[137] And, though the first one comprises stricter demands regarding the form, it, in comparison with the Law on LLCs does not prescribe the nullity of an SHA by law as the consequence of violation of such provisions.[138]

If the Law on LLCs eventually will be the one applied in relation to CAs in LLCs, just a written form will be required. So, there will be different approaches to the requirements to the form of such agreements in LLCs and JSCs.

But, at the same time, the issue if the provisions of the Law on CAs shall be implemented to the Law on LLCs is a quite reasonable one. Though, on the one side, it will provide for additional burdens for participants, like the necessity to turn to the notary, and more difficult procedure in case of making amendments to the CA, but, on the other side, it will provide for better protection of a legal force of the agreement.

However, to the author's opinion, it shall also be noted that if we intend to conclude an agreement and do not subordinate it to a foreign legal order, we shall be very careful with including such provisions as if one of the participants/shareholders alienates its/his/her share (-s), he/she/it shall ensure that the buyer of such share (-s) will adhere to this agreement by way of signing a special document of adherence (deed of adherence). Though there is no such requirement as the form of the single document in either of the legislative acts analyzed, in

[134]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 1, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

[135]Erika Kindsvater, "Shareholder agreement: draft CCRF (Article 67.2) as compared to the German law and court practice", http://yust.ru/eng/press-center/publication/shareholder_agreement_draft_ccrf_article_67_2_as_compared_to_the_german_law_and_court_practice/

[136]The Law of Ukraine "On amendments to some legislative acts of Ukraine regarding corporate agreements" No. 1984-VIII as of 23 March 2017, http://zakon2.rada.gov.ua/laws/show/1984-19

[137]The Law of Ukraine "On limited liability and additional liability companies" No. 2275-VIII as of 06 February 2018, http://zakon3.rada.gov.ua/laws/show/2275-19/print1509634575243058

[138]The Law of Ukraine "On amendments to some legislative acts of Ukraine regarding corporate agreements" No. 1984-VIII as of 23 March 2017, http://zakon2.rada.gov.ua/laws/show/1984-19

Article 205 of the Civil Code of Ukraine[139] and in the provisions of Interpretation of the Ministry of Justice of Ukraine "On the form of agreements" dated 19 April 2011[140], there is no direct prohibition or permission to conclude it not in such a form (as, for example, the Commercial Code of Ukraine demands the form of a single document, but at the same time envisages the opportunity to conclude commercial agreements in a simplified form, i.e. exchange of e.g. letters, telegrams[141]).

It can be considered that it may be a certain risk for the parties of such a contract if the party with a certain legally protected interest goes to court with a claim that such agreement does not correspond to the requirements to the form of the agreement. Moreover, if such adherence is done in the form of the deed, it raises the question, if all the other parties to such an agreement shall sign the deed in order to confirm their consent with a new party to a contract and certify the signatures in a specially prescribed order (i.e. by a notary). Unfortunately, the author cannot be sure how the judicial practice will go with it.

To conclude, there are no special requirements to the form of SHAs in England and Germany, i.e. general requirements to a form of a contract are applied to them, though in order to ensure a more stable ground for such agreements they are in a written form. Of course, there are some characteristic features of each country regarding this point which are connected with peculiarities of contractual law of each country, for instance, consideration in ordinary contracts (but that is a requirement to the terms of the agreement) or witness's signature at deeds in the UK. Other formal requirements are connected with imperative rules of legislation, for example the obligation to register some agreements with a special subject, as it is in Germany. In Ukraine the issue is not so unambiguous mostly because of the contradictions between the provisions of two new laws. But there are no special distinctive requirements regarding this in Ukraine.

2.2 Parties to the Agreement and Third Parties

In this sub-chapter the following issues shall be researched: how many parties are usually there in SHAs, what shareholders (minority or majority) are usually parties to such agreements, if a company can be a party to such an agreement, influence of CAs/SHAs on third parties.

[139]The Civil Code of Ukraine No. 435-IV as of 16.01.2003, http://zakon2.rada.gov.ua/laws/show/435-15

[140]Interpretation of the Ministry of Justice of Ukraine "On the form of agreements" (from Ukrainian "Щодо форми правочинів"), as of 19 April 2011, http://zakon2.rada.gov.ua/laws/show/n0028323-11

[141]The Commercial Code of Ukraine No. 436-IV as of 16.01.2003, http://zakon2.rada.gov.ua/laws/show/436-15

To the author's astonishment, the UK, as a "mother-country" of SHAs, unfortunately, submits low numbers of contracting parties per agreement. Particularly, 90 per cent of SHAs are concluded between just 2 parties, 5 per cent – between 3 or 4 parties, and absolutely no agreements with 5 and more parties to it.[142] At the same time "relatively higher numbers of contracting shareholders (although they are still small and manageable) in civil law countries suggests that shareholders are most comfortable at contracting with 2-4 other parties and only in exceptional cases the number exceeds ten."[143]

Speaking about the qualitative description of such shareholders-parties to SHAs, it can be claimed that in England minority shareholders are not too active, as it could be presumed for a country with a highly dispersed ownership structure, which is, most probably, presumed to present the data that the number of SHAs with contracting minority shareholders is the highest. According to the information gathered by Paulius Miliauskas, shareholders with 5 per cent or less are not active at all, shareholders owning between 5 and 30 per cent are the most active, as conclude 48 per cent of SHAs at the listed companies, shareholders owning between 30 per cent and 50 per cent of shares – comprise just 20 per cent of shareholders concluding such contracts, and majority shareholders, owning 50 per cent of shares – 32 per cent respectively.[144] At this point minority shareholders are also more active in civil law countries, than in a country of a common law jurisdiction.

Of course, "these results are confusing as it might be assumed that the number of contracting parties should be greater in a jurisdiction with dispersed ownership pattern (as naturally there are more shareholders in each company). The possible explanation for such state of affairs might be that the number of shareholders required in the common law jurisdiction to reach at least small"[145] "threshold of voting rights in the company, which would allow such shareholders to exercise some level of control, is so high that such shareholders do not have enough incentives to contract."[146]

"The other explanation for these findings is that the predominant type of SHAs that was identified in the UK listed companies was the relationship agreement (a few voting agreements that were found were very limited in scope). This agreement usually entails that there are

[142]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 456, https://epublications.vu.lt/object/elaba:2121038/

[143] Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 366, https://epublications.vu.lt/object/elaba:2121038/

[144] Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 374, https://epublications.vu.lt/object/elaba:2121038/

[145]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 365, https://epublications.vu.lt/object/elaba:2121038/

[146]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 366, https://epublications.vu.lt/object/elaba:2121038/

contractual relationships established between the majority shareholder and the company."[147] So, at the same time it can be stated that the activity of majority shareholders is observed to be more frequent in the UK, than in civil law countries.[148]

"The relationship agreements are intended to protect the interests of the company (and of minority shareholders) from possible misconduct and fraudulent behavior by the majority shareholder. The company in these contracts usually acts as a party that has a right to require from the majority shareholder to act or to refrain from acting in certain way and not as a party that is required to limit its statutory powers in any way."[149] But, nevertheless, a relatively high number of relationship agreements raises the question whether a company can be a party to such agreements and voting agreements in general and what provisions regarding companies can be included in such agreements.[150]

So, with an undoubtful level of certainty it can be remarked that "in English law the question of possibility of the participation of a company in an SHA does not raise doubts. However, the common law has developed restrictive standards for such participation"[151]. "For instance, the principle that a company cannot forgo its right to alter its articles exists. This was once again indicated in a judgment Southern Foundries (1926) Ltd v. Shirlaw [1940] AC 701. As this principle had been stated earlier in Allen v. Gold Reefs of West Africa Ltd [1900] 1 Ch 656, particularly in words that 'if the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions (Sections 50 and 51 [of the Companies Act 1862]); any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute': Walker v London Tramways Co (1879)."[152]

"Judgments cited were authority for a rule of law that a company cannot validly agree not to alter its Articles. Further support for this was derived from a dictum of Russell LJ in Bushell v. Faith who had referred to the well-known proposition that a company cannot by its

[147]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 373, https://epublications.vu.lt/object/elaba:2121038/

[148]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 374, https://epublications.vu.lt/object/elaba:2121038/

[149]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 311, https://epublications.vu.lt/object/elaba:2121038/

[150]Ibid.

[151]Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law", *JCL* 7:11, 129.

[152]Mads Andenas, "Shareholders' Agreements : Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 148,
https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

articles or otherwise deprive itself of the power by special resolution to alter its articles or any of them."[153]

The analogous viewpoint was once more confirmed by the judgment in Russell v. Northern Bank Development Corp Ltd [1992] 1 WLR 588, that was analyzed in the previous chapter of the thesis. Though, on the one side, it may be acknowledged that it was a rather stable practice of British courts, but, on the other side, this "decision was needed to confirm this position because the majority in the Northern Ireland Court of Appeal had decided that even an agreement solely between shareholders relating to the exercise of their voting rights was unlawful if it operated to fetter the use of one of the company's statutory powers for an unlimited time. They had said that voting agreements were permissible only for one-off agreements relating to particular meetings, not where all shareholders agreed to vote in a particular way at all times in future."[154]

So, the author considers that, undoubtedly, that is a tremendously reasonable limitation in the aspect of a company as a party, as if a company would be allowed to be bound according to such restrictive provisions as all the other parties to it, i.e. shareholders, it would cause the situation that all the future shareholders of the company (or even the present shareholders that are not parties to the agreement) would also be bound by the contract which obviously violates the principles of fairness and reasonableness.

But such a problematic practice can grant an amazing opportunity to warn that the issue of making a company as a party to an agreement is a rather important one which requires thorough previous consideration. And the company shall not be made a party to an agreement without considering whether there is any real need for this. Or at least, the drafters of the agreement shall properly define which obligations are for all the parties of an SHA and those which could be undertaken only by the shareholders.[155]

"In Germany, as far as public data and reports on factual background are accessible, shareholder voting agreements are concluded mostly by long-term shareholders, which are often significant or together hold a majority of shares in their company."[156] The quite important move ahead for Germany is that SHAs with all participants-parties to them are provided with more legal weight and means of protection, and judicial enforcement then SHAs with just some of the

[153]Mads Andenas, "Shareholders' Agreements : Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 149, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[154]Tamasin B. Little, "Company law: shareholders' agreement: articles of association" (*International Company and Commercial Law Review*, 1992, 3(8), C149-150, © 2018 Sweet & Maxwell and its Contributors), 1-2

[155]Ibid.

[156]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 1-2, http://ssrn.com/abstract=2234348

participants/shareholders. It also can be stated that it is not prohibited to make a company a party to an SHA, though the data on the practice of applicability of such an opportunity is, unfortunately, not observed.

"An important point to outline is that accepted are voting trust agreements when the member of the management or supervisory board is also a shareholder, but academia is reluctant, when the member of the management or supervisory board is not a shareholder."[157]The same attitude to the issue is envisaged in Ukraine in the new Law on CAs.

So, turning to Ukraine, due to the fact that the provisions of laws are new and have not had an opportunity to become a base for judicial practice, some obviously problematic issues within the practical scope of their applicability cannot be revealed. According to the provisions of the relevant Laws a number of parties may be as the participants or shareholders themselves wish. But whether majority or minority shareholders will mostly be the parties – is also not understandable yet. Of course, it substantially depends on the contractual opportunities of minorities in defending their interests.

The issue that can be quite controversial in Ukraine, as it has been for some period in England, is if a company can be a party to the agreement. Laws do not contain an unambiguous answer to this question. There is no permission, no clear prohibition.

Of course, it can be predictable that the representatives of legal scientific field will have a number of arguments regarding the issue. On the one side, the norms of corporate law are, to some extent, mandatory (mostly to JSCs), and do not openly envisage the opportunity for a company to be a party to an agreement, moreover, the Law on CAs, at least, prescribes that these are agreements on realization of participants'/shareholders' rights, the conclusion of which the company should be informed of, which generally leads to a conclusion that the company cannot be a party to such an agreement. On the other side, this is a sphere of contract law and presumption of the invalidity of an agreement which is not clearly provided for by law is incorrect. That is, the controversy and pluralism of thoughts can be awaited to be observed in Ukraine.

It can be expected that the judges will follow British path in the question, but, taking into account that Ukraine is the civil law country without such a pure precedent that exists in the UK, it can be predicted that the issue will be resolved just after appearance of some recommendations of the highest courts.

Moreover, the issue of effectiveness of making a company a party to an agreement shall be considered, as it was footnoted in relation to England, there shall be a practical necessity for a

[157]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 6-7, http://ssrn.com/abstract=2234348

company to be a party. The Ukrainian law does not imply the advantages of such an inclusion, except for the case when the participants/shareholders intend to subordinate the corporate disputes arising from contractual relations to the consideration of international commercial arbitration, as the provisions of the Commercial Procedural Code of Ukraine prescribe such a possibility only in case if the arbitration clause (arbitration agreement) has been concluded between the company and all the participants/shareholders (as a general rule consideration of such disputes in arbitration is prohibited).[158]

The important aspect that the author would like to point out is that it will be much more effective if Ukrainian legislation prescribed a special regulation for CAs which have all participants/shareholders as parties to them. Such a definition of them as of the parts of the statutory documents of the companies and definition of the provisions of such agreements as those which are more preferable than those contained in the charter, if they were concluded later, will be tremendously essential in practice. Besides, the interests of minorities will not be neglected as they will also be the parties to such agreements.

The next rather important point that the author would like to pay attention to is the relation of SHAs/CAs with third parties. It can be analyzed in such aspects as legal influence of CAs/SHAs on third parties, quasi-CAs that can be concluded with third parties and influence of SHAs/CAs on third parties in cases of disputes.

Summarizing the position of all the three countries, it should be outlined that all these countries support the viewpoint that SHAs/CAs have the influence on and are binding just for the parties to an agreement. This principle is quite understandable as the agreement cannot regulate rights or even obligations of the persons that are not the parties to it – that would violate the basic values of civil law – integrity, fairness and reasonableness (as they are the major principles of Ukrainian civil legislation). In England, for instance, this common law doctrine is called the doctrine of a privity of a contract (also known as the third party rule).[159]But as every rule this one also has some exceptions. Speaking about England it cannot be omitted that "there are a number of statutory exceptions to the third party rule, of which the most important is that created by the Contract (Rights of Third Parties) Act 1999 under which a third party may enforce a contract term against the parties to the agreement where:"[160]

- "the contract expressly gives the third party the right to do so; or"[161]

[158]The Commercial Procedural Code of Ukraine No. 1798-XII as of 06.11.1991, http://zakon2.rada.gov.ua/laws/show/1798-12

[159]Chris Owen, Manches, IBA Guide on Shareholders' Agreements (England and Wales), 1, https://www.ibanet.org/Document/Default.aspx?DocumentUid=CD3FB209-112A-4678-91D2-CED421DD8A53

[160]Chris Owen, Manches, IBA Guide on Shareholders' Agreements (England and Wales), 2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=CD3FB209-112A-4678-91D2-CED421DD8A53

[161]Ibid.

- "the term purports to confer a benefit on the third party, and the contract shows the parties' intention to make that term enforceable by the third party."[162]

As far as the author is concerned there are no such exceptions in Germany.

But that is quite understandable that the parties to SHAs/CAs cannot prescribe that the provisions of an/a SHA/CA in some way oblige third parties to do something, that is in the situation when one of the shareholders/participants transfers his/her/its share, there is always a risk that that third party-buyer will not agree with the provisions of the SHA that had perfectly functioned earlier and provided for the effective governance of the company. And if there is no preferred right of other participants/shareholders according to the charter/articles of association of their company or a/an CA/SHA, or if they rejected to realize this right particularly in this case, or if they have not prescribed any obligation of the shareholder who sells to gain a permission for such an action from other shareholders as it is often done in Germany[163], for example (as a method of preventing the appearance of a new undesirable shareholder in the company), the parties will have no choice except for to include provisions in the SHAs according to which the selling shareholder will put all his/her/its efforts to ensure that the future shareholder will adhere to the terms of the SHA and will execute a deed of adherence to ensure the preservation of the system of corporate governance, for instance, that had been already constructed and existed effectively.

In the aspect of influence of SHAs/CAs on third parties in cases of disputes, the author would like to mention the paragraph from the Law on CAs, which envisages "the possibility to recognize the agreement concluded in violation of the provision of a CA as void if the party with a legally protected interest files a lawsuit, but just if it will be proved that the party of the other, 'violating' contract, knew or had to be aware of the limitations envisaged in the agreement on realization of participants' rights/SHA."[164] In other words it strengthens the principle of a purchaser in a good faith and in a bad faith. Germany also supports the principle of good faith buyer, while England, in its turn, does not accept it.

This is generally a very positive aspect (it is an effective tool for the protection of the rights of third parties that were parties to a contract in a good faith that is a wonderful opportunity to make the civil turnover more stable not depending on the unreliable elements of such relations). But the contradictory issue is that it does not correspond to the provisions of the Law of Ukraine on LLCs, as that one envisages that the agreement is null by law and does not

[162]Chris Owen, Manches, IBA Guide on Shareholders' Agreements (England and Wales), 2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=CD3FB209-112A-4678-91D2-CED421DD8A53

[163]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 1, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

[164]The Law of Ukraine "On amendments to some legislative acts of Ukraine regarding corporate agreements" No. 1984-VIII as of 23 March 2017, http://zakon2.rada.gov.ua/laws/show/1984-19

need any confirmation or proving of it in judicial procedures.[165] So, the situation is the following: everything is understandable with JSCs, but there is a contradiction in relation to LLCs. Though if just the provisions of the Law on LLCs will be in force, the author considers that it will be better to make amendments to Article 7 of the Law and to preserve the provision regarding voidness, as the fact if the party had known or had not known shall be carefully and deeply assessed by the authorized body of judicial branch of power.

The next question that needs attention is the existence of quasi-SHAs/CAs. "Whether shareholders in general may bind themselves to the instructions of third parties is disputed in German academia. Some see agreements with non-shareholders as inflicting the prohibition to separate the share and the right to vote at the general meeting, also because of the duty of loyalty in exercising the voting rights. The majority view in academia is that also SHAs with non-shareholders should be accepted. Even if such agreements are accepted, there are peculiarities: while SHAs among shareholders are seen as civil partnerships, agreements with third parties will mostly be agency or trust relationships."[166]

Nevertheless "German AG Act clearly forbids the selling or purchasing of the voting rights according to section 405 (3) no. 6, 7 Stock Corporation Act. The German Stock Corporation Act prohibits to give or to promise special advantages to shareholders for voting in a certain way and for shareholders to ask for, get promised or to take special advantages. Doing so is an administrative offence with the effect that such agreements are void (Section 134 of the Civil Code). Such SHAs are void, the shareholders are not bound."[167]In Ukraine, creditors who have their legally protected interests which are dependent on the participants'/shareholders' realization of their rights have the opportunity to conclude an agreement on realization of such rights of participants/shareholders. Such agreements are not CAs/SHAs – the provisions on the latter are just spread on them – that is, it was considered reasonable to name them as "quasi CAs". In such a way the legislator intended to provide the special tools for protection of creditors' legal interests. The author supports the viewpoint of the minority of the German legal doctrine, basing the position on the facts that the conclusion of such an agreement cannot always be called reasonable – as the provisions on voting etc. that will be in the interest of creditors can violate the interest of the company eventually. Moreover, as seen from the previous part of the research the nature of CAs is disputable, the nature of quasi-CAs will be much harder to define.

[165]The Law of Ukraine "On limited liability and additional liability companies" No. 2275-VIII as of 06 February 2018, http://zakon3.rada.gov.ua/laws/show/2275-19/print1509634575243058

[166]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 8, http://ssrn.com/abstract=2234348

[167]Ibid.

So, speaking about parties to such agreements, it shall be footnoted that English shareholders are not so active in concluding SHAs, especially minorities. And generally unanimous SHAs are not such a widespread tool in England as it could be expected. These indeces are higher in civil law countries.

England and Germany express a special attitude to SHAs to which all shareholders are parties to, in comparison with Ukraine, which can be considered a disadvantage that limits the possible scope of enforcement and applicability of CAs. So, to author's viewpoint, in this aspect the foreign practice shall be rationally implemented.

Foreign experience presents the attitude that the company itself can be a party to an agreement, though it cannot limit the statutory rights granted to it by legislation. Making a company as a party to an agreement shall be deeply and carefully assessed by the drafters in order not to raise judicial doubts in enforcement and recognition of such agreements or their particular parts.

The general rule is that SHAs/CAs have the influence on and are binding just for the parties to an agreement (principles of fairness, reasonableness, principle of privity of a contract), though there are some exceptions, for instance, in British legislation. Also, it is noteworthy that principles of good and bad faith purchaser are used in Germany and in Ukraine in the process of defining which agreement shall stay in force if the agreement with a third party violates the provisions of CAs/SHAs. Special attention shall also be paid to quasi-CAs.

2.3 Discretion in Defining the Terms of the Agreement and its Restrictions

Results of practical researches are the following: "shareholders can deal with all aspects of the relationship between themselves if required, including non-company matters and personal rights and obligations. However, it would be usual in the UK to restrict the content to matters relating to the company and shareholding relationships. If the parties wish to deal with non-company matters, these will usually be contained in a separate agreement."[168] In Germany the attitude to the terms of SHAs is practically the same as in the UK: there are no legal rules regarding the content of an SHA, therefore the parties are free to regulate non-company contents.[169]

[168]Chris Owen, Manches, IBA Guide on Shareholders' Agreements (England and Wales), 2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=CD3FB209-112A-4678-91D2-CED421DD8A53

[169]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

Speaking about Ukraine, as it was analysed before in sub-chapter regarding definitions for such an agreement, the scope of terms that can be a subject of regulation of CAs/SHAs is not so definite and unambiguous, as it could be desired, due to several legislative acts. It is not understood from the relevant provisions of legislative acts that non-company content can or cannot be the subject of SHAs'/CAs' regulation – no permission, no prohibition. But, to the author's strongest belief, it will be better to avoid including of such disputable provisions into agreements, at least, until there is a more or less stable judicial practice presenting the judicial viewpoint on the issue.

So, in order to understand the general scope of discretion of participants/shareholders while forming the terms of SHAs, the most widespread terms usually included will be enlisted.

As it was mentioned earlier, "in the UK the parties to an SHA are free to agree the content and restrictions contained within an SHA. Typical SHAs in England and Wales will include provisions in relation to the following: the composition of the board; representatives and warranties given by the directors/the company and/or the shareholders; the transfer of shares; restrictive covenants (including non-solicitation and/or non-compete provisions, for example); confidentiality; any restrictions on certain actions of the company (which may require the consent of certain shareholders or a certain percentage of shareholders); rights to receive financial information and agreement on business plan; dividend policy; and veto rights in relation to certain matters."[170]

So, in Germany, in general, the parties to the SHA are free to determine its content. Obligations connected with the right to vote, limitations of alienation of shares or equity, actions of increase of the charter capital, (preferential) rights to purchase of shares, prohibition of competition etc. are the most common content of shareholder agreements.[171] "So, the composition and remuneration of board members are also an often part of such agreements. Good-leaver and bad-leaver provisions as well as conditions for a transformation or liquidation of the company and for profit distributions tend to be included in SHAs, as well. Other clauses typically included are share transfer restrictions, rights of first refusal, tag-along or drag-along rights, put or call options and non-competition covenants."[172]

In Ukraine, in its turn, according to the Law on CAs it is allowed to prescribe the methods of voting on the GPM/GSM; coordinate the purchase and alienation of shares at a price

[170]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

[171]Erika Kindsvater, "Shareholder agreement: draft CCRF (Article 67.2) as compared to the German law and court practice", http://yust.ru/eng/press-center/publication/shareholder_agreement_draft_ccrf_article_67_2_as_compared_to_the_german_law_and_court_practice/

[172]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 3, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

defined in advance and/or in case of occurrence of the events envisaged in the agreement (which is known as such instrument of regulation of contractual relations as the option); stipulate to refrain from alienation of the shares before the occasion specified in the contract (lock up clauses); determine other actions related to the management of the company, termination of the status of the legal entity, separation of the new legal entity from the previously existing; moreover, it can prescribe the terms and procedure of defining the terms when the participant (founder)/shareholder is obliged to purchase or sell its/his/her share(-s) in the share capital and envisage the cases when such right or obligation appears.[173] The narrower scope of terms possible to prescribe according to the Law on LLCs has been analyzed earlier. To outline, the list of possible provisions is not defined in Art. 7, the definition of the agreement raises a number of controversies. In particular, what exactly the legislator meant in the wording "agreement, according to which participants are obliged to fulfill their rights and authorities". Do "authorities" include "duties and obligations"? – this is the question.

Despite such a wide general discretion, there is a number of reasonable limitations and restrictions which are connected with mandatory rules of corporate legislation or other principles existing in legal doctrine of the countries. Moreover, such limitations and restrictions may be observed not only in the specialized legislation relating to CA, LLCs and JSCs, but also in general rules of civil law defined in the Civil Code of Germany or Ukraine, for instance, and in legal acts of other spheres which CAs may become subordinated to.

In Germany, "as for agreements in general, provisions in SHAs are invalid, if they are infringing upon mandatory provisions of the law or contrary to public policy."[174] It is important to understand that in some of the companies the relation of the charter and the law are quite strict, i.e. "article 23 of the German AG Act stipulates that the charter may deviate from the norms of the Law insofar as it is permitted by law. For example, direct regulation of the (preferential) right to purchase of shares by the charter would contradict the principle of free alienation of shares and would be recognized as a breach of the provisions of Article 23 of the AG Act."[175]

[173]The Law of Ukraine "On amendments to some legislative acts of Ukraine regarding corporate agreements" No. 1984-VIII as of 23 March 2017, http://zakon2.rada.gov.ua/laws/show/1984-19

[174]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 3, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

[175]Erika Kindsvater, "Shareholder agreement: draft CCRF (Article 67.2) as compared to the German law and court practice", http://yust.ru/eng/press-center/publication/shareholder_agreement_draft_ccrf_article_67_2_as_compared_to_the_german_law_and_court_practice/

"In a similar way, limitation of a voting right fixed in a charter would be recognized invalid for contradicting the free vote principle. Moreover, the same will be the provisions of the SHA."[176]

"Moreover, in Germany, the SHA may not independently regulate the issues, which should be stipulated by the charter. For example, the agreement may not regulate the company's status, its relationship with the shareholders, and legal status of its management bodies."[177]

"In Germany, the company charter must directly stipulate the provisions of payment for the shares by non-monetary means, of taking of shares, of charter capital increase etc. Evasion of the provisions that regulate protection of interests of minority shareholders and fix the shareholders' right to information and study of the company documents is also prohibited."[178]

So, SHAs may regulate the issues the discretion and boundaries for which were prescribed in the Law and, consequently, in the charter. That is why it can be regarded that SHAs in GmbHs in Germany have more options to envisage then SHAs in AGs.

As it has been observed earlier, in Ukraine the situation is pretty the same. The Law of Ukraine on JSCs outlines that the charter or other documents of the company can not envisage any duties or obligations of shareholders that contradict to the provisions of the Law.[179] That is, as it was analyzed in the previous chapter, the Law on JSCs prescribes a very limited discretion in terms "unless otherwise is prescribed in the charter" and the Law demands the charter to contain 16 points regarding the activities of the JSC. Though the Law on CAs amends it with several articles prescribing discretion in CAs, the author considers that from the position of judicial practice it may be a rather risky challenge to prescribe some additional obligations for shareholders as it is accurately strictly prohibited by the Law.

Of course, the author cannot be sure that the judges will not perceive this as from the point of predominance of the principle of the freedom of contract and the voluntary fulfillment of a right in such a way, though that would be unreasonable to deny that in JSCs this scheme can be rather risky. The situation regarding correlation of CAs, charter and the Law in LLCs in Ukraine has been analyzed earlier, so the attention to it will not be paid here.

A very vivid example of a prohibition to include a provision in an SHA as it infringes the public policy in Germany is the case when "the SHA contains a binding voting agreement – a

[176]Erika Kindsvater, "Shareholder agreement: draft CCRF (Article 67.2) as compared to the German law and court practice", http://yust.ru/eng/press-center/publication/shareholder_agreement_draft_ccrf_article_67_2_as_compared_to_the_german_law_and_court_practice/

[177]Ibid.

[178]Ibid.

[179]The Law of Ukraine "On joint stock companies" No. 514-VI as of 17.09.2008, http://zakon2.rada.gov.ua/laws/show/514-17

choice-of-law clause is ineffective because this is subject to mandatory provisions of the law of the (German) company."[180]

Again the attaching aspect can be found in provisions of Ukrainian legal acts – the highly mentioned Resolution of the Supreme Court of Ukraine as of 2008 which is still in force envisages the following: "the activity of a JSC, registered as a legal entity in Ukraine, relations between the JSC and its shareholders, between shareholders themselves regarding the activity of the company are defined exclusively by the laws and other legislative acts of Ukraine; the agreement on the subordination of relations between shareholders, as well as between shareholders and a JSC on the company's activities, to a foreign law, is considered null and void, as it violates the public order".[181]

The analogous is not prescribed for LLCs which is, to the author's viewpoint connected with the public nature of JSCs themselves, at least of public JSCs. Nevertheless, the provisions of legislative acts, neither the Civil Code of Ukraine in part of agreements that violate the public order (Art. 228)[182], nor the Law of Ukraine "On Private International Law"[183] do not contain this norms. Though it cannot be definitely stated that as such provisions are not prescribed for LLCs even in the Resolution of the Supreme Court of Ukraine, the internal regulations of such legal form of the company can be subordinated to any legal order desirable. To the author's viewpoint, the courts will be reluctant to acceptance of such provisions due to the imperative nature of corporate relations in part of corporate governance in general, disregarding contractual dispositive nature of corporate agreements.

The next important point which cannot be omitted is the connection of conclusion of CAs with competition law. The latter norms also belong to public policy and public order. There is no opportunity for the agreement to prescribe that there is no need to gain permission for concentration or for agreed actions if the relevant legislation requires so in the particular case. Though even if the agreement does not envisage such provisions, but the participants/shareholders simply have not gained the needed permissions, what the sanctions will be is the question for the author. Those from competition law will definitely be applied but will any other be, like nullity or voidness of the agreement, is not understandable. The provisions of laws in Ukraine do not mention such consequences.

[180]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 5, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

[181]Resolution of the Supreme Court of Ukraine "On practice of judicial consideration of corporate disputes" (from Ukrainian – "Про практику розгляду судами корпоративних спорів" dated October 10, 2008 No. 13, http://zakon5.rada.gov.ua/laws/show/v0013700-08

[182]Civil Code of Ukraine, No. 435-IV, as of January 16, 2003, http://zakon0.rada.gov.ua/laws/show/435-

[183]The Law of Ukraine "On Private International Law" 2709-IV as of 23.06.2005, http://zakon3.rada.gov.ua/laws/show/2709-15

In the UK the aspect of restrictions is seen from the different angle. There are no such limitations regarding voting of shareholders in so called voting agreements. "It has been established by the UK scholars that voting agreements are valid under the UK law and that shareholders are free to exercise their voting rights in any way they see it fit, including exercising them in coordination with other shareholders. The UK courts have also long since ruled that shareholders can vote in the general meetings of the shareholders in a manner that suits their interests, and thus they can enter into agreements in order to agree on the exercise of their voting rights in a particular way."[184]

"Hence, there are no legal obstacles in the UK law for the shareholders to agree on the exercise of the voting rights conferred to them by the shares. Essentially, this means that voting agreements, as a type of an SHA, are enforceable by the courts, for example, the court can order the shareholder to vote or to restrain from voting according to the terms of the voting agreement."[185] It should be kept in mind that "voting agreements in the UK are contractually binding (provided that there was sufficient consideration), but only if they are not in conflict with the articles of association of the company, the applicable statutory provisions and do not unfairly prejudice or fraudulently affect the minority shareholders (*author's note* in case it is not a unanimous SHA which is a part of the company's constitution)."[186]

"As there are no provisions in the CA 2006 regarding the SHAs, there are no statutory restrictions on the subject-matter of the agreements stipulated by the legislature. However, the courts have established certain limitations to matters on which shareholders are allowed to agree."[187] "The overall concept to limit the scope of SHAs is the duty of loyalty. In the general meeting of the stock corporations, the duty of loyalty of the shareholders is the general limit for the binding by the SHA."[188] The same principle is supported both in the UK and in Germany.

Paulius Miliauskas raises a very controversial question at this point: in order to be clear with the understanding what is bona fide or the duty of loyalty to the company it shall be unambiguously understandable what the company in general is. As it is a well-known fact that there are several theories to the understanding of a company and the main distinctive issue is who the stakeholders are: just majority shareholder (-s), all shareholders or even a wider scope of constituencies. Judicial practice chose a path that the company as a whole is all its shareholders

[184]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 300, https://epublications.vu.lt/object/elaba:2121038/

[185]Ibid.

[186]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 301, https://epublications.vu.lt/object/elaba:2121038/

[187]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 302, https://epublications.vu.lt/object/elaba:2121038/

[188]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 8, http://ssrn.com/abstract=2234348

as a general collective body.[189] "That is to say, the case may be taken of an individual hypothetical member (*author's note* either a majority, or a minority one) and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit."[190] So, the position can be outlined with the phrase of "the New York Court of Appeals which focuses on the fact that the agreement does not 'harm anybody'. How could such an agreement harm someone? For example, if it would force the appointment of an incompetent director it might be argued that it could harm creditors and other stakeholders."[191]

So, "there is a general rule established by the UK case law that individual shareholders have full discretion as to the exercise of rights attached to the shares and 'the shareholder's vote is a right of property, and prima facie may be exercised by a shareholder as he thinks fit in his own interest'. However, this changes once shareholder is acting not individually but collectively as a majority shareholder (such cases also include SHAs), and thus he has to take into account not only his interests, but also interests of the company and minority shareholders."[192]

"The UK case law has formulated a rule that majority shareholder (or shareholders acting in concert through an SHA) cannot exercise voting rights in a manner as to violate the interests of minority shareholders and of the company itself. For example, in Cook v. Deeks the House of Lords ruled that majority shareholders are not entitled to benefit themselves at the expense of the company and minority shareholders."[193]

It was stated that "a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority shareholders in favor of the majority, and that by the votes of those who are interested in securing the property for themselves".[194]

"This consistent position can be observed in other cases of English courts, such as Brown v. British Abrasive Wheel Company Limited ('it was ruled that the voting agreement to change the articles of association of a particular company to the detriment of the minority shareholders is unenforceable)'."[195]

So, "the English case law is absolutely clear that '[n]o right of a shareholder to vote in his own selfish interests or to ignore the interests of the company entitle him with impunity to

[189]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 305, https://epublications.vu.lt/object/elaba:2121038/

[190]Ibid.

[191]Ventoruzzo, Marco, Conac, Pierre-Henri, Gotō, Gen, Mock, Sebastian, Notari, Mario, and Resiberg, Arad, *"Comparative Corporate Law"* (2015), 455.

[192]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies",(doctoral dissertation, Vilnius University, Ghent University, 2014), 302, https://epublications.vu.lt/object/elaba:2121038/

[193]Ibid.

[194]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 303, https://epublications.vu.lt/object/elaba:2121038/

[195]Ibid.

injure his <⋯> fellow shareholders'."[196] "From the above arguments it could be concluded that shareholders are not allowed to agree on the exercise of their voting rights (and on the manner that they will vote in the general meeting of the shareholders) if such an agreement might undermine the interests of the minority shareholders or the company."[197]

Due to such practice "the CA 2006 has transposed these decisions into a statutory right for the shareholders of the company to apply to court if they think that they are treated unfairly."[198] But, nevertheless it is worth to note that "there should be a balance between the freedom to exercise the right to vote and the unfair treatment of the interests of the company and minority shareholders (when such interests are undermined for the benefit of controlling shareholders)."[199]

In Germany the duty of loyalty has also a great number of manifestations. For instance, "in Germany one important Supreme Court decision has concluded that shareholders cannot be bound by a voting agreement to appoint certain members of the Supervisory Board, if they reasonably believe that the nominee is incompetent, untrustworthy, or lacks the necessary skills for the job […]. In Clark v. Dodge the court held the agreement valid, also because it would only operate as long as the nominee would remain 'faithful, efficient and competent'."[200]

German legislation also prescribes that SHAs "under which a shareholder has to vote in a certain way in exchange for a monetary payment ('vote buying') are illegal and null and void because they violate Section 134 of the German Civil Code and can be punished with a fine of up to 25,000 Euro (Sec. 405 subs. 3 no. 7 Stock Corporation Law)."[201] The Law of Ukraine on LLCs also states that each and every monetary payment which is prescribed in the agreement makes it null by law, without even necessity to consider and admit its nullity in judicial proceedings.[202]

But there are also some specific cases of restrictions which are the consequence of the parties to SHAs themselves. The very special case is the one slightly mentioned earlier, when the shareholder is the director of a company at the same time and the party to an SHA. That is quite understandable that such a double status can lead to some questionable aspects. The conflict of a

[196]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 305, https://epublications.vu.lt/object/elaba:2121038/

[197]Ibid.

[198]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 307, https://epublications.vu.lt/object/elaba:2121038/

[199]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 306, https://epublications.vu.lt/object/elaba:2121038/

[200] Ventoruzzo, Marco, Conac, Pierre-Henri, Gotō, Gen, Mock, Sebastian, Notari, Mario, and Resiberg, Arad, *"Comparative Corporate Law"* (2015), 454.

[201] Ventoruzzo, Marco, Conac, Pierre-Henri, Gotō, Gen, Mock, Sebastian, Notari, Mario, and Resiberg, Arad, "*Comparative Corporate Law*" (2015), 455.

[202]The Law of Ukraine "On limited liability and additional liability companies" No. 2275-VIII as of 06 February 2018, http://zakon3.rada.gov.ua/laws/show/2275-19/print1509634575243058

duty of a director intended to protect the interests of the company and shareholders as a whole, and of the status of a shareholder with his/her/its personal interests at this position.

"Under current British legislation, directors must exercise independent judgment and have a duty to promote the success of the company for the benefit of its members as a whole. There is, therefore, a general principle that directors cannot fetter their future discretion and therefore should not contract, undertake or otherwise agree in advance, to exercise their discretionary powers in a particular way."[203]

"For example, in the context of an SHA, the duty to exercise independent judgment would prima facie mean that a director cannot simply agree with his appointing shareholders to vote at board meetings in any particular way (even if voting in that way would not otherwise be a breach of his duties to the company) as he would not be exercising his independent judgment. This is a general rule and, in particular circumstances, directors may bind themselves as to the future exercise of their powers."[204]

"But this rule and principle shall not be perceived as an unquestioning rule, as judicial practice formed some exceptions from it: if the members of the company release the directors from such strict requirements themselves or if such agreement to act as directors in a particular way is an agreement in a good faith and is concluded in this part in the best interests of their company."[205]

Taking all the highly mentioned into consideration, sometimes the best option to stick to (which is widely used in Germany) is "by prescribing by shareholders' (who in the aggregate are owning the majority or all of the shares in the company) obligation of the parties to exercise their shareholders' rights in a way to cause the directors to take or omit certain actions. Shareholders of a GmbH may do so by giving the directors binding instructions through a shareholders' resolution or by issuing rules of procedure under which a director is required to ask for shareholders' approval before taking certain management measures."[206]

The quite interesting point is that the vice versa situation when the executive bodies of the company influence on shareholders' decision-making process is definitely unaccepted, which is quite understandable as the major interest in the company even according to different concepts of the company is owned by shareholders.

[203]Chris Owen, Manches, IBA Guide on Shareholders' Agreements (England and Wales), 2-3, https://www.ibanet.org/Document/Default.aspx?DocumentUid=CD3FB209-112A-4678-91D2-CED421DD8A53

[204]Ibid.

[205]Chris Owen, Manches, IBA Guide on Shareholders' Agreements (England and Wales), 3, https://www.ibanet.org/Document/Default.aspx?DocumentUid=CD3FB209-112A-4678-91D2-CED421DD8A53

[206]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

"The rationale is to avoid an 'incestuous' relationship in which the directors control shareholders' voting without having invested in the corporation themselves."[207] "According to Article 136 of the AG Act, the agreement is void if pursuant to it a shareholder undertakes to vote as instructed by the company, its board or supervisory council, or as instructed by a dependent venture. Under section 136 (2) German AG Act agreements with the company to vote according to the direction of the company or its directors are void."[208]

"In other words, a treaty in which a shareholder binds himself to use his voting rights according to the instruction of the company, the management board or the supervisory board, is void. Also void is a treaty according to which the shareholder is obliged to vote in favor of the proposals of the management board or the supervisory board."[209]

"Votes according to the agreement are not void, the voting itself has no deficiency only the agreement does. This finding of the BGH was followed in the 1990ies by the higher court (OLG) Nürnberg. Academia assumes that voting in the general meeting is already clear when the agreement is made."[210]

Such a prohibition is not prescribed regarding LLCs in the German legislation, but there are some suggestions to spread such a limitation at LLCs too. However, the issue is debatable and "has not gained a wide support as the application of Article 136 of the AG Act in German court practice by analogy to LLC shareholders is dismissed, because the courts are of the opinion that the competencies within LLCs are distributed in a completely different way than it is the case with AG internal regulations."[211]

So, Ukrainian legal field also has such provisions. The norms of new Laws contain the prohibition to include provisions which will oblige a party to vote in accordance with the orders of executive bodies into CAs. Besides, that is not just a declarative prohibition, but a mechanism of protection of the participants/shareholders of the company against such violations is determined – such provisions are null by law – there is no need to prove its nullity in judicial order.

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[207]Ventoruzzo, Marco, Conac, Pierre-Henri, Gotō, Gen, Mock, Sebastian, Notari, Mario, and Resiberg, Arad, "*Comparative Corporate Law*" (2015), 454.

[208]Erika Kindsvater, "Shareholder agreement: draft CCRF (Article 67.2) as compared to the German law and court practice", http://yust.ru/eng/press-center/publication/shareholder_agreement_draft_ccrf_article_67_2_as_compared_to_the_german_law_and_court_practice/

[209]Ibid.

[210]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 7, http://ssrn.com/abstract=2234348

[211] Erika Kindsvater,"Shareholder agreement: draft CCRF (Article 67.2) as compared to the German law and court practice", http://yust.ru/eng/press-center/publication/shareholder_agreement_draft_ccrf_article_67_2_as_compared_to_the_german_law_and_court_practice/

Moreover, the Ukrainian law in comparison with the German one clearly defines such a prohibition regarding both LLCs and JSCs. But, it shall be pointed out, that the Law on CAs prescribes that the whole agreement is null if contains such a provision, while the Law on LLCs prescribes its nullity just in the particular part of its violating provision. To the author's viewpoint the latter position is more reasonable as corresponds to the civil law contractual principal that the nullity of a part of an agreement shall not lead to the nullity of the agreement as a whole. So, if the norms of the Law on LLCs will be used, the relevant amendments shall be made.

"The UK law, in its turn, does not provide any statutory or court formulated restrictions regarding the exercise of voting rights (for example, according to the instructions of the bodies of the company or for all the proposals of the management). The absence of these restrictions could be explained by the fact that the CA 2006 does not provide for a clear distribution of powers among the management body and the general meeting of the shareholders." [212]

"It is also argued that shareholders at any time have the right to instruct the directors to act or refrain from acting, and thus they retain their powers as residual claim holders. From these arguments it could be argued that in the UK there is no need for restrictions on the subject matter of the voting agreements related to the instructions stemming from the management body, as shareholders decide on the distribution of powers in the company […]."[213]

The interesting aspect which is rather often paid attention to in the English practice is the "agreements restricting the removal of directors. English law confers wide power on companies to remove a director without cause by an ordinary resolution. This right cannot be circumvented by any contrary agreement between the company and the director. In small private companies where shareholders are also directors of the company, special provisions may be included in an SHA to protect minority shareholders from removal from office by a simple majority vote. The controversial issue is whether the 'non-excludable' statutory right to remove directors can be limited or restricted by the terms of an SHA seeking to entrench directorship."[214]

Speaking about the terms devoted to transferability of shares and its restrictions (pre-emptive rights, lock-up clauses) such discretion and limitations to these provisions can be observed: in England and Wales current legislation allows transferability of shares or other interest of any member in a company in accordance with the company's articles of association. So, it is allowed to prescribe restrictions for the transfer of shares in the articles of association

[212]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 307, https://epublications.vu.lt/object/elaba:2121038/

[213]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 308, https://epublications.vu.lt/object/elaba:2121038/

[214]Cheung Rita, "Shareholders' Contractual Freedom in Company Law", *Journal of Business Law Issue*, 2012, No. 6, 521.

and/or an SHA. However, there are no statutory limitations to the transfer of shares in England and Wales.[215]

In Germany there is no general prohibition to the transfer of shares, though the legislation prescribes the list of limitations, without sticking to which an SHA will be definitely regarded as infringing the provisions of the law. Relevant consequences to such provisions of an SHA are nullity or voidness.[216]

Nevertheless, "in a GmbH even a complete prohibition of transfer is usually admissible. In stock corporations, however, restrictions are only permitted for registered shares but not for bearer shares."[217] "So, the German Corporation Law offers two ways to limit their transferability. First, the charter of the corporation can state that the transfer of the share requires the approval of the corporation (Sec. 68 German AG Act). In this case a contract transferring the shares without the approval of the corporation would be void."[218]

"However, this limitation […] can only be used for registered shares. For bearer shares such a limitation can only be established in an SHA on a contractual basis, and in case of violation only damages would be available. A provision limiting the transferability of bearer shares in the charter would be considered void."[219]

Also, to the author's position, speaking regarding the parties' discretion in SHAs, the very interesting point in the comparative aspect may be the fact that the UK practice includes such type of SHAs as security lending agreements which provides the parties to it with an opportunity to lend voting rights at shares without lending the shares themselves. However, some British scholars doubt if it is a proper and legal construction.[220]Obviously, that is not an option in the Ukraine and Germany as shareholders' rights to securities or participants' rights to shares are considered as property rights, right to ownership – such a separation of pecuniary and non-pecuniary aspects of the right is considered impossible.

To summarize, there is a general principle in the UK and Germany that shareholders can include all the provisions they intend to in SHAs, as legislations of these countries do not envisage a limited scope of issues that can be prescribed. Though there are some rules of separate legislative acts, rules of doctrines or legal principles that at some point limit the scope of

[215]Chris Owen, Manches, IBA Guide on Shareholders' Agreements (England and Wales), 3, https://www.ibanet.org/Document/Default.aspx?DocumentUid=CD3FB209-112A-4678-91D2-CED421DD8A53

[216]Dr. Harald Gesell, Oppenhoff & Partner, IBA Guide on Shareholders' Agreements (Germany), 2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=63D9B6E1-A039-4842-881C-71010F44AB98

[217]Ibid.

[218]Ventoruzzo, Marco, Conac, Pierre-Henri, Gotō, Gen, Mock, Sebastian, Notari, Mario, and Resiberg, Arad, "*Comparative Corporate Law*" (2015), 442.

[219]Ibid.

[220]Paulius Miliauskas, "Company law aspects of shareholders' agreements in listed companies" (doctoral dissertation, Vilnius University, Ghent University, 2014), 316-318, https://epublications.vu.lt/object/elaba:2121038/

such discretion. Such restrictions are also relevant in relation to Ukraine. They are: the general mandatory rules of legislation, for instance, those that are devoted to authorities of companies, imperative norms, norms of public order. For example, limitation of the authority of a company to change its charter capital or provisions of the charter will definitely be regarded as violation of legislation and most probably will not be enforced by the courts.

Doctrinal principles and formed rules like a duty of loyalty also play an important role in the issue. The shareholder acting under the provisions of an SHA shall not abuse such a power in order to infringe the interests of the company or other shareholders, the director-shareholder shall not violate his obligations as a director and duties as a shareholder but shall hold a reasonable balance.

2.4 Disclosure of Information Regarding Conclusion of the Agreement and its Content

Disclosure of CAs/SHAs is a rather problematic issue which influences not only on participants/shareholders, but also on the company itself, its stakeholders, creditors and the market in general. There are different peculiarities regarding disclosure of CAs/SHAs or simply their conclusion in three analysed countries.

In the UK the attitude is the following: if "SHAs can in effect change the statutory rules or provisions in the Articles about voting, appointment of directors, transfer of shares etc., this may be material changes in a company's governance and require disclosure."[221] Furthermore, according to section 793 CA 2006 a company may require information from a shareholder about his present (and to a certain degree, past) interest in shares. A company may in this context also require information whether a shareholder is party to an SHA on the acquisition of shares or on the exercise of any rights out of shares.[222]

"More controversial is the case when an SHA with similar effect on statutory rules and the articles of association involves only the majority of shareholders. While such agreement creates reasonable expectations for its parties, it in fact suppresses the reasonable expectations of non-participating shareholders deriving from the articles of association, as the latter do not participate in decision-making, while the former would not always take into account the effects of their agreements on third parties."[223]

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[221]Mads Andenas, "Shareholders' Agreements : Some EU and English Law Perspectives" (筑波ロー・ジャーナル創刊号（2007：3)), 137, https://tsukuba.repo.nii.ac.jp/?action=repository_action_common_download&item_id=9185&item_no=1&attribute_id=17&file_no=1

[222]The Companies Act 2006, http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf

[223]Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law" (*JCL* 7:11), 126.

"To mitigate the conflict arising out of significant externalities for non-participating shareholders and to correct information asymmetries, English law requires the disclosure of such SHAs, as, in effect, SHAs materially change the company's governance and serve as its articles of association. This measure is efficient and effective for future shareholders, as they can obtain information and make informed decisions about buying shares."[224]

In Germany the regulation is more complicated. "The disclosure duties in Section 20 of AG Act were implemented in the Stock Corporation Act 1965 and among the issues were most controversially discussed in the legislative process. In the Marburger Discussion on the Stock Corporation Law Reform, such disclosure was portrayed as contrary to 'a core element of our free business order'."[225] But, nevertheless, the provisions were finally introduced. And nowadays "Section 20 of AG Act requires shareholders to disclose shares held by the shareholder, by a dependent company, of shares held for the company and of shares the company is obliged to acquire."[226]

"All listed companies have to report SHAs known to the company in the management report, […]. The same applies to a consolidated report, […]. The management report has to provide information on restrictions of voting rights or transfer of shares, also resulting from agreements between shareholders which are known by the management board of the company. […] The provision focuses on limitations resulting from the articles of association but encounters also SHAs."[227]

But the problematic issue is the following: how the management shall be aware of such agreements if shareholders did not inform directors.[228] Moreover, "BGH sees shareholder voting agreements as civil partnerships in the form of an undisclosed or inside civil partnership. This hints that there is no disclosure duty towards the company."[229]

At the same time, "Section 22 (2) Securities Trading Act requires shareholders to disclose also the shares held by other shareholders with which the shareholder has an SHA which aims at coordinated conduct with the other shareholders in the voting at the GSM or in other forms, and has the purpose of a long-lasting and significant change of the business practice of the

[224]Suren Gomtsian, "The Enforcement of Shareholder Agreements under English and Russian Law" (*JCL* 7:11), 126.

[225]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 6, http://ssrn.com/abstract=2234348

[226]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 13, http://ssrn.com/abstract=2234348

[227]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 14, http://ssrn.com/abstract=2234348

[228]Markus Roth, University of Marburg, "Shareholders' Agreements in Listed Companies: Germany", 15, http://ssrn.com/abstract=2234348

[229]Ibid.

issuer. […].”[230] “The Issuer Guideline from the Bafin, the German Supervisory Authority, clarifies that all parties of an SHA have to indicate the aggregate holding, also in the case of one shareholder dominating the SHA.”[231]

“According to Section 26 (1) German Securities Trading Act, the issuer has to publish the information in due course, no later than three trading days after the information by a shareholder was received. If the information given by the shareholder is incomplete, a duty of the issuer to ask for information is assumed in academia.”[232]

As it can be derived from these legislative provisions, there is a substantial number of requirements in Germany regarding disclosure of not only the fact of conclusion of an SHA in AG, but also regarding its content. It is also essential that these provisions are not just declarative but the sanctions for non-disclosure are envisaged: “the suspension of rights from the share, meaning especially no voting rights and no dividend rights as long as the duties for disclosure are not fulfilled […], in case of intent or gross negligence, such rights may not be exercised for six months after the disclosure duties were finally fulfilled. Moreover, for dividends also past payments may be challenged, as academia assumes a duty of the shareholders to pay back dividend received without having a right to receive them due to suspension as a sanction for nondisclosure.”[233]

Generally, it should be mentioned that the adoption of the Thirteenth Company Law Directive on Takeovers into national law affected SHAs both in the UK and in Germany. As such disclosures and the proposal for introduction of relevant sanctions were contained particularly in this document.

Ukrainian legislation also pays attention to the question of disclosure. Of course, taking into consideration the substantiality of the issues which can be regulated by the agreement, the fact of conclusion of it has to be made known to the company itself. There are some differences in the question between LLCs and JSCs following from the contrasting nature of these legal entities, especially taking into account the contradiction between these two new acts.

In all these legal entities one of the parties to an agreement shall make the company aware of its conclusion within 3 working days from such a moment. In LLCs and private JSCs they have to notify the company regarding the parties to such an agreement and the term of its action, while in public JSCs except for this, the company has to make the information regarding

[230]Markus Roth, University of Marburg, “Shareholders’ Agreements in Listed Companies: Germany”, 17, http://ssrn.com/abstract=2234348

[231]Markus Roth, University of Marburg, “Shareholders’ Agreements in Listed Companies: Germany”, 18, http://ssrn.com/abstract=2234348

[232]Ibid.

[233]Markus Roth, University of Marburg, “Shareholders’ Agreements in Listed Companies: Germany”, 19, http://ssrn.com/abstract=2234348

the conclusion of the agreement, parties to the agreement and the term of its action, public according to the Law of Ukraine "On joint stock companies".[234]

If the shareholder of a public JSC gained the right to define the mean of voting in GSM, he/she/it is obliged to inform the company regarding such a right, if as a consequence of that, he/she/it gained the opportunity to manage more than 10, 25, 50 and 75 percent of the votes for outstanding ordinary shares. If he/she/it had not sent such information, he/she/it as a matter of sanction and prevention from future violations and others from violations, does not have the right to dispose of these shares.[235]

Generally in relation to all the companies all the other information concerning the terms of the agreement is confidential and must not be disclosed if another is not defined by the law or by the agreement itself. But this is the regulation of the issue in the Law on CAs.[236] The Law on LLCs, in its turn, simply mentions that by general rule, the agreement is confidential unless otherwise is prescribed by the legislation or by the agreement itself.[237]

Taking into account the situation with these legislative acts, the latter provisions will be applied in relation to LLCs, which to the author's opinion are too limited as they prescribe no requirement for providing even the company with a fact of knowing that the CA was concluded. So, if the provisions of the Law on LLCs will be applied the author expresses the viewpoint that it will be necessary to supplement them with the highly mentioned provisions of the Law on CAs devoted to this part.

The concern that can be raised regarding such provisions is that, it is not mentioned that the information regarding conclusion of such an agreement shall be included into the Register, that is, the third party was not aware and could not be aware of the existence of such an agreement (if the party to an agreement had not provided her with such information itself), consequently, its/his/her rights will be protected and the agreement will not be considered as null.

But if to speak about interests of participants of CAs, if there were no evidence to prove that the party to an agreement that violates corporate agreement provided the third party with information about the existence of such an agreement or its other terms, it will be extremely difficult to prove that the third party had information about existence of such an agreement – it would be impossible to recognize it as null – as there is no public source which grants the third

[234]The Law of Ukraine "On amendments to some legislative acts of Ukraine regarding corporate agreements" No. 1984-VIII as of 23 March 2017, http://zakon2.rada.gov.ua/laws/show/1984-19

[235]Ibid.

[236]Ibid.

[237]The Law of Ukraine "On limited liability and additional liability companies" No. 2275-VIII as of 06 February 2018, http://zakon3.rada.gov.ua/laws/show/2275-19/print1509634575243058

party with the opportunity to find out about the existence of such an agreement. So the CA itself will be in a very unstable position.

The next problematic point is that the obligation to inform the company is prescribed but there is no sanction for disobedience except for those in JSCs that a shareholder cannot vote with those shares, which is solely not an effective provision.

In conclusion, the disclosure of information regarding the conclusion of SHAs/CAs or even concerning their content shall be considered as necessary and useful for shareholders, third parties and the market in general. The provisions of Ukrainian legislation in this part shall be supplemented.

CONCLUSIONS

1. All the countries present utterly different attitude to SHAs/CAs even in such basic aspects as understanding of the legal nature of the instrument: England perceives it as a simple contract that sometimes influences the constitution of the corporation according to the cases prescribed in the CA 2006, in Germany legal nature of SHAs is regarded as similar to the partnerships' one. That is, Ukrainian legal nature of CAs is closer to the British one, but not to German, as it could be expected.

2. The thing that can be perceived as an advantage in one country can be seen as a substantial drawback in the other one. This proves that introduction of a new instrument, in this case, CAs, shall be carried out with taking into account the special features of the country recipient, blind adoption leads to no efficiency. In particular, one of the advantages of SHAs in the UK and Germany is their simpler enforceability due to their contractual nature, but this pros does not flow from the implemented legislative norms in Ukraine. That is, effective tools and mechanisms for ensuring of CAs' efficient enforcement shall be introduced either by legislator, or invented by legal practitioners.

3. German and British courts have not recognized and enforced SHAs for a long period of time. The analysis of the reasons of such state of affairs carried in the thesis proved that the problems faced by the judges of English and German courts (e.g. place of SHAs in the system of company's documents, necessity of special regulation of unanimous SHAs) most probably will be faced by the Ukrainian judges, as contradictions and confusions in the doctrine and legislative provisions can already be observed.

4. The issue of correspondence of provisions of SHAs/CAs with imperative corporate legislation or company's charter/articles of association differs among these countries. In the UK the state of affairs can be described as follows: if the provisions of the SHA with all shareholders parties to it contradict to the provisions of articles of association but do not infringe the imperative norms of companies' legislation, they will be predominant. However, if an agreement with all shareholders parties to it contradicts to the provisions of articles of association and at the same time infringes the imperative norms of companies' legislation, its predominance above articles of association and companies' legislation is a not such an uncontroversial issue. Scholars' viewpoints differ in this regard.

The position in Germany is simpler: a decision of the general meeting in violation of or in contradiction to an SHA with all shareholders parties to it, can be challenged, though there is no possibility for an SHA to be fulfilled if its provisions violate the imperative norms of legislation. In Ukraine, unfortunately, such straightforwardness cannot be observed, as no

priority of CAs with all shareholders parties to it was prescribed by the legislator. Legal practitioners can stick to some means of protecting provisions of CAs, though with such drawbacks as loss of their confidentiality.

5. There are no special requirements to the form of SHAs in England and Germany, i.e. general requirements to a form of a contract are applied to them, though in order to ensure a more stable ground for them they are performed in a written form. Of course, there are some characteristic features of each country regarding this point which are connected with peculiarities of contractual law of each country. Other formal requirements are connected with imperative rules of legislation, for example the obligation to register some agreements with special subject as it is in Germany.

6. Speaking about parties to such agreements, it shall be footnoted that English shareholders are not so active in concluding SHAs, especially minorities.

7. England and Germany express a special attitude to SHAs to which all shareholders are parties to, in comparison with Ukraine, as it has been mentioned earlier.

8. Foreign experience presents the attitude that the company itself can be a party to an agreement, though it cannot limit the statutory rights granted to it by legislation. Making a company as a party to an agreement shall be deeply and carefully assessed by the drafters in order not to raise judicial doubts in enforcement and recognition of such agreements or their particular parts.

9. The general rule is that SHAs/CAs have the influence on and are binding just for the parties to an agreement, though there are some exceptions, for instance, in British legislation. Also, it is noteworthy that principles of good and bad faith purchaser are used in the process of defining which agreement shall stay in force if the agreement with a third party violates the provisions of CAs/SHAs. Special attention shall also be paid to quasi-CAs.

10. There is a general principle in the UK and Germany that shareholders can include all the provisions they intend to in SHAs, as legislations of these countries do not envisage a limited scope of issues that can be prescribed. Though there are some rules of separate legislative acts, rules of doctrines or legal principles that at some point limit the scope of such discretion. Such restrictions are also relevant in relation to Ukraine. They are: the general mandatory rules of legislation, for instance, those that are devoted to authorities of companies, imperative norms, norms of public order. The rule of a duty of loyalty also plays an important role in the issue.

11. The disclosure of information regarding the conclusion of SHAs/CAs or even concerning their content shall be considered as necessary and useful for shareholders, third parties and the market in general. The requirement for such a disclosure shall be supported with reasonable corresponding sanctions.

RECOMMENDATIONS

1. In case the misconfusion with Final and transitional provisions of the Law on LLCs will not be resolved, the author proposes to make amendments to the Law on LLCs, in particular, to its article 7 and to add the wide scope of terms which can be included into such an agreement according to the provisions of the Law on CAs in order to avoid the possible narrow interpretation of the terms of such agreements by the judges.

2. To consider legal nature of CAs in relation to minutes/resolution of GPM/GSM: to make relevant amendments to the legislation in order to equate unanimous CAs to unanimous decisions of participants at GPM/GSM with all members present. To exclude the provision of the Law on CAs "the violation of the agreement cannot be the reason for recognition of the decisions of the bodies of the company null", or to supplement it with the following: "unless it is the unanimous agreement of participants/shareholders".

If the provisions of the Law on LLCs are the leading regarding CAs in Ukraine, to amend it with the following provision: "the violation of the agreement cannot be the reason for recognition of the decisions of the bodies of the company null, unless it is the unanimous agreement of participants/shareholders".

3. In case such amendments will not be carried by the legislator, for drafters of CAs to stick to the following practice in order to make CAs more effective:

- to prescribe in the charter that the issue is regulated by the unanimous CA and provide a reference to such a CA in relation to those questions where the discretion in the charter is possible according to legislation;

- to make a unanimous CA with necessary provisions and to make relevant amendments to a charter regarding these particular provisions with a unanimous decision of all the participants/shareholders present at the GPM/GSM (confidentiality will not be infringed);

- to use one of the tools implemented by the Law on CAs – an option, in particular, to prescribe in the CA that if a participant/shareholder disagrees to fulfill his/her/its right in the order, envisaged by the CA, he/she/it is obliged to sell his/her/its part to other participants/shareholders pro rata to their shares.

4. In case the Law on LLCs eventually will be the one applied in relation to CAs in LLCs, just a written form will be required. So, the author suggests implementing the provisions of the Law on CAs to the Law on LLCs in part of a requirement of signing of a CA by its all participants and authorization of their signatures in the prescribed order (i.e. by notary).

5. In case the Law on LLCs eventually will be the one applied in relation to CAs in LLCs, to add to the Law on CAs in relation to CAs in JSCs the following provision: "The

agreement is gratuitous. Any prescription of payment that shall be carried in accordance with its provisions makes it null."

6. In case the provisions of the Law on LLCs will be used, to make amendments to its p. 6 Article 7 and to change the provision regarding nullity to voidness, as the fact if the third party had known or had not known about the infringement of a CA, shall be carefully and deeply assessed by the authorized body of a judicial branch of power.

7. If the provisions of the Law on CAs will be the one applied in relation to CAs in LLCs, to supplement the Law with the provisions of the Law on CAs in respect of requirements of disclosure, in particular, with the following: "One of the parties to an agreement shall make the company aware of its conclusion within 3 working days from such a moment".

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ABSTRACT

The research was carried with intention to analyse the new institute of CAs in Ukraine, to juxtapose the more successful and developed institutes of SHAs in the UK and in Germany with the new one implemented in Ukraine, to define, analyse, evaluate in a complex manner the advantages and drawbacks of the institute of CAs in Ukraine and to make suggestions regarding the actions that can be taken, paying attention to the Germany's and the UK's experience that can be adopted and implemented in Ukraine, in order to mitigate the possible risks, to resolve the problems of Ukrainian legislation in the field for this new tool to be used efficiently.

In particular, the attention in the Master thesis is paid to the following: the most wide-spread definitions used, the understanding of pros and cons of CAs/SHAs, the history of judicial attitude to the recognition of CAs/SHAs in the UK, Germany and Ukraine, the process of development of the doctrine of CAs/SHAs in these countries, the place of CAs/SHAs among other statutory documents of the company, formal requirements to such agreements (form, necessity of registration or disclosure of CAs/SHAs), parties to it, terms that are generally included in the agreements, discretion in defining the terms of such agreements, and relevant restrictions and prohibitions. The presentation of the material throughout the whole thesis is carried in a comparative perspective. It comprises the data regarding SHAs in the UK and Germany together with the analysis of new legislation of Ukraine. The issues which exist in the UK and Germany but have not been taken into account by Ukrainian legislator, which have been found out due to comparative analysis, are pointed out. After circling the scope of such problematic issues, the possible solutions of their improvement or avoidance are suggested.

Key words. Doctrine of shareholders'/corporate agreements, correlation with other company's documents, unanimous shareholders'/corporate agreements, disclosure of agreements, restrictions and limitations in freedom of a contract.

SUMMARY

The topic of the Master thesis is "Corporate Agreements: Doctrine of the Institute and Practice of Applicability". The research was carried on this particular topic because of its tremendous actuality, relevance and usefulness. The aim was to gain results which in the form of critical observations of drawbacks of the field and suggestions for the latter's solutions could be implemented into future amendments to the Ukrainian legislation or, at least, be a useful guide for the practitioners and judges.

In the process of carrying the research the author has intended to analyse the new institute of CAs in Ukraine, to juxtapose the more successful and developed institutes of SHAs in the UK and in Germany with the new one implemented in Ukraine, to define, analyse and evaluate in a complex manner the advantages and drawbacks of the institute of CAs in Ukraine, to make suggestions regarding the actions that can be taken, paying attention to the Germany's and the UK's experience that can be adopted and implemented in Ukraine, in order to mitigate the possible risks, to resolve the problems of Ukrainian legislation in the field for this new tool to be used efficiently.

The body text of the master thesis consists of 2 main chapters. The first one comprises 4 sub-chapters and is devoted to the most wide-spread definitions used, the understanding of pros and cons of CAs/SHAs, the history of judicial attitude to the recognition of CAs/SHAs in the UK, Germany and Ukraine, the process of development of the doctrine of CAs/SHAs in these countries, the place of CAs/SHAs among other statutory documents of the company. The second chapter also consists of 4 sub-chapters which define formal requirements to such agreements (form, necessity of registration or disclosure of CAs/SHAs), parties to it, terms that are generally included in the agreements, discretion in defining the terms of such agreements, and relevant restrictions and prohibitions.

The scope of problematic issues is circled, the possible solutions of their improvement or avoidance are suggested. They are also outlined in the conclusions and recommendations.

The planned results of the research were achieved, i.e. the defense statements declared at the beginning of the research were argumentatively confirmed. In particular, the following:

- CAs (SHAs) are one of the most important instruments of corporate governance, the exploration of which shall gain the respective attention in the legal field of a country, that intends to develop its economy and attract foreign investments, though there are also some disadvantages in the use of SHAs/CAs which shall be foreseen;
- the study of relevant experience of foreign countries in the field can be in use with a high level of probability in the intention to build the effective practice of application of the tool,

though it shall not be blindly implemented but just with the proper adaptation to the field, practice and state of affairs of the perceiving country;

- in order for a CA to be effectively implemented in the field of practice and, consequently, to have legal base to be properly enforced generally or protected in case of judicial claims the appropriate attention shall be paid to the CA as to the constituent of the whole system of the internal documents of the company (the company's charter/articles of association, resolutions/minutes of a GPM/GSM;
- the special regulation shall be prescribed for a CA, to which all the participants/shareholders are the parties to;
- conclusion of a CA, prescription of its provisions, including a company as a party to it shall always be carried out with a substantial regard to the influence of such a CA on the other participants/shareholders, a company itself, interests of third parties, norms of public order, for a CA not to be regarded as null/void;
- requirements of the disclosure of a CA shall be treated as a mean of protection of a CA as an important part of a company's regulations.

HONESTY DECLARATION

10/05/2018

Vilnius

I, Nataliia Berbat, student of Mykolas Romeris University (hereinafter referred to University), Institute of Private Law, Master's Double Degree Program "Ukrainian-European Legal Studios" (Specialization "Private Law"), confirm that the Master thesis titled "Corporate Agreements: Doctrine of the Institute and Practice of Applicability":

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.

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