1216-2574 / 2002 / USD 5.00
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ACTA JURIDICA HUNGARICA
43, Nos 1–2, pp. 119–133 (2002)

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Shareholders' Agreements

Abstract. The essay deals with the syndicate contract functioning as a preparation to partnership contract or a skeleton agreement. The syndicate contract, as an atypical-innominate contract, also evolved in the Hungarian legal practice concerning major companies. The essay distinguishes the syndicate contract from agreement in principle (in the Hungarian Civil Code). It discusses in details the problems of joining the syndicate contract at a later stage, the collisions of syndicate and partnership contracts and their consequences. In analyses the consequences of the breach of syndicate contract

Keywords: company law, syndicate agreement

1. Competition Law and Company Law Approach

In commercial law, shareholders' agreements are discussed from two different points of view: in a sense of competition law and in a sense of company law.

In a sense of competition law, the shareholders' agreement (syndicate agreement) is a *qualified cartel contract*. The essence of the cartel is that it is an agreement limiting (precluding) competition—with regard to prices, quantity of production, conditions of business deals, geographic area or other aspects. In a more narrow sense, the cartel is directed at influencing market behaviour, at the market itself. The shareholders' agreement is *stronger* than the market cartel: it is broadened to include matters of production and product development, e.g. specialisation, cooperation of production, cooperation of research and development etc.

In Hungarian competition law, the narrowly understood (market) cartel and the production-development or syndicate cartel *are not separately treated.* Arts. 11–20 of Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Limiting Competition preclude as a general rule cartels in both the more narrow and the broader (syndicate) sense—proclaiming as generally illegal (with exceptions and the possibility of providing

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exemptions—relative prohibition of cartels) all such agreements concluded in a written form, orally, or by actual conduct. Consequently in Hungarian literature the competition law meaning of shareholders' agreements has faded, *we only talk of cartel agreements*.[1]

The company law interpretation of shareholders' agreements remains all the stronger. Precisely the multiparty and multisided, but at the same time—towards the outside world—cooperative-organisatory nature of the companies (organisational obligation as opposed to barter-based contracts: Steinbach), their characteristic as being based upon a long-term and generally significant joint ownership and a dominance of the community of interests of the parties and the companies' relative separation from their members is the reason behind the fact that the members in the case of a number of companies

— formed in perpetuity (or for a longer definite period of 10–15 years)
— with large funds
— and with legal personality
— conclude a shareholders' agreement alongside the company agreement.

The subject matter of the shareholders' agreement is thus the *formation and the operation* of the company.

The shareholders' agreement, as its name in common law areas implies, evolved in relation to *stock corporations* with large funds. Later, however, in German and French law it appeared also in relation to larger *limited liability companies* and is even exceptionally to be found among firms created in the form of *partnership or limited partnership*.

The shareholders' agreement thus became a *general institution* of the law of commercial companies. It must, however, be stressed that—in the lack of a statutory definition—the parties may conclude shareholders' agreements outside the realm of company law, e.g. it is not unknown for partners to complex investments to call their cooperation framework agreement a shareholders' agreement. But shareholders' agreements are found also in the law of non-profit organisations, e.g. among non-profit limited liability companies or associations. At the same time, in case of *the formation of stock corporations* by public share offering, the conclusion of a shareholders' agreement before the founders' meeting is not usual, only maybe later, and even then not among all shareholders but only *major shareholders*. For similar reasons, the shareholders' agreement—as concluded on a founders'

[1] Vörös, I.: *Az európai és a magyar versenyjog összehasonlító elemzése* (The Comparative Analysis of European and Hungarian Competition Law). Budapest, 1997.

meeting, alongside the articles of association—is also rare among co-operatives.

Following the general reform of Company Law new-regulation at the end of the 1980's, the instrument of the shareholders' agreement has also been reborn in Hungarian practice at the beginning of the 1990's. The spreading practice had been supported by scholarly literature.[2] At the same time a lot of interesting and open legal issues arise in the topic of the shareholders' agreement.

2. The Independence of the Shareholders' Agreement

The shareholders' agreement is directed towards the operation of the company and regulates the cooperation of the parties to the agreement with regard to the operation of the company. At the same time the shareholders' agreement and the company agreement are *two independent contracts*, usually not even concluded at the same time. The shareholders' agreement is generally already concluded before the company agreement, there is, however, nothing to prevent the shareholders' agreement from being concluded after the company agreement. (A special form of the shareholders' agreement, agreements as to the order of voting in the company's main organs are often concluded later.)

The parties to the shareholders' agreement and the company agreement are generally the same, but

— a person who is not a member of the company may be a party to the shareholders' agreement, either originally, even before the formation of the company, or he may "join" the shareholders' agreement through its modification later. The company may have members who were not originally parties to the shareholders' agreement. Anybody may cancel the shareholders' agreement while keeping his share in the company (he may leave the syndicate) or new members who do not join the shareholders' agreement may join the company.

— the shareholders' agreement may be in force only between a part of the company's shareholders.

— generally by selling stocks or shares and thus becoming a member of the company one does not automatically become a party to the share-

[2] For a book including an international overview of the topic, see Kolben, Gy.: *A szindikátusi szerződés* (The Shareholders' Agreement). Budapest, 1996.

holders' agreement. The succession as to membership does not mean a *change of parties* or *succession* regarding the shareholders' agreement; the party has to join that separately.

— in some instances (although rarely) it happens that the company as a legal person itself joins the shareholders' agreement (necessarily only after its conclusion, if the shareholders' agreement is concluded before the company agreement, but if it is concluded only afterwards, it may even be an original party.)

The *subject matter* of the shareholders' agreement and the company agreement also necessarily differ, it may be *mutually broader* or *narrower*. The company agreement regulates the cooperation of the members, but

— certain questions of cooperation are regulated only in the shareholders' agreement;

— issues regulated in the company agreement or by Company Law do not fall under the scope of the shareholders' agreement, although may be mentioned in both the company agreement and the shareholders' agreement;

— there is nothing to prevent the parties from regulating in the shareholders' agreement issues not touched upon in the company agreement or not falling under the scope of company law, e.g. issues of limitation of competition or matters of intellectual property law, the use of trademarks etc.

3. The Shareholders' Agreement as a special atypical Contract

The Hungarian civil law—as modern civil law systems generally—does not impose a limitation as to possible types of contract. The Part of the Civil Code on Specific Obligations lists the most common types of contract, but

— separate pieces of legislation may regulate other types of contract (this is how the concession contract, the funds management contract, the sponsorship contract etc. have been created),

— representatives of industry groups may create new types of contract through trade usages, *standard form contracts* (basically this is what happened in the case of the leasing or franchise contract, but

— anybody at any time may also *individually* create new contracts not fitting into a statutorily defined type of contract. The shareholders'

agreement is in this latest group, it is so specific that general terms as to it may hardly be created.[3]

Qualification as an atypical contract only means that the given contract does not belong to a type of contract regulated in the Civil Code (and consequently recognised by statute). However, an overwhelming majority of atypical contracts are at the same time *mixed* contracts, i.e. they are not typical contracts also because they had been created using the characteristics of several types of contract. Generally, also the Hungarian court practice developed in the direction to apply the rules of the type of contract that stands closest to the given atypical-mixed contract in cases when the contract fails to regulate a certain issue. This application, however, happens “adequately”, often with the use of extensive interpretation, even analogy.

The shareholders’ agreement is a *cooperative contract*; it is therefore a point of interest that the shareholders’ agreement belongs to a “type” that is itself not named within the law and exists only in legal theory. The lower level of cooperative contracts are merely of a moral nature, qualified as *gentlemen’s agreements*. The shareholders’ agreement is, however, a business contract and may not be qualified simply as an *expression of best intentions*, the breach of which in Hungarian law may only result in a possibility of a tort claim of damages for expenses incurred in reliance if intentional misleading conduct is shown. The shareholders’ agreement is a *contract* falling under the Civil Code; a conduct in opposition to its terms is a *breach of contract*.

The shareholders’ agreement has certain aspects—especially if the shareholders’ agreement is concluded before the conclusion of the company agreement and the shareholders’ agreement is terminated with the formation of the company—which may qualify as a “consortium”, as a partnership agreement and consequently may fall directly or by way of analogy under Arts. 568-578 of the Civil Code. The shareholders’ agreement in other cases also stands close to the civil partnership as it is a contract with *no requirement of form*, although generally put down in writing, it may be concluded orally. As opposed to that, commercial companies (including partnerships) all over Europe share a mandatory requirement of written

[3] Company or commercial laws of West-European countries do not regulate the Shareholders’ Agreement and it naturally does not appear in the current Hungarian Civil Code either. Of the ccmpany laws created in East-European countries in the 1990’, one is known to include rules—of course, hardly more than a definition—of shareholders’ agreements, that one being Albanian law.

form, stock corporations and limited liability companies even a qualified written form (e.g. a notarial document), moreover the law defines the mandatory substantive elements of the company agreement (articles of association).[4] Exceptionally in civil partnerships a mandatory requirement of written form may also be found, e.g. as to building communities; Art. 578/B (2) of the Civil Code.

A phenomenon similar to the more organised forms of the civil partnership is that the shareholders' agreement creates an *organisation independent* of the organisation of the company whose operation is the subject matter of the contract. Such is for example the *syndicate meeting* that is usually held immediately prior to the general meeting of the company, although generally may be called together at any time upon the request of any member. On syndicate meetings the members of the company often bring more important decisions as to the operation of the company than on general meetings, or the syndicate decisions may determine the decisions of the general meeting.

It may happen that the shareholders' agreement meets all the requirements of an agreement to agree or that the shareholders' agreement contains an agreement to conclude a company agreement as well. (The eventuality of a shareholders' agreement being solely an agreement to conclude a company agreement is rare in practice). According to Art. 208 of the Civil Code the shareholders' agreement qualifies as an agreement to form a company agreement if the parties to the shareholders' agreement oblige themselves to conclude a company agreement (form a given type of commercial company) in accordance with the terms of the shareholders' agreement at a determined, later date. The agreement to agree usually runs out with the conclusion of the final contract, whereas the shareholders' agreement generally remains in force.

The basic problem with the possible qualification of the shareholders' agreement as an agreement to agree in Hungary is that according to Art. 208 (1) of the Civil Code the agreement to agree must be concluded following the formal requirements established for the final contract which, on the other hand, according to Art. 10 of the Act on Business Associations (hereinafter referred to as Companies Act) would entail drawing up a notarial document or the signature of a lawyer. The parties to the shareholders' agreement tend, however, not to follow the qualified written form. In case of company

[4] About this issue, see Fischer, F.: *Die Gesellschaft bürgerlichen Rechts.* Hamburg, 1977. 271–280. and Ulmer, P.: Die *Gesellschaft bürgerlichen Rechts.* München, 1980. 5–8.

agreements the application of Art. 208 pars. (3)–(4) of the Civil Code is also hard to imagine. According to these rules, in case of a failure to conclude the final contract the court may create the contract—and establish its terms—at the request of any of the parties, moreover the court may exceptionally modify the terms agreed upon by the parties in the agreement to agree. Such an intervention by the court would, in case of multiparty contracts of a long duration, be in discrepancy with the principle of private autonomy. The rules of the company agreement would anyway be almost impossible to apply to an agreement to conclude a company agreement [Art. 208 (6) of the Civil Code]. Therefore I believe that *the rules pertaining to agreements to agree in the Civil Code, modelled on barter-based contracts, are not applicable* to the shareholders' agreement—even though its core subject matter is an agreement to conclude a later company agreement. Namely, as a result of its multiparty and multisided nature, the conclusion of the company agreement may not be regarded as a series of separate offers and their acceptance, the future partners must accept a unified draft contract and no mutual performances between the parties exist in the way as it does in contracts for the exchange of goods.[5]

The shareholders' agreement is definitely not to be confused with the instrument of *pre-incorporation company* existing from the signing of the company agreement to the judicial registration of the company (Arts. 14–15 of the Companies Act), although there is naturally nothing to prevent the parties from concluding a shareholders' agreement solely for this period. But even in this case the shareholders' agreement and the pre-incorporation company are different.

The basic difference is that the commercial company is a company registered by the state. In the majority of European laws the company gains a commercial name and legal existence, or, in the case of stock corporations and limited liability companies, legal personality constituted by inclusion in the register (either *ex tunc*, i.e. retrospectively to the conclusion of the company agreement as in the 1988 Hungarian Companies Act, or *ex nunc*, i.e. for the future, as it is laid down in our current 1997 Companies Act). Therefore the process of the formation of the company—as modelled especially by Fritz Rittner, Professor at Freiburg University—may be broken down into two phases.[6]

The first phase is the *internal bargaining process of the future company members* which may, in the given case, be regulated by the shareholders'

[5] See Müller, R.: *Gesellschaftsvertrag und Synnallegma*. Zürich, 1971. 16–21.
[6] See Rittner, F.: *Die werdende juristische Person.* Tübingen, 1972. 52–72.

agreement. The second phase, in which the future members play a mostly passive role, although it is initiated by them, is *obtaining State recognition*. Registration primarily means the state approval of the formation and operation of the commercial company which in the so-called system of normative requirements (in its historic origins crated to replace the general concession system) entails a *control of legality* and at the same time results in the inclusion of the company in the official register, providing publicity and thus the possibility of the control of publicity over the company to begin.[7]

The juridical registration procedure is a process, situations arising under which—e.g. whether the company may or may not operate and if it may, under what conditions—must be regulated by law. If state registration comes to pass, the law must regulate the *transition from the temporary State to the final state*, in a way which in the case of an already operating company expresses the *continuity* of the company's operations, but also the *qualitative leap* which obtaining legal personality, the official recognition of the company entails.[8] If, on the other hand, registration is denied with no further possibility of appeal, the preliminary formation operating in the hope of recognition must immediately be dissolved, but in a way so as to settle the internal (those between the members of the company) and external (e.g. contracts with third parties or employees) legal relationships arising between the conclusion of the company agreement and the refusal of registration.

The phase between the conclusion of the company agreement and the state judicial decision on recognition may theoretically be regulated by law according to two models.

a) The identity of the preliminary society and the final society may be denied and the "founding society", the "association of founders" may be regulated in both the internal and external legal relationships independently, following the analogous application of the loosest organisatory obligation, the *civil partnership*.[9] The internal and external relations of the unregistered company, the different questions of liability may adequately be dealt with on the basis of the rules of the Civil Code. This solution is especially advantageous in the case of an *ex*

[7] See Mummenhoff, W.: *Gründungsysteme und Rechtsfähigkeit.* Berlin, 1979. 7–13.

[8] See Büttner, P.: *Identität und Kontinuität bei der Gründung der juristischen Person.* Bielefeld, 1967. 111–128.

[9] See Fabricius, F.: Vorgesellschaften bei den A.G. und GmbH, ein Irrweg? In: *W. Kastner Festschrift.* Wien, 1972. 212–213.

tunc constitutive registration system, as in this case the registration process takes a longer time and therefore it is more correct if the decisions of the "preliminary" become the decisions of the company with the express decision of the highest organ of the registered company (this is why this solution was applied by the Companies Act of 1988).

b) If, however, the preliminary operates until registration according to the rules pertaining to the final company, a pre-incorporation company is created which, contrary to the civil partnership, is some kind of a legal subject.[10] The *Vorgesellschaft* had been created in relation to the limited liability company and the private stock corporation—these rules are harder to apply to the foundation of corporations by IPO, because of, if nothing else, the stricter imperative public law rules of the securities supervisory authority. In this case "continuity" dominates in the relationship between the "future" limited liability company or the future stock corporation and the final company; if the company is registered, the legal transactions of the pre-incorporation company automatically become—as succession is theoretically ruled out—the legal transactions of the final company (the limited legal existence melts into the full legal personality of the company).[11] If, on the other hand, the company is a "defective", "illegal" company and the court refuses registration after the exhaustion of possibilities of appeal, then the preliminary must be terminated basically according to the rules pertaining to the planned commercial company (although e.g. in Hungarian law, no formal termination takes place and the company is not dissolved either). Basically this German model had been transposed by the 1997 Companies Act, connecting this naturally with a maximum time limit of the registration process in the Law on the Process of Company Registration (Art. 44 of Act CXLV of 1997) and an *ex nunc* system of registration (Art. 16 of the Companies Act). The pre-incorporation company of a Hungarian limited liability company (LLC) or stock corporation (SC) is already an LLC p.r. or an SC p.r., i.e. a company pending registration. (Interestingly enough the new Hungarian Law on Cooperatives, Act CXLI of 2000 dropped, with regard to cooperatives, the institution of "pre-incorporation cooperative", introduced following the 1997 Companies Act, and returned to the civil partnership solution.)

[10] See Kiesslig, E.: *Vorgründung und Vorgesellschaften.* Berlin, 1999. 31–39.
[11] See John, U.: *Die organisierte Rechtsperson.* Köln, 1976. 307–311.

It must, however, be stressed that no matter whether the legal order accepts the first or the second solution as to the formation of the commercial company, the shareholders' agreement may *never*—not even with the civil partnership solution—*be equated* with the pre-incorporation company.

4. The Reasons Behind the Conclusion of a Shareholders' Agreement

Concluding a shareholders' agreement "before" or "alongside" a company agreement may be due to several reasons. The most typical are the following:

a) A typical purpose is to organise the cooperation of the future members in the possibly rather long period before the conclusion of the company agreement (or later, as the case may be, should e.g. a new member join) in order to enable a least problematic foundation of the company. In this case the shareholders' agreement, even if it is not an agreement to agree, is a *"preparatory" contract*. A typical element of this preparation is related to setting up the company's funds by the members with non-monetary contributions. The previous evaluation of contributions in kind—especially in the case of intellectual property—is a rather complicated question and may have consequences as to the future balance of power within the company, the involvement of an accountant or accountants is mandatory. (The parties should also regulate e.g. the procedure to be followed in case the court refuses to accept certain parts of the contributions in kind etc.)

b) In the majority of cases the shareholders' agreement is not terminated with the formation of the company but remains parallel in force during the period of the operation of the company. In this case the shareholders' agreement shows the characteristics of a *framework agreement*, including terms pertaining to the conduct of the members in relation to the organisation and the operation of the company during the whole period of the existence of the company—thus whether e.g. on the general shareholders' meeting votes are to be cast so as to appoint to the board of directors the candidate of each of the members, or so that the supervisory board should elect the candidate of the minority member as the chairman of the supervisory board etc. We remark that in several cases the shareholders' agreement remains in force for a shorter period after the termination of the company—e.g. members may oblige themselves to abide by the so called non-compete clauses, not to form companies with a similar sphere of

activity for a certain period of time with other partners after the termination of the company etc.

5. Collisions between the Company Agreement and the Shareholders' Agreement

If the shareholders' agreement and the company agreement are parallel in force, several interesting problems arise out of the independence of the two contracts.

a) The publicity of the content of the company agreement, the secrecy of the content of the shareholders' agreement

It is characteristic of the law of commercial companies that it places the interests of *business secrecy* important in the economic life to the background in preference for the *public interest of the publicity* of the operation of the commercial companies (*Publizitätskontroll*). The Law on the Procedure of Registration of Companies defines the sphere of data to be included in the register, documents to be submitted to the court, rules that companies' accounts should be made public etc. Moreover, anybody may at any time—without even rendering probable an interest recognised by law as to this—inspect the register free of charge. (See the 1st EU Company Law Directive on Publicity.)

An important purpose of the shareholders' agreement is to regulate those details of the cooperation between the members which the *parties do not intend to make public* and the publicity of which is *not prescribed in a mandatory manner* by the company law or the registration law. From these details the competitors may namely draw inferences, which would disadvantage the position of the company or its members in the market competition.

b) Choice of law

A large proportion of the members of companies in Hungary are *foreigners*. A significant number of Central-Eastern European countries suffer from a lack of capital and thus encourages foreign investment. These investments are mainly realised in the form of companies, even if the law of the State receiving investment provides the possibility of opening a direct appearance by the foreign company e.g. in the form of opening a branch subsidiary. Especially in the case of a foreign majority or ownership by a single foreigner the foreigner wishes to *transplant* as much of

his law as possible, conclude contracts in his own language, have dispute relating to the foundation and operation of the company settled in court procedures he is familiar with.

The company, however, has legal existence, the stock corporation and the limited liability company are legal persons, the stock corporation and the limited liability company are important actors in the economic life, therefore all countries insist on applying *their own company law* to companies which have their seat on national territory, to have the official version of the company agreement drawn up in the official language, as the registration process and the register itself are necessarily in that language. In company law therefore there is no general freedom of choice of law otherwise recognised among the principles of private international law—thus also the Hungarian Act on Private International Law (Art. 24 of Law-decree No.13 of 1978).

The shareholders' agreement, however, *falls under the general rules of collisions* on applicable law, therefore the foreigner may insist that his own law or perhaps some other foreign law be used as the supplementary legal system in deciding issues not regulated by the contract. There is nothing to prevent the parties in case of a limited liability company with two members, one of whom is Hungarian and the other German, to choose Swiss law as the law applicable to the contract as supplementary law, prepare the contract in several languages and proclaim for example the English version as official and provide for the resolution of company law disputes for a French language arbitration procedure by a Paris tribunal, for example.

c) Limiting the mandatory nature of company law

The legal regulation pertaining to the company agreement in case of a stock corporation is, as a general rule, mandatory in nature in the majority of he countries of the world, but mandatory regulation is rather widespread also in relation to the limited liability company. On the other hand, the shareholders' agreement as an atypical contract is regulated almost completely by non-mandatory rules—not taking into account a few exceptional provisions of the Part of the Civil Code on General Rules of Obligations, there is a possibility for *honouring the intention of the parties almost completely*. The parties therefore wish to make use of the shareholders' agreement in order to ease the strictness of the mandatory rules of company law. The question only is, to what extent does the law of the seat of the company accept the "intervention" of the shareholders' agreement into the company law, up to

what point does it honour solutions in the conflict between company law and general contract law to the disadvantage of company law.

The first question arises if some term in the shareholders' agreement conflicts a term in the company agreement. The view may be taken that

a) *the company agreement prevails*
b) the contract concluded *later* prevails
c) the term in the prevailing contract automatically invalidates or *modifies* the terms of the weaker contract.[12]

The prevailing—and in my opinion correct—view in Hungarian arbitration practice is that in case of a collision between the company agreement and the shareholders' agreement the content of each contract *must be independently ruled upon*, in other words the issue of collision need not be solved. From this it also follows that a breach of the "additional requirements" of the shareholders' agreement *may not have company law consequences*. If accordingly e.g. in a shareholders' agreement relating to a private stock corporation the majority Hungarian shareholder obliges himself to vote on a general shareholders' meeting on the candidate proposed by the minority foreign member during the election of the supervisory board and, to the contrary, with the help of his majority he turns down the persons suggested by the foreigner, the decision of the shareholders' meeting is valid in a company law sense and claims may "only" be put forward (e.g. for damages) according to the rules of civil law for breach of the shareholders' agreement. This is the reason why the parties try to ensure compliance with the contract by way of *security instruments*, e.g. penalty clauses.

The content of the shareholders' agreement may, however, in the given case lead to the *invalidity* of the company agreement. The "covering" or "fictitious" nature of the company (*Mantell-* or *Scheingesellschaft*) may often be established from the content of the shareholders' agreement, thus e.g. that the parties chose the corporate form primarily to avoid taxation. The problem is that following the 1st EU Company Law Directive the possibility of establishing the invalidity of the company agreement is limited, consequently even if a dispute over the shareholders' agreement leads to finding a fault in the company agreement, it is not possible to draw the legal consequences of invalidity regarding the company agreement.

[12] For this view see Juhász, J.: A szerződések ütközése a kft-n belül avagy felesleges duplicitás (The Collision of Contracts within the Limited Liability Company, or unnecessary Duplicity). *Magyar Jog*, 1991. No. 12. 730–732.

The question is more difficult when the terms of the shareholders' agreement are in contradiction to the rules of company law. The following cases may possibly arise from this aspect:

— the shareholders' agreement is in contradiction to the non-mandatory rules of company law;

— the shareholders' agreement expressly derogates the mandatory or imperative rules of the generally applicable parts of company law or of the part relating to the given type of company;

— the provisions of the shareholders' agreement are not in express contradiction with company law but contain possibilities not mentioned therein or aim at a specific application of the provisions of company law.

In the first case it would follow from the independent nature of the shareholders' agreement and the company agreement as legal transactions that it would only be possible to derogate the non-mandatory rules of company law in the company agreement. In this case Hungarian arbitration practice pierces the separation of the two contracts and generally makes it *possible for the parties to derogate* the non-mandatory rules of company law, i.e. those which allow for such deviation. In my opinion this practice is correct.

In the second case the arbitration practice regards the terms of the shareholders' agreement conflicting the imperative or mandatory rules of company law (or even, with the application of Art. 239 of the Civil Code, the whole of the shareholders' agreement) as being an illegal contract under Art. 200 of the Civil Code and consequently null and void. Thus e.g. the parties may not agree—regarding a limited liability company—even in a shareholders' agreement not to hold a single general shareholders' meeting a year and bringing decisions e.g. as to financial reports by way of casting votes by post.

The third case represents the hardest problem and depends partly on the interpretation of the nature of the regulation as mandatory or imperative. E.g. the Companies Act lists the types of preferential stock in Art. 183; the question remains whether one may introduce in the shareholders' agreement types of preferential stock not regulated in the Companies Act. Does this still form a part of the contractual autonomy of the parties or is the mandatory nature of the Companies Act provisions on preferential stock to be interpreted in a way that this creates a *numerus clausus* with regard to the types of preferential stock, providing for new types of preferential stock being invalid as a consequence?

In this question the arbitration and court practice is not unified neither internationally nor in Hungary. Some qualify as *invalid*, with a strict interpretation of Art. 9 (1) of Companies Act, all applications not mentioned in

the Companies Act, whereas others qualify the freedom of contract of the parties as the stronger interest and regard these rules of the shareholders' agreement (which usually find their way into the company agreement as well) as *valid*.[13] The practice generally classifies as valid those terms of the shareholders' agreement which aim at a particular application of the rules of company law in the company agreement. Such are e.g. the already mentioned shareholders' agreements containing limitations on the practice of voting rights—*voting agreement*, *Stimmbindungsvertrag*. The traditional legal view, thus e.g. also the Hungarian Supreme Court (Kúria) in the 1920s (see decision No. 3478/1925) considered voting agreements as conflicting the "morals of the good merchant", thus null and void as immoral. More recently, however, the American and Western European practice tends to recognise the validity of these agreements—accepted also by more recent Hungarian practice, as opposed to practice in the Czech Republic.[14]

[13] The issue is extensively dealt with in Balásházy, M.: Szindikátusi szerződés a társasági és a polgári jog határán (Shareholders' Agreement on the Borderline between Company Law and Civil Law). *Gazdaság és Jog,* 1993. No. 5.

[14] See e.g. Waldvogel, M.: Zur Zulässigkeit von Stimmbindungsverträgen in Tschechien. *WIRO,* 1997. No. 1. 13–16.