

## EVOLUTION OF LEGAL REGULATION OF CORPORATE AGREEMENT IN DOMESTIC LEGAL SYSTEM

The article is devoted to the evolution of legal regulation of corporate agreements in Ukraine. The attention has been paid to the development of corporatisation in the imperial and soviet times as a prerequisite for the slow and long-term implementation of the corporate agreements institute in the domestic legislation regulating business entities activity. The stages of legal comprehension of corporate agreements have been outlined. The prospects of scientific researching of the mentioned institute in the domestic legal system and the doctrine of economic law have been defined.

**Key words:** corporate agreement, corporatization, corporate rights, joint-stock companies, agreement on realization of rights of participants (founders) of a partnership, shareholders agreement.

**Problem setting.** Corporate law is a complex, multiplicity field of law that regulates the dynamically developing legal relations and actively reacts to economic and political changes in society. Problems of legal regulation of corporate governance in domestic business entities are among the most relevant in corporate law in Ukraine, as they relate to the direct definition of the rules for the organization of the business entities activity. The rupture of economic realities, the actual development of corporate relations and corporate legislation, which at this stage does not cover the needs for regulation of corporate governance, led to the need to study the development and implementation of domestic legislation of the institute of corporate agreements as a mechanism for additional discretionary regulation of corporate relations associated with the realization of rights and the powers of its parties in a certain way.

The issue of corporate agreements institutionalization is popular in domestic corporate law, but it acquired special significance with the adoption of the Laws of Ukraine “On Amendments to Certain Legislative Acts of Ukraine regards Corporate Agreements” № 1984-VIII from 23.03.2017 and “On Companies with Limited and Additional Liability» № 2275-VIII from 06.02.2018. Having received the legal basis for its existence, the institute of corporate agreements became one of the main fields of the corporate reform of 2017-2018 and paid a considerable attention to law enforcers and scholars, thus updating civil and economic-legal research on the above-mentioned issue.

**Analysis of recent research and publications.** Problems of determining the nature, scope, content, subject structure of corporate agreement in Ukraine were the subject of scientific research of representatives of both civil and economic law sciences. Significant creative

work in the study of the topic was introduced by V.A. Vasil’eva, V.V. Vasil’eva, I.V. Venediktova, O.M. Vinnik, Yu.M. Zhornokui, I.V. Spasibo-Fateyeva, M.M. Sigidin, L.Sischuk, V.I. Tsikalo, Yu.M. Yurkevich, O.S. Yavorsky and others. However, the reform of corporate law, the institutionalization of the corporate agreement at the legislative level updates interest in the raised issue, expanding promising scientific research, providing an opportunity to update existing doctrinal approaches on this issues.

**Target of research.** The purpose of this article is to outline the main pillars of the development of domestic legislation on corporate relations and corporate agreements from the stage of comprehension of the need for their legal registration to the formation of law enforcement practices on the basis of the current legislation that had been adopted. The author also aims to identify the main promising directions of corporate agreements scientific researching as a subject economic-legal field of law.

**Article’s main body.** The need for the legal provision of the institution of a corporate agreement in Ukraine has long elapsed. It became clear in the course of applying corporate legislation that the company’s charter is unable to resolve a number of issues related to its activities effectively and in its entirety. The charter may contain only general provisions of the organization of activities and it’s impossible to foresee all the details of business activity conduction in it, as well as the difficulty which the participants or authorities can meet with during corporate entities activity. In its turn, the corporate agreement, as a discretionary instrument of legal regulation of corporate relations, expands the possibility of resolving certain issues related to the management of the company. It’s able to balance the interests of

participants in corporate relations, which can not be ensured by the provisions of corporate law and the charter.

The corporate contracts is the well-known instrument in world-wide practice of corporate relations regulating. It designed to resolve individual issues of governance between the members of the company, its bodies and, for example, creditors. But in the domestic legal system this instrument was not widespread, primarily because of the lack of normative grounds for its use.

The history of domestic corporatization reaches the imperial, later soviet times. In journalistic publications, as well as in scientific economic and legal literature, it is indicated that in the late nineteenth and early twentieth centuries, large corporate enterprises had been functioned already. For example, the «Produgol» syndicate was created in 1904, which, in contributing to the monopolization tasks, united 18 joint stock companies and controlled 75% of coal mining in the Donetsk basin [5]. But with the fall of the Russian Empire and the establishment of a communist paradigm of political and, as a consequence, economic development - corporatization has been frozen in fact for more than 70 years. One of the first evidence of a revival of the corporate sphere within the public sector was the adoption of the decision of the Council of Ministers of the USSR «On Issuance of Enterprises and Securities Organizations» at the end of 1988.

Obviously, in the absence of effective and adequate development of the institute of corporate relations in the Ukrainian SSR, it is not necessary to talk about the conception of such an institution as a «corporate agreement» in soviet times. But a superficial analysis of this stage of corporatization development gives an insight into why the investigated law institute was absent in Ukraine, while in the countries of the anglo-saxon and continental legal systems, a corporate contract, as an instrument of legal regulation of corporate relations and corporate governance, is used from the 60-70 years of passed centuries. The latest history of corporatization in Ukraine began with the adoption in 1991 of the Law on Business Entities, which defined the basic legal principles of corporate relations, consolidating the concepts and types of business entities, rules for its creation, activities, rights and obligations of its participants and founders. Unfortunately, the question of the possibility of concluding the corporate agreement, its scope, content and subject structure were not fixed that time.

In our opinion, this situation was quite obvious for two reasons: firstly, the institution of corporate relations was only emerging in Ukraine, and the awareness of the need for regulation of corporate relations not only by the rules of law and provisions of the charter has not been

established yet; secondly, corporate law was actively formed on key and expedient issues of that time: state registration of business entities - the Law of Ukraine «On State Registration of Legal Entities, Individuals - Entrepreneurs and Public Associations» (2003); the procedure for placement and circulation of securities - the Law of Ukraine «On Securities and the Stock Market» (2006) and others.

The first uncertain steps regarding the legalization of a corporate agreement were made in 2008 with the adoption of the Law on Joint-Stock Companies. Art. 29 determined that the charter of a joint-stock company may provide for the possibility of concluding an agreement between shareholders, under which the latter enters additional obligations, including the obligation to participate in general meetings, and provides for liability for non-compliance. Today, this provision is excluded on the basis of the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine regards Corporate Treaties» № 1984-VIII of 23.03.2017. We agree with T. Zhuk's position that the specified provision cannot be considered as an opportunity for shareholders to exercise their corporate rights, since it provides for the establishment of additional obligations only to them [1]. For the most widespread legal form of legal entities in Ukraine - limited liability companies - the possibility of contractual regulation of corporate relations between its participants at this stage was not foreseen at all.

Despite the fact that the realities of corporate governance and corporate relations have been indicative of the need to update domestic corporate law for long, this issue was updated only in 2016, when a draft law on corporate agreements was drafted (Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine on Corporate Agreements»), which was adopted on March 23, 2017 and entered into force on February 18, 2018. On February 6, 2018, the Law «On Limited Liability Companies» № 2275-VIII also was adopted, which in line with the Law № 1984-VIII raised the issue of legal regulation of corporate relations in limited liability companies and additional liability for a new stage. From June 17, 2018 (when the mentioned Law entered into force), the legislative basis for the conclusion of corporate agreements in limited liability and additional liability companies appeared in Ukraine. This fact significantly expanded the possibilities of realization of corporate rights and interests of the parties of corporate relations in the mentioned entities.

At present time the corporate agreement institute is at the stage of its formation in Ukraine and requires the development of law enforcement experience, but obviously the laws adopted as part of the so-called «corporate reform» formed the basis for the formation of

corporate and judicial practice. So, after studying the short and ambiguous development of legal understanding of the institute of corporate treaties of the period of independent Ukraine, the following stages can be distinguished:

1. Stage of formation of the corporate form of economic activity (September 19, 1991 - September 17, 2008). This period is the most long-term for the time being. It begins with the adoption of the Law of Ukraine "On Business Entities" in 1991 and is characterized by: (a) the formation of the legal and regulatory framework for corporate relations in Ukraine (Law of Ukraine "On State Registration of Legal Entities, Individuals - Entrepreneurs and Public Formations" (2003 The Law of Ukraine "On Securities and the Stock Market" (2006), the Law of Ukraine "On Holding Companies in Ukraine" (2006), (b) outline of further directions of research of corporate relations, comprehension of the necessity of their legal registration.

2. Stage of Legal Awareness of the Institute of Corporate Contracts in Ukraine (September 17, 2008 – March 23, 2017). The isolation of this stage was marked by the adoption of the Law of Ukraine "On Joint Stock Companies" in 2008. The provision of mentioned Law provided for the possibility of concluding a corporate (share) agreement, although it is obvious that the corporate agreement institute has not been formed during this time, since the legal vacuum on the regulation of this issue was not eliminated. Scientific research and discussion on the necessity of legal registration of the mentioned institute are being activated during this period, the first draft laws on corporate agreements has been appeared. All this formed the basis of the current Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine regards Corporate Treaties" on March 23, 2017. It is obvious that we can't talk about the formation of the legal basis of corporate agreements at this stage, but it should be recognized that this was a period of legal understanding of the need to introduce this institute into the legal level.

But we pay attention that despite the first attempts to formalize the institution of a corporate agreement in Ukraine at that time, the practice of resolving issues arising from corporate agreements was absent. Thus, in the resolution of the Plenum of the Supreme Court of Ukraine on October 24, 2008 "On the practice of corporate disputes consideration by the courts" it was stated that corporate relations are regulated exclusively by laws and other normative legal acts of Ukraine. The

possibility of regulating relations with corporate governance at the contractual level was eliminated.

3. The stage of legal implementation of the institute of corporate agreement in Ukraine (March 23, 2017 - June 17, 2018). During this period, the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Corporate Contracts" and the Law of Ukraine "On Limited Liability Companies" have been adopted came into force, what laid the legal and regulatory framework of the investigated institute, eliminating the legal vacuum, which existed in the matter of regulation of relations with the conclusion, execution, change and termination of corporate agreements in Ukraine.

4. The stage of the formation of law enforcement practice regarding the use of a corporate agreement as a means of regulating corporate relations (June 17, 2018 - to date). Despite the way that has passed the institution of a corporate contract in Ukraine in its development, it is premature to say that it was formed, because it is necessary to wait for the formation of practice of application of legal provisions by both parties of a corporate agreement, and courts, during the consideration of disputes concerning with execution, modification and termination of the contract. There was no judicial practice on this issue.

As a conclusion it should be noted that, despite the fact that the Institute of Corporate Agreement was formalized only in 2018, the history of its understanding, as necessary instrument for the domestic legal system, dates back to the time of the birth of national corporatization in independent Ukraine. The recent reform of corporate law updates the legal researches of this institution, bringing to the scientists updated scientific and practical tasks, such as: (a) establishing the legal nature of the corporate agreement and its place in the domestic contractual system - the conclusion of the discussion; (b) determining the place of the corporate agreement in the system of regulation of corporate relations; (c) the legal characterization of a corporate agreement, defining its scope, features, principles, content and subject structure; (d) analysis of the totality of corporate interests of the parties to the investigated agreement, establishing their balance for effective management of a business entities; (e) studying the mechanism for regulating corporate relations with the help of a corporate agreement, determining the peculiarities of the conclusion, execution, change and termination of the latter one in the context of the revised corporate law.

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#### РАЗВИТИЕ ПРАВОВОГО РЕГУЛИРОВАНИЯ КОРПОРАТИВНЫХ ДОГОВОРОВ В ОТЕЧЕСТВЕННОЙ ПРАВОВОЙ СИСТЕМЕ

Статья посвящена вопросам развития правового регулирования корпоративных договоров в Украине. Обращено внимание на особенности развития корпоратизации в имперские и советские времена как предпосылки медленной и длительной имплементации института корпоративных договоров в отечественное законодательство, регулирующее вопросы деятельности хозяйственных обществ. Автором выделено этапы, которые прошло правовое регулирование корпоративных договоров во времена независимой Украины. Определены перспективы становления исследуемого институт в отечественной правовой системе и доктрине хозяйственного права.

**Ключевые слова:** корпоративный договор, корпоратизация, корпоративные права, договор о реализации прав участников (учредителей) общества, договор между акционерами общества.

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## РОЗВИТОК ПРАВОВОГО РЕГУЛЮВАННЯ КОРПОРАТИВНИХ ДОГОВОРІВ У ВІТЧИЗНЯНІЙ ПРАВОВІЙ СИСТЕМІ

**Постановка питання.** Проблеми правового регулювання корпоративного управління у вітчизняних господарських товариствах є одними з найбільш актуальних в корпоративному праві України, оскільки стосуються безпосереднього визначення правил організації діяльності господарського товариства. Проблема інституціоналізації корпоративного договору у вітчизняному корпоративному праві назріла давно, але особливої актуальності вона набула із прийняттям корпоративної реформи 2018 року, яка закріпила інститут корпоративних договорів на законодавчому рівні, звернувши на нього увагу правозастосувачів та науковців, актуалізуючи цивілістичні та господарсько-правові дослідження із окресленого питання.

**Аналіз останніх публікацій.** Вагомий творчий доробок у вивчення досліджуваної теми було внесено, В. А. Васильєвою, В. В. Васильєвою, І.В. Венедиктовою, О.М. Вінник, Ю. М. Жорнокуєм, І. В. Спасибо-Фатєєвою, М. М. Сигидин, Л. Сішук, В. І. Цікалом, Ю. М. Юркевичем, О.С. Яворською та іншими. Однак реформування корпоративного законодавства, інституціоналізація корпоративного договору оновлює інтерес до піднятого питання, розширяючи перспективні наукові дослідження насамперед інструментами господарсько-правової науки, надаючи можливість оновлення наявних доктринальних підходів до вирішення згаданої вище проблематики.

**Мета статті.** Метою проведеного дослідження є окреслення основних віх розвитку вітчизняного законодавства із регулювання корпоративних відносин та корпоративних договорів від стадії осмислення необхідності їх правового оформлення до формування правозастосовної практики на основі діючого законодавства, що їх регулює.

**Виклад основного матеріалу.** Стаття присвячена питанню розвитку правового регулювання корпоративних договорів в Україні. Звернено увагу на розвиток корпоратизації в імперські та радянські часи як передумови повільної та довготривалої імплементації інституту корпоративних договорів у вітчизняне законодавство, що регулює питання діяльності господарських товариств. Виокремлено етапи, які переживало правове осмислення корпоративних договорів за часів незалежної України. Окреслено перспективи становлення досліджуваного інституту у вітчизняній правовій системі та доктрині господарського права.

**Висновки і перспективи подальших досліджень.** Нещодавнє реформування корпоративного законодавства актуалізує правові дослідження інституту корпоративних договорів, ставлячи перед науковцями оновлені науково-практичні задачі, серед яких: (а) встановлення правової природи корпоративного договору та його місця у вітчизняній договірній системі; (б) визначення місця корпоративного договору в системі регулювання корпоративних відносин; (в) надання правової характеристики корпоративному договору; (г) аналіз сукупності корпоративних інтересів сторін досліджуваного договору, встановлення їх балансу для ефективного управління господарським товариством; (д) дослідження механізму регулювання корпоративних відносин за допомогою корпоративного договору, визначення особливостей укладання, виконання, зміни та припинення останніх в умовах дії оновленого корпоративного законодавства.

**Ключові слова:** корпоративний договір, корпоратизація, корпоративні права, акціонерні товариства, договір про реалізацію прав учасників (засновників) товариства, договір між акціонерами товариства.

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