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PRE-EMPTION RIGHT OF SHAREHOLDERS TO PURCHASE SHARES FOR SALE IN PRIVATE LIMITED LIABILITY COMPANIES: THE PROBLEMATIC LEGAL REMEDIES

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Abstract. This article analyses the problems that can arise when implementing the rights of shareholders in private limited liability companies to purchase the shares of another shareholder being for sale in priority to others and the possible legal remedies for violated rights. According to the practice of the Lithuanian Supreme Court, the rights of the buyer cannot be assigned to a private limited liability company shareholder whose pre-emption right to purchase the shares being for sale has been breached. However, in this article it is being argued that perhaps in certain exceptional cases, in order to create fair business practice and ensure a "tangible" result for the plaintiff in relation to the judgment, the court could (should) take advantage of the freedom to maneuver and, by implementing justice, change the method of restitution (pertaining to the subject) – assign the shares to the plaintiff (an aggrieved shareholder) simultaneously creating an obligation on the same person to settle properly with the last owner of the disputed shares.

Keywords: private limited liability company, sale of shares, pre-emption right of the shareholders, assignment of buyer's rights, restitution.

JEL Classification: K22.

Introduction

The development of an entrepreneurship and the possibility to accumulate a bigger capital in commercial activities foster participants of the civil turnover to incorporate their capital and expertise when establishing companies. However, due to the existence of mutual fiduciary relationships and significant investments, it is simultaneously important to the participants who will be their business partners in result of the sale of the shares. Both Lithuanian (Tikniūtė 2008; Lauraitytė 2014a) and foreign law scholars (Talbot 2008; Mantysaari 2012) have repeatedly analysed *historical origins* of company's formation and *the need to constrain the change in the participants* in business relationships. Global social changes in the business sector and the aspiration to minimise the risk of disputes when one or more participants decide to withdraw from the ongoing business, encourage for further investigation in this article in order to help to determine whether the current legislature and the case-law of the Supreme Court of Lithuania (hereinafter – SCL) ensure fair business practices and regulate adequately the legal relationships between the shareholders of a private limited liability company (Lith. – *uždaroji akcinė bendrovė*, *UAB*; hereinafter – *UAB*), where one of the shareholders wishes by the pre-emption right to acquire the other shareholder's shares, and what legal remedies can be taken where the procedure of the implementation of the pre-emption right is violated. The article particularly analyses the problems of the breach of the pre-emption right of shareholders of *UAB*, as the latter is the most popular and attractive form of business in Lithuania. According to the data of the Register of Legal Entities, in the beginning of 2015, 114,738 *UABs* had been registered in Lithuania; that made 64 per cent of all

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registered private legal entities, i.e., 177,507 (VĮ "Registrų centras" 2015).

1. General aspects of the right of pre-emption to acquire shares offered for sale in a private limited liability company

Although according to Article 23 of the Constitution of the Republic of Lithuania (hereinafter – the Constitution) a person is free to dispose of his property, in some cases, however, the legislature does not make this right an absolute one, as *transferable* shares does not necessarily mean *freely tradable* shares (Kraakman *et al.* 2009). In legal doctrine, the following several systems for the limitation of the transfer of a company's shares are usually mentioned: the so-called *consent clause* and the so-called *proposal clause* or *pre-emption clause* (Maitland-Walker 2008). Following the *consent clause*, a participant in the company has to get the consent of the specific body (general meeting of the participants or other management body, i.e., the board) or of all other participants in the company prior to transfering the shares to the third party. In the event the consent for the transfer is not granted, the transferor may apply to the court and to initiate judicial proceedings to determine whether the refusal is adequately grounded (such regulation is applied, for example, in Austria, Belgium, Germany) (Kalss 2004); otherwise, an obligation to the company to redeem such participant's shares shall be imposed (e.g., in Portugal, Italy, Norway, France) (ed. Dornseifer 2005; Maitland-Walker 2008). Meanwhile, under the *proposal* (*pre-emption*) *clause* the participant is obliged to offer his shares to other participants in the company before such shares could be sold to an outside third party, i.e., this system includes other participants' preferential rights to purchase shares being under the sale (ed. Dornseifer 2005; Maitland-Walker 2008). Similar regulation is being applied in England as well. However, it should be additionally mentioned that the Companies Act provides the companies' directors with the discretion right to decline to register the transfer of the shares if the requirement of pre-emption right has not been observed (Stamp 2001); and until 1980, there was a mandatory requirement to include into the articles of association of private entities the limitations to transfer the shares to the third parties (Companies Act 1948 (s 28), 1980 (Sch 4)). It means that the legislator granted companies' management with the specific measures to control the changes in the participants. Although until the rewording of the Law on Companies (hereinafter – LoC) in 2003, in Lithuania, the consent clause existed as well – the legislator in Art. 34(2) of the LoC 1990 and Art. 34(7) of the LoC 1994, had established an option to provide for in the articles of association the requirement to get the consent of the Board (later general meeting of the participants, director) for the transfer of shares, i.e., if the consent was not granted, the shares could not be transferred (in such event the shareholder was entitled to dispute ungrounded refusal); however, as from the beginning of 2004, exclusively the proposal (pre-emption) clause has been applied. The current LoC (the wording of 14/10/2014) states that a shareholder must deliver a written notice to a private limited liability company of his intention to sell all or a part of the shares in a private limited liability company and indicate the number of shares being disposed of according to their classes and sale price, and the right of pre-emption to acquire all the shares offered for sale in a private limited liability company shall be vested in the shareholders who, on the day of receipt of the shareholder's notice of his intention to sell shares in a private limited liability company, held shares in the company (*note of the author* – other shareholders must acquire all the shares offered for sale, it is not possible to acquire a part of the shares by the pre-emption right) (Art. 47(1-2) of the LoC). However, the legislator had worded Article 47(2) of the LoC dated 11/12/2003, which was in effect between 01/01/2004 and 01/03/2010, as follows: "*The right of pre-emption to acquire all shares offered for sale in a private limited liability company shall be vested in the shareholders who, on the day of receipt of the shareholder's notice of his intention to sell shares in a private limited liability company, held shares in the company, unless the Statutes provide otherwise*". Due to such wording until 01/03/2010 it seemed that shareholders could not eliminate the right of pre-emption by the articles of association. The SCL has explained the aim of this general provision stating that proper implementation of the pre-emption right of the shareholder allows to decrease the number of the shareholders of the company and thus to concentrate the capital in a single pair of hands. The pre-emption right gives an option to retain the strategic management, which is executed by the company's shareholders, among persons already participating in the company's capital and skilled in its activity (Ruling of 22/12/2009 in civil case No. 3K–3–587/2009). The fact that the SCL has not provided any argument detailing why shareholders in no event could agree on such rule in the articles of association shall be appraised in a critical manner. In the opinion of E. Lauraitytė (2014b), evaluating the position of the court *in the prospect of the contractual theory of the corporation*, such an overall interdiction without negating the arguments (e.g., whether a refusal of such rule always leads to additional costs of a transaction and is ineffective *per se*) seemed indefensible. Therefore, other corporative law scholars (Bitė, Kiršienė 2008) also noted in their research works that only other criteria to identify shareholders bearing the pre-emption right (e.g., that the pre-emption right is retained for the shareholders who held shares in the company not on the day of receipt of the shareholder's notice, but on the day of the sale of

shares, etc.) or somehow different (more detailed) procedure for the implementation of the pre-emption right could be itemised in the articles of association; however, the right itself could not be eliminated. In the new wording of the LoC, which came into force on 01/03/2010, the legislator in Article 47(9) had changed the regulation stating that "*the articles of association of a private limited liability company may stipulate a procedure for selling shares other than the procedure stipulated in paragraphs 1–8 of this Article*", i.e., it seems that the legislator allowed the company's shareholders to absolutely eliminate the mentioned pre-emption right in the articles of association. However, this question could still be considered to be open.

The further analysis of the structure of Article 47 of the current LoC shows that Paragraphs 3–7 stipulate the procedure for the implementation of the pre-emption right to purchase the shares offered to sale, and Paragraph 11 details specific exemptions where the pre-emption right shall not be applied: "*If shares in a private limited liability company are disposed of in any other manner prescribed by law (other than by selling) or under the court decision, this Article shall not apply; however, in any case of share disposal, the number of shareholders in a private limited liability company may not exceed <...>*" 249 shareholders (Art. 2(4) of the LoC). It follows that, in each individual case, the company's shareholders are given the freedom to decide for themselves whether during the company's activities it will be guided by the pre-emption right to purchase the shares on sale guaranteed by Art. 47(2) of the LoC, or due to the specifics of the company this right will be withdrawn in the articles of association by the agreement between the shareholders. In our opinion, while establishing such a legal regulation the legislator could have taken into account the essential circumstance, that when large number of shareholders operate the company (e.g., from 10 to 249 natural and/or legal persons), the implementation of the pre-emption right set forth in Article 47 of the LoC could contravene the aim of the limitation of the change in shareholders, which is emphasised in the SCL case-law (e.g., Ruling of 05/05/2009 in civil case No. 3K–3–168/2009), i.e., to ensure the right of *delectus personae* of the shareholders of *UAB* which means that partners (shareholders) have the possibility *to choose* other partners and that neither group of partners can take another person as a partner without the consent of each and every partner (Law Dictionary 2015). When *UAB* becomes formally similar to a public limited liability company (shares to be transferred without any limitations, number of shareholders reaches a limit of 249, etc.), it becomes not so important to the remaining shareholders who will be their business partners as a result of transfer of the shares. When sufficiently remarkable gap appears between the large number of the shareholders and the management of the company, the main interest of the shareholders (at least the most of them) amounts to the receiving of the dividends without much of participation in the activities of the company. Meanwhile, when the company has a small number of shareholders (e.g., up to 10 people), after the participants use the pre-emption right to acquire the shares offered for sale, the number of shareholders clearly decreases; which means that the business only retains shareholders who have a goal to continue to operate and satisfy their private interests, to make profit, to participate in the management of the company or even to take a position of a director and/or a board member and so on. Of course, this reduces the risk of disputes between the shareholders. Failure to comply with the shareholders' pre-emption right to acquire the shares makes it possible for bystanders, including those who have nothing to do with the business and never had, to become the participant of the company and affect its management. Under these circumstances, there appears a good chance for a dispute between shareholders, the consequences of which could lead the company to its bankruptcy and liquidation. On the other hand, in this case the freedom of shareholders self-regulation has a priority.

2. Possible legal remedies for protection of violated pre-emption right of a shareholder

It is clear that the above mentioned pre-emption right to purchase the company's shares being sold, which is set forth in Article 47 of the LoC, has common features with the priority right to buy a portion held in commonly owned property, which is enshrined in Article 4.79 of the Civil Code of the Republic of Lithuania (wording effective on 16/12/2014) (hereinafter – the Civil Code). The mentioned provisions (Art. 47 of the LoC and Art. 4.79 of the Civil Code) differ in nearly one essential thing – Art. 4.79(3) of the Civil Code states that if the portion is sold in violation of priority right to buy it, the other co-owner shall have the right, within three months, to demand through court the assignment of buyer's rights and obligations to him. Meanwhile, the legislator has not foreseen such a right in Article 47 of the LoC. Forming the unified case-law, the SCL emphasizes this difference in many rulings as well (e.g., Ruling of 14/12/2007 in civil case No. 3K–3–464/2007; Ruling of 22/12/2009 in civil case No. 3K–3–587/2009), stating that ownership of shares in *UAB* does not create legal status of the co-owner to the shareholder, and the pre-emption right to purchase the shares to be sold according to Article 47 of the LoC is related to the peculiarities of *UAB* activities. Therefore, the provisions of Article 4.79 of the Civil Code concerning the assignment of the buyer's rights when selling the shares *shall not be applied*. The rights of the shareholder who was not offered to buy the shares and the shares were disposed of to the third party avoiding transfer restrictions, in the opinion of the SCL, are

defended by annulling such transfer *ab initio* and applying the restitution (Art. 6.145 of the Civil Code). Let us try to analyse in deep the arguments to confirm or exclude the possibility for the plaintiff, i.e., the shareholder, who has not been offered to buy the shares by pre-emption right, to assign the buyer's rights.

2.1. Feasibility to assign the buyer's rights and obligations

The impossibility to assign the buyer's rights and obligations is grounded by the set of arguments.

First of all, Article 23 of the Constitution formalises the principle of property's inviolability and the common rule that without the owner's consent property may be transferred to another owner only in cases established by law (legal analogy cannot be applied – SCL Ruling of 22/12/2009 in civil case No. 3K–3–587/2009). Article 4.47(1)(12) of the Civil Code states that the ownership right can be acquired "*as else described by law*", and Article 1.138(1)(8) of the Civil Code provides that civil rights can be protected by "*other ways provided by law*". Thus, restrictions are possible only in special cases expressly prescribed by law. The essence of the right of ownership of the shares is enshrined in a will of the shareholder to manage, use or dispose of these shares in regards to the requirements set by law (Rymeikis 2004). It is prohibited to restrict the shareholders' right to sell or otherwise transfer the shares to the other person's ownership more than it is mandated by law, as this would violate the constitutional rights (SCL Ruling of 5/12/2005 in civil case No. 3K–3–639/2005; SCL Ruling of 29/01/2003 in civil case No. 3K–3–155/2003; SCL Ruling of 4/02/2002 in civil case No. 3K–3–209/2002; SCL Ruling of 9/10/2000 in civil case No. 3K–3–976/2000; SCL Ruling of 1/05/2000 in civil case No. 3K–3–494/2000).

Second, neither LoC nor other laws state that the assignment of the buyer's rights and obligations is possible in the event of violation of the pre-emption right; meanwhile, it is clearly entrenched for the co-owner of a property in Art. 4.79(3) of the Civil Code. Moreover, ownership of shares in UAB does not create legal status of the co-owner to the shareholder, and pre-emption right to purchase the shares to be sold according to the LoC is related to the peculiarities of UAB activities; therefore, the provisions of Article 4.79 of the Civil Code *shall not be applied* in regard of the transfer of the shares (SCL Ruling of 14/12/2007 in civil case No. 3K–3–464/2007).

Third, in countries where such a possibility is an option, it is clearly set forth in the legislation (e.g., in Art. 7(3) of Russian Federal Law on Joint-Stock Companies (wording of 22/11/2014)) and the case-law (Resolution No. N4/8 of 02/02/1997 of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Arbitration Court of the Russian Federation). Meanwhile, in other countries, where such clear provisions do not exist, such an option is negated. For instance, the Supreme Tribunal of Spain in 2005 stated that other shareholders do not have any right to acquire shares at the price and terms stipulated by the invalidated contract (Petz *et al*. 2005).

Fourth, rights of the aggrieved shareholder are sufficiently protected by recognition of the share transfer transaction to a third party null and void (Art. 1.80 of the Civil Code) and the application of the restitution (Art. 6.145 of the Civil Code), i.e., restoration of the shares ownership to the previous owner (Art. 1.138(1-2) of the Civil Code) that, in order to properly transfer the shares once again, will have to comply with the requirements of the law on pre-emption right of the shareholders; however before that the parties should be returned to the *status quo*.

Fifth, the plaintiff should not be placed in a better position than it would have been if procedures for the implementation of the pre-emption right had been properly carried out. Even if the seller properly informs other shareholders about the intention to sell his shares, it still does not mean that the plaintiff would acquire these shares, because the seller can generally change his position to sell the shares or decide to increase the price when he finds out that the other shareholder wishes to acquire the shares, and the seller will not be able to transfer them to the buyer to whom he may apply a "special price" (e.g., a good friend, a relative, or alike). In the case-law (SCL Ruling of 5/09/2008 in civil case No. 3K–3–276/2008; SCL Ruling of 5/05/2009 in civil case No. 3K–3–168/2009; Lithuanian Court of Appeal Ruling of 23/06/2003 in civil case No. 2A–233/2003; Lithuanian Court of Appeal Ruling of 11/12/2007 in civil case No. 2A–162/2007, etc.), it is considered that the shareholder's notice of its intent to sell all or part of the UAB shares is a component of share transfer procedure ensuring the implementation of the company shareholders' pre-emption right to acquire the shares being sold (in Latin *lex obligationis*), i.e., a statutory obligation, execution of which is not a *formal offer* (a proposal for concluding a contract that is sufficiently definite and bounds the seller in the case of acceptance – Art. 6.167 of the Civil Code) by default, but just a *proposal* to use the pre-emption right to buy and negotiate (unless the proposal is very definite in scope and could be recognised as a formal offer). The principle of freedom of contract entrenched in Art. 6.156 of the Civil Code shall be applied to the offer and acceptance as legal facts, replacing, generating or ceasing the civil rights and obligations. Under that principle, the parties to the transaction shall have the right to freely enter into contracts and discretion to determine the mutual rights and obligations, which is entrenched by the legislator. It is this principle of freedom of contract that delimitates the scope of Article 6.156 of the Civil Code and the implementation of the pre-emption right to acquire

property for sale that is established by the imperative legal norms (Ražanaitė 2008). So, if any proposal would be considered to be a formal offer, there may be cases where another shareholder "benefits from the situation" and by legal means takes over the shares, which the seller for some reason did not want to transfer to the latter subject.

On the other hand, arguments in support of the assignment of buyer's rights and obligations *feasibility* can also be distinguished.

First, the wording of Art. 47(5) of the LoC implies *the obligation* to sell the shares to shareholders who have expressed their willingness.

Second, such civil remedy can be considered as *a recognition of the rights* (Art. 1.138(1) of the Civil Code), or *a fulfilment of the obligation in kind* (Art. 1.138(4) of the Civil Code), or *modification of the civil relationship* (Art. 1.138(5) of the Civil Code), which would objectively ground the argument, that such a possibility is stipulated by law though. In addition, it is possible to follow the general principles of justice, reasonableness and good faith making content of the law (Art. 1.5 of the Civil Code) that may imply the implementation of such right in the circumstances of the specific case.

Third, the allowability of such a remedy could be justified by giving the priority to such functions of the pre-emption right as concentration of the capital in the same hands (extension of the company's strategic management's efficiency and ease) and preventing outsiders coming into the company, the choice of partners (*delectus personae* right), that is probably the most substantial goal of constraints (limitations) to changes in participants of private legal entities (SCL Ruling of 05/05/2009 in civil case No. 3K–3–168/2009).

Fourth, Art. 1.137 of the Civil Code does not justify unfair behaviour, so if in a civil case the court comes to the conclusion that one of the parties is unfair and abuses the right, the court may have to be on the side of the party which is not in default and allow taking over the rights of the buyer.

Fifth, Art. 30 of the Constitution establishes the principle of *effective judicial protection* that should ensure for the claimant the opportunity to finally prevent unlawful conduct of the defendant, since after the application of restitution (Art. 6.145 of the Civil Code) the defendant could sell the same shares again to the same or any other third party, thus tendentiously breaching the interest of the plaintiff (shareholder not in default); and then the applicant would have no other choice, but to once again claim for a judicial defence. This means that the plaintiff would not get any real, "tangible" outcome. In this case, the following question arises: does the court properly defend the rights of the plaintiff and execute justice?

However, in the SCL case-law, the priority was given to returning the parties to the previous position; and an assignment of the rights of ownership without the will of the owner is regarded very carefully. Therefore, the assignment of the rights of the purchaser is not applied, dissimilarly to the rule provided for in Art. 4.79 of the Civil Code.

2.2. The new possible option is the modification of the method of restitution

Although the position of the SCL regarding the assignment of the rights of the buyer is formed and rights are not assignable; however, as can be seen from the above arguments, the provisions under discussion could be interpreted and applied to the other direction as well. Since every civil case and the legal relationship is *individual* by nature, it might be wrong to draw a definite line and state that the case-law of application and interpretation of Art. 47 of the LoC (even in exceptional cases) is not a subject to change.

We can agree that the case-law formed by the SCL and its substantive arguments that the rights of shareholder's (to whom a proposal to acquire the shares has not been made, and the shares have been sold to a third party without transfer restrictions) are defended by recognising a transfer to a third party invalid and by the application of restitution (in which case the shareholder who violated other shareholders' pre-emption right, in order to transfer the shares will have to properly execute the requirements set forth in Art. 47 – SCL Ruling of 22/12/2009 in civil case No. 3K– 3–587/2009). It can be also agreed that the company's share ownership does not create a legal status of the co-owners, and the shareholders' pre-emption right to acquire the shares of the company is related to peculiarities of the operations of the *UAB*; therefore, provisions of Art. 4.79 regarding the assignment of buyer's rights should not apply to the sale of shares (SCL Ruling of 14/12/2007 in civil case No. 3K–3–464/2007). However, does that mean that there are no other options under which a court in some (exceptional) cases could take procedural decisions of other forms?

Even if a specific rule conferring the right to assign the rights of the buyer is not clearly laid down in the LoC, we can simulate certain exceptional cases where, with regard to the specific actual situation, the court could (or should) recognise that the plaintiff should become an owner of the shares being in dispute. In particular, this could be the case where the defendant was *acting in bad faith* (e.g., the seller notices of his intention to sell the shares and another shareholder expresses the desire to purchase these shares; however, the seller still sells the shares at the same price to a third party, possibly even the company's competitor; a shareholder sells the shares to a third party multiple times in turn despite the fact that prior court has already ruled on the first transaction nullity and application of restitution, etc.).

There may also be a situation, where the restitution and return the parties to the previous position are objectively not possible (e.g., if one of the shareholders sells his shares and subsequently dies, the court shall apply the restitution

by returning the shares to the heirs, who are a third party in regards of the shareholders (the plaintiffs) remaining in the company and by Art. 6.426 of the Civil Code may even sell or give away (Art. 6.465 of the Civil Code) the right of succession to other third parties; moreover, such third parties may be considered as competitors who strive to thwart the ongoing business).

Not in all cases *lawful* judgement is *legitimate* judgement, therefore not the law has to be adjusted to the legislation, but the legislation has to be in line with the law, i.e. in the rule-of-law the *legitimacy of justice* shall prevail (Vaišvila 2000). It should be noted that in order to ensure the real justice the SCL has adopted some rather controversial decisions by resolving cases even in the absence of a specific law or rule, but only relying on the Article 30 of the Constitution and the general principles of justice, reasonableness and good faith (Art. 1.5 of the Civil Code). For example, the expanded panel of judges of the SCL in 2011 adopted an unprecedented ruling by deciding that: "*The courts by implementing justice had to apply Art. 30(2) of the Constitution of the Republic of Lithuania directly by filling up the legal gaps ad hoc and to apply the law (inter alia, by making use of legal analogy, by applying general principles of law, as well as legal acts of higher legal force, first of all, the Constitution, as the principle of justice is an universal principle that cannot be achieved by admitting interests of only one person and not protecting the legitimate interests of another person)"* (Ruling of 28/02/2011 in civil case No. 3K–7–70/2011). Another example is the case in which the SCL, for the sake of justice implementation, reopened the case without regard to mandatory requirements of the law providing a renewal limitation of the five-year term (Ruling of 14/04/2004 in civil case No. 3K–3–233/2004). For these reasons, one may consider that the plaintiff's (shareholder's) rights could be defended by means of eventual *modifications* of the institution of restitution, for which the SCL *should not* (!) be obliged to change its current position on interpretation and application of Article 4.79 of the Civil Code and Article 47 of the LoC. Moreover, the rule that when the buyer's rights are assigned, the transaction remains in effect (only the parties to the transaction are replaced), would not be violated, while using restitution the transaction is deemed void *ab initio* and the parties are ought to return everything they have received under the transaction. However, *is it possible to return the asset (shares) to a person not being a party to the transaction?* Restitution (in Latin *restitutio* – restoration of the previous position) is a method of civil rights defence when the party gets back what it has given to the other party, and from the wrongly acquired party is recovered what it has transmitted to the other party (Lithuanian Dictionary 2015). Thus restitution means returning of the parties to the previous (initial) position (in Latin *status quo*) (Art. 1.138(1)(2), Art. 6.145(1) of the Civil Code) (SCL Ruling of 29/04/2008 in civil case No. 3K–3–229/2008). It is easy to notice that the provision set forth by Article 6.145(1) of the Civil Code has features common with the provision of Article 1.80(2) of the Civil Code and states that "*restitution shall take place where a person is bound to return to another person the property he has received either unlawfully or by error, or as a result of the transaction according to which the property has been received by him being annulled ab initio* [...]". The latter wording of "*a person bound to return to another person*", in our opinion, leads to the conclusion that the application of restitution (as a civil rights remedy) and restitution of property must necessarily be associated with the return of property *exclusively to the other party of the transaction.*

Accordingly, there exists a possibility to modify the legal relationship and assign the assets to *the third party*, which *has never been* a party to any specific transaction. This means, that a court, deciding upon an application of restitution, first of all should determine whether the restitution is subject to application in general (Art. 6.145(2), Art. 6.241 of the Civil Code), and upon such decision to apply the restitution the court shall determine the method of restitution (Art. 6.146 of the Civil Code) and assess whether there is no ground to change it (Art. 6.145(2) of the Civil Code (SCL Ruling of 23/04/2009 in civil case No. 3K–7–90/2009; SCL Ruling of 29/06/2009 in civil case No. 3K–3–278/2009; SCL Ruling of 31/07/2009 in civil case No. 3K–3–339/2009). Articles 6.145 and 6.147 of the Civil Code stipulate various modifications of the application of restitution, the essence of which is to ensure fair and grounded balance of interests of the parties. SCL in its decisions detailing the rules for application of restitution noted that when applying restitution in a specific case, a legal possibility for a court to change the method of restitution or not to apply it at all in exceptional cases must be evaluated, if due to its application the situation of one of the parties would become unreasonably and unfairly worsen, whilst the other's relevantly improved (Ruling of 29/04/2008 in civil case No. 3K–3–229/2008; Ruling of 27/01/2009 in civil case No. 3K–3–41/2009; Ruling of 31/07/2009 in civil case No. 3K–3–339/2009; Ruling of 4/12/2009 in civil case No. 3K–3–570/2009; Ruling of 5/02/20010 in civil case No. 3K–3–47/2010). SCL has also recognised that restitution can be changed in a way that would cover a *benefit of the third party*, stressing though that such application must be justified *by exceptional circumstances*, e.g., need of children rights' protection, or ambiguously to arise from the provisions of the law (e.g., Art. 6.66 of the Civil Code) (Ruling of 27/09/2013 in civil case No. 3K–3–457/2013).

It can be argued that in Article 6.145(2) of the Civil Code the legislator is not only aiming to protect the transaction itself, but also the interests of the third persons, and has provided a possibility in certain exceptional cases to change the method of restitution (*in terms of the subject, not the object*)

and to apply it *not to the transaction, but to the third person (third party).* This is clearly reflected in the SCL's case-law regarding this matter, where the prosecutor challenges the County Governor's decisions in the part of the restoration of ownership rights of the defendants to the state forest, as well as all subsequent transactions and seeks restitution; but the court *modifies* the method of application of restitution (in terms of the subject) by *awarding the State* for the returned land to pay the money based on the relevant transactions *to the last* buyer of the illegally transferred land. Therefore, the property is returned *not to the counterpart* (the initial purchaser, which would be burden to return the same asset to the State), but immediately *to a third party* – to the State (although it had not been the counterpart of the last transaction under dispute) (SCL Ruling of 26/01/2012 in civil case No. 3K–3–4/2012; SCL Ruling of 15/11/2012 in civil case No. 3K–7–379/2012).

The specified option to apply restitution is closely related to the rule formed in the case-law that the application of a restitution in a particular case must be based on the principle of fairness *to a wide extent* (SCL Ruling of 15/11/2001 in civil case No. 3K–7–874/2001; SCL Ruling of 24/01/2007 in civil case No. 3K–7–4/2007), and to the essential fact that restitution should not apply mechanically, but should have regard to the conditions of restitution and specific (individual) circumstances of the case (SCL Ruling of 31/07/2009 in civil case No. 3K–3–339/2009) and the company's interests. If, for example, in the event of the aforementioned inheritance situation the court would apply the "standard" restitution and thus increase the number of company's shareholders (i.e., after the death of a shareholder, the shares would be taken over to two, three or more of his heirs), the question that has to be answered is how to ground the objectives of the implementation of Article 47 of the LoC, which were pointed out by the SCL, with the result of such procedural decision (i.e., that it makes it possible to reduce the number of participants in the company and to concentrate capital in the same hands, thus making the company's strategic management more efficient and more comfortable, with a consequent reduction of shareholders' mutual disagreements; and that the pre-emption right gives an option to retain strategic management, which is executed by the company's shareholders, among persons already participating in the company's capital and skilled in its activity (Ruling of 05/05/2009 in civil case No. 3K–3–168/2009)). Although Article 2(4) of the LoC provides that the maximum number of *UAB* shareholders can be 249 persons, in practice it is difficult to find cases when more than 10 shareholders operate *UAB*; this once again highlights the need to limit changes in the participants due to close links between them and *delectus personae* legal guarantees.

Principles of protection of legitimate expectations, legal certainty and legal security imply a duty to the court not to create a possibility for a new dispute to arise, but to protect the interests of the existing participants (shareholders) of the company. If the court did not change the kind of restitution to apply (in terms of *subject*), in such cases the plaintiff would not receive a "tangible" and meeting his interest outcome – after the shares had been returned to the heirs of the deceased, he could not reasonably expect that the shares would be offered to him to buy. In this context, taking into account Article 30 of the Constitution, the principles of justice, reasonableness and good faith constituting the content of the law (Art. 1.5 of the Civil Code), the court having recognised the transaction void (*ab initio)* and in order to realistically and effectively protect the interests of the shareholders, in certain exceptional cases should have the freedom of manoeuvre and modify the legal relation (Art. 1.138(1)(5) of the Civil Code) and change the method of restitution (in terms of subject), i.e., *to assign* shares to the plaintiff protecting his interests (the aggrieved shareholder) simultaneously creating an obligation to settle properly with the last owner of the shares. Lithuania is the rule-of-law state, and the rule-of-law recognizes supremacy of the law – not the legislation itself; for that it is necessary to give priority to real human rights protection, rather than the formalism (Vaišvila 2000). The principle of justice entrenched in the Constitution plays an important role along with the provision that justice is being implemented only by the courts – this means that not the adoption of a decision by court makes it a constitutional value, but a legitimate rulling does. The mere formal judicial implementation of justice is not that justice which is entrenched in, protected, and defended by the Constitution (Resolution of 21/01/2008; Resolution of 24/10/2007; Resolution of 21/09/2006 of the Constitutional Court of the Republic of Lithuania). The court, being the only institution with the right to execute a justice in the name of the state and society, must implement a margin of discretion assigned to it, because if courts are deprived of the opportunity to take a decision in accordance with justice and reasonableness, taking into account certain very important circumstances, the judgement would become merely formal and useless (Constitutional Court Ruling of 24/10/2007; Ruling of 15/05/2007).

Conclusions

Although shareholders' pre-emption right to acquire another *UAB* participant's shares, which had been formalised in the LoC, was considered to be unbreakable, it seems that since 01/03/2010 the legislature has allowed *UAB* shareholders to eliminate that pre-emption right entirely in the company's articles of association, thus giving priority to the freedom of self-regulation of the shareholders. On the

other hand, in the event the shareholders have not opted for such a model and the selling shareholder violates the other shareholders' pre-emption right, the matter of application of legal remedies arises.

Under the SCL case-law, the purchaser's right shall not been assigned to the *UAB* shareholder, whose pre-emption right to purchase shares has been violated. However, in certain exceptional cases, in order to form fair business practices and to ensure "tangible" result of the judgement for the plaintiff, the court could (should) take an advantage of the freedom of manoeuvre and, by implementing justice, change the method of restitution (in terms of subject), i.e., to assign the shares to the plaintiff (the aggrieved shareholder) simultaneously creating an obligation to the latter to settle properly with the last owner of the shares under dispute.

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