Shareholders' Agreements

Edited by
ANA PERESTRELO DE OLIVEIRA,
MARTA BOURA,
and CATARINA COELHO

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Ethical and Legal Perspectives on Freedom of Contract in Company Law

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Ana Perestrelo de Oliveira, Marta Boura and Catarina Coelho

Mohr Siebeck

Ana Perestrelo de Oliveira is Professor at the Faculty of Law of the University of Lisbon; Researcher at Research Centre for Private Law (CIDP).

Marta Boura is Guest Lecturer at the Faculty of Law of the University of Lisbon; Researcher at the Research Centre for Private Law (CIDP).

Catarina Coelho is Guest Lecturer at the Faculty of Law of the University of Lisbon; Researcher at the Research Centre for Private Law (CIDP); Ph.D.'s Scholarships holder of the CIDP

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Mohr Siebeck GmbH & Co. KG, Wilhelmstraße 18, 72074 Tübingen, Germany
www.mohrsiebeck.com, info@mohrsiebeck.com

Foreword

The Boundaries of Shareholders' Freedom in Shareholders' Agreements

Ana Perestrelo de Oliveira, Marta Boura and Catarina Coelho

I. The Research Project and Preliminary Takeouts

I. Contractual autonomy (and, more broadly, the legal freedom of contract under private law) is currently under close scrutiny. Although it is recognized as a historical and axiological foundation of private law, its content and limits are not easily defined. This book aims to bridge the gap between academic theory and corporate practice, offering new perspectives on the efficiency, ethics, and adaptability of shareholders' agreements in a changing legal landscape.

This discussion attracts particular attention in the field of corporate law, mainly for two reasons. First, because the sector is marked by the rapid transformation of organisations, so debates about contractual freedom are constantly evolving and are repeatedly tested by the creation or adoption of new legal institutions, often driven by economic needs and demands. Second, some legal systems evidence that corporate law may diminish contractual functionality and efficiency in companies. As permissive tendencies increase, the question of how to balance flexibility and legal certainty (particularly under the numerus clausus system) remains unresolved.

By gathering contributions from leading scholars and practitioners across different jurisdictions, this volume stands out for its international and multidisciplinary approach, identifying both convergences and divergences in the treatment of shareholders' autonomy.

Widespread uncertainty about the limits of contractual freedom has fuelled scholarly disputes over which matters should be regulated in the articles of association versus shareholders' agreements. This debate has shaped progress in the field, helping to resolve doubts about the admissibility of shareholders' agreements and clarifying who may be a party to such agreements. It is also necessary to consider the compatibility of various clauses imported from international contractual practice to different jurisdictions (which creates significant obstacles for both national and international investors), as well as the ethical challenges posed by the parallel governance resulting from shareholders' agreements.

The works collected here are grouped around key themes: the relationship between shareholders' agreements and articles of association; the preservation of control and governance in family and venture capital contexts; the enforceability and legal constraints of such agreements; and the ethical and legal challenges posed by innovative contractual clauses.

These reflections shape the main goal of this project: to influence the practice of shareholders' agreements by promoting a reconsideration of efficiency and business ethics, while making use of the potential of the legal system.

II. At the International Conference held at the Faculty of Law, University of Lisbon, on 14 and 15 January 2025, we had the opportunity to explore the most pressing topics in corporate governance, independence, transparency, sustainability, and democracy – all central to the discussion we aim to address in this collective work. Both minorities, contractual freedom, conflict resolution, asset and value were keywords that emerged throughout, all meaning the one overall concept that we are trying to capture within the corporate world: control.

We received contributions from various jurisdictions, which further highlighted the importance of the debate and the common principles that unite us in discussing new trends and developments in economic and legal frameworks.

All in all, the question remains: how can we reconcile the contractual and corporate worlds in a way that does not breach corporate and civil law provisions, yet still addresses the practical demands of company law?

We hope this book will serve as a vehicle for further debate and innovation, inspiring both scholars and practitioners to rethink the boundaries of shareholders' freedom in light of contemporary legal, economic, and ethical challenges.

II. New Opportunities and Challenges within the Scope of Contractual Autonomy

I. A significant gap remains between academic perspectives and practical corporate realities, highlighting the need to reassess certain established dogmas. The law must keep pace with corporate practice and critically reflect on the challenges shareholders currently face.

This book seeks to explore the tensions arising from private autonomy and to clearly distinguish between truly unlawful shareholder conduct and actions that, while seemingly unbalanced, remain within the bounds of legality.

II. Another pressing issue is sustainable governance, which is increasingly relevant as companies act as market agents with responsibilities that extend beyond their shareholders to a broader range of stakeholders. Can shareholders' agreements serve as instruments to promote due diligence, environmental sustainability, and human rights?

All these matters raise the question of whether private autonomy is an adequate – or perhaps even preferable – means for addressing such issues, as opposed to relying on mandatory provisions, especially in an increasingly regulated field within the EU law framework.

III. Presentation of the Works

I. Turning to the works that shape this research, the first four papers were presented in the conference's first panel. We now have the opportunity to examine some of the most pressing issues related to control, asset locking, and the bidding effect in various contexts: generally, in family firms, in venture capital, and with regard to sustainability concerns.

Sebastian Mock's paper provides a comprehensive legal and comparative analysis of shareholders' agreements, focusing on their relationship to the articles of association, examining their differences and potential conflicts, as well as the legal effects, content, and enforceability of such agreements.

Paula del Val Talens' paper explores the role of shareholders' agreements in family-owned businesses, focusing on how these agreements help preserve family control, ensure intergenerational involvement, and structure governance and company organization.

Luca Enriques and Casimiro A. Nigro's essay examines why Italian corporate law is highly resistant to private ordering, particularly in the context of venture capital (VC) contracting. Building on their prior research, it demonstrates how this legal framework hinders the adoption of U.S.-style VC contracts, which are widely regarded as efficient and globally influential.

Maria Elisabeth Ramos' paper examines the role of shareholders' agreements in promoting sustainable corporate governance, particularly in the context of the EU Corporate Sustainability Due Diligence Directive and Portuguese law.

Given the importance of shareholders' agreements in these areas, the question was posed: can we opt out of corporate law?

As part of the roundtable discussion, Paulo Olavo Cunha and Carolina Cunha offer a perspective on the link between shareholders' agreements and board independence, combining both practical and theoretical approaches.

These agreements, especially when they are omnilateral, often seek to influence or direct the actions of the board or management bodies outside the formal mechanisms provided by company statutes or law.

The core problem lies in the potential conflict between private autonomy – allowing shareholders to organize their internal relations – and the legal principle of managerial independence. Most legal systems restrict or invalidate agreements that bind directors in the exercise of their management powers, aiming to safeguard the directors' fiduciary duties and the proper functioning of corporate governance. Even

when all shareholders are parties to such agreements, the law typically maintains a clear separation between the shareholders' will and the autonomy of the management body, to prevent the creation of parallel governance structures and to protect the interests of the company and third parties.

The admissibility and enforceability of such agreements must always be balanced against the fundamental principles of corporate law, particularly the independence and responsibility of directors.

II. The next three papers, by Alexandre Soveral Martins, Francisco Mendes Correia, and José Ferreira Gomes, respectively, address legal constraints associated with shareholders' agreements, particularly in the contexts of private equity, venture capital, enforceability, and omnilateral agreements.

Alexandre Soveral Martins' paper analyses the practical challenges and legal constraints faced by private equity and venture capital investors when negotiating shareholders' agreements under Portuguese company law. It aims to guide foreign investors through the nuances of the Portuguese legal framework.

Francisco Mendes Correia's work discusses the normative content and foundations of the principle of separation between shareholders' agreements and articles of association, as well as the enforceability of shareholders' agreements under Portuguese company law. It aims to clarify the available remedies in cases of breach.

José Ferreira Gomes' paper explores the effectiveness of unanimous (omnilateral) shareholders' agreements across different jurisdictions, focusing on their relationship with company law and the principle of separation between shareholders' agreements and the company's articles of association.

During the conference, several thought-provoking questions were raised, sparking a lively debate on the role and limits of omnilateral shareholders' agreements.

A central question was whether the unanimous will of all shareholders should be sufficient to shape management, either directly or by influencing the directors' duties of loyalty and care. Even when all shareholders are in agreement, can their collective will override the core legal duties imposed on directors – duties that exist to protect not only the shareholders as a group, but also the integrity of the company as a separate legal entity and the interests of other stakeholders? Ultimately, the discussion returned to the concept of corporate purpose, which may be a key element in defining the limits of shareholder influence. While shareholders' agreements can play a significant role in shaping the company's direction, they cannot legitimately modify the fundamental duties of management or transform the company into a mere extension of the shareholders' will. The law draws a line to ensure that the company's purpose, the protection of minority and third-party interests, and the integrity of the governance structure are preserved – even in the face of unanimous shareholder agreement.

This ongoing tension underscores the need for a nuanced and principled approach to the role of shareholders' agreements in corporate governance.

III. Finally, still within the context of the conference, this reflection concluded with a discussion of the termination of shareholders' agreements, further develop-

ments on corporate purpose, and the legal and ethical issues raised by deadlock provisions in shareholders' agreements.

Catarina Monteiro Pires' work examines the termination of shareholders' agreements under Portuguese law, focusing particularly on termination due to breach. It raises critical questions about the adequacy of general contract law remedies when applied to the unique nature of shareholders' agreements.

Paulo Câmara's paper addresses legislative responses to shareholder intervention in sustainability matters. He argues that while the broader EU framework on shareholder engagement in sustainability is adequate, EU takeover law responses are open to criticism, and ultimately advocates for a TOD reform.

Nicola de Lucas' paper examines the legal and ethical dimensions of Russian roulette clauses in shareholders' agreements, particularly in the context of business deadlocks and forced exits. It draws on comparative legal analysis and the landmark Italian Fintech case to explore whether such clauses must comply with fair pricing and how they align with business ethics.

Beyond the scope of the conference, and within the broader context of these discussions, Catarina Coelho's paper explores the legal admissibility, ethical implications, and practical consequences of including Russian roulette clauses in shareholders' agreements of closed limited liability companies under Portuguese law.

Taken together, the works presented in this book seek to reflect upon and critically analyse shareholders' agreements in light of the contemporary legal and practical challenges they raise. They aim to question the traditional dogmatic assumptions underlying these agreements and to open new avenues for debate within corporate law theory and practice.

In a time when ethics, sustainability, and contractual flexibility are increasingly central, we trust that this collective work will contribute to the progression of the debate and to the progress of balanced solutions for the future of company law.

Content

Shareholders' Agreements between Corporate and Contract Law

Sebastian Mock

Abstract: Shareholders' Agreements have a growing influence on the general understanding of corporate law since they bind not only the shareholders but also affect the constitution of the corporation and can have a severe impact on capital markets. Therefore, Shareholders' Agreements are increasingly subject to regulation in corporate, capital market and insolvency law on the national, the European and the international level. The following article provides an overview of the fundamental issues of shareholders' agreements and highlights the differences between shareholders' agreements and articles of association and their relationship to each other.

I. Shareholders' agreements and their status in the relation to corporate documents

Articles of association[1] represent the *constitution* of a corporation, regulating its existence, operation, structure, organization and relations among its shareholders, their relations toward the company and the powers of the corporation's bodies. Beside corporate documents, shareholders use to enter into special contractual agreements regulating their mutual relations. In practice, they are usually denominated as *bylaws* or *shareholders' agreements*.[2] A shareholders' agreement is an agreement of at least two shareholders establishing a contractual link in regard to their position as shareholder. The mere fact of *acting in concert* or the existence of joint interest between shareholders does not suffice as a shareholders' agreement but can nevertheless have the same consequences as a shareholders' agreement in e. g. capital markets law.[3] First of all it is necessary to define shareholders' agreements in a way that allows the distinction from articles of association. The distinction between the articles of association and a shareholders' agreement is sometimes hard to draw. According to a formal distinction, the articles of association and shareholders' agreement are distin-

[1] For the purposes of this analysis and unless stated otherwise the terms articles of association shall cover all types of deeds of establishment, memorandum of association and all internal corporate documents, i. e. *Satzung*, charter, bylaws.

[2] In German *Nebenabreden, schuldrechtliche Gesellschaftervereinbarungen* or *Syndikatsverträge* (Austria) in Italian *sindicati azionari*.

[3] This is e. g. the case in German law (see *Mock*, in Mock/Csach/Havel (eds.), International Handbook on Shareholders' Agreements, 2018, 289, 309).

guished based on the formalization of a particular provision in a formal document regulated by corporate law adopted by a defined body. In such sense, the articles of association cover all arrangements incorporated into the formal document they are. Thereby, a shareholders' agreement is any other arrangement between shareholders that is – formally – not included in the articles of association. On the other hand, shareholders' agreements and articles of association might be distinguished regarding their actual content. Articles of association cover any arrangement that governs the corporation and/or has an effect on all shareholders. Any other contractual arrangements must be considered as shareholders' agreements. However, such simplistic criteria have their limitations as articles of association and shareholders' agreements may deal with similar aspect and therefore overlap.

Articles of association do not have to regulate only aspects of corporate law that are dealt with by the law as a possible content. The articles of association may thus include: a) the mandatory rules of corporate law, b) alterations from the non-mandatory corporate regulation, c) the non-mandatory rules, and last, but not least, also d) regulation of other issues that are not foreseen by corporate law regulation, but are formally included into the articles of association (for example various contractual arrangements, arbitration clause for disputes related to the share in a company). It shall not be ruled out that articles of association may also deal with issues that are very loosely connected with the participation of the shareholders in the corporation (for example, an obligation of shareholders to provide each other loans, authority and conditions for the use of company's services, etc.). Hence, the scope of the articles of association may be extended by the shareholders, even beyond the limits laid down by the law. Articles of association will thus establish an obligation containing not only the rules of a corporate constitutive nature, i. e. those that are inevitable or foreseen for the existence of a company, but also other rules that are not inevitable and that express the intended will of its shareholders. However, this applies *vice versa*, i. e. the shareholders may decide that they will not incorporate into the articles of association all the issues that are foreseen for this instrument. The corporation might have articles of association complying with the law but still its shareholders might have wished to execute an ancillary shareholders' agreement containing arrangements that should be contained in the articles of association (limitations on the transferability of shares, rules for appointing members of the company's bodies, profit sharing etc.). This approach is usually employed due to the fact that the articles of association are publicly accessible, while the shareholders' agreements are not available to the public.[4] Although the form does not predetermine the content, the selection of a particular form, or placement of a particular arrangement in the articles of association or in a shareholders' agreement may have consequences. Unless provided otherwise the placement of a particular arrangement into a certain formalized document is in general irrelevant for the validity of a particular arrangement. The particu-

[4] See III. for further details.

lar arrangement of non-corporate issues which is contained in the articles of association is not void only because it is contained in the articles of association and not in a separate agreement.[5]

II. Regulation of shareholders' agreements

Although the execution of shareholders' agreements has become a commonplace corporate practice, usually, they are not subject to a specific legislation.[6] Although the concept of shareholders' agreements itself is basically left undefined in many jurisdictions, the frameworks or various specific consequences of such agreements are defined.[7] National legislators usually regulate only the limits and possible consequences of shareholders' agreements, for example, in the area of fiduciary obligations of the company's authorised representatives, or in the area of the law of corporate groups, while the rest is subject to the general rules of the law of contract.

However, some legislators enacted specific regulations on shareholders' agreements and their approaches vary between generalization and *casuistry (Kasuistik)*. In the United States, for example, Section 7.32 MBCA applies a general negative model:

Section 7.32 MBCA states:
An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this Act in that it:
(1) eliminates the board of directors or restricts the discretion or powers of the board of directors;
(2) governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in section 6.40;
(3) establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;
(4) governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

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[5] Constitutive elements of a company will obviously not qualify for being a subject of shareholders agreements. It will be, for example, useless if a business name, registered office or amount of registered capital or the line of business are contained in the shareholders' agreement. This will not void the document but it will rather make such provision of the shareholders' agreement obsolete, since in order to accomplish their intended effect, such questions must be contained (also formally) in the articles of association.

[6] This is e.g. the case in German law (*Mock*, [supra note 3], 289, 292), shareholders agreements are delimited "in legislation", for example, in Article 36 of the draft model law UNCITRAL on a simplified business entity of 2015. (*UNCITRAL Draft model law on a simplified business entity.* A/CN. 9/WG. I/WP. 89.)

[7] See e.g. the Irish Companies Act of 2014.

(5) establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;
(6) transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;
(7) requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or
(8) otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

an example of a positive approach existing since 2017 is the Slovak law.[8]

Section 66c Slovak Commercial Code (Shareholders' agreements) states:
Parties may, by a written shareholders' agreement, agree mutual rights and duties resulting from their share in the company, in particular mode and conditions of the exercise of the rights related to the share in the company, mode of the exercise of the rights related to the company governance,
conditions and extent of the involvement in the changes of the share/registered capital, and ancillary arrangements related to the transfer of the share in the company. The conflict between a decision of the company's body and the shareholders' agreement shall not make such a decision void.

Besides this example, which might be interpreted as determined by the local culture and legislative technique and thus superfluous[9], other national legal systems show a lack of positive regulation expressly allowing shareholders' agreements.[10]

III. Advantages and disadvantages of shareholders' agreements

Shareholders' agreements have become quite common in the current corporate practice. The reasons for concluding shareholders' agreements vary. The confidentiality or *absence of publicity,* of shareholders' agreements is considered as one of their major advantages. Contrary to the articles of association they need not be filed with the

[8] See in detail *Mrázová*, in Mock/Csach/Havel (eds.), International Handbook on Shareholders' Agreements, 2018, 551, 553 ff.

[9] See also for Slovak law *Mrázová*, (supra note 8), 551, 553 ff. and for Danish law *Neville*, in Mock/Csach/Havel (eds.), International Handbook on Shareholders' Agreements, 2018, 233, 236.

[10] This is e. g. the case in Austria (*Arlt*, in Mock/Csach/Havel (eds.), International Handbook on Shareholders' Agreements, 2018, 153, 157), Belgium (*Matthijs*, in Mock/Csach/Havel (eds.), International Handbook on Shareholders' Agreements, 2018, 179, 180 f.) or Germany (*Mock*, [supra note 3], 289, 292).

public register and thus are not available to the public or third parties. Shareholders' agreements show a certain degree of flexibility since their amendment is not subject to any special formal procedure as it is required for the amendment of other corporate documents. Another advantage is also a wide availability of contractual instruments of securing and enforcing rights and duties resulting from the shareholders' agreements. Last, but not least, the reason for entering into shareholders' agreements may also be the need to determine the relationship between some of the shareholders differently from the relations towards other shareholders. Shareholders' agreements also frequently involve other persons that are not bound by the articles of association.

The major disadvantages are the contractual nature of shareholders' agreements and consequently their limited effect upon third parties (especially upon assignees and share purchasers). Moreover, shareholders' agreements require a quite complicated amendment mechanism compared to the majority principle for the amendments of articles of association. Also, it is usual to apply corporate consequences from a breach of obligations imposed by the shareholders' agreement (e. g. the exclusion of shareholders). As the national reports show, the absence of domestic case law might also be considered disadvantageous, to a certain extent, although the fact itself does not seem to limit the use of shareholders' agreements.

When searching for the reasons why shareholders' agreements are concluded, one has to consider wider structural links between the purpose of a company itself and the interests of those who have made up, manage or control it. It is well-known that especially registered companies basically serve as a tool to produce a benefit defined by their shareholders, i. e. profit, but it is also known that there is a kind of a wall standing between the company, its assets and its shareholders, known as "asset locking". In other words: the shareholders, on the one hand, define the purpose of the whole organization, but afterwards the organization lives its own autonomous life and the shareholders may only influence its activities indirectly. This concept of division of the company's assets from its shareholders is a more general justification of the necessity to make shareholders' agreements whereby the shareholders are trying to compensate their future limited influence on the company's management to a certain extent *ex ante*, at least, on a contract basis. Law & economics analyses indicate that such contracts may *ex ante* decrease not only the risk of future disputes, but they may also provide the space for a later re-negotiation and application of the principles of contract law within the less flexible corporate law.[11]

[11] See e. g. *Chemla/Ljungqvist*, An Analysis of Shareholder Agreements, 5 Journal of the Economic Association 93 (2007).

IV. Shareholders' agreements and their impact on the company

A problem of representation that has been described many times (i. e. *agency problem*)[12] points out that despite the unifying purpose of the whole organization there will always be a structural difference, at least, between the interests of the shareholders, the company, the members of its bodies, the creditors, and the like. Regardless of the extent to which it is possible to interpret the concept of the company's interest functionally and to let it cover also wider social interests, and even without considering what the interests of all shareholders and the company itself are and how they can get into conflict with the interests mentioned above, the statutory concept of dichotomy of interests of the shareholders and those of the company must be respected. Considering the fact that they are clearly differentiated, the analysis admits that these interests are kept distinct. On the other hand, the interest of the company is supposed to prevail over the interests of all shareholders in order that the company could accomplish its purpose to protect third persons (creditors, employees, etc.). Further, it is obvious that members of the company's bodies are bound by the purpose and goal of the company itself, hence, they must take into account the will of the shareholders expressed by the company's purpose. Where the influence of a shareholder is to be strengthened, typically in various kinds of corporate groups, the loyalty of members of the company's bodies shifts toward the corporate interest. It should also be pointed out that a certain degree of loyalty binds also the shareholders themselves, not only because of the fact that they are parties to the articles of association, but also due to the fact that it is prescribed by the standard of fair conduct toward the company. Moreover, diverse interests may also arise, inter alia, among the shareholders toward one another.

Already in the 1930s, economic academia started to pose a rhetoric question as *to whom the company management does actually serve*. The problem became a topic during a period of so called *managerial capitalism*, i. e. at the time when the company basically served as a tool of profit maximization controlled by the management massively exploiting (scarce) resources. This concept then served not only to understand the functionalities of the company as such, but mainly to gradually re-define the standards of fiduciary duties of members of the company's bodies. To simplify, experts try to find out whose interests should be pursued/protected by the company's bodies. If one realizes that the process was accompanied with a gradual change of the concept of responsibility of members of the company's bodies, i. e. from subjective to

[12] See e. g. *Armour/Hansmann/Kraakman*, in Kraakman/Armour/Davies/Enriques/Hansmann/Hertig/Kanda/Pargendler/Ringe/Rock, The Anatomy of Corporate law, 3rd edition, OUP 2017, Chapter 2; also see *Sjåfjell*, Towards a Sustainable European Company Law, Kluwer 2009, 37 ff.; see also (from a German context) *Bachmann/Eidenmüller/Engert/Fleischer/Schön*, Regulating the Closed Corporations, Berlin, 2014, 28 ff. (conflicts of shareholders in closed corporations); or Roth/Kindler, The Spirit of Corporate Law, Munich 2013, 71 ff.; in Czech see, *inter alia, Havel,* Obchodní korporace ve světle proměn, Praha 2010, and the literature quoted therein.

absolute liability, hence, the objectivized and identifiable standard was becoming all the more important, it is no surprise that the attention of experts focused on whether the management is to pursue:

- only and only the interest of the company,
- the interest of shareholders or their majority (so called *shareholders model*),
- the interest of stakeholders in a more general sense, or such stakeholders as creditors, employees, etc. (so called *stakeholder model*), or
- various forms of enlightened models (*enlightened shareholders model*)[13], or later even wider models established on the basis of corporate social responsibility (*CSR model*) [14] and the like (e. g. *productive coalition model*)[15].

It is needless to say that the further development gradually oscillated between various approaches and/or their combinations and the model which prevailed finally was the one combining all of the above models also in relation to their socially sustainable development (similarly a coalition/cooperation model). Such a solution is pragmatic and foresees various nuances depending on the purpose selected for a particular company, for example, whether a public interest exists in respect of its activities, etc. Especially so if one realizes that even today the management of companies is vested with non-corporate organizations, such as trusts that also enter in the shareholders' agreements.

Substantially, the company is therefore an arranged structure which becomes the (meeting) place for various unarranged interests. If one connects such a concept of the company with the contractual aspects arising out of shareholders' agreements, the question of a conflict of interests or complicacy of identification of such conflicts may grow significant. It is then disputable if the existence of contractual covenants outside corporate documents represents only the establishment of a parallel world of contractual obligation outside the company or even of a distinct category of a third kind. Obviously, the discussions about models of corporate governance are closely connected with shareholders' agreements since the external strengthening of the shareholders' positions may shift the company more toward the shareholders model, i. e. it may result in the strengthening of a utilitarian perception of the benefit of *the owners* of the company. At the same time, however, it cannot be expected that the resulting corporate structure would pursue or show only a single interest, because there would still be a rule that although the statutory grounds of the company established by the articles of association are wrapped up by the contractual net of shareholders' agreements, the company's bodies must nevertheless perform their statutory duties and must pursue wider interests than just those that would be pursued by the

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[13] See e. g. *Sjåfjell,* (supra note 12), 88 ff.

[14] See the comparative study in *Güler/Crowther*, in Güler/Crowther, Global Perspectives on Corporate Governance and CSR, 2009, 1 ff.; *Sacconi/Blair/Freeman/Verceli* (eds.), Corporate Social Responsibility and Corporate, 2011.

[15] *Johnston*, EC Regulation of Corporate Governance, CUP, 2009, 59 ff.

shareholders. In other words, the complicated and intertwined relations among partial components of the company's governance would not result in creating a single uniform interest and in eliminating the agency problem.

The dichotomy of interests of all the shareholders and the company is not – conceptually – interfered with by the shareholders' agreement. The shareholders' agreement does not result in the change of the interest, nor does it create any common collective corporate interest that would prevail over the interests of the shareholders and that would automatically by itself define or interfere with the interests of the company for the purposes of determining the liability of members of the company's bodies. Even the agreement among all shareholders does not have any relevance for the articles of association.[16] The existence of the shareholders' agreement, however, will facilitate the identification of the shareholder's interest, or the interest of several or of all shareholders. Where the company's body proceeds in accordance with the shareholders' agreement it could be expected not to prefer any of the shareholders who are parties to the agreement. That still does not mean that it proceeds in compliance with the interest of the company.

V. Differences between the articles of association and shareholders' agreements

Both shareholders' agreements and articles of association have a contractual basis. They are established by a consent of shareholders, and they are dependent on that will. Their operation is, however, completely different. To put it simply, these are two parallel worlds, each having their own rules that are not directly related, although they might cross each other. As mentioned before, besides a formal distinction between the articles of association and shareholders' agreements (the articles of association being a formalized contract meeting some requirements as to its form and content, whose amendment and operation are subject to a separate regulation) a substantive distinction might be proposed between corporate and non-corporate issues. Corporate issues cover the structure and functioning of the company and involve provisions which are considered as a possible or inevitable content of the articles of association as set by corporate law. In contrast, non-corporate (contractual) provisions regulate other issues of an obligatory nature regardless of where such provisions are contained in the articles of association or in the shareholders' agreements. From such a perspective, a corporate issue may be regulated in a shareholders' agreement,

[16] From a point of view of German or Czech law, however, it should be pointed out that case law has repeatedly admitted a direct influence of shareholders' agreements on the articles of association (see e.g. arrangements of all shareholders contained in the shareholders' agreement regime may result in an *ad hoc* piercing the rule contained in the memorandum of association in Czech law (*Bohumil*, in Mock/Csach/Havel (eds.), International Handbook on Shareholders' Agreements, 2018, 219, 229) and German law (*Mock*, supra note 3], 289, 307).

but also *vice versa*, a contractual (non-corporate) issue may be contained in the articles of association. Distinguishing according to a material criterion will play a role in considering particulars necessary for the validity of a given legal act, its effect, possibility of changes and legal consequences of defects or remedies available. It will also be important for the evaluation of the relation between the resolution of a general meeting and the articles of association. The fundamental distinctions between the articles of association and the shareholders' agreement may be outlined as follows.

1. Different content and formal requirements for corporate and non-corporate provisions

The formation of a shareholders' agreement is subject to regulations governing legal conduct and its restrictions. Besides general prohibitions and limitations which are imposed by the law in relation to the content of contracts, other restrictions that respond to a stricter nature of some sections of the corporate law are to be taken into account. The law often regulates the content of the articles of association by its mandatory rules (the concept of *Satzungstrenge*[17] and its more or less persuasive derivatives). The mandatory or cogent nature of a particular provision (rule) of corporate law, however, does not automatically make the provision of the shareholders' agreement contravening such a regulation void.[18] It is always necessary to examine the reasons why a particular arrangement in articles of association is prohibited, or why it is prohibited to deviate from a particular rule by an arrangement in the articles of association. Where a statutory prohibition is aimed to prevent a particular result (constitutive elements or *status* of the company), but also aims at basic construction elements of individual forms of companies (for example, a prohibition to split a share, rules of maintaining the capital or the basic division of functions of the company's bodies), then an arrangement leading to such an undesired result is void even if it is part of a shareholders' agreement.

It may be concluded that it is not possible to agree, within a shareholders' agreement, on any arrangements that would interfere with the mandatory rules of the company, i.e. the rules that are considered so significant by the law that they are forming the very substance of a company. At the same time, however, even if such rules are agreed, they will not be void automatically, but they might be considered as having no effect externally and leading to specific consequences *inter partes*. The same might be said about those rules contained in the articles of association that could possibly contravene the non-mandatory rules. Even these rules may remain valid, but only in the contractual regime without having any influence upon third

[17] This is e.g. the case in Austria (*Arlt*, [supra note 10], 153, 153) and Germany (*Mock*, [supra note 3], 289, 290 ff.).

[18] See e.g. in German law (*Mock*, [supra note 3], 289, 290 f.).

persons. These considerations may be important when discussing sanction schemes pertaining to such rules, or resulting from their violation.

Arrangements where shareholders' agreement threaten the company's interest not available to the shareholders themselves should be viewed critically. For example, a shareholders' agreement, whereby shareholders obligate themselves not to initiate an *actio pro socio* or derivative suit should be void (especially if the breach of such a duty would be sanctioned by a contractual fine). Regardless of whether such an arrangement would amount to an *ex ante* waiver of rights (which might be – in some jurisdictions – prohibited) or a limited *pactum de non petendo*, the arrangement in question should be void since it interferes with the interests of the company and the creditors. Its execution interferes with the company's interest which is not available to the shareholders and not even to the company itself. Nevertheless, in many jurisdictions the discussion is pending on a possibility to waive the rights related to a share in the registered company, i. e. on a possibility to agree, for example, on a share without a profit-sharing right, without a voting right, etc. Even such discussions usually result in a conclusion that it is not possible to waive those rights which basically consist in the protection of minority shareholders, or in the retaining of control in the company.

Also, the application of general corporate substantive-law mechanisms among shareholders might be an option. For example, the content of corporate documents will be subject to a prohibition to abuse rights, and especially in some jurisdictions it might be a ban on abusive disadvantaging of some of the shareholders. The shareholders' agreement is of a contractual nature allowing the contractual modification of the legal status and it represents voluntary, rather than mandatory, assumption of obligations (except for the arrangements that would vest the right to determine the content of this covenant with the majority). It is therefore protected by contractual mechanisms (good morals, fair business practices, ban on the abuse of a right, and the like).

In other cases, however, there is no reason why the mere fact that an arrangement in shareholders' agreements contravening the rules of the corporate law or the law regulating legal entities should inevitably result in its nullity. Nevertheless, it remains disputable if an inclusion of a particular provision in the shareholders' agreement which, if contained in the articles of association, would have to be in a prescribed written form (for example, in form of a notarial deed). In general, it may be stated that private law does not require that an act related to another act which is subject to a stricter statutory requirement of a written form would also have to comply with the same statutory requirement of a stricter written form. The fact that the articles of association require a stricter written form would still not imply that a similar contractual regulation must comply with the same formal requirements.[19]

[19] See e. g. in German law (*Mock*, [supra note 3], 289, 293 ff.).