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INNOVATIVE CORPORATE MANAGEMENT OF UNILATERAL CONTRACTS

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Abstract: In The article analyzes the ratio of contracts and other unilateral acts of corporate law that help manage corporations. The authors of the article pay special attention to litigation practice on the protection of preferential purchase rights upon disposing shares and stakes in the authorized capital of companies. The authors reveal the different legal nature of notifications of the sale of shares belonging to the authorized capital of a limited liability company and shares belonging to a non-public joint-stock company. The study also discloses the legal uncertainty of a unilateral refusal to conclude a corporate agreement within a company.

Keywords: corporate management; contracts; unilateral acts; corporate agreement; self-employed workers

Introduction

Nowadays, corporate law is a rapidly developing system of norms regulating both internal and external relations of corporations. The rules of corporate management hold a special place among these relations.

The most common corporate legal entities whose members (participants) exercise their control through a unilateral expression of will are limited liability companies and joint-stock companies (Sitdikova, Starodumova, Volkova, 2018). Within the framework of this article, we consider their specific management. The general meeting of members (participants) is the supreme governing body of any corporation. Its management can be exercised both directly (through decisions made at general meetings) and indirectly (for example, through a signed corporate agreement). The specifics of management is determined by unilateral contracts and other acts concluded by the above-mentioned members (participants). At the same time, managerial relations in the Russian civil

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law are not unified because corporate relations have been included in the subject matter of civil legal regulation not so long ago.

Unfortunately, the analysis of numerous judicial materials has demonstrated that disputes about the disposal of shares (stakes) arise due to the uncertain legal nature of unilateral contracts and other acts of corporate law.

Our previous research of corporate contracts (Sitdikova, Starodumova, 2019) proved that this method of managing companies is quite effective since it allows members (participants) to determine how they will act when selling shares (stakes) in the authorized capital or exercise other unilateral acts aimed at managing their company. However, participants may disagree on joint managerial decisions and even those parties which agreed on some corporate agreement have the opportunity to unilaterally refuse to fulfill its obligations. In addition, a decision to exercise the right to sell shares is not an obligation to actually sell them.

In the course of the study, we plan to compare contracts and other unilateral acts of corporate law on corporate management, consider the specifics of a unilateral refusal to fulfill some corporate contract and determine the legal nature of corporate management.

Methods

Throughout the study, we used a combination of general and specific legal methods of cognition to obtain practice-oriented results on corporate management with the use of unilateral contracts.

While combining historical and comparative-legal methods, we revealed the impact of historical conditions on the development of corporate law in general and the formation of corporate management standards in particular. We also used the comparative-legal method to compare preferential and subordinate rights and determine the legal nature of unilateral acts and notifications related to corporate management.

The formal-legal method enables to analyze legal norms governing the conclusion of an agreement by means of an offer and its acceptance, as well as to justify the viability of using the structure of an offer (an offer to sell) and actual notifications (messages of one's intention to sell

something to a third party) when managing some corporation.

Using the analytical method of cognition, we revealed the specifics of corporate management as a type of activity and the activity of its participants (members) as self-employment.

Results

It was established that legal consequences of the participant's notification (offer) about the sale of their share in the authorized capital of a limited liability company and the shareholder's notification about the sale of their share in a non-public joint-stock company are of different legal nature. Thus, the notification (offer) of participants of a limited liability company and its acceptance constitute unilateral contracts. The notification of shareholders of a joint-stock company and their consent to purchase such a share can be regarded as a legally significant message. It is advisable for limited liability companies to use the structure of an offer (an offer to sell), while stock companies should utilize an actual notification (a message of one's intent to sell something to a third party).

We revealed that unilateral contracts having the legal effect of corporate management are as follows: a notification (offer) of participants of limited liability companies about the sale of their share and its acceptance; a membership cancellation letter; an irrevocable offer and its acceptance; one's consent to conclude a contract.

Corporate management is a type of entrepreneurial activity regardless of the legal status of some company participant (shareholder), i.e. whether they are entrepreneurs or not. We believe that such participants (shareholders) should be recognized as self-employed.

We identified the issue of implementing the participant's (shareholder's) right to a unilateral refusal to fulfill a corporate contract. We believe that Clause 2 of Article 310 of the Civil Code of the Russian Federation (Article 310 of the Civil Code of the Russian Federation, n.d.), according to which persons engaged in entrepreneurial activity, including a general meeting of participants managing some corporation, should not be able to unilaterally cancel such a contract.

Discussion

The ratio of contracts and other unilateral acts of corporate law

While dwelling on the nature of corporate relations, some scholars define them as relations that are governed by civil law and the constituent corporate documents, as well as exist only between some corporation and its participants (therefore, they are often called internal) throughout their membership in the above-mentioned corporation. At the same time, legal scholars emphasize the self-sufficiency of such relations (along with property rights, laws of obligation and exclusive rights) (Kirillovykh, 2009).

One of the debatable issues is the legal nature of unilateral acts and notifications related to the exercise of preferential rights to purchase shares and stocks in the authorized capital of companies.

The current legislation imposes restrictions on a participant of some company who wants to sell their share in the authorized capital of this company to a person who is not a member of this company. The same limitation applies to the sale of shares in a non-public joint-stock company (previously a private limited company) to a person who is not a shareholder of this company (Article 7 of the Joint-Stock Companies Act). In both cases, a shareholder who intends to sell their shares or stocks to a third party is obliged to offer the remaining participants or shareholders with a preferential purchase right to acquire the alienated shares or stocks.

Within the framework of a civilistic doctrine, the structure of preferential rights is sometimes correlated with subordinate rights. Thus, A.E. Worms notes that these rights are special because they provide the power to unilaterally change the position of another entity (Worms, 1915). The concept of subordinate rights is based on a unilateral expression of will conditioning civil relationships.

On the contrary, a group of scholars conclude that it is inadmissible to identify the legal structure of preferential rights and subordinate rights. A.A. Onina believes that "preferential rights cannot be exercised solely by the will of an authorized person, i.e. through a unilateral contract" (Onina, 2009).

According to M. Smirnova and K. Sklovskii, it is possible to consider preferential rights from the perspective of subordinate rights and such structures as an offer and the seller's notification about their intention to sell their share as identical phenomena (Sklovskii,

Smirnova, 2003). E.A. Glushkova is of the opposite opinion and indicates that preferential rights to purchase a share in common property are not subordinate. The fact that a shareholder receives a notification does not entail such legal consequences as the fact of receiving such an offer by the addressee (Glushkova, 2016).

Thus, we need to analyze and compare the content and legal consequences of an offer provided for in Article 435 of the Civil Code of the Russian Federation and the notification issued by a member of a limited liability company about their intention to sell its share that is defined as an offer in Clause 5 of Article 21 of the Joint-Stock Companies Act (Article 435 of the Civil Code of the Russian Federation, n.d.).

According to Article 435 of the Civil Code of the Russian Federation, an offer is one's promise addressed to one or several persons which is quite definite and expresses the intention of the person who makes such a proposal to regard themselves as having concluded a contract with the addressee who will accept the proposal (Article 435 of the Civil Code of the Russian Federation, n.d.).

The legal nature of an offer is a unilateral contract, whose validity is conditioned by the coincidence of the will and the expression of the will of the person who sends an offer (Zhelonkin, 2017). Some legal scholars also consider an offer as a unilateral transaction that is converted into an agreement upon its acceptance (Baibak, Bevzenko, Budylin, 2018).

Litigation practice allows applying transaction rules to offers. In particular, Decree of the Chamber for Commercial Disputes of the Supreme Court of the Russian Federation of November 7, 2014 No. 303-ES14-524 recognizes that it is permissible to put an offer under a condition (Decree of the Chamber for Commercial Disputes of the Supreme Court of the Russian Federation No. 303-ES14-524, 2014). Decree of the Presidium of the Supreme Arbitration Court of June 29, 2010 No. 3170\10 and Decree of the Chamber for Commercial Disputes of the Supreme Court of the Russian Federation of November 27, 2017 allow for the possibility of invalidating an offer before its acceptance (Decree of the Presidium of the Supreme Arbitration Court No. 3170\10, 2010).

If individuals send someone an offer, they express their intention to conclude a contract directly with the addressee, and the legal result of such an offer is the creation of a civil relationship at the time of its acceptance, i.e. the conclusion of a contract.

When a member of a limited liability company sends a notification (offer) they fulfill their obligation under the current law to notify other company's participants of their intention to sell their share to a third party. The literal interpretation of Clause 5 of Article 21 of the Joint-Stock Companies Act proves that the seller has no interest in concluding a direct contract with the addressee. For this reason, some scholars believe that such a notification (offer) aims only at notifying other participants about one's intention to sell their share to an unauthorized person, which is not the same as an offer to conclude an agreement. Therefore, a notification of sale is just a legally valid message in relation to Article 165.1 of the Civil Code of the Russian Federation (Zhelonkin, 2017).

We cannot agree with this conclusion because the participant's notification about the sale of their share is called an offer in Clause 5 of Article 21 of the Joint-Stock Companies Act. Thus, the legislator tried to combine the use of an offer (an offer to sell) and an actual notification (a message of one's intention to sell something to a third party).

Until January 1, 2016, Clause 11 of Article 21 of the Joint-Stock Companies Act had provided for the possibility of selling a share in the authorized capital of some company through a preferential purchase right by sending an offer to sell the above-mentioned share and its consequent acceptance. Therefore, the legal effect of the participant's notification (offer) about the sale of their share and its acceptance by the person realizing their preferential purchase right was the formation of a contractual relationship, i.e. the conclusion of a contract. Courts also recognize the existence of a contractual relationship due to the buyer's acceptance of the offer received if it was sent before January 1, 2016. In such cases, the law does not require a notarial contract in the form of a unified document signed by both parties. In litigation practice, a contract is recognized as concluded at the time the person who sent an offer receives its acceptance (Resolution of the

Arbitration Court of the North-Western District No. F07-14838/2017 with regard to Case No. A56-1006/2017. (December 27, 2017; Resolution of the 18th Arbitration Court of Appeal of 18AP-443/2017 with regard to Case No. A76-5659/2016, 2017; Resolution of the Arbitration Court of the Central District No. F10-4686/2018 with regard to Case No. A14-24775/2017, 2018).

Federal Law No. 67-FZ of March 30, 2015 amended Clause 11 of Article 21 of the Joint-Stock Companies Act that entered into force on January 1, 2016 (Federal Law No. 67-FZ, 2015). If a participant exercising their preferential right accepts an offer, this action does not form a contractual relationship. In this case, the participant's notification (offer) and its acceptance are a necessary prerequisite for the conclusion of a contract that is subject to notarial certification by compiling a unified document signed by both parties in conformity with Clause 11 of Article 21 of the Joint-stock companies.

After making these amendments, the litigation practice concerned with the protection of preferential purchase rights upon the alienation of a share in the authorized capital of some company is not characterized by uniformity.

In some cases, courts state that the purchase-and-sale transaction in relation to selling a share in the authorized capital of some company between two parties exchanging an offer and its acceptance is regarded as concluded, although it is not given the notarial form of a unified document required by Clause 11 of Article 21 of the Joint-Stock Companies Act (Resolution of the 2nd Arbitration Court of Appeal No. 02AP-4689/2019, 2019; Resolution of the Arbitration Court of the Ural District No. F09-6472/17, 2017; Resolution of the 17th Arbitration Court of Appeal No. 17AP-8134/2018-GK, 2018). To satisfy the plaintiff's claim for recognizing their rights to a share in the authorized capital, courts indicate that the offeror is bound by the offer sent, i.e. they are obliged to conclude a share purchase agreement if this offer is accepted by the person to whom it was addressed (Resolution of the 13th Arbitration Court of Appeal No. 13AP-4227/2018, 2018).

In the other cases, courts indicate that the sale of a share is the right of a company's member and expression of their free will rather than

an obligation and no one has the right to force a person to alienate their share (Resolution of the Arbitration Court of the North Caucasian District No. F08-1638/2016, 2016; Decision of the Zheleznodorozhny District Court of the city of Chita (Zabaykalsky Krai) with regard to Case No. A45-35658/2017, 2019).

The jurisprudence of disputes resolution seeks to protect the preferential right of shareholders in a non-public joint-stock company (formerly a private limited company), represents a fairly unified system and proceeds from the impossibility of forcing a shareholder to conclude a share purchase agreement if a notification of their intention to sell shares is sent and the other shareholder agrees to exercise their preferential purchase right. This state of affairs is largely conditioned by the scope of Article 7 of the Joint-Stock Companies Act where a notification is considered not as an offer and one's consent to acquire a share is not regarded as acceptance. The interpretation provided by the Supreme Arbitration Court of the Russian Federation is mostly the same. Thus, Clause 10 of Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of June 25, 2009 No. 131 "Review of the Litigation Practice of Arbitration Courts Considering Disputes on the Preferential Right to Acquire Shares in Private Limited Companies" states that a notification of one's intention to sell shares is not an offer and one's consent to purchase them is not acceptance (Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 131, 2009). It is also indicated that there is no reason to satisfy the claim of shareholders in private limited companies on forcing another shareholder to conclude a share purchase agreement since Article 7 of the Joint-Stock Companies Act does not state that a person notifying shareholders of a private limited company about their intention to sell shares is obliged to conclude a sale-and-purchase agreement with a shareholder who decides to use their preferential right.

According to judicial materials, unilateral transactions having a legal effect in the field of corporate law can include other unilateral expressions of will, for instance, the participant's application for leaving a company, an irrevocable offer and its acceptance, etc. (Information Letter of the Presidium of

the Supreme Arbitration Court of the Russian Federation No. 162, 2013; Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 9913/13, 2014).

The issue of unilateral refusals to fulfill a corporate contract

According to S.N. Aleksandrova, the subject matter of a unilateral refusal to fulfill a corporate contract can be a shareholder (participant) of some company, both an individual and a legal entity. A unilateral refusal to fulfill a corporate contract embraces situations when a party refuses to fulfill its own rights, i.e. to exercise its rights in a certain way or refrain (refuse) from their fulfillment (for example, a refusal to vote for a certain decision at a general meeting of participants or to perform other consistent actions to manage a company) (Aleksandrova, 2017).

However, V.V. Vitryanskii notes that the parties to a corporate contract can be both organizations (commercial or non-commercial) and citizens (including those who do not conduct entrepreneurial activity) that are the founders (participants) of the relevant business entity. At the same time, Article 67.2 of the Civil Code of the Russian Federation contains no norm granting those parties to a corporate agreement that conduct entrepreneurial activity the right to unilaterally change the terms of such a contract or unilaterally refuse to fulfill its obligations (Vitryanskii, 2018).

In this regard, S.N. Aleksandrova highlights that the innovation of Article 310 of the Civil Code of the Russian Federation on a fee for unilateral repudiation is not applicable to corporate contracts since some payment for the repudiation of a contract can be charged only in relation to the implementation of entrepreneurial activity by its parties (Aleksandrova, 2017).

According to E.V. Glukhov, the parties to a corporate contract have the right to supplement it with a provision that they can refuse to fulfill their contractual obligations unilaterally, for example, if they relied on the misrepresentation of some circumstances significant to them. At the same time, they are often reluctant to include such a provision in the main text of a contract because repudiation will cancel all the conditions previously

approved and will aggravate the existing conflict (Glukhov, 2017).

The expression of the shareholder's (participant's) will to refuse its obligations under some contract is the notification of a counterparty about such a refusal which is considered a legally valid message and is subject to Article 165.1 of the Civil Code of the Russian Federation (Zhelonkin, 2017).

While clarifying the possible application of Article 310 of the Civil Code of the Russian Federation ("a unilateral refusal to fulfill obligations") in relation to corporate contracts, the Supreme Court of the Russian Federation states that within the scope of Article 67.2 of the Civil Code of the Russian Federation contract terms can stipulate the party's right to repudiation (Resolution of the Plenum of the Supreme Court of the Russian Federation N 54, 2016).

Thus, we do not consider corporate management as entrepreneurial activity regardless of its type (direct management at general meetings or the conclusion of a corporate agreement). The current civil law does not provide this indication. If we regard this type of management as entrepreneurial activity, then all of its participants (shareholders) are involved in managing their company and cannot unilaterally terminate the corporate agreement they concluded. Thus, Clause 2 of Article 310 of the Civil Code of the Russian Federation should indicate the impossibility of terminating a corporate contract by means of a unilateral refusal but litigation practice proves otherwise.

On January 1, 2020, a new version of Article 23 of the Civil Code of the Russian Federation was adopted. It comprises an additional clause on the possibility of citizens conducting certain types of entrepreneurial activity without state registration as sole proprietors.

In this regard, legislators adopted Federal Law of December 15, 2019 No. 428-FZ "On Amending the Federal Law ‘On the Experiment to Establish a Special Tax Regime ‘Tax on Professional Income’ in the Federal City of Moscow, in Moscow and Kaluga Regions and in the Republic of Tatarstan (Tatarstan)’" (Federal Law No. 428-FZ, 2019). It establishes a special tax regime in 23 Russian regions for self-employed citizens who are not officially registered as sole proprietors but systematically receive income (most importantly, not exceeding the amount of 2.4 million

rubles in the current legal year) subject to taxation as if it was received from entrepreneurial activity.

The concept of self-employed citizens has not been enshrined by legislators. Therefore, it is considered by scholars as one of the most relevant and controversial issues of modern Russia (Ershova, Trofimova, 2017). However, the issue of identifying and legalizing self-employed citizens is typical not only of Russia but also of most foreign legal systems (Herb, 2002).

E.S. Kryukova and V.D. Ruzanova believe that self-employed citizens are those who provide services to other individuals without hiring employees to satisfy their personal, domestic and/or similar needs (Kryukova, Ruzanova, 2018).

According to A.V. Burlak, self-employed citizens combine the features of a capital owner, employer and manager. These functions of capital management and personal labor help identify these individuals as self-employed in the class of small business owners (Burlak, 2016).

We believe that the involvement of some company's member in its corporate management can be considered from the perspective of self-employment if such a member does not have the status of a sole proprietor.

Conclusion

Summarizing the above, we should note that corporate relations are often based on unilateral acts, some of which have the legal nature of unilateral contracts, as well as decisions of general meetings which are legal facts with a complex structure, including both procedural actions and the will of their participants.

The ratio of contracts and other unilateral acts of corporate law is of practical significance for many reasons. The main reason is that the implementation and protection of the rights and legitimate interests of participants in corporate relations can be achieved only by determining the regulatory aspect of corporate legal acts.

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