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HISTORY OF SHAREHOLDERS' AGREEMENTS' FORMATION IN THE UNITED KINGDOM AND GERMANY: USEFULNESS OF EXPERIENCE FOR UKRAINE

The article is devoted to the investigation of experience of formation and establishment of the institute of shareholders' agreements in the United Kingdom and in Germany. Particularly, the attention as paid to the attitude of judicial practice to shareholders' agreements and to disputable problematical issues that influenced on their recognition. The conclusions will be considered as a useful guide for Ukrainian doctrine and practice in light of a new Law of Ukraine "On amendments to legislative acts of Ukraine on corporate agreements" as of March 23, 2017 No. 1984-VIII establishing a corporate agreement as an effective tool of corporate governance.

Key words: shareholders' agreements, recognition, specific enforcement, null and void, judicial practice.

Researched problem. 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 a corporate agreement (hereinafter – a "CA") – the analogue of the CA that had existed prior to the reform had been tremendously far from such efficient tool as a shareholders' agreement (hereinafter – an "SHA") in such developed countries as the United Kingdom (hereinafter – "the UK") and Germany. Today the state of affairs is the following: understandable absence of judicial practice formed according to the new legislation, existence of contradictory previous provisions of the Law of Ukraine "On joint stock companies" and of the Resolution of the Supreme Court of Ukraine "On practice of judicial consideration of corporate disputes" as of October 10, 2008 No. 13 in part related to shareholders' deals, moreover, obviously observed reluctance of Ukrainian courts to recognize shareholders' deals. That is, CAs is an extremely effective tool of corporate governance and its introduction in the legislation is a huge step forward to the development of a favorable base for growth and enhancement of Ukrainian business, though the judicial attitude to them is, unfortunately, not so unambiguous.

Level of the analysis of a researched problem. There is a number of scientific articles devoted to the issue of predecessors of CAs in Ukraine written by T. Hrybkova, R. Ibrahimov, A. Zhavoronkov, O. Molotnikov, I. Spasybo-Fatieieva, S. Stiepkin, I. Shytkina [1, p. 146], T. Shtym. The latter scientist, except for the articles, also carried a substantially deeper research – dedicated a part of the dissertation to the analysis of agreements between shareholders in joint stock companies. Speaking about investigation of the topic in comparative perspective, articles of O. Vinnyk are worth noting: the scientist carried the comparison of Ukrainian legislation with those of the Russian Federation, Switzerland and the USA. The analysis of differences in Ukrainian and American legal fields was also made by M. Polishchuk. But as far as the author is concerned, unfortunately, there are almost no deep fundamental researches of Ukrainian legal thought devoted to the development of SHAs in foreign countries, the UK and Germany, in particular.

Aim of the research. All the above mentioned lead the author to the conclusion that the investigation of foreign experience and identification of the problems that British and German SHAs faced in the process of formation and judicial recognition of the institute, and definition of the courts' attitude to such disputable questions can be interesting and rather useful for Ukraine in its future path of formation, recognition and development of the institute of CAs. It is understandable that such a foreign experience

can not be blindly adopted to our system, though it will be definitely useful to take it into account in the process of formation of our own one.

Material of the research. 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. [2, p. 3]

Though, later the House of Lords judgment in Russell v. Northern Bank Development Corporation Ltd. in 1992 went far in accepting SHAs [3, p. 140].

Moreover, it can be mentioned that the Russell is a classic case of private agreements trumping legal rules. The Russell jurisprudence has obvious appeal insofar as it gives proper recognition to the principle of freedom of contract. However, the doctrine is obviously flawed, because it allows the use of private agreements to avoid statutory corporate provisions. It raises difficult question of principles: the conflict between shareholders' contractual freedom and the primacy of mandatory legal rules. While debate ensues as to the extent to which shareholders can, by private agreement modify company law rules, the precise conceptual basis of Russell remains most contentious [4, p. 2-3].

To the author's opinion, it will be reasonably to pay more thorough attention to the case. The object of the agreement (*author's note* analyzed in the case) was to protect the four minority shareholders in the company against the risk of share dilution. The key question for the House was to determine whether the agreement constituted an unlawful and invalid fetter on the company's statutory power to increase its capital, or whether it was nothing more than a private agreement between the shareholders as to how they would vote. Lord Jauncey, delivering the judgment of the House, held that it was a valid private agreement. The basis of the decision was that although the company could not fetter its statutory power to increase capital, a private agreement between the shareholders alone as to how to exercise their votes was nevertheless valid and enforceable. To save the agreement in question, the House benignly severed the company's undertaking from the agreement so that it amounted to a purely personal agreement between shareholders. It followed that the company's undertaking was unenforceable but, since it was "independent of and severable from that of the shareholders", it was therefore enforceable between shareholders as a private agreement [4, p. 5].

The result of Russell is that a company cannot validly agree not to exercise its statutory powers by way of a contract outside the articles (the House's first ruling). This rule can, however, be circumvented by the terms of a private agreement between shareholders, which is binding on shareholders and enforceable between themselves (the second ruling) [4, p. 5].

That is, it can be observed that the judgment have dealt with two issues: if a company can be a party to the agreement and under what circumstances, what provisions can relate to the company as a party as well, and the other one –"the conflict between two principles, that of the primacy of the established principles of company law and that of shareholders' contractual freedom, in favour of the latter" [4, p. 5].

The argument justifying the conclusion in Russell flows from the more general proposition that the right to vote is a property right which a shareholder is free to exercise in his own selfish interests and, accordingly, an agreement between shareholders as to how to exercise their votes is lawful and enforceable. But perhaps the best support for the rationale in Russell, as explained by Ferran, is to give greater flexibility for private companies to dispense with the formalities imposed by the companies' legislation [4, p. 6].

So, the judgment in the case became a precedent, in which the House of Lords distinguished a contractual obligation of a company that has restricted the legal capacity of the latter 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 [2, p. 3].

To summarize, the Court held that a company cannot itself be party to an agreement which would restrict its powers as they are required by companies legislation [3, p. 140], i.e. the first obligation is void as a limitation of statutory powers of a company that is contrary to the law. The SHA, in its turn, at least as long as it is not intended to oblige future shareholders to adhere to it, is valid [2, p. 3], as the highly mentioned does not bar SHAs with the same effect from being enforceable by the courts [3, p. 140]. Also, the other quite important conclusion can be made: shareholders can validly enter into a private agreement, inter se, which imposes a fetter on a statutory power.

Against this background, it is not surprising that English courts have followed a frustratingly

unpredictable path, producing irreconcilable and inconsistent case law. Although the English courts have been far from unanimous in accepting the principles recognized in Russell, recent authorities show a discernible trend of increasing liberality to shareholder private contracting. An important and much more fraught question in recent time concerns whether and to what extent shareholders can contract out of the statutory minority remedies of unfair prejudice and just and equitable winding up. In Fulham Football Club (1987) Ltd v Richards, the Court of Appeal upheld a shareholders' agreement providing for arbitration of disputes and stayed an unfair prejudice petition presented by a member of a company. While the judgment leaves untouched the principle laid down in Russell, the speeches of the Court of Appeal suggest that shareholders' agreements to arbitrate management and corporate disputes are generally enforceable unless they affect third-party rights or go against public policy. The conclusion in Fulham Football reflects the views espoused in Russell and signifies a wider recognition of greater freedom in private contracting [4, p. 3].

Speaking about development of attitude to SHAs in the 21st century, it can be observed, that, unfortunately, "SHAs have not attracted much attention in the company law reform" [5, p. 140]. Nevertheless, with adoption of the updated British Companies Act 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. According to Article 17 of the CA, constituent documents of a closed company include a charter (the company's articles), certain categories of decisions of shareholders and CAs (SHAs) [2, p. 4].

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 a problematic issue already, nowadays SHAs "are usual especially where there are complicated shareholder structures, where there is a differential in the treatment 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). [...] 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" [5, p. 1].

It should also be mentioned that "the impact of SHAs [...] may be stronger in private companies". This fact is also confirmed by Paulius Miliauskas in a dissertation "Company law aspects of shareholders' agreements in listed companies", in which the scientist 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 shareholders' agreements 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" [6, p. 364].

Turning to Germany, SHAs have a long tradition in Germany: they are accepted by the courts since almost a hundred years, but it shall be mentioned that the way to such an acceptance was not the 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 did not mince its words as to the capital market interests of shareholders: "The shareholders ... do not entertain any personal relationship with the enterprise, (they) ... do not intend to assume responsibility with respect to the amount of their investment. Instead they expect to receive maximum dividends without abandoning the prospect of retiring from the enterprise through a sale of stock at any given time". The report 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 (körperschaftliche Lebenssphäre) provided the intellectual underpinnings for stock corporations: stock corporations were built on a social concept of organizing the individual wills of their member-shareholders (Prinzip sozialrechtlicher Willensorganisation). Shareholders could ask for the protection of the "sphere of corporative life" and challenge any attempt to wipe out their investment [7, p. 688].

In 1892 the German parliament passed the law on close corporations (authors' note limited liability companies (Gesellschaft mit beschränkter Haftung, hereinafter – "GmbH"). 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. Shareholders of

GmbH were described as more willing to inject additional money should business necessities so dictate. The stock of a GmbH (Geschäftsanteile) 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" (Mitgliedschaft) in a GmbH is expected to be of a long-term nature. So, though, SHAs restricting the transferability of stock are quite common nowadays – it was not the same during that period of time [7, p. 688].

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 statutebook 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 [...]. The RG ruling of 16 March 1904 invalidated a voting agreement between the shareholders of a GmbH. [7, p. 688] And that was not the only case. In a number of decisions in the first years of the 20th century, the RG rejected SHAs [8, p. 5]. 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 [8, p. 5].

The RG [...] also held that SHAs are unenforceable. According to the first decision of the RG concerning shareholders' agreements, an enforceable duty to comply with the shareholders' agreement 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 foundation: freedom for the shareholders in the voting secures a factual review of the agenda items [8, p. 11].

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 general meeting and that the company is not affected by a dispute on a shareholders' agreement 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 [8, p. 11-12].

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 [7, p. 688].

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 behaviour. Instead, the RG described a voting agreement as a special obligation separate from the articles of incorporation. 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 (Verbandswillen). It is unclear whether this approach was motivated by corporate efficiency considerations or a somewhat diffuse notion of minority protection [7, p. 688].

The RG cases on SHAs did not differentiate between corporations with publicly traded stock (author's note joint stock companies, hereinafter – "AG") and GmbHs. The court remained faithful to Gierke's idea of the "sphere of corporative life" (körperschaftliche Lebenssphäre) of a corporation where the social concept of organizing the individual wills of their members (Prinzip sozialrechtlicher Willensorganisation) mattered more than shareholder investment interests. Moreover, the RG would not have subscribed [...] that shareholders may unite to make their 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 [7, p. 688].

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 a 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 [8, p. 5].

To author's opinion it is relevant to mention about "bound shares" in a more detailed way. The approach was very liberal: until 1965 German Stock Corporation Law (author's note –hereinafter "the AG Act") allowed shares for which votes were to be executed under the direction of the stock corporation itself. During the World Economic Crises from 1929 onwards, the German legislator introduced some regulations concerning the law governing stock corporations. The first regulation on stock corporations introduced the concept of the so called "gebundene Aktien" (bound shares). 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 has to provide information on voting under the direction of the company. According to Section 260a (3) no. 3 Commercial Code 1931, 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. 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 shareholders' agreement by the company, but only a damages claim. That might have been one of the rationales of that decision, however, accepting such agreements is in line with the international legal standards as was – surprisingly – the establishment of the leadership principle in the German Stock Corporation Act 1936 [8, p. 6].

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 [8, p. 6].

It also can not 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 German Federal Supreme Court (author's note hereinafter– "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 authorized the specific enforcement of shareholders' voting agreements. The court expressly recognized that SHAs may constitute a breach of the articles of incorporation (Satzung). Nonetheless, SHAs initiated without observing the established procedures for an amendment of the Satzung 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 honoured shareholders' attempts to unite to make their power felt and to pursue particular investment strategies [7, p. 689].

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 are tempting to a breach of a 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 are already determined. 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 (Section 894 Civil Procedure Code), not on actions (Sections 887, 888 Civil Procedure Code) [8, p. 12].

Under German law a shareholder voting agreement may operate as a control agreement. As the law on GmbHs does not disallow shareholder instructions to the director of a GmbH a voting agreement may lawfully cover matters within the directors' realm. It is for this reason that the BGH insisted on an all-shareholders' voting agreement. The court has been cautious on liability issues. This may be due to the fact that German law is far from being clear on whether the equivalent of partnership law should be applied to GmbHs where the shareholders "take over" [7, p. 689].

The other important point is that SHAs are mostly found in privately owned companies, but they are also in place between stockholders of public companies [5, p. 1].

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. That serves as evidence that the problematic issues and controversial questions have not become utterly exhausted and resolved.

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 such attempt. Courts are likely to be ill-prepared to apply capital market standards once an SHA

and a GmbH break apart. 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 [7, p. 689].

Conclusions.

The article was devoted to a brief observation of formation of the institute of SHAs in the UK and Germany. 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 us to a conclusion that both countries have a rather substantial history of formation of SHAs – approximately 160 and 110 years respectively.

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. 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 a shareholders' rights and their restrictions and limitations to the detriment of the interests of the company (especially which concerned the voting rights of shareholders), "the possibility of envisaging such provisions in an SHA that will contract restrict or remove members' statutory rights to petition for unfair prejudice and/or just and equitable winding up, whether such an agreement is an unlawful and invalid fetter on members' statutory rights or a valid private agreement, 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 company law" [4, p. 6]. 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.

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. And the next striking one is that there are 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 can not make the issue the one of a clear understanding. That proves, that despite unquestionable efficiency of SHAs, while introducing them into the legal field, there shall be an indispensable readiness to bear all the difficulties.

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Стаття присвячена дослідженню досвіду формування та становлення інституту акціонерних договорів у Великобританії та Німеччині. Зокрема, увага приділяється ставленню судової практики до акціонерних договорів та спірним проблемним питанням, які вплинули на їх визнання. Висновки можуть розглядатися як корисне керівництво для української доктрини та практики у світлі нового Закону України "Про внесення змін до деяких законодавчих актів України щодо корпоративних договорів" від 23 березня 2017 № 1984-VIII року, який запроваджує корпоративний договір як дієвий інструмент корпоративного управління.

Ключові слова: угоди акціонерів, визнання, спеціальне виконання, недійсність, судова практика.

Статья посвящена исследованию опыта формирования и становления института акционерных договоров в Великобритании и Германии. В частности, внимание уделяется отношению судебной практики к акционерным договорам, а также спорным проблемным вопросам, которые влияли на их признание. Выводы могут быть рассмотрены как полезное руководство для украинской доктрины и практики в свете нового Закона Украины "О внесении изменений в некоторые законодательные акты Украины относительно корпоративных договоров" от 23 марта 2017 № 1984-VIII года, который вводит корпоративный договор как действенный инструмент корпоративного управления.

Ключевые слова: соглашения акционеров, признание, конкретное применение, недействительность, судебная практика.