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Shareholders Agreements in Russian Joint-Stock Companies

Emergence of shareholders agreements in Russian business

The possibility to conclude shareholders agreements in joint-stock companies emerged after enactment of the Federal statute, dated June 3, 2009 No. 115-FZ. The Statute amended another Federal statute: «On Joint-stock Companies» with article 32.1 that determined the form, the status and restrictions at the conclusion of shareholders agreements.

Prior to enactment of the Statute No. 115, shareholders agreements in the Russian legal practice, as a rule, were drawn and governed by the laws of foreign states, mostly by the English law or laws of the certain USA states. The Russian arbitrazh court practice for long period of time did not recognize legal force of shareholders agreements governed by the foreign laws. The arbitrazh courts of all instances recognized such shareholders agreements as void.

However, as of today, the situation due to recent described amendments has changed. The shareholders agreement in the Russian law is recognized and is considered to be a contract which provides a procedure of execution of rights certified by shares, and (or) peculiarities of disposal of rights granted by shares. The right to conclude shareholders agreements is based on the article 421 of the Civil Code of the Russian Federation which provides the principle of «freedom of contract». According to stated principle, shareholders possess a right to enter into civil-law contracts according to which they are obliged to exercise in a specific manner their rights certified by shares, and (or) rights on shares, and (or) to abstain from disposal of the specified rights.

According to the Statute, the shareholders agreement can, among other, provide:

a. obligation of its parties to vote in a specific manner on general meeting of shareholders;
b. to agree upon manners of voting with other shareholders;
c. to acquire or to dispose shares in advance fixed price and (or) at occurrence of certain circumstances;
d. to abstain from alienation of shares before certain circumstances occur; and
e. to carry out interactively with other shareholders other actions related with management of the company, business, reorganization and liquidation of the company.

The usage in articles “c” and “d” of the term “circumstance” instead of “condition” is essential. Such change allowed to exclude shareholders agreements from regulation of conditional bargains. Likewise, this change allowed avoiding equal regulation of shareholders agreements with bargains concluded at stock exchanges. Parties of the shareholders agreements can only be shareholders of company and entities with an intention to purchase shares of the company. The joint-stock company itself cannot be a party of the shareholders agreement. Moreover, shareholders agreement can not provide an obligation of a participant to vote according to instructions received from management bodies of a joint-stock company.

Types of shareholders agreements

Depending on the shareholder’s rights protection level the following shareholders agreements classification may be presented:

a. agreements, regulating protection of interests during the entrance of a new member to joint-stock company;
b. agreements, concluded during purchasing by a shareholder shares with the aim to get ability to block or oppositely to seek for adopting of some decisions; and

c. agreements, aimed to separating of spheres of influence if there are few shareholders in company, who hold amount of shares which is enough to block adopting of some decisions by company.

Access to the shareholders agreement

As shareholders agreements may dramatically affect development and business of company, one of the most important questions that was raised during the adoption of the Statute in legislative bodies was the question on access of third parties to shareholders agreements. The Statute provides that an entity that purchased according to shareholder agreement the right to determine the manner of voting at shareholder's meeting must notify company on such purchase in case as a result of such purchase the entity itself or together with its affiliates will be able to dispose more than 5,10,15,20,25,30,50 or 75 per cents of company's ordinary shares. The responsibility for failure of such notification consists of restriction to exercise rights of shares, in respect of which an agreement was reached.

Enforcement and protection of shareholders agreement

The Statute established that shareholders agreement is not a foundation document. Therefore, it is not necessary to file it within the state authorities. The right to conclude shareholders agreements is vested in the law, therefore, it exists regardless to provision in the articles of association. However, according to the part 3 of the article 11 of the Federal statute «On Joint-stock Companies», shareholders' rights must be vested in the articles of association as well, hence the right to conclude shareholders agreements should be vested in the articles of association (as it is one of shareholder rights).

Absence of provision on capability to conclude shareholders agreement in the articles of association does not effect the validity of concluded shareholders agreements, however the articles of association should contain a condition allowing conclusion of shareholders agreements in order to minimize risks of incapability to conclude shareholders agreements.

The shareholders agreement is obligatory only for the parties of the agreement. It's not feasible to claim for invalidity of company's management bodies' decisions in case of their noncompliance with provisions of shareholders agreement. However, parties of shareholders agreement themselves possess enough legal tools to protect their own interests. The shareholders agreement is a civil-law contract, therefore, all methods of protection of civil rights and interests are applicable to shareholders agreements. Among them are: methods of security for performance of obligations, application of penalties for breach or improper performance of shareholders agreement and judicial means of protection of party's rights provided by the law are applicable.

Before the Statute was adopted, rough legislative regulation of shareholders agreements that sometimes extended to prohibition of such agreements existed. This forced Russian legal entities to often use other, low-tax and off-shore jurisdictions. One of the main goals of the Statute was to decrease the constantly growing flow of Russian business immigration.

The amendments, obviously, are not able to solve all problems, because certain ways of breaking its obligations for unfair participants of agreement still remain. For example, a shareholder can transfer shares to a third party, which was not aware of the existing shareholders agreement and new shareholder will not be binded with former shareholder's obligations under the shareholders agreement and will not be obliged to fulfill the conditions of such shareholders agreement. In order to avoid these adverse effects it is necessary to carefully draft shareholders agreement and promptly identify rights and obligations of shareholders, including their obligations during shares alienation.