

# Legal Essence of the Corporate Contract

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## ABSTRACT

The purpose of this study is to reveal the legal nature of a corporate contract as an institution of civil law. The study was conducted by analysing their content. The analysis of scientific research in this area has demonstrated different opinions in the doctrine on several issues arising in connection with the conclusion and execution of a corporate contract. In particular, there is no unified approach to understanding the legal nature of the corporate contract, the relationship between the corporate contract and the charter is not clear, and there are significant gaps in protecting participants' rights in the corporate contract. The study showed that the legal regulation of a corporate contract in Russian legislation is based on a dualistic approach, which led to the institutionalisation of a mixed model of a corporate contract, which has both binding and corporate elements. The author systematises the corporate contract features in common law countries and the Romano-German legal system based on comparative legal analysis.

**Keywords:** *Corporate contract (agreement), Corporate agreement, Corporation, Legal nature of the corporate agreement, Corporate law.*

## 1. INTRODUCTION

The relevance of the research topic is determined by the trends in the development of modern legislation. Over the past few years, there have been many changes in the Civil code of the Russian Federation (CC RF) [1], one of which is the legalisation of the concept of "corporate contract". The consolidation of this concept in Article 67.2 of the Civil Code of the Russian Federation is due to the development of corporate relations.

However, despite all the advantages of a corporate contract, this design's use leads to various problems. This is not due to the completeness of legislative regulation. In particular, nowadays, issues affect the corporate agreement subject, its subject composition, the ratio of the charter and the corporate agreement, and ways to protect the corporate agreement participants.

A corporate contract's legal structure exists in two versions: Anglo-American and continental, which entails legal regulation peculiarities. In the first case, it has a special regulation, in the second, it is subject to the general provisions of civil law, including the law of obligations. This is due to different approaches to the essence of a legal entity.

Under Russian legislation, a corporate agreement is an agreement on various issues of exercising corporate rights concluded between the participants of a business entity or other persons who have the right to be a party to a corporate agreement under the legislation.

Due to its specific nature, a corporate contract is always consensual, is usually gratuitous and is bilaterally binding. A fiduciary is not typical for the corporate contract.

At first glance, the corporate contract in Russian law is fixed as a corporate contract in the Romano-German legal system. Meanwhile, the current legislation establishes provisions that are not typical for a corporate contract in the continental law system. Thus, Clause 9 of Article 67.2 of the Civil Code of the Russian Federation provides for the possibility of entering into agreements with third parties by participants of a business company that fully coincide with the corporate contract in terms of content. Also, the corporate agreement has priority for its participants concerning the charter of the legal entity.

Therefore, a corporate contract has a dual private-legal essence; namely, it contains legal obligations and corporate elements.

## 2. RESEARCH METHODOLOGY

The object of this work is social relations that arise in the process of concluding corporate contracts, as well as the exercise of corporate rights. The study's subject is the regulatory framework governing the conclusion, operation, modification and termination of corporate contracts, and scientific research on this issue. The aim is to study the current Russian legislation regulating matters related to the corporate contract, scientific literature and identify problems in this area.

To achieve this goal, it is necessary to solve the following tasks: to consider the concept and legal nature of a corporate contract; to determine the subject matter of a corporate contract; to give a comparative legal analysis of the opinions of scientists on relevant issues; to identify the features of the Russian model of a corporate contract.

The study's methodological basis was made up of general scientific methods, such as deduction and induction methods, scientific analysis, description, abstraction, and exceptional legal methods: formal legal, method of legal modelling, and interpretation of the law.

## 3. ANALYSIS OF THE PRACTICE OF REGULATING THE PROCEDURE FOR CONCLUDING CORPORATE CONTRACTS IN RUSSIA

For the first time, the norms on the corporate contract appeared in 2008, with the amendments to Federal Law No. 14-FZ of 08.02.1998 "On Limited Liability Companies" [2], which introduced Part 3 in Article 8, according to which the founders (participants) of a limited liability company have the right to conclude a contract on the exercise of the rights of the company's participants. In signing the Treaty, the founders (participants) undertake to exercise their rights in a certain way and (or) refrain from their implementation, and to take other agreed actions associated with the management, creation, activity, reorganisation and liquidation of companies.

In the future, Federal Law No. 208-FZ of 26.12.1995 "On Joint-Stock Companies"[3] was amended (Article 32.1.), establishing the concept and procedure for concluding a joint-stock agreement.

Before the introduction of these changes, corporate contracts were concluded and were subject to judicial review. The provisions of foreign law were applied to conclude corporate disputes and the judicial review of corporate conflicts [4].

In 2014, the Civil Code of the Russian Federation was amended (Chapter 4), establishing the concept and procedure for concluding a corporate contract (Article 67.2) [5] The wording fixed in the law reveals a corporate contract's concept by listing the conditions that make up

its content. These provisions of Article 67.2 of the Civil Code of the Russian Federation is general concerning the norms of special laws on limited liability companies and joint-stock companies.

To date, there is no unified approach to understanding the subject of a corporate contract in science. Thus, Shleynov A.A. believes that a corporate contract's subject may include issues directly related to a corporate contract regulation and not specified in the law [6]. Meanwhile, according to Lomakin D.V., the corporate contract scope is limited only to issues regarding which the possibility of their inclusion in the contract's text is directly provided [7].

Analysis of the legislation shows a mandatory ban on certain conditions in the corporate contract in some cases. Thus, paragraph 2 of Article 67.2 of the Civil Code of the Russian Federation provides that a corporate agreement may not oblige its participants to vote under the company's bodies' instructions to determine the structure of the company's bodies and their competence.

Also, Article 67.2 of the Civil Code of the Russian Federation provides for the specifics of concluding corporate contracts, depending on the legal entity's organisational and legal form. For example, per paragraph 4 of article 67.2 of the civil code the information on the corporate agreement with shareholders of public joint-stock companies, as a rule, should be disclosed to the extent, according to and as specified in, stipulated by the law on joint-stock companies; information on the content of the corporate agreement concluded by the parties of non-public companies, not subject to disclosure and is confidential.

## 4. PROBLEMS OF DETERMINING THE LEGAL NATURE OF A CORPORATE CONTRACT

Examining the construction of a corporate contract, it can be characterised as follows:

1) consensual. Such a conclusion is drawn from the concepts of a corporate agreement provided for by the Civil Code of the Russian Federation, a joint-stock agreement and participation agreement specified in the Federal Laws on Joint-Stock Companies and Limited liability companies;

2) bilateral or multilateral. At the same time, it can be concluded that several corporate contracts can be concluded within the framework of one company;

3) bilaterally binding (mutual, synallagmatic) or unilateral. Meanwhile, the positions of scientists on this issue differ. For example, according to A.V. Guryev, the corporate contract defines its parties' mutual rights and obligations [8]. According to M. S. Varyushin's research, corporate agreements can be bilaterally binding and unilateral [9]. This position can be accepted since an

agreement can be concluded on the voting of a particular person in a certain way;

4) paid or free of charge. There is no unified position on this issue. Some researchers believe that in the absence of special rules, Article 423 of the Civil Code of the Russian Federation is applied, according to which the contract is paid [10].

According to scientists [10], a corporate contract should be singled out as an independent civil law phenomenon, since Article 67.2 is in chapter 4 "Legal entities". The inclusion of this contract in chapter four of the Civil Code of the Russian Federation indicates the priority position of the contract's content - corporate relations compared with the form – contractual.

Some scientists believe that the corporate contract refers to meetings' decisions and should be regulated by Chapter 9.1 of the Civil Code of the Russian Federation "Decisions of meetings" [11]. However, this conclusion is difficult to accept, as based on this chapter's content, for meeting participants includes all participants of a legal entity, when in turn, parties to a corporate agreement may be all members of the society and some of them.

Meanwhile, some authors believe that the corporate contract should be attributed to the group of contracts for joint activities' organisation [12].

According to another approach, a corporate contract is a kind of civil-legal transactions, and in this case, it applies to the General provisions on obligations (clause 3, article 307.1 of the civil code), unless otherwise provided by law and does not arise from the nature of the respective relations [13,14].

Turning to foreign legal systems, we will see that a corporate contract is a kind of civil-legal contract in Germany and has a binding character [15]. From the Hueck G., Windbichler Ch. point of view, the authors of the "Gesellschaftsrecht", general principles of civil law apply to corporate contracts, including the prohibition of abuse of law [16]. Therefore, corporate contracts are binding only for the parties who have concluded them, and as a result, there is no corporate effect.

In the Anglo-American legal system, a different, "corporate" approach to a corporate contract's legal nature prevails [17,18,19]. Thus, according to S. FitzGerald, G. Muth, authors of the "Shareholders' agreements" study, one of the principles of the corporate contract is no violation of the rights and legitimate interests of third parties, as well as the interests of the company [20], that is, it must not contradict the norms of public order.

In the United States, a closed corporation's shareholders are recognised as having the right to make contractual changes to the management structure for their "own needs". And depending on state law, it is

recognised that it is possible to enter into contracts only concerning agreements on the establishment of voting trusts and shareholder voting agreements or corporate governance agreements. Meanwhile, from M. Ventoruzzo point of view, the absence of corporate contracts in public companies in the United States is explained by the fact that the current legislation provides and guarantees adequate protection of the rights of minority shareholders [21].

We believe that this issue's correct perspective is the position according to which a corporate contract has a complicated legal nature. Thus, I.S. Shitkina argues that these agreements' legal nature is dual and has both corporate-legal and mandatory components [22]. This point of view is supported by M.I. Inozemtsev [23].

#### ***4.1. The legal relationship of the corporate contract with the charter of the business entity***

In the UK, a corporate contract in closed companies may contain conditions that differ from the charter's provisions, including a clause on the advantage of contractual terms over statutory ones [24]. Meanwhile, such a contract must be concluded by all participants, as well as deposited with the registration authority [20]. Shareholder agreements are currently used in common law countries as private corporations' constituent documents [25,26].

In German law, a corporate contract binds only the participants, while it does not affect the corporate governance structure and should not contradict the corporation's charter. Such agreements' legal nature leads to the fact that a corporate contract cannot contradict the charter and does not prioritise it.

In the Russian Federation, the company's charter is a local regulatory legal act that is binding and applies to all company participants and has forced interested third parties. Any interested person can get acquainted with the charter; therefore, the charter has signs of public reliability and openness.

In its essence, the charter cannot be changed in private interests, and when making changes, the procedure established by law must be observed. Therefore, the charter is a normative act of the highest legal force concerning this corporation's other local acts, and the latter should not contradict it.

Therefore, a corporate contract is an act that supplements and details the corporation's charter provisions.

However, in paragraph 7 of article 67.2 of the Civil Code provides that "parties to a corporate contract is not entitled to rely on its invalidity in connection with its contradiction of the Charter." The Plenum of the Supreme Court of the Russian Federation clarifies that "in this case, the party to the corporate contract retains

the right to present claims based on it to other parties to the contract" [24]. The presence of such a rule leads to the fact that the charter loses its imperative principles.

The possibility of concluding a corporate agreement by the company's participants that contradicts the charter allows not to make changes to the charter, avoiding a lengthy procedure for making changes to the charter and their registration, but to settle the relationship by contract. For example, during a corporate contract conclusion, the parties could change the procedure for alienating shares in the authorised capital, which is provided for by the charter, and, therefore, such changes will be legitimate.

Under Clause 5 of Article 67.2 of the Civil Code of the Russian Federation [1], a corporate contract does not create obligations for persons who are not parties to it. Therefore, any contract provisions that contradict the corporation's charter provisions will only apply to this contract's signatories.

## 5. CONCLUSIONS

Based on the above, it can be concluded that the main purpose of the corporate contract is to supplement and clarify the provisions of the constituent document of the corporation - the charter. A corporate contract gives rise to binding and corporate legal relations related to corporate organisations' participation in and management.

The problem is related to the ratio of the charter, and the provisions of the corporate contract can be resolved by making the Civil code of the Russian Federation the norms providing for the right of members of the company and third parties that are not parties to the corporate contract in the event of a conflict, the provisions of the Treaty the Statute of the economic company, to accept such provisions of the contract null and void.

With the development of corporate relations, the complication of legal relations, and various problems in implementing concluded corporate contracts are increasingly appearing. The analysis of scientific research in this area has demonstrated different opinions in the doctrine on several issues arising in connection with the conclusion and execution of a corporate contract. In particular, there is no unified approach to understanding the legal nature of the corporate contract, the relationship between the corporate contract and the charter is not clear, and there are significant gaps in the protection participants' rights in the corporate contract.

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