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A Comparative Analysis of the Provisions of the Corporate Contract in Russia and Foreign Legal Systems

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Abstract

Legal consolidation of the corporate agreement institution in the Civil Code of the Russian Federation allowed the participants of business companies to implement and manage corporate rights in accordance with this agreement. A comparative analysis of the provisions of the corporate contract in Russia and foreign legal systems will allow us to develop this institution in the national corporate law and to prevent possible conflicts and disagreements on the content of a corporate contract between its members and third parties. Thus, corporate agreements have different contents in the Anglo-American, continental European and Russian corporate law. The resolution of many conflicts and gaps in foreign corporate law are the basis of many years of judicial practice and the current Anglo-American and continental European legal systems. However, the current situation of the institutes of corporate law in Russia is developing in accordance with economic basis and fully focuses on the model of the corporate contract of foreign laws which does not seem appropriate. Certainly, future models of Russian corporate law institutions should be guided by international practice as well, in particular, a number of provisions of the European civil law should be taken as its basis.

Key words: contract, corporate agreement, corporation, obligation, legal nature.

A comparative analysis of the provisions of the corporate contract in Russia and foreign legal systems will allow us to develop this institution in the national corporate law and to prevent possible conflicts and disagreements on the content of a corporate contract between its members and third parties.

Development of corporate relations in the Anglo-American and continental European legal systems started to be formed long before their appearance in the Russian civil law. So, the first mention of corporate contracts can be found in the decisions of the English courts of the 19^{th} century [1, p. 224]. For example, in the case *Re Peveril Gold Mines Ltd* the obligation not to carry out the liquidation of the company, until all the conditions of the corporate agreement entered into between the shareholder and the company are met, was established [2, p. 745–746].

Initially, such agreements were a constituent document (Charter of Incorporation). It was only with the adoption of the Companies Act and Limited Liability Act that the Anglo-Saxon doctrine of the corporate law began to define the corporate attitude to the relationship between shareholders and the relationship between the Corporation and the shareholders. These consolidations gave rise to the duality of the corporate contract which was previously considered the founding deal [3].

In the modern sense, the Anglo-American concept of the corporate contract is constructed in such a way that allows to change the provisions of the Charter of the Corporation without complying with specially established procedure. So, for example, art. 17 of the Companies Act 2006 (Royal Assent on 8th November 2006) [4] and paragraph 7.32 of the Model Business Corporation Act 2002 [5] provide an opportunity, by joint agreements, to limit the powers of the Board of Directors, to establish the types of stocks, to model the corporate structure that is different from the statutory structure, to provide "enhanced voting rights" to certain shareholders etc.

At the same time, in the Corporate Contract Law of the United

Kingdom there is the possibility of such an agreement in oral form but, in practice, such agreements are usually in written form [6]. Unlike the Anglo-American model, the European joint agreements are purely civil law contracts [7, p. 176]. Such contracts shall comply with the provisions of the law, statutes and special regulations of the record keeping (the law of the higher rank).

However, Anglo-American and continental European corporate relations, in terms of content, differ significantly from the Russian corporate agreements in the view of the peculiarities of the legal systems and customary practices of each particular state.

So, the participants in the Western European corporation agreement are members of the Association of capital, i.e. shareholders, trading participants and other partnerships. Such shareholders are granted the right to enter into contracts that define the joint vote and do not provide a reciprocal influence on corporate activities. In fact, these are the contracts on the rights of shareholders only to vote [8].

Members of the French agreements are only shareholders provided with voting rights on specific meetings. In addition, they have a number of serious rights restrictions [9].

In the Swiss Confederation, parties to such agreements are small joint-stock companies.

In the Federal Republic of Germany, parties to such agreements are, as a rule, members of the society. The agreement of the parties determines the formation of the will of the Corporation (business entity) [10, p. 164].

In many countries, there is a possibility for the participants of the business entities to conclude the corporate contracts as free contracts.

The participants of the corporate contract of the business entity of Russia are free to exercise their corporate rights to manage this entity and to dispose of their corporate property consistently. This enterprise agreement does not obligate the parties that have opposite interests and purposes to enter into a contract independently from each other, to execute their responsibilities for implementation of actions of property character, of the termination of the obligation executed properly, for example, in the transfer

of property and other actions, as well as in the occurrence property liability.

Swiss legislation establishes the freedom of enterprise of the contract within the law. However, free contracts may not be for an indefinite period and shall not contradict to good morals.

In Germany, regardless of the validity of the general civil principle of freedom of contract, freedom to enter into corporate contracts is limited. By virtue of paragraph 136 (2) of the Act on Joint-Stock Companies in Germany of 6th September 1965, the provisions of the corporate agreement must not contradict the interests of the company. For example, the Supreme Court of Germany by the decision of 1994 recognized corporate contract null and void in terms of determining the price of the shares disposed in accordance with the contracts preemptive right to purchase because the price was below market [11].

In US corporate law develops the practice of signing corporate agreements with the members of private corporations because their members are also members of the Board of Directors. The agreements are in the nature of corporate secrets.

These agreements provide for certain restrictions on the freedom in decision-making by the members of the Board of Directors. This is a violation of American corporate law because the Board of Directors but not members of the Corporation Affairs are being conducted [11].

For example, in the course of the proceedings in the State Court of New York has been found that three members of the closed Corporation entered into an agreement under which one of them was entitled and obliged to manage all Affairs of the Corporation over the next nineteen years [12, p. 90]. With the decision of the court was established the disparity of the agreement to the relevant law, since the implementation of management exclusively by the Board of Directors of the Corporation is illegal. However, the court did not take into account the lack of harm caused. In other cases, US courts agree that the management of the Corporation will be conducted by one person—the Director and the General Manager indefinitely [13, p. 247–48]. The court found such restrictions on the freedom of action of the Board of

Directors "irrelevant". Taking these decisions, the court proceeded from the terms of the agreement, which provides for the possibility of revocation by the Board of Directors, consisting only of two participants in connection with the improper performance of their duties, or discovered the shortcomings of the qualification.

Based on the analysis of practice, we can conclude that the US judicial system does not take the position of the endless recognition of all corporate agreements that contradict or supersede corporate law.

Paragraph 3 of article 67.2 of the Civil Code establishes that the information content of the corporate agreement is not subject to disclosure and is confidential [14].

The duty of the parties to the corporate contract is only the need of notifying the company about the fact of its conclusion. Another duty is provided for parties of a public company. They are obliged to disclose the information about its contents, but only to the extent, manner and conditions provided by law.

In public joint stock companies the information on corporate agreements must be disclosed to the extent, manner and conditions provided by law [15].

The current Russian legislation in article 67.2 of the Civil Code makes it inaccessible to third parties the fact of the conclusion of the corporate contract and its contents. For investors of public corporations the information of consolidation of corporate control should be disclosed at the conclusion of such contract. However, the text of the contract is not provided to them.

Among the German participants of commercial turnover the corporate agreements are popular. This popularity is due to the fact that corporate agreements remain unknown to third parties. In other words, the members of the Corporation keep their relationships in secret. Such confidentiality is a risk to third parties. However, German law sets certain conditions for the disclosure of the content of corporate agreements [16].

There is another position with the contents of shareholder agreements in France.

Corporate agreements are known throughout the society as a whole, as well as the authority of control and supervision of financial risks.

Corporate agreements have the same popularity in the Swiss Confederation as in Germany. Corporate agreements are made between participants in small private and not public joint stock companies. The duty to disclose certain information is placed on participants of the shareholders' agreements [17].

In Anglo-American law on corporations, corporate agreements, which are concluded by the participants of the public companies, are mostly accessible to any third parties. But in Anglo-American law the content of corporate agreements is available in all companies [16].

Thus, corporate agreements have different contents in the Anglo-American, continental European and Russian corporate law. The resolution of many conflicts and gaps in foreign corporate law are the basis of many years of judicial practice and the current Anglo-American and continental European legal systems. However, the current situation of the institutes of corporate law in Russia is developing in accordance with economic basis and fully focuses on the model of the corporate contract of foreign laws which does not seem appropriate. Certainly, future models of Russian corporate law institutions should be guided by international practice as well, in particular, a number of provisions of the European civil law should be taken as its basis.

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