THE USE OF SHAREHOLDERS' AGREEMENT IN THE U.S. FOR INTER-GENERATIONAL TRANSFER OF WEALTH AND ALLOCATION OF CONTROL

– LESSONS FOR CROATIA –

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ABSTRACT

Shareholders' agreements (hereinafter: SHAs) are increasingly used in Croatian legal practice despite not being regulated in any statute and there being only a handful of published cases which incidentally mention them. Given the above, I believe it is important to demonstrate what can be accomplished through the use of SHAs, specifically focusing on problems related to the inter-generational transfer of wealth and allocation of control. The latter is one of the burning issues Croatian companies are facing since most of them were formed in the second half of 1990s, and, today, the founders of these companies have reached or are reaching retirement. As a consequence, companies are facing a universal problem: what will happen to the company in the case of a change in control?

In this thesis, I canvas the laws and experiences of the U.S., currently one of the most developed legal systems in this respect, and show how SHAs could, as a special instrument, contribute to the growth of businesses and through that to the Croatian economy. What I demonstrate is that Croatia should take advantage of the extensive U.S. practices related to SHAs and start exploiting them as a powerful tool to overcome the issues related to inter-generational transfer of wealth and allocation of control.

Using a comparative analysis, I portrait relevant Croatian and U.S. laws and practices, with particular focus on pertaining U.S. cases which Croatia could directly benefit from and which could serve as a benchmark even for drafting prescriptive Croatian laws that would not just impose (mandatory) obligations on but also guide legal subjects. Accordingly, this thesis shows that SHAs are one important technique to ensure the survival and continued operation of a company in the event of the retirement or death of the founding shareholder.

LIST OF ABBREVIATIONS

ABA	American Bar Association
Croatia	Republic of Croatia
DGCL	Delaware General Corporation Law
SHA	Shareholders´ agreement
SHAs	Shareholders´ agreements
MBCA	Model Business Corporation Act
MBCA (2016 Revision)	Model Business Corporation Act (2016 Revision)
U.S.	United States of America

INTRODUCTION

i. BACKGROUND

A shareholders' agreement (hereinafter: SHA) is a "separate, additional, contractual arrangement" between shareholders that functions as a conventional contract, separately, but not contradicting, the articles of incorporation and can serve as an additional technique to regulate shareholders' relationship.[1] In an SHA, shareholders may provide for anything they consider of essence, as long as these provisions do not violate the law, articles of incorporation or the bylaws of the company.

While SHAs appear to be increasingly used in Croatian practice, only a few reported cases can be found for the time being. One of the reasons is the fact that these agreements are *per se* confidential and hidden from the eyes of the public. Another one is the fact that shareholders´ agreements, in Croatia, are not regulated by law. This means that SHAs are governed by the general statutory provisions embodied in the Croatian Obligations Act[2] with the mandatory application of the cogent provisions governing the organization and operation of companies enshrined in the Croatian Companies Act[3].

ii. THESIS OBJECTIVE

Given the fact that shareholders' agreements are not regulated by law and yet are increasingly used in practice, I believe it is important to address this particular topic to emphasize what can be achieved through their use. I will particularly focus on problems related to the inter-generational

[1] L. Gullifer and J. Payne, C*orporate Finance Law - Principles and Policy* (Hart Publishing 2011) pp. 10-11.
[2] Croatian Obligations Act Official Gazette NN 35/05, 41/08, 125/11, 78/15, 29/18 Second Part Title VIII Section 1.
[3] Croatian Companies Act, Official Gazette NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19, see for example, Arts 84, 150, 164, 217, 227, 291, 450.

transfer of wealth and allocation of control of small and mid-size businesses (hereinafter: SMEs) controlled by few partners, often family members.

I will concentrate on SMEs because in Croatia, like in many countries worldwide, SMEs numerically represent the largest share of legal entities.[4] Although, strictly speaking, Croatian law does not know for the U.S.-type closely-held corporations, the ensuing discussion will apply, *mutatis mutandis*, to Croatian limited liability companies (Croatian designation *društva s ograničenom odgovornošću*) which are their closest equivalent.

In my view, one way to benefit from comparative law is to come forward with new ideas. I chose Croatia because, similarly to most CEE countries, one of the pressing problems is the inter-generational transfer of wealth and allocation of control since prior to the 1990's, during socialism, companies were not held in private hands. Consequently, this is a novel issue. Due to the war which resulted in Croatian independence, the formation of private businesses began with a bit of a delay compared to Central European post-socialist systems; in the second half of the 1990s thousands of small-scale companies, in the hands of a few people, often family-owned, were formed.

As a result of the passage of time since the creation of these companies in the 1990s, an increasing number of founders are reaching retirement age, which has led to a legal vacuum: what will happen to their companies in the case of a change in control of the company, as shareholder structure changes? In the coming years, this issue will be exponentially growing in importance due to the continued trend of retiring founders.

[4] SMEs and Entrepreneurship Policy Center, Small and Medium Enterprises Report – Croatia 2019 including the results of GEM – Global Entrepreneurship Monitor research for Croatia for 2018 [December 2019] <www.cepor.hr/wp-content/uploads/2015/03/SME-REPORT-2019-EN-WEB.pdf> accessed 13 March 2020, p. 13.

In this thesis, I will take a look at the laws[5] and experiences of the U.S., currently one of the most developed legal systems in this respect, as manifested in a select number of court precedents from Delaware and a number of States following the Model Business Corporations Act (hereinafter: MBCA). The purpose of this is to show by analogy how SHAs could, as a special instrument, contribute to the growth of Croatian businesses and thus, impact the economy. I will demonstrate how SHAs should be utilized, what provisions they can contain, and finally what lessons Croatia may draw from the U.S. experience, with special focus on inter-generational transfer of wealth and allocation of control.

Accordingly, I will demonstrate that SHAs are one technique which can help to overcome the above stated issues. Shareholders can use SHAs as an instrument to ensure that the company will continue to operate after the retirement or death of the founding shareholder by providing details regarding the transfer of control and other related particularities, such as financial support for family members.

iii. RESEARCH METHODOLOGY

In this thesis, I will analyze Croatian laws and exiguous case law with regards to SHAs. Likewise, given the fact that the U.S. model serves as an example of how to tackle this particular topic, I will examine the U.S. laws, in particular the MBCA and the Delaware General Corporate Law, and the extensive case law that has emerged in the practice of the U.S. courts. To supplement the above, secondary sources, notably, books, scholarly articles, and other relevant publications are being considered to provide additional input.

[5] It should be noted here that the Corporate law is the of the various States in the U.S., not the federal law.

I will only address laws and cases that can serve as a beneficial model for Croatia, without limiting the scope of research to any State in particular, as the law regulating corporations, partnerships, and other business forms lies within the jurisdiction of the various States. Such an eclectic approach is justified by the desire to collect as many examples of such best practices.

In addition, I will limit my analysis to the use and role of SHAs in closely held corporations, i.e. corporations that are not publicly listed and that are held only by a few people, usually family members, as most businesses in Croatia exist in a form of closely held corporations called 'limited liability companies' (Croatian designation *društva s ograničenom odgovornošću*)[6].

I would also like to clarify that because the two jurisdictions significantly differ, with the U.S. belonging to the common law legal family, and Croatia to the Continental European civil law system, Croatian courts play a significantly different role in the formation and application of the law.

iv. STRUCTURE OF THE THESIS

In my analysis, I will first address the current Croatian legal framework and practice related to shareholders´ agreements, highlighting specific issues related to the inter-generational transfer of wealth and allocation of control in Chapter I.

Secondly, I will show that, on the basis of the U.S. law and key cases, SHAs can serve as an efficient technique to regulate inter-generational transfer of wealth and allocation of control. In this respect, Chapter II will begin with a general overview of the U.S. legal framework and practice

[6] In Croatian law, so-called *društva s ograničenom odgovornošću* are *per* definition closely held as their shares cannot be publicly listed, see definition of a limited liability company Art 385 of the Companies Act, whereas shares of a join-stock company, Croatian designation *dioničko društvo*, can be publicly listed, see, for example, Art 275 of the Croatian Companies Act, which allows the General Assembly of a join-stock company to decide to publicly list its shares.

related to the shareholders´ agreements. Following this overview, I will particularly focus on the landmark case of *Galler v. Galler* which illustrates the flexible approach U.S. courts have adopted towards various practical solutions provided in the SHAs concerning the transfer of control and wealth in a company. Lastly, I will take a look at other cases that have emerged in the U.S. practice addressing the issue of inter-generational transfer of wealth and allocation of control between the family members to support my argument that SHAs are one effective tool to tackle certain issues that may arise in relation to this particular issue which is widely recognized by the U.S. case law.

Finally, in Conclusion, I will provide a brief summary of the thesis' findings supplemented by the recommendations and advice as to what steps Croatia should consider in the future for the purpose of nurturing the conclusion of SHAs as a special tool to tackle various aspects exemplified in this thesis.

CHAPTER I.

CROATIAN LEGAL FRAMEWORK AND PRACTICE RELATED TO SHAREHOLDERS´ AGREEMENTS

This Chapter provides an overview of what can be found in the current Croatian laws and practice regarding shareholders´ agreements (hereinafter: SHAs).

Before delving into the particularities, it is important to emphasize that terminology in the Croatian language may differ and few variations have been detected in relation to the translation of the phrase 'shareholders´ agreement' in the Croatian language, depending on the nature of the entity whose shareholders are concluding the SHA. While in the case of limited liability companies (in Croatian: *društvo s ograničenom odgovornošću*), the name '*ugovor o uređenju međusobnih odnosa između članova društva'*[7] (metaphrased: agreement on the regulation of relations of the members of a company) is used, in case of joint-stock companies (in Croatian: *dioničko društvo*) the designation '*ugovor o međusobnim odnosima dioničara'*[8] (metaphrased: agreement on the regulation of relations of shareholders) is utilized.[9]

As will be demonstrated hereunder in more detail, the available resources that mention SHAs are rather scarce suggesting that SHAs are not exploited to their full potential and their importance is not sufficiently recognized. While providing a brief overview of the current Croatian legal

[7] Decision of the Croatian Supreme Court Kž 665/09-6.
[8] Decision of the Croatian Supreme Court Kž-Us 94/13-10.
[9] It is should be clarified that Croatian company law forms are similar to those of German law and thus the recognized forms are not fitting those in the U.S. This thesis is focused on closely held companies, corresponding to the U.S. LLC´s and closely-held corporations, while in Croatian law they are called *društva s ograničenom odgovornošću* and *´zatvorena´ dionička društva*, the latter corresponding to the joint-stock companies which are closely held, as opposed joint-stock companies that are publicly listed, called *dionička društva dionicama kojeg se trguje na uređenom tržištu vrijednosnih papira*.

framework and practice (through available sources and case law), I will introduce some specific issues that are emerging these days in Croatia, notably, related to inter-generational transfer of wealth and allocation of control.

1.1. General Overview of the Croatian Legal Framework and Practice Related to Shareholders´ Agreements

1.1.1. Croatian Legal Framework

The organization and operation of companies in Croatia is primarily governed by the Croatian Companies Act[10], whereas formation, rights, and obligations arising out of contracts, in general, are governed by the Croatian Obligations Act[11].

As regards the operation of companies, irrespective of the form of a certain company, the Croatian Companies Act provides information that needs to be contained in the founding act of a certain company, notably, articles of incorporation.[12] The said Act also provides the possibility of including other information in articles of incorporation that shareholders find important or appropriate.[13] One should, however, keep in mind that such provisions are publicly available[14] and, should the shareholders decide to change or amend such a provision, a certain quorum to adopt that decision will be required.

[10] Croatian Companies Act, Official Gazette NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19.
[11] Croatian Obligations Act, Official Gazette NN 35/05, 41/08, 125/11, 78/15, 29/18 Second Part Title VIII Section 1.
[12] It should be noted here that, depending on a type of a company, the terminology used in the Croatian language for the articles of incorporation is *društveni ugovor* in the following companies forms: *javno trgovačko društvo, komanditno društvo, društva s ograničenom odgovornošću*, while is *statut* in *dioničko društvo*.
[13] Croatian Companies Act, Official Gazette NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19 Art 71, 133, 173, 387 Art 71, 133, 173, 388.
[14] Court Register Act Official Gazette NN 1/95, 57/96, 1/98, 30/99, 45/99, 54/05, 40/07, 91/10, 90/11, 148/13, 93/14, 110/15, 40/19 Art 2.

Furthermore, the Croatian Companies Act provides that a company may also adopt bylaws, such as rules of procedure of the Management Board, Executive Directors or General Assembly where the particularities regarding operation and internal procedures of these corporate bodies may be prescribed in more detail.[15] In addition to by-laws explicitly provided by the law, a company may decide to adopt 'other internal documents' governing, for example, labor law, and other similar matters not directly related to the corporate governance.[16] However, the Croatian Companies Act does not provide for any particularities regarding the conclusion of shareholders' agreements nor it prohibits them either.

Given the above, SHAs are governed by the general rules regulating contractual obligations contained in the Croatian Obligations Act.[17] By virtue of Article 2 of the said act, the parties are free to arrange their relationship, i.e. contractual rights and obligations, and these arrangements may not violate the "Constitution of the Republic of Croatia, mandatory laws and the morals of the society".[18] This principle follows the public international law principle providing that everything that is not forbidden by the law, is legally allowed.[19]

While contractual freedom is a well-recognized principle in Croatian law and practice, it is nevertheless not unlimited. Accordingly, one should keep in mind that, in this particular case, the

[15] see, for example, Arts 240, 272i, 274 of the Croatian Companies Act, Official Gazette NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19.
[16] see, for example, Croatian Labor Act Arts 26, 27.
[17] Second Part Title VIII Section 1 of the Croatian Obligations Act, Official Gazette NN 35/05, 41/08, 125/11, 78/15, 29/18.
[18] Croatian Obligations Act, Official Gazette NN 35/05, 41/08, 125/11, 78/15, 29/18 Art 2.
[19] see, for example, the answers of the Croatian Constitutional Court No. SuP-MS-2/2008 acknowledging this principle, <www.confeuconstco.org/reports/rep-xiv/report_Croatia_cr.pdf> accessed 14 April 2020, available only in Croatian language, also a number of scholarly articles refer to the said principle, e.g. Jadranko Crnić, 'Ustavna (dis)harmonija jamstva i ograničenja prava vlasništva' [Constitutional (dis)harmony on the guarantees and limitations of the ownership title] (Hrvatska javna uprava, 1999), <www.hrcak.srce.hr/197502> accessed 14 April 2020, Mato Arlović, 'Ocjena ustavnosti i zakonitosti drugih propisa' [Assessment of the constitutionality and legality of other regulations] (PRAVNI VJESNIK BR. 3-4, 2014), <www.hrcak.srce.hr/134180> accessed 14 April 2020.

cogent provisions of the law still apply to SHAs, notably ones contained in the Croatian Companies Act.[20] To illustrate, parties may not in an SHA exclude shareholders' right to be informed and inspect books, financial reports and other relevant documents of the company because it is prohibited by the Croatian Companies Act.[21] Therefore, as a general rule, there are no restrictions regarding the formation or content of the SHAs, within the limits prescribed by the law.

Although articles of incorporation and bylaws may provide various provisions regarding the governance of the company and various financial matters, the Croatian Companies Act does not provide for a private-law mechanism that could potentially address similar matters, particularly, shareholders´ agreements. However, the mere fact that the law does not lay down the rules governing SHAs does not mean that they are not used in practice, as will be shown below.

1.1.2. CROATIAN PRACTICE

As previously noted, the fact that SHAs are not regulated makes them, at least for the time being, difficult to find in reported Croatian case law. During the research for this thesis, I found merely a handful of publicly available cases which directly or incidentally refer to SHAs.

To start with, two decisions of the Croatian Supreme Court rendered in criminal proceedings have been identified that only incidentally refer to SHAs.[22] The decisions acknowledge that a certain SHA has been entered into, without providing further detail on the content of SHAs.[23] Due to these considerations, further particularities of these decisions will not be analyzed.

[20] Croatian Companies Act, Official Gazette NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19 see for example, Arts 84, 150, 164, 217, 227, 291, 450.
[21] ibid Art 84.
[22] Decision of the Croatian Supreme Court Kž 665/09-6 and Decision of the Croatian Supreme Court Kž-Us 94/13-10.
[23] ibid.

Further, two related arbitration cases have been identified that arose regarding the Shareholders Agreement Relating to INA-Industrija nafte d.d., entered into between the Republic of Croatia and MOL Hungarian Oil and Gas Company Plc on 17 July 2003, as amended in 2009.[24] The said SHA contains various provisions regarding the corporate governance, dividend policy, transfer of shares, deadlock, dispute resolution, and similar provisions.[25]

The first case was initiated by the Republic of Croatia versus MOL Hungarian Oil and Gas Company Plc before the Permanent Court of Arbitration.[26] In this case Croatia´s main allegation was that the SHA is null as a result of the bribery affair that led to its conclusion.[27] In the alternative, Croatia alleged that, under Croatian corporate law, it should be proclaimed null and void because the proposed model allegedly creates a model of corporate governance that is in violation of the Companies Act.[28] Croatia alleged that this model deprives the Management Board of its right granted by Article 240 of the Companies Act, and it gives shareholders rights which are outside of their authority.[29] The most disputed provision of the SHA, clause 7.5., was the one that provided for a corporate structure that strengthened the influence of MOL, the majority shareholder, in the company.[30] The said clause stipulated that MOL is having 5 out of 9 seats on the Supervisory Board, had the right to nominate the President of the Management Board, and it created the Executive Board, a new body consisting of Executive Directors, chosen by the Management Board.[31] In this respect, the Tribunal found that this clause is not in violation of Croatian corporate

[24] The shareholders´ agreement entered into between Croatia and MOL on 17 July 2003 is available at <www.molincroatia.com/sites/default/files/SHA%2017-07-2003.pdf> and its first amendment dated 30 January 2009 is available at <www.molincroatia.com/sites/default/files/FASHA%2030-01-2009.pdf> both accessed 25 March 2020.
[25] ibid.
[26] *Republic of Croatia v. MOL Hungarian Oil and Gas Company Plc*, PCA Case No. 2014-15.
[27] ibid.
[28] *Republic of Croatia v. MOL Hungarian Oil and Gas Company Plc*, PCA CASE No. 2014-15, Final Award 23 December 2016, paras 334, 342.
[29] ibid.
[30] ibid para 335.
[31] ibid.

law, as by virtue of the Croatia Companies Act, "the Parties were allowed to include a provision in the FASHA regarding the creation of the Executive Board as a working group, so long as it was understood that this body was not a third corporate organ."[32] Also, the Tribunal rejected other claims brought by Croatia, which will not be examined in more detail as that part of the award focuses on different issues.[33]

The second case is the ICSID arbitration case initiated by the MOL Hungarian Oil and Gas Company Plc versus the Republic of Croatia, related to the underlying SHA.[34] In this case Croatia alleged violation of the Energy Charter Treaty and numerous provisions contained therein and objected to the tribunal´s jurisdiction claiming that the 2009 Shareholders' Agreement was obtained through bribery.[35] As this case is still pending, details are not presented here because the final award has not been reached yet.

When it comes to publicly available information on SHAs concluded in Croatia, the Croatian Government has published a summary of the SHAs entered into between Croatia, HT – Hrvatske telekomunikacije d.d. and Deutsche Telekom AG.[36] These SHAs contain various provisions regarding corporate governance, dividend policy, transfer of shares and alike provisions.[37] The

[32] ibid 409.
[33] ibid 467.
[34] *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32.
[35] Margareta Habazin, 'MOL v. Republic of Croatia: The ICSID Case Where Investor Corruption as a Defense Strategy of the Host State in International Investment Arbitration Might Succeed' (2015) Kluwer Arbitration Blog <www.arbitrationblog.kluwerarbitration.com/2015/11/16/mol-v-republic-of-croatia-the-icsid-case-where-investor-corruption-as-a-defense-strategy-of-the-host-state-in-international-investment-arbitration-might-succeed/#comments> accessed 25 March 2020.
[36] Sažetak Ugovora o međusobnim odnosima dioničara, sklopljenog 17. listopada 2001. godine između Republike Hrvatske (RH), društva Deutsche Telekom AG (DT) i društva Hrvatske telekomunikacije d.d. (HT) [Summary of the Shareholder's Agreement Concluded on 17th of October 2001 between the Republic of Croatia, the Company Deutsche Telekom AG and the Company Hrvatske Telekomunikacije d.d.] (The SHA is only available in the Croatian language) <https://mmpi.gov.hr/UserDocsImages/arhiva/2007/HT%20ugovori-svi.pdf> accessed 25 March 2020.
[37] ibid.

Croatian Government published these agreements because it holds a substantial number of shares in HT – Hrvatske telekomunikacije d.d., which is in the process of privatization.[38]

As the brief overview of the case law indicates, while SHAs are used in practice, a handful of cases and other sources suggest that the importance of the SHAs has not yet been sufficiently recognized and that they are not used to their full potential as in other developed systems. As I demonstrate in Chapter II, the time has come for change.

1.2. Specific Issues Related to Inter-Generational Transfer of Wealth and Allocation of Control

As already indicated in the introduction, after seceding from Yugoslavia and becoming independent in in the early 1990s, Croatia adopted a new regulatory framework for the organization and operation of companies. The first Croatian Companies Act that was based on principles of market economy known and inspired by Western European standards, notably German law, was passed on 23 November 1993 and entered into force on 1 January 1995.[39]

This was followed by the formation of thousands of small-scale companies, in the hands of a few people or families. From the time of their formation in 1990's, more than a quarter of a century has passed and inevitably the issue of succession emerges, as the founders of these companies reached and are about to reach their retirement age, while some are already deceased. In this respect, my claim is that thousands of companies are facing the same issue: what will happen to them in the case of transfer of control or wealth between generations of shareholders?

[38] According to the available data published on the website of INA, the Government of Croatia holds 44.8% of the shares in INA, see < https://www.ina.hr/en/home/investors/struktura-dionicara/> accessed 3 June 2020.
[39] Croatian Companies Act, Official Gazette NN 111/1993.

To illustrate, according to the Croatan Bureau of Statistics, in March 2019, the number of registered legal entities was 268,204, of which 154,184 were active, and 83.7% were held in private ownership.[40] In 2018, 99.7 % of the registered legal entities were small and mid-sized businesses.[41] In addition, according to KPMG´s latest research, 80% of Croatia´s SMEs are family-owned businesses.[42]

Researchers suggest that percentual-wise less and less family firms continue into the next generation: 30% were demonstrated to continue into the second generation, while only 15% into the third one.[43] This data demonstrates that companies encounter a variety of obstacles during the transition period, in the end leading to a dissolution of the family businesses which are being managed by subsequent generations. Accordingly, the process of inter-generational transfer of family business represents one of the most "critical issue confronting family firms".[44]

It is needless to say that shares in a company[45] represent assets that can be transferred to successors in the case of the death of the shareholder. This transfer occurs either *ex lege* to legal successors or according to the will to the appointed successors, as provided in the Croatian Inheritance Act.[46] However, neither inheritance law nor companies´ law provides particularities regarding such a

[40] Croatian Bureau of Statistics, Release on the Number and Structure of Business Entities [March 2019] <www.dzs.hr/Hrv_Eng/publication/2019/11-01-01_01_2019.htm> accessed 18 March 2020.
[41] SMEs and Entrepreneurship Policy Center, Small and Medium Enterprises Report – Croatia 2019 including the results of GEM – Global Entrepreneurship Monitor research for Croatia for 2018 [December 2019] <www.cepor.hr/wp-content/uploads/2015/03/SME-REPORT-2019-EN-WEB.pdf> accessed 13 March 2020, p. 13.
[42] KPMG, Family Business Croatia <www.home.kpmg/hr/en/home/industries/family-business.html> accessed 18 March 2020.
[43] Michael H. Morris, 'Correlates of Success in Family Business Transitions' (1997), Journal of Business Venturing Vol.12n5, 385, p. 386.
[44] ibid 387.
[45] While in US law the term 'share' is used both for closely held and public corporations as well as LLCs, in Croatia different terms are used, namely, a share in a limited company (*društvo s ograničenom odgovornošću*) are called *poslovni udjeli*, while a share in a joint-stock company (both closely held and publicly listed) are called *dionice*. Nevertheless, discussion in this thesis will apply to both *mutatis mutandis*.
[46] Croatian Inheritance Act Official Gazette NN 48/03, 163/03, 35/05, 127/13, 33/15, 14/19.

transfer. Many issues may emerge from a situation where the deceased shareholder did not specify how shares should be transferred and whether the company should be wound up or not. Other potential issues include the following: what happens with directors and the composition of the board? Similarly, what happens if successor(s) are not suitable to step in, or simply do not want to? Furthermore, it may also be a pivotal issue in the case of family firms whether the company can provide for remaining family members (spouses, sons, and daughters) from future income through the continued payment of dividends or salaries?

All these issues should be addressed beforehand in order to ensure that the company continues to operate successfully, that the existing amount of control is preserved and financial stability and security of the successor is guaranteed; it is often extremely hard to reach a consensus among partners and shareholders once the dispute has already arisen. As will be demonstrated in Chapter II, one way to appropriately address these burning questions is by concluding shareholders´ agreements.

While the current Croatian regulatory framework allows the conclusion of SHAs in situations like the one described above, I believe that this possibility still rests on theoretical rather than on realistic foundations. However, it is the definite position of this thesis that they should be used more often in practice, as the U.S. case law suggests.

CHAPTER II.

U.S. LEGAL FRAMEWORK AND PRACTICE RELATED TO SHAREHOLDERS´ AGREEMENTS

U.S. law and practice have developed noteworthy case law and statutes addressing shareholders´ agreements (hereinafter: SHAs), recognizing their role and importance in the sphere of company law, and regulating the rights and obligations of the parties having concluded SHAs. Shareholders agreements have been brought before the U.S. courts for almost a century, with a case being brought before the Court of Appeals of New York regarding an agreement between shareholders as early as in 1934[47]. Over the years, the case law has expanded and statutes have developed addressing SHAs, rendering the U.S. a model jurisdiction in this particular field.

In line with the foregoing, this Chapter will firstly provide a brief overview of the current U.S. legal framework and practice related to the SHAs. Later on, this chapter will delve into particularities of the inter-generational transfer of wealth and allocation of control that has emerged in the case law.

It should be noted that this thesis will not provide a complete overview of the legal framework and case law, but rather will simply provide some examples to demonstrate how the regulatory framework may be organized and to showcase a variety of clauses that can be found in the U.S. case law that may be interesting at this point to Croatian law and practice.

[47] *McQuade V. Stoneham* [1934] 263 N.Y. 323, 189 N.E. 324.

2.1. General overview of the U.S. legal framework and practice related to the shareholders´ agreements

2.1.1. U.S. Statutes

When enacting laws that govern legal entities, their formation, governance and other related matters, 32 States and the District of Columbia have completely or partially enacted the Model Business Corporation Act (hereinafter: the MBCA)[48] which makes it the most followed corporate model in the U.S., while the most influential one is the Delaware General Corporation Law[49].

According to the data published by the Delaware Division of Corporations, nearly 1.4 million companies were incorporated in Delaware as of 2018, and 67.2% of all Fortune 500[50] companies are also incorporated in Delaware.[51] Due to the considerable number of incorporated companies, especially financially significant ones, Delaware case law surpasses that of any other State with courts of other States routinely referring to Delaware law and precedents when deciding cases before them under the applicable law of that State.[52]

While Delaware has a statute, the General Corporation Law, the MBCA is only a model law drafted by the American Bar Association (hereinafter: the ABA) which must be adopted by the various States through enactment of a statute by the local legislature in order to become the law in force of

[48] American Bar Association, MBCA Enactment Map <www.americanbar.org/groups/business_law/committees/corplaws/> accessed 24 March 2020.
[49] Stephen M. Bainbridge and others (eds), *Can Delaware Be Dethroned?: Evaluating Delaware's Dominance of Corporate Law* (Cambridge University Press 2018) p. 1.
[50] The Fortune 500 is published by the Fortune magazine and it is an annual list of 500 "of the largest US companies ranked by total revenues for their respective fiscal years." Investopedia, Fortune 500 <www.investopedia.com/terms/f/fortune500.asp> accessed 12 April 2020.
[51] Delaware Division of Corporations, Annual Report Statistics [2018] <www.corp.delaware.gov/stats/> accessed 24 March 2020.
[52] Stephen M. Bainbridge and others (eds), *Can Delaware Be Dethroned?: Evaluating Delaware's Dominance of Corporate Law* (Cambridge University Press 2018) p. 1.

a given State. The first Model Business Corporation Act was published in 1950 by the ABA, in 1984 the Revised Business Corporation Act was published[53]and throughout the years, the MBCA has undergone many revisions and updates, the latest comprehensive one being published in 2016[54]. For the purposes of understanding the relevant U.S. legal framework, this thesis will briefly provide an overview of the relevant provisions governing SHAs of the Delaware General Corporation Law and MBCA, as revised in 2016.

2.1.1.1. MODEL BUSINESS CORPORATION ACT (2016 REVISION)

The MBCA has recognized that shareholders in a closely held corporation frequently govern the operation of the corporation in shareholders´ agreements.[55] The purpose of provisions contained in the MBCA is to provide "legal certainty to such agreements that embody various aspects of the business arrangement established by the shareholders to meet their business and personal needs".[56]

The Model Business Corporation Act, as last revised in 2016, governs shareholders´ agreements in Chapter 7, Subchapter C., §7.32.[57] Section 7.32(a) of the MBCA provides for various matters that may be addressed in SHAs, including various aspects regulating the shareholders´ relationship, matters regarding the governance of the company, directors position within a company, financial matters and similar provisions.[58] What is important to highlight is that §7.32(a) validates a shareholders´ agreement that is contrary to the other norms provided in the Act, if the agreement

[53] Angela Schneeman, *Law of Corporations and Other Business Organization* (5th Edition Delmar Cengage Learning 2010) p. 247.
[54] The text of the revised version of the MBCA is available at <www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf> accessed 27 March 2020.
[55] Model Business Corporation Act (2016 Revision) § 7.32 Official comment <www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf> accessed 19 March 2020.
[56] ibid.
[57] ibid.
[58] ibid see § 7.32 (a) which sets out examples of matters shareholders can address in SHAs.

is approved by all shareholders or contained in a written agreement signed by all shareholders.[59] Additionally, §7.32(a) provides that the existence of such agreement should be indicated on the share certificate or the information statement.[60] This section provides special rules regarding unanimity in adoption of the agreements violating other provisions of the Act. [61]However, if an SHA is not in violation of other provisions of the Act, reference to this section is needless and a unanimity requirement shall not be followed.[62]

As illustrated above, the MBCA illustrates the flexible approach MBCA jurisdictions have taken when enacting rules governing SHAs as it practically validates all sorts of SHAs, even those seemingly violating other provisions of the Act, when conditions provided in §7.32 are met.

2.1.1.2. DELAWARE GENERAL CORPORATION LAW

The Delaware statute governing corporations can be found in the General Corporation Law, Chapter 1, Title 8 of the Delaware Code.[63] Unlike the MBCA, this statute does not address SHAs in a specific section, but rather provides that shareholders may reach agreement in relation to specific matters addressed in the statute in a particular subchapter. To illustrate, §202 provides some particularities when restrictions on transfer of ownership of securities are agreed to and in §202(c) recognizes five categories of restrictions which are permissible.[64] Further, §218 governs voting trusts and other voting agreements, and provides under which conditions are such agreements valid, for example, §218 provides that a copy of the voting trust agreement should be delivered to the registered office in order for agreement to be valid.[65] Also, the statute in Subchapter

[59] ibid.
[60] ibid.
[61] ibid.
[62] ibid.
[63] 8 Del. C. 1953.
[64] 8 Del. C. 1953, § 202.
[65] 8 Del. C. 1953, § 218.

XIV provides some specific provisions regarding close corporations, i.e. corporations that are held in the hands of no more than 30 shareholders whose shares are not publicly offered and are subject to one or more of the restrictions on transfer.[66] As an example, §350 governs and validates agreements restricting the discretion of directors, under conditions provided in the said section.[67]

As can be seen from the overview of statutes presented above, the lawmakers refrained from regulating SHAs in great detail to keep regulation to the bare minimum to make the system as flexible as possible. Moreover, due to the particularities of the common law system followed in the U.S., case law plays a more significant role in shaping law and practice in relation to a specific field of law, as will be demonstrated below. The following subchapter will illustrate what types of acceptable arrangements between shareholders have emerged in the practice.

2.1.2. U.S. CASE LAW

As mentioned earlier, shareholders´ agreements may contain everything that is not prohibited by law, articles of incorporation or bylaws, which allows shareholders to provide for various provisions regarding the matters they find to be of the essence for the management and governance of the company.

Case law, as the main source of U.S. law, has a major influence on the formation of rules related to the SHAs. Listed below are some of the examples emerging from the U.S. case law related to the content of SHAs. I have chosen these examples because I believe, as a Croatian trained lawyer, that these issues and topics are of the biggest relevance and potential practical applicability in Croatia.

[66] 8 Del. C. 1953, § 342.
[67] 8 Del. C. 1953, § 350.

While the particularities of the cases differ, all of the cases presented below are relevant because they illustrate the variety of solutions shareholders may provide in an SHA. To begin with, the *Zion v. Kurtz* case illustrate how SHAs can limit the powers and discretion of directors.[68] In this case the Court of Appeals of New York upheld a SHA that provided that "no 'business or activities' of the corporation shall be conducted without the consent of a minority stockholder".[69] This particular provision is called 'sterilization' of the board and, under Delaware law, is possible if third-party rights are not affected in a negative way and it is made in a written form.[70] Similarly, the *Pohn v. Diversified Industries, Inc.* case, decided by the United States District Court, N.D. Illinois, Eastern Division, illustrates how the court will uphold an agreement authorizing one of the shareholders to fully manage the company in every aspect.[71] Likewise, SHAs may restrict the rights of the parties to elect and remove directors, like in the *Klaassen v. Allegro Development Corp.* case decided by the Delaware Supreme Court.[72]

In addition, shareholders may provide for a forum selection clause providing exclusive foreign jurisdiction over a matter involving a Delaware corporation´s affairs, like in the case *Baker v. Impact Holding, Inc*, decided by the Delaware Court of Chancery, where the court upheld such agreement.[73] Furthermore, SHAs may provide for specific mechanisms if shareholders are unable to reach a decision. For example, in the event of the deadlock, parties may include a so-called "buy-sell" clause in their agreement, which may provide that one shareholder may buy shares from the other shareholder or sell shares to the other shareholder under specific terms provided in the

[68] *Zion v. Kurtz* [1980] 50 N.Y.2d 92.
[69] ibid.
[70] ibid.
[71] *Pohn v. Diversified Industries, Inc.* [1975] 403 F. Supp. 413.
[72] *Klaassen v. Allegro Dev. Corp.* [2013] C.A. No. 8626-VCL.
[73] *Baker v. Impact Holding, Inc.* [2010] C.A. No. 1144-VCP.

agreement.[74] Shareholders may also include tag-along provisions that allow the minority shareholder to tag along if a sale of a company arranged by the majority is planned[75], or drag-along provisions which allow the parties to force the minority shareholder to join the majority in selling the company[76].

As the examples provided above illustrate, the abundant U.S. case law has enabled an operating framework for practitioners and businessmen in the U.S. who are able to draw on a wide range of experience and expertise that U.S. courts have developed when dealing with the SHAs.

Hereinafter, this thesis will turn to the specific question of inter-generational transfer of wealth and allocation of control in family-owned firms, with a special focus on the landmark U.S. case *Galler v. Galler* and other cases addressing similar issues.

2.2. INTER-GENERATIONAL TRANSFER OF WEALTH AND ALLOCATION OF CONTROL

Shareholders´ agreements may provide for different solutions when the inter-generational transfer of wealth and allocation of control is concerned. Such agreements may envisage, for example, the appointment of predetermined directors, distribution of votes between shareholders, payment of dividends or salary of the deceased shareholder to its successors, deadlock provisions, repurchase options and similar arrangements. The leading U.S. case in this respect is *Galler v. Galler*, decided by the Supreme Court of Illinois in 1964, which demonstrates how the court took a flexible approach when assessing the validity of an agreement in a closely held company and how the court legitimized the agreement that to a certain extent departed from the established law.[77] In addition,

[74] see for example *Miller v. Miller* [2009] Tenn. App. LEXIS 103, 2019 WL 990544.
[75] see for example *Howington v. Ghourdjian* [2002] U.S. Dist. 208 F.Supp.2d 892.
[76] see for example *Mar-Cone Appliance Parts Co. v. Mangan* [2012] 879 F. Supp. 2d 344; *Grasinger v. Perkins* [2016] 250 N.C. App. 183, 791 S.E.2d 903.
[77] *Galler v. Galler* [1964] 32 Ill.2d 16, 203 N.E.2d 577.

similar cases addressing particularities of the inter-generational transfer of wealth and allocation of control will be briefly presented to demonstrate a wide range of experience the U.S. courts have in dealing with such SHAs.

2.2.1. GALLER V. GALLER CASE

This case concerns proceedings initiated by Emma Galler, wife of the deceased Benjamin Galler, against Isadore Galler and others for the specific performance of an shareholders' agreement entered into between the plaintiff and her husband and defendants, Isadore Galler and his wife Rose, on the other.[78] Benjamin and Isadore Galler were brothers, each owning 47.5% of outstanding shares in the Galler Drug Company.[79] Their desire was to provide income for their families upon their retirement or death so they entered into the shareholders' agreement that provided the following:

a) the shareholders will amend bylaws (i) to provide for four directors; (ii) the quorum will be three directors and (iii) ten days' notice for directors' meetings;
b) the four family members (Isadore, Rose, Benjamin and Emma) shall be elected as directors in the future, and, in case of death of either brother, his wife shall have the power to nominate a new director;
c) the annual dividends will be declared in the minimum amount of $50,000 given that the earned surplus exceeds $500,000;
d) "a salary continuation agreement" will be entered into during widowhood or to the children if a widow remarries authorizing the company to pay twice the salary sum of the deceased brother; and

[78]ibid, p. 579.
[79] ibid.

e) the company will be authorized to repurchase stocks sufficient to pay taxes; if the repurchase of the stock results in the reduction of the dividends to the heirs, the parties shall nevertheless have the same voting rules on election of directors and the corporation shall pay an additional benefit equal to the diminution of the dividends.[80]

When assessing the validity of the SHA, the court first established that the authority of a court to invalidate an agreement based on public policy should be utilized only when "the corrupt or dangerous tendency clearly and unequivocally appears upon the face of the agreement itself or is the necessary inference from the matters which are expressed". [81]

As the company in this dispute was a closely held corporation[82], the court further held that those SHAs, as this particular one, are often necessary to protect those who are financially interested in the company, as they are not able to freely trade their shares in the open market which is not ready to buy such shares.[83] The court recognized, relying on previous case law, that in closely held corporations, SHAs are not necessarily void if they deviate from statutory rules *"*in order to give legal efficacy to common business practice*"*.[84] In addition, the court held that such agreements are the result of thorough negotiations as shareholders participated in their formulation and therefore, they should not be unreasonably limited when exercising their freedom to create contracts to their liking.[85] The court conclude by stating that the rules on public corporations should not be blindly followed in the case of close corporations.[86] Accordingly, the court found no valid reasons for

[80] *Galler v. Galler* [1964] 32 Ill.2d 16, 203 N.E.2d 577 p. 580, 581.
[81] ibid p. 583.
[82] For the purposes of the case at hand, the court defined closely held corporation as one whose "stock is held in a few hands, or in few families, and wherein it is not at all, or only rarely, dealt in by buying or selling", ibid p. 578.
[83] ibid.
[84] ibid.
[85] ibid.
[86] ibid.

preventing the parties to reach an agreement concerning the governance of the company, acceptable to all parties concerned, since "no complaining minority interest appears, no fraud or apparent injury to the public or creditors is present, and no clearly prohibitory statutory language is violated".[87]

What this part of the decision suggests, closely held companies are usually held in the hands of few people, often family members, like this particular one, and given this particular shareholding structure, their operation and governance are under less scrutiny than publicly held ones. That is to say, shareholders in closely held companies enjoy broader discretion in general, especially when entering into the SHAs. This is particularly important, as the court, in this case, noted, because shareholders lack a market to sell their share if they find corporate governance inadequate or disagree with the management decisions, and therefore they are free to reach an agreement as regards the important matters of the company, even if that agreement slightly deviates from statutory provisions, under conditions underlined above.[88]

When it comes to particularities of the SHA, the court held that the fact that the agreement does not specify its duration is not a reason to invalidate it as the parties intended for it to be in force only as long as one of the parties live and its purposes were carried out when the surviving party dies.[89] Further, the court held that the pre-election of stated persons as directors is valid and well established in the case law.[90] As regards the provision of the fixed dividends, the court found that provided minimum surplus that needs to be earned before paying dividends protects the company as well its creditors and the salary continuation agreement "is a common feature, in one form or

[87] ibid p. 585.
[88] ibid.
[89] ibid pp. 586, 587.
[90] ibid.

another, of corporate executive employment."[91] Finally, the court concluded that the effect of the stated purpose suggests that "there is no evil inherent in a contract [aiming] to provide post-death support for those dependent on them".[92]

The court´s approach towards SHAs, in this case, is best summarized in the following sentence: "There is no reason why mature men should not be able to adapt the statutory form to the structure they want, so long as they do not endanger other stockholders, creditors, or the public or violate a clearly mandatory provision of the corporation laws."[93]

This case is a perfect illustration of the approach the courts have towards various arrangements regarding the inter-generational transfer of wealth and allocation of control that shareholders of a closely held corporation may provide in SHAs. SHAs like this particular one may be important for the shareholders wanting to keep the company in the hands of family members by appointing directors of their choosing beforehand, ensuring that decisions may be reached only when the majority of family members are on the same page and ensuring future income for their closest ones. Therefore, it is extremely important that the courts are familiarized with the background of these agreements and that they understand their importance for the shareholders in closely held companies. As this decision demonstrates, the U.S. courts will uphold an SHA which provides for mechanisms giving each shareholder a veto power in controlling the board, a right to appoint predetermined directors and providing salary continuation and payment of dividends, even though some of the provisions may depart from the law. This flexible approach is crucial for nurturing the conclusion of SHAs and creating a favorable entrepreneurial climate.

[91] ibid.
[92] ibid.
[93] ibid p. 585.

2.2.2. OVERVIEW OF CASE LAW FOLLOWING GALLER V. GALLER

In the line of case law that followed after *Galler v. Galler*, a number of cases have emerged addressing in one way or another the issue of inter-generational transfer of wealth and allocation of control between the family members. In this respect, the *Lehrman v. Cohen* case, decided by the Supreme Court of Delaware, should be mentioned.[94] This case demonstrates how SHAs can be used to resolve a deadlock that arose when the children of the deceased shareholder took over a company. This case concerned Giant Food Inc., a company controlled by the Cohen and Lehrman families, each owning equal amounts of the voting stock, divided into two stock classes, allowing each family to appoint two members of the Company's board, consisting of four directors in total.[95]

When the children inherited stock in the company after Samuel Lehrman died, a dispute among them arose.[96] To settle their differences, an agreement between shareholders was reached to resolve the deadlock, which allowed Jacob Lehrman to acquire all the stocks of his family's class, giving him equal voting power as the Cohen family had.[97] In addition, this agreement provided that the company shall repurchase the stock held by Jacob´s siblings, that they shall waive any claim regarding the disputed stock gift, and there shall be a balancing submission of certain Cohen stock to the company for retirement.[98] A key provision of the agreement was the formation of a fifth directorship to eliminate the risk of deadlock.[99] This new, third class of stock, had only the power to elect one director and was not granted a right to dividend or rights upon liquidation, save as the repayment of par value.[100]

[94] *Lehrman v. Cohen* [1966] 222 A.2d 800, 43 Del. Ch. 222.
[95] ibid p. 802.
[96] ibid.
[97] ibid.
[98] ibid p. 803.
[99] ibid.
[100] ibid.

As regards this particular arrangement between shareholders, the court held that this type of arrangement was not illegal and it was not in violation of the Delaware public policy.[101] The court further held that there is "no reason, either under our statutes or our decisions, which would prevent the stockholders of a Delaware corporation from protecting themselves and their corporation, by a plan otherwise lawful, against the paralyzing and often fatal consequences of a stalemate in the directorate of the corporation", accordingly concluding that this arrangement had an appropriate goal.[102]

Additionally, the *In re Estate of Riefberg* case, decided by the Court of Appeals of New York, refers to the shareholders' buy-sell agreement, amended a day before the death of one of the shareholders.[103] The said agreement provided that corporation shall repurchase all the decedent's shares and pay the entire value to the designated immediate family.[104]

Similarily, the *Battaglia v. Battaglia* case should be mentioned, decided by the Appellate Court of Illinois.[105] This case concerned three brothers that concluded a buy/sell agreement to ensure that the family business would remain in the hands of the Battaglia family and to ensure a death benefit for wives and children of the three brothers.[106] They provided that shares of the deceased brother shall be "offered to the company for redemption to the extent legally possible and any other balance of the stock would be offered to the remaining stockholders".[107] When the brothers realized that the above-stated redemption provision disabled the transfer of the shares to their sons, to correct

[101] ibid p. 801.
[102] ibid.
[103] *In re Estate of Riefberg* [1983] 446 N.E.2d 424, p. 424.
[104] ibid.
[105] *Battaglia v. Battaglia* [1992] 596 N.E.2d 712, p. 713.
[106] ibid.
[107] ibid.

that, they amended the agreement accordingly.[108] A dispute arose when one of the brothers purchased the shares of the other, behind the third brother´s back, who brought a suit for injunctive relief against the brother who purchased the shares.[109]

With regard to the transfer of the shares restrictions provided in an SHA, the Court of Appeals of New York in *Fiore v. Fiore* upheld an SHA entered into between three brothers that provided that each brother, in the event he decides to sell the shares in the company, shall firs offer shares in equal parts to the other brothers.[110] Similarly, the *Furman v. Gossels* case, decided by the Superior Court of Massachusetts, discussed an Operating Agreement that contained a strict provision on transfer of shares.[111] The said provision on transfer of shares provided that "[o]nly descendants [sic] by blood or adoption of Anne Shapiro Furman and Jacob Furman shall be Members."[112] When one of their children, Walter, died in 2010, he left his estate to a family trust, but shortly thereafter, his wife rejected her interest in the company to transfer the interest to a trust of her and Walter's children instead.[113] This transfer was contested by Walter's siblings claiming to have an option to purchase, i.e. claiming that the shares were transferred to impermissible persons.[114] Nevertheless, the court declared that Walter´s interest in the company was adequately transferred and that no option to purchase existed as the transfer was in accordance with the Operating Agreement.[115]

As the provided overview of statutes presented above, notably the MBCA and the Delaware General Corporation law, suggests, the lawmakers abstained from regulating SHAs in great detail

[108] ibid.
[109] ibid. Other details on the case are not provided as they do not address SHA in detail, but fiduciary duties the brothers had towards the company and each other.
[110] *Fiore v. Fiore* [1979] 46 N.Y.2d 971, p. 138.
[111] *Furman v. Gossels* [2012] 30 Mass. L. Rep. 169.
[112] ibid.
[113] ibid.
[114] ibid.
[115] ibid.

to keep regulation to the bare minimum to make the system as flexible as possible. In addition to the statutory flexibility, what can be seen from the analyzed case law is that SHAs may provide for a plethora of solutions with regards to the appointment of directors, governance of the company, transfer of shares, avoidance of deadlock, and financial matters in closely held companies, and, as a general rule, the courts will uphold such arrangements.

With respect to the inter-generational transfer of wealth and allocation of control, in line with the case law stated above, an SHA agreement may provide for different mechanisms enabling a shareholder to regulate every important aspect of the transfer of shares to its descendants. This may be important because a shareholder might want to keep the company in the hands of a family, or certain family members that will continue to cherish the family tradition. Also, a shareholder may want to ensure that is descendants are financially settled after its death, in a form of salary continuation or dividend payment. Likewise, a shareholder may want to provide special rules regarding the appointment of directors and the management of the company or provide a solution in the event of a deadlock. All these questions may be crucial when the succession in a company is about to occur, therefore, providing for the specific solutions beforehand in an SHA may be beneficial to everyone as it may save time, money and avoid long and costly court proceedings.

CONCLUSION

This thesis emphasized the importance of shareholders´ agreements (hereinafter: SHAs) and brought to light potential issues that may arise regarding their conclusion and performance, with reference to the U.S. regulatory framework and some interesting cases decided by U.S. courts. As the analyzed case law reveals, the U.S. courts have adopted the pragmatic and flexible approach towards the various arrangements shareholders provide in SHAs in order to uphold as many agreements as possible, within the limits set by the law. Consequently, this approach creates a favorable entrepreneurial environment and nurtures the conclusion of SHAs.

Most importantly, this thesis' main goal was to demonstrate that SHAs should be used as a new tool for the inter-generational transfer of wealth and allocation of control in Croatia, by learning from the U.S. experience. The analyzed case law illustrates how the stated issue of the future of the company in the event of retirement or death of the shareholder may be tackled. As a solution, shareholders may provide various detailed particularities of each aspect of corporate governance and financial matters, ensuring the smooth transition and financial security for the successors and the survival and continued operation and growth of the company. This might positively impact the Croatian economy through the growth of the businesses by keeping companies already established on the market alive and operating, hence enabling the opportunity for their growth and expansion, by both providing jobs for its employees and generating taxable profits and income.

Lastly, as the presented comprehensive overview of both legal systems has demonstrated, SHAs are a useful and sophisticated tool used to improve the strategic position of shareholders in a company, enabling them to agree on specific terms regarding issues that are of essence for their

position in the company. More importantly, SHAs enable shareholders to address in advance the transfer of control and wealth between generations of the shareholders in a company.

Having this understanding, one should, however, bear in mind that, unlike the U.S. common law model, Croatia follows the civil law system. Therefore, in Croatia, codified laws play a more significant role than court decisions. Accordingly, certain adjustments will be needed, but I believe that being familiar with the importance and usage of the SHAs might lead to both legislative changes and might be a source of inspirations for Croatian courts. This further allows a more efficient exploitation of SHAs, especially for the purposes of inter-generational transfer of wealth and allocation of control in a company.

Finally, I strongly recommend that the U.S. law – with its unique statutory solutions and rich case law – could be taken as a model when assessing what changes Croatian legal framework needs in order to enable and incite the use of SHAs, as the problems emerging from the relationship between shareholders, and especially those related to the inter-generational transfer of wealth and allocation of control, will continue to be a growing problem in Croatia. These recommendations can further be strengthened by educating and familiarizing judges with SHAs in general and with the myriad special purposes that could be materialized by their use, including providing for the unscathed survival of viable family-owned firms yet without depriving family members of the much-needed means for survival.

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