

Summary

Pokora I. E. Relationship and Interaction of the Substantive Law and the Conflict of Law Methods in Private International Law. – Article.

The article deals with the issues of relationship between the substantive law and conflict of law methods in private international law. It also explores advantages and disadvantages, which usually occur while using these methods, as well as the expediency of the use of the two methods of private international law.

Key words: private international law, the substantive law method, the conflict of law method, relationship and interaction, advantages and disadvantages.

УДК 340.135(477)

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URGENT ISSUES OF ELECTING SUPERVISORY BOARD MEMBERS PURSUANT TO THE LAW OF UKRAINE «ON JOINT-STOCK COMPANIES»

Formulation of a problem. It goes without saying that such a popular form of doing business in domestic and foreign practices as a joint-stock company is considered to be the most optimal way of attracting a great number of stakeholders, concentrating big equities and providing shareholders with a possibility to take part in managing a company. In this context, the legislation of Ukraine on business entities (company legislation) belongs to the priority sphere of implementation of the Nation-wide program of adaptation of the Ukrainian legislation to EU Law [1].

In light of this, the Verkhovna Rada of Ukraine passed the Law of Ukraine «On Joint-Stock Companies» of 17.09.2008 № 514-VI [2] (hereafter – the «JSC Law») which in turn became one of the landmark events in Ukrainian corporate law for recent 10 years. The «JSC Law» strengthened considerably, among other things, a role and an importance of a supervisory board to a new level by stipulating in detail its principles of functioning. However, an adoption of the Law of Ukraine «On Amendments to the Law of Ukraine «On Joint-stock Companies» Regarding Improvement of the Mechanism of Joint-Stock Companies' Activity» N 2994-VI on 3 February 2011 (hereafter – Amendments to the Law of Ukraine «On Joint-stock Companies») [3], which essentially altered methods for electing members of the supervisory board, resulted in certain obstacles in view of providing minority shareholders to be represented in the supervisory board.

Review of recent researches and publications. Legal issues in relation to certain aspects of functioning of joint-stock companies, corporate governance, determination of the competence of the company's managerial bodies were/are researched by such Ukrainian and Russian scholars as O.A. Belyanevych, O.M. Vinnyk, V.A. Vasilyeva, A.P. Efimenko, O.R. Kibenko, N.S. Kuznietsova, V.M. Kravchuk, V.V. Lutz, R.A. Maidanyk, V.K. Mamutov, L.L. Neskorozhena, N.O. Saniahmetova, I.V. Spasibo-Fatejeva, V.S. Scherbina, V.V. Dolynskaya, T.V. Kashynyna, O.A. Makarova, S.D. Mogilevskij, G.L. Rubeko, I.S. Shitkina and others. To date, there is, however, an absence of profound researches regarding recent alterations of electing supervisory board members in joint-stock companies, and in particular their impact on minority shareholders.

Therefore, **objectives of this article are:** to analyze and compare a procedure for electing supervisory board members pursuant to a previous, that is prior to 03.02.2011 and a current edition of the «JSC Law»; to formulate propositions in respect of paving the way for minority shareholders to participate in managing the company by electing members of the supervisory board.

Body of a research paper. *The procedure for electing members of the supervisory board according to the previous edition of the «JSC Law».* The election of members of the supervisory board of the public company had been carried out exclusively by the cumulative voting [2]. In this connection, the cumulative voting is the process of electing persons to the composition of company bodies, when the general amount of shareholder's voices is multiplied by the number of members of body of a joint-stock company, that are elected, and a shareholder has a right to give all votes for one candidate or to distribute them between a few candidates (Article 2 of the «JSC Law»).

The number of supervisory board members had been determined by the general meeting of shareholders. However, in companies with the number of shareholders (holders of common shares) from 100 to 1000 persons, the composition of the supervisory board had had to comprise not less than 5 (five) persons, with the number over 1000 – not less than 7 (seven) persons, and in companies with the number of shareholders over 10 000 persons – not less than 9 (nine) persons [2]. Considering that pursuant to Article 5 of the «JSC Law», a membership of shareholders of a private joint-stock company cannot exceed 100 shareholders, this provision shall be applied only to public joint-stock companies by using the cumulative voting. In other words, there had been the minimal number of supervisory board members which in turn had given a possibility for minority shareholders to promote their candidates into the supervisory board. For example, if the majority shareholder (s) had owned 80% (to simplify a calculation, it is used a percentage – % instead of general amount of shareholders' voices) of shares and the minority shareholder (s) had owned 20% of shares respectively, the later voting jointly and using the cumulative voting, would have been able to select minimum 1 (one) of their candidate into the supervisory board (in terms of 5, 7 or 9 of the minimal number of supervisory board members).

In Germany, for example, the supervisory board of large corporations is composed of 20 members, 10 of which are elected by shareholders, the other 10 being employee representatives [4, p. 1]. The minimum of members a board can consist of is three, the maximum – 21. The number of members has to be divisible by three, as stated in the law [5].

The election of supervisory board members of the private company had been carried out by the principle of proportional representation (*pro rata principle*) of shareholders' representatives in the composition of the supervisory board depending on the amount of shareholders' voting shares (*the principle of proportion*) or by the cumulative voting. The concrete method of election of such members of the private company had been determined by its charter [2]. It should be noted, however, that legislator did not specify a content of the above – mentioned *principle of proportion*

and peculiarities of its application. Consequently, experts had faced certain problems of using this vague principle in legal practice.

Nevertheless, it seems that this principle should have reflected a proportion between the amount of shares and the number of supervisory board members. To put it another way, if the shareholder (s) had possessed 30% of shares, he/she would have had a potentiality to select 30% of members of the supervisory board accordingly. At the same time, there might have been the so-called «deadlock situation». For instance, in the event of the situation illustrated above (5 members, 70/30% shares), the minority shareholder(s) with 30% and the majority shareholder (s) with 70% of shares would have gained 1,5 and 3,5 of supervisory board members respectively. It appeared to imply, thus, that one member had remained unselected by any shareholder (s).

In this respect it has to be emphasized that the Draft Law «On Amendments to the Law of Ukraine «On Business Entities» of 30.05.2003, № 3567, brought in by the deputy – V. Zubanov, contained provisions which in detail described a procedure of proportional election of supervisory board members, including the foregoing deadlock situation [6]. Although the Center of European and Comparative Law defined that this Draft Law did not contradict acquis of European Union [7, p. 1], it was unfortunately rejected by the Ukrainian parliament.

The procedure for electing members of the supervisory board pursuant to the current edition of the «JSC Law». Having adopted Amendments to the Law of Ukraine «On Joint-stock Companies», the Verkhovna Rada of Ukraine introduced a new mechanism for electing members of the supervisory board in public and private joint-stock companies.

Despite the fact that the cumulative voting as an obligatory method for electing supervisory board members of the public company was preserved, the minimal number of supervisory board members was excluded. Such circumstances might lead to an impossibility for minority shareholders to be represented in the supervisory board mainly because according to Article 53 of the «JSC Law», the number of supervisory board members is set up by the general meeting of shareholders [2]. For instance, if the majority shareholder (s) with 80% of shares at the general meeting decided that the supervisory board shall be composed of 3 members, the minority shareholder (s) with 20% of shares would not be able to select even 1(one) of their candidate. As it was also argued by experts that «On the other hand, the exclusion of correlation between the minimal number of supervisory board members and the total number of company shareholders may adversely affect the possibility for minority shareholders to elect a supervisory board member» [8].

For instance, it is appropriate to point out that in accordance with Article 66 of the Federal Law of Russian Federation «On Joint-Stock Companies» of 23.12.1995 № 208-ФЗ, the number of supervisory board members of the company is determined by the company's charter or the decision of the general meeting of shareholders, but cannot be less than 5 (five) members. For the company with the number of shareholders (holders of voting shares) over 1000, the number of supervisory board members cannot be less than 7 (seven) members, with the number of shareholders

over 10 000 – not less than 9 (nine) members. The election of members of the supervisory board of the company is carried out by the cumulative voting [9]. The main advantage of such a provision of Russian corporate law is that it concerns both open and closed joint-stock companies.

What is more, methods for electing members of the supervisory board of the private company were substantially changed. Thus, under Article 53 of the «JSC Law» the election of supervisory board members of the private joint-stock company is carried out by means of the principle of representation of shareholders' representatives in the composition of the supervisory board (*the principle of representation*) or by the cumulative voting [2]. It should be understood that *the principle of representation replaced the principle of proportion (pro rata principle)*.

In the case of electing supervisory board members by *the principle of representation*, it can be stipulated by the company's charter, that is at the general meeting of shareholders, a dependence of membership and/or a proportion of representation of shareholders' representatives in the composition of the supervisory board depending on the amount of shareholders' common shares or an absence of limitation of the number of shareholders' representatives in the composition of the supervisory board [2].

As a matter of fact, the so-called «*principle of representation*» pertains to the situation in which supervisory board members of the private company shall be selected by simple majority votes of shareholders (50%+1), as it is/was provided for by the Civil Code of Ukraine of 16.01.2003 № 435-IV [10] and the Law of Ukraine «On Business Entities» of 19.09.1991 № 1576-XII [11]. *The principle of proportion (pro rata principle)*, nonetheless, could be applied as the supplementary method if only such a possibility was stipulated by the company's charter [2]. Moreover, it might be even determined the dependence of membership in the composition of the supervisory board depending on the amount of shareholders' common shares. For these reasons, it is obviously that the majority shareholder (s) without any obstacles can select only their candidates with a view to forming the composition of the supervisory board.

Conclusions. Bearing in mind all the aforesaid, it is worth making the following statements and conclusions: (1) A presence of the minimal number of supervisory board members and, to some extent, *the principle of proportion (pro rata principle)* according to the previous edition of the «JSC Law», may have enabled minority shareholders to manage the company through their representation in the supervisory board; (2) After passing Amendments to the Law of Ukraine «On Joint-stock Companies», a state of minority shareholders was negatively changed primarily due to eliminating the minimal number of supervisory board members as well as replacing *the principle of proportion (pro rata principle)* onto *the principle of representation* for private joint-stock companies. Obviously, such a situation does not facilitate a development of the corporate legislation and an implementation of the Ukrainian legislation to EU Law as well; (3) In order to find a solution to this problem, it is highly recommended to fix in the «JSC Law»: (a) the minimal number of supervisory board members; (b) the cumulative voting as the common method

[12, p. 5] to select supervisory board members for both public and private joint-stock companies. Grounds for implementing these relevant proposals, for instance, might be borrowed from German and Russian corporate law.

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Summary

Bondar I. S., Tkachenko K. V. Urgent issues of electing supervisory board members pursuant to the Law of Ukraine «On Joint-Stock Companies». – Article.

The article is devoted to the problem aspects of electing supervisory board members of the joint-stock company, in particular as to possibilities for minority shareholders to manage the company through their representation in the composition of supervisory board.

Key words: joint-stock company, supervisory board, minority shareholders, cumulative voting, principle of proportional representation of shareholders' representatives, principle of representation of shareholders' representatives.

Анотація

Бондар І. С., Ткаченко К. В. Актуальні питання обрання членів наглядової ради відповідно до Закону України «Про акціонерні товариства». – Стаття.

Стаття присвячена проблемним аспектам обрання членів наглядової ради акціонерного товариства, зокрема щодо можливостей міноритарних акціонерів брати участь в управлінні товариством шляхом свого представництва у складі наглядової ради.

Ключові слова: акціонерне товариство, наглядова рада, міноритарні акціонери, кумулятивне голосування, принцип пропорційного представництва представників акціонерів, принцип представництва представників акціонерів.

Аннотация

Бондарь И. С., Ткаченко К. В. Актуальные вопросы избрания членов наблюдательного совета согласно Закону Украины «Об акционерных обществах». – Статья.

Статья посвящена проблемным аспектам избрания членов наблюдательного совета акционерного общества, в частности касательно возможностей міноритарных акционеров принимать участие в управлении обществом путем своего представительства в составе наблюдательного совета.

Ключевые слова: акционерное общество, наблюдательный совет, міноритарные акционеры, кумулятивное голосование, принцип пропорционального представительства представителей акционеров, принцип представительства представителей акционеров.