# Legal aspects of corporate control in the Republic of Azerbaijan: Improvements based on the US practice

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# Abstract

Corporate control is the token of successful operation of the companies. This explains the necessity of adopting legal acts regulating corporate control matters, including tackling abuses. Each legal system has its own approach to that matter and various legal instruments to regulate it. When it comes to the Republic of Azerbaijan (hereinafter: Azerbaijan), the main source of company law regulating corporate governance is the Civil Code, adopted in 2000. As it was adopted relatively late after gaining independence in 1991, certain aspects of corporate governance have not been subjected to express rules and are consequently still in the process of development. That is why some aspects of corporate governance – including corporate control – still need to be incorporated into it together with the related lessons generated in business life.

For this purpose, this thesis comparatively analyzes some of the key overlooked elements of corporate control in Azerbaijan in light of the laws and practices of the United States (The US). Since the States of New York and Delaware have not only differing laws on corporate control matters, but also possess a rich repository of landmark cases on control-related issues, it is worth using them as the model jurisdictions herein.

The thesis analyses two key shortcomings of control-related corporate governance in Azerbaijan: the problems caused by excessive control of shareholders, or directors and officers (by emphasizing presence of executive control) and inadequacy to defend local businesses from hostile takeovers. Besides analyzing the applicable statutory laws, the pertaining case law, equal attention will be given to established practices too. It is also hoped that the thesis will pave the way for modernization of the corporate law of Azerbaijan to better serve the interests of Azerbaijani enterprises and through that the economy.

# List of abbreviations

AR- Azerbaijan Republic

AMEX- American Stock Exchange

CC-Civil Code

DGCL- Delaware General Corporation Law

GMS-General Meeting of Shareholders

IFC-International Finance Corporation

JSC-Joint Stock Company

MBCA-Model Business Corporation Act

M&A- Merger and Acquisition

NYBCL-New York Business Corporation Law

NYSE-New York Stock Exchange

OECD-Organization for Economic Co-operation and Development

SEC- Security and Exchange Commission

# Introduction

## I. Significance of the topic

The conventional wisdom, enshrined into the Civil Code of Azerbaijan, is that shareholders are the main controllers of the corporation.[1] The side effects of such control, however, have not become a widely discussed topic in the country. The Civil Code of Azerbaijan – containing also the country's company laws – fails to regulate these issues as well.[2] Certain matters such as legal protection of minority shareholders from oppression by the majority shareholders' control remain an open issue. Consequently, what the oppressed minority shareholders can do is to rely on general provisions of the Civil Code stating equal treatment for all shareholders; something that is hardly exploitable successfully in practice. This stems from the fact that the Code fails to expressly provide for remedies against abuse of control and how it should be prevented. Considering the fact that CC was adopted almost recently (the Code was adopted on 27th December 1999 and entered into force on 1st September in 2000.[3]), it needs to be elaborated.

However, as a positive trend, some Azerbaijani enterprises have aired publications showing that they are aware of these problems, and try to structure their businesses in compliance with soft law instruments like G20/OECD Principles of Corporate Governance by Organization for Economic Co-operation and Development (OECD)[4] which state that even though some shareholders exercise control over all of them (including minority shareholders), shareholders



[1] Kerimov Emin, *Azərbaycan Korporativ Huququ (Corporate Law of Azerbaijan)* (ABŞ-da Təhsil Almış Məzunlar Assosiasiyası (US Alumni Association) 2014) 26–27.
[2] Azərbaycan Respublikasının Mülki Məcəlləsi(Civil Code of the Republic of Azerbaijan). Section 2, chapter 4 of the Code covers company laws (articles 43-119).
[3] "Azərbaycan Respublikası Mülki Məcəlləsinin təsdiq edilməsi, qüvvəyə minməsi və bununla bağlı hüquqi tənzimləmə məsələləri haqqında"Azərbaycan Respublikasının Qanunu (The Law of AR on approval, enforcement of Civil Code of Azerbaijan Republic) 2000.
[4] *G20/OECD Principles of Corporate Governance 2015* (OECD Publishing 2015) <https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en> accessed 28 January 2024.

should be treated equally. But the issue is that these priciples are not mandatory and eventually Azerbaijan is not even a member of OECD. Even though the mentioned soft law instrument provides the model for good corporate governance, a general level of awareness of the companies about control models enshrined in the above mentioned set of principles is low. For example, as to the World Bank Group Survey results amongst respondent joint stock companies of Azerbaijan which were questioned about the awarness of best practice to operate the company, only 30% were aware of existence of these principles.[5] This shows that to apply corporate control standards we need them to be expressed in the legislation.

Another disregarded caveat under Azerbaijani corporate governance is executive control. Legal mindset in Azerbaijan mostly sides with idea "the one who owns, controls the company." However, in reality control may be concentrated in the hands of executives who as a result may adopt key decisions affecting company's operation in lieu of the shareholders. Therefore, it is necessary to highlight in the thesis that control also might be perceived as a separate conception from ownership as it was done by Berle and Means back in 1932.[6]

Apart from above-mentioned control issues, the concept of control must also be considered in the context of hostile takeovers. This is so because today no country's businesses are immune from takeover attacks, and yet know very little, or nothing about these risks that rest on the concept of control.



## II. The jurisdictions within the purview of the thesis

To reveal gaps in Azerbaijani legislation and practice, models of corporate control applicable in the States of New York and Delaware will be comparatively analyzed as reflected in their laws, landmark cases, and established practices.

[5] World Bank Group, 'Company Corporate Governance in Azerbaijan. Survey Results' 38.
[6] Adolf A.Berle & Gardiner C Means, *The Modern Corporation & Private Property* (6th edition, New Brunswick and London 2004).

It must be noted that in the US, more than 25 States adopted Model Business Corporation Act (MBCA) as the basis for their corporate state laws, though each of these States has modified the provisions of the MBCA.[7] Delaware and New York are non-MBCA States[8] and they follow their own corporate laws which are Delaware General Corporation Law (DGCL) and New York Business Corporation Law (NYBCL) respectively. Thus, as a basis of corporate law of NY and Delaware, mentioned laws will be analyzed.

Although Azerbaijan is a civil law system, and these States belong to the common law (Anglo-Saxon) legal family, the thesis is based on the presumption that using these jurisdictions as benchmarks is possible. This stems from the fact that New York and Delaware are the most tested jurisdictions in this domain, and not only in the US, but globally as well, and contain elaborate models of corporate control, as well as numerous milestone cases focused on "taming" of corporate control. Besides, Delaware and New York are considered as the principal stewards of a "national corporation law" being a domicile for thousands of US corporations.[9] Moreover, US practice in detail reveal what disputes might arise from excess of control by referring to court cases which are absent in Azerbaijan.

## III. Methodology

The thesis is based on comparative analysis of the laws, reported cases, as well as other pertaining sources of law of Azerbaijan and the mentioned two US jurisdictions. As to Azerbaijan it is important to mention that there are no reported court cases on corporate control yet on the problems listed above. Therefore, the main source of reference would be limited to the analysis of the Civil Code, various surveys (since there are no recent survey results for



[7] Jeff Keustermans, 'Countertrends in Financial Provisions for the Protection of Corporate Creditors: The Model Business Corporation Act and the E.E.C. Corporate Directives' (1986) vol 14, 276.
[8] 'Model Business Corporation Act Resource Center' <https://www.americanbar.org/groups/business_law/resources/model-business-corporation-act/> accessed 8 June 2024.
[9] E. Norman Veasey, Jesse A. Finkelstein, and Robert J. Shaugh, 'The Delaware Takeover Law: Some Issues, Strategies and Comparisons' (2024), vol 43 The Business Lawyer 865, p.866.

control issues, I will refer to surveys of previous years), industrial publications of well-known Azerbaijani companies (as well as legal scholars) and my own practice in corporations. As far as the last source is concerned, it must be stressed that due to confidentiality, the names of the involved parties and law firms will not be revealed. However, due to the fact I have personally encountered certain control issues it is worth indicating that these represent much needed practical examples.

As to the US practice, since both States of New York and Delaware have numerous court precedents of relevance, a number of them will be devoted utmost attention. Moreover, legal scholars' writing also will be taken into consideration as they provide a general picture on how corporate control works in the US.

## IV. The road map of the thesis

This thesis aims to analyze the selected corporate control issues chapter by chapter combining both jurisdictions of Azerbaijan and the US. For this purpose, it will follow the pattern "from general to special". The chapters of the thesis will appear in the following order.

*The first chapter* is dedicated to the general concept of control, its history and types. The chapter will analyze the differences in perception of the concept of corporate control in AR and the US indicating the historical patterns both states followed, as well as illustrating the prong of the definition of the corporate control. Furthermore, the chapter aims to provide classification of corporate control to emphasize that control can be exercised in various ways in addition to traditional way through ownership of majority stocks of the company concerned.

*The second chapter* focuses on shareholder and executive control. It is hoped to provide analysis of control by shareholders in Azerbaijani companies by revealing the shareholder-centric system's drawbacks. More precisely, exemplifying how it paves a way to grabbing control by a single individual (or groups of individuals), what tactics can be used to overcome

excessive control, as well as to guarantee protection of minority shareholders. Furthermore, it discusses control by executives in the light of the US practice and analyze its presence under Azerbaijani corporate governance.

*The third chapter* discusses one of the least known topics for Azerbaijan, namely takeovers. Although this term does not appear in the Civil Code, it is not uncommon that large companies "swallow" small enterprises, make them disappear from the market to become dominating on the relevant markets. Hence, it is vital to review the extent of such a company's control and analyze what tactics the US practice suggest fending off businesses vulnerable to the takeover attacks.

In the process of comparing Azerbaijani and US jurisdiction the recommendations will be included on how to elaborate control tactics in Azerbaijan based on the New York and Delaware States' practices.

# Chapter I. Concept and nature of corporate control

## 1.1. Definition of corporate control

The term "control" in the context of corporate governance implies a power to determine corporate policy or an authority to influence corporate decisions.[10] More precisely, it is an authority to make key corporate decisions and ultimate power in corporate policymaking[11]. As in many other post-Soviet countries, in Azerbaijan the legislation fails to provide definition of control (such absence also pertains to the most of European civil law systems). However, Chapter IV of the CC of Azerbaijan, regulating legal entities' operation, contains provisions expressly defining the content of control, although the word "control" does not appear in the text. This includes the capacity of shareholders to adopt corporate decisions, appoint the directors and a traditional way of control by Supervisory Board pertaining to German two-tier corporate governance system (German two-tier system recognizes executive and supervisory board as separate corporate governance bodies[12]). More precisely, in the light of above-mentioned content of control enshrined in Chapter IV of CC, it might be perceived that in Azerbaijan, term of "corporate control" is associated with either ownership of stocks or monitoring internal corporate affairs by the Supervisory Board (the latter one is out of scope of this thesis).

Although there is no precisely defined concept in any piece of legislation (Code, statute, or ministerial regulation) some Azerbaijani legal scholars offer interpretation of the concept of corporate control. For example, Emin Karimov in his article on "Corporate (company) law of Azerbaijan" approaches corporate control as an institution of corporate governance which encompasses regulation of legal relations between the board of directors, holders of controlling

[10] David C Bayne, 'A Philosophy of Corporate Control' (1963), vol 112, University of Pennsylvania Law Review, 22.
[11] ibid.
[12] Lexology GTDT, 'Corporate Governance' [2022] Law Business Research, p.11.

shares and minority shareholders.[13] Furthermore, the textbook by Russian Economic Academy (which is used by several Azerbaijan colleges and universities for teaching purposes) stipulates that the term "control" can be used in two ways: control as a monitoring and as a power to adopt essential corporate decisions.[14] The latter one encompasses authority to determine the fate of the company: decisions on merger and acquisition, the company's liquidation or in what direction business must progress, etc.

Contrary to AR, both States of New York and Delaware statutorily define the notion of control. As per article 203 (c) (4) of DGCL "control" means "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract or otherwise."[15] The text of the pertaining provision is essentially the same under § 912 of NYBCL.[16]

As to Choper et.al book on "Cases and Materials on Corporations", "no one can acquire corporate control without first acquiring power to elect majority of the Board".[17] From the first sight it might be perceived that control is associated with majority shareholder power since they possess majority of company's shares and thus also the majority voting power. However, "control" does not exclusively arise from ownership, as it may appear in many other forms entitling control holder to make key corporate decisions (this will be discussed in the light of corporate control typology reviewed in paragraph 1.3 of the thesis).

It must be emphasized that the most important prong of control definition tends to be the right to appoint directors. For instance, in KKR Financial Holdings LLC Shareholder Litigation, Delaware Court of Chancery did not recognize KKR as a control holder following the statement



[13] Kerimov Emin, *Azərbaycan Korporativ Huququ (Corporate Law of Azerbaijan)* (2014), 27.
[14] Russian Economic Academy, *Səhmdarlıq Işi (Equity Business)* (Azerbaijan State Economic University 2010), 126.
[15] Delaware General Corporation Law 1953 art 203 (c) (4).
[16] New York Business Corporation Law sec 912 (a) (8).
[17] Jesse H Choper, John C Coffee and Ronald J Gilson, *Cases and Materials on Corporations* (6th edn, ASPEN Publishers 2004), 553.

that KKR did not controlled the Board of KFN when it approved the merger, neither it had right to appoint directors (as Board members) which is the determinative indicia under Delaware law for defining if a shareholder is a control holder.[18]

## 1.2. Historical development of corporate control

The US corporate control evolved through different paths. Some authors classify 1930's as a period where terms of "ownership" and "control" used to be synonyms since "giant entrepreneurs" like Morgan, Rockefeller, Carnegie were not only owners, but also controllers of the companies.[19] However, the milestone book of Berle & Means published in 1932, "The Modern Corporation and Private Property" highlighted the separation of control from ownership by introducing a typology of corporate control and emphasized that control can be exercised in many other ways than stock ownership. Berle and Means examined 200 largest corporations in the US at the beginning of 1930's (e.g., railroads, public utilities) and concluded that in 44% of these, control was exercised by the directors, in 21% through some legal device, and in 23% minority control was present.[20] This illustrates why and how the concept of 'control' might become complex and exercised through different tools. As the trend of the segregation of control from ownership was especially express, in the 1960's and 1970's, the control powers of directors and officers further increased.[21]

By 1980's "hectic takeover activity" came into vogue.[22] Significant portion of transactions (1,889-2,258 M&A transactions had been concluded following takeover activity between



[18] *In re KKR Financial Holdings LLC Shareholder Litigation* [2014] In the Court of Chancery of the State of Delaware Consol. C.A. No. 9210-CB.
[19] 'Corporate Governance in America: A Brief History – Strategic Management' <https://open.oregonstate.education/strategicmanagement/chapter/2-corporate-governance-in-america-a-brief-history/> accessed 4 March 2024.
[20] Adolf A.Berle & Gardiner C Means (n 6) 109.
[21] Gregory Jackson, 'Understanding Corporate Governance in the United States: A Historical and Theoretical Reassessment' (2010) Arbeitspapier, No. 223, Hans-Böckler-Stiftung, Düsseldorf,16.
[22] Brian Cheffins, *The History of Modern U.S. Corporate Governance*, vol 1 (Edward Elgar Publishing Limited 2011) 17.

1980-1988) belonged to hostile takeovers.[23] At this time powerful companies grabbed control over poorly managed corporations upon stock acquisition. Such competition for corporate control required prompt reaction of legislature. Already in 1988 State of Delaware incorporated an anti-takeover statute into DGCL.[24] In the beginning of the 2000's the necessity for re-examination of corporate governance rules came into scene following the collapse of Enron Corporation. Apart from financial reasons, inadequate oversight by the Board (breach of fiduciary duties, poor governance of executive's compensation of stock options etc.) caused system failure.[25]

Compared to the US, Azerbaijan has not passed such complicated path of corporate control since Azerbaijani corporate law development starts from 2000 following adoption of CC. Before that, during communism all enterprises were owned by the state and consequently controlled by the state.[26] Therefore, back then the issue of control could not come up, since everything was in the hands of the state. Main source one can find the developed path of corporate control of AR, is CC which set boundaries of rights for each governing body (GMS as supreme governing body, directors as executive body and supervisory board as a monitoring institution checking executives activity). Furthermore, corporate governance models in companies like "Pasha Holding",[27] "Gilan Holding",[28] "Veyseloglu Group"[29] and other



[23] Marcel Kahant and B Rocktt, 'How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law' (2002), vol 69, University of Chicago Law Review 871, 873–874.
[24] E. Norman Veasey, Jesse A. Finkelstein, and Robert J. Shaugh (n 9) 867.
[25] Huu Cuong Nguyen, 'Factors Causing Enron's Collapse: An Investigation into Corporate Governance and Company Culture' (2011), vol 8, issue 3, 585, p.589.
[26] Azərbaycan Milli Elmlər Akademiyası, A. Bakıxanov adına Milli Tarix İnstitutu, (National Institute of History in the name of A. Bakikhanov) *Azərbaycan Tarixi (History of Azerbaijan)*, vol 6 (2008), 20.
[27] 'Group Structure | PASHA Holding' <https://pasha-holding.az/en/about-us/group-structure/> accessed 27 February 2024.
[28] 'Fövqəlbiznesmen Kəmaləddin Heydərovun Şirkətləri » XalqXeber.Az | Son Xeberler Azerbaycan Xeberleri' <https://xalqxeber.az/society/35651-fovqelbiznesmen-kemaleddin-heyderovun-shirketleri.html> accessed 23 March 2024.
[29] 'Şirkətlər | Veysəloğlu' <https://www.veyseloglu.az/our-activity/companies> accessed 9 June 2024.

corporations founded in the process of privatization, conceptualize existing approach on corporate control in Azerbaijan which tends to recognize shareholders as the control holders.

## 1.3. Types of corporate control

To clarify the nature of corporate control, it is worth listing in which forms it may appear. Besides, being aware of the fact in which form control exists in the eyes of law and in practice is crucial for different participants of corporate life. For instance, equity holders investing in the company should know to what extent they would be able to participate in corporate life or how far executives may influence corporate decisions. Various sources list types of control, but more precise typology can be found in "Modern Corporation and Private Property" by A.Berle and G.Means.[30] Berle, a lawyer, and Means, an economist, based on the conditions prevailing in the US in the 1920's and 1930's in the corporate section, identified the following types of control:

*1.Control through ownership.* This type can be classified as an "absolute control" in case shareholders own all or substantially all company shares.[31] The main idea is based on the principle "one who owns the company, controls it".

*2. Majority control.* It seems that majority control is one of the most widespread corporate control models in Azerbaijan. This stems from the fact that corporations holding the largest share in Azerbaijani market (e.g., "Azersun Holding", "Avrora" LLC-leading companies in food industry[32], Gilan Holding-company with around 350 subsidiaries totally controlled by the Heydarov's[33]) are controlled by holders of 50% (and more) of company shares. As to survey results conducted by International Finance Corporation (IFC) in Baku, Sumgait, Ganja which



[30] Adolf A.Berle & Gardiner C Means (n 6) 67–85.
[31] Adolf A Berle, '"Control" in Corporate Law' (1958), vol 58 Columbia Law Review 1212, p.1213.
[32] 'Avrora Qrup | Haqqımızda' <https://avrora.az/az/about> accessed 1 May 2024.
[33] 'The Extraordinary Businessman Kamaladdin Heydarov - MEYDAN.TV' <https://www.meydan.tv/en/article/the-extraordinary-businessman-kamaladdin-heydarov/> accessed 1 May 2024.

are the main centers of business operation, in 81% of Azerbaijani companies ownership had been concentrated in the hands of single controlling shareholder.[34] More precisely, out of 81%, in 56% of surveyed companies controlling shareholder owned more than 66.7% of shares and in 25% of these companies, shareholder control interest ranged between 50%-66.7%.[35] Basic idea of majority control stems from owning more than 50% of company shares to become controller. Greater share percentage leads to more concentration of powers in the hands of controller. For example, "Garadagh Cement" OJSC is one the largest cement manufacturing company of Azerbaijan. In the process of privatization (1999), Swiss company "Holcim Ausland Beteiligungs GmbH" acquired 70% of company shares and became a controller.[36] By 2012, the company had been renamed as "Holcim Azerbaijan" OJSC and the controlling packages of Holcim increased from 70% to 80% at the expense of purchasing shares from another equity holder of company - The European Bank for Reconstruction and Development (EBRD).[37]

In this type of control, the risk is that gradually the controller can attain complete ownership over the company by expelling minority shareholders. However, in majority control cases (unlike complete ownership), control powers are relatively limited: certain corporate decisions such as dissolution of company, amendment of company's charter requires more than simple majority votes.[38] Such voting system is enshrined in the articles 102.5 and 107.5 of CC, as to which decisions on company's reorganization, liquidation as well as alteration of company's charter require two-thirds of votes of shareholders of voting stocks.[39] This supermajority



[34] World Bank Group (n 5) 17.
[35] ibid.
[36] 'History of Garadagh Cement Plant Holcim Azerbaijan' <https://www.holcim.az/en/about-us/history-of-garadagh-cement-plant-holcim-azerbaijan> accessed 26 February 2024.
[37] 'EBRD Sells Its Stake in Cement Plant in Azerbaijan' <https://www.azernews.az/business/138446.html> accessed 26 February 2024.
[38] Adolf A.Berle & Gardiner C Means (n 6) 67.
[39] Azərbaycan Respublikasının Mülki Məcəlləsi(Civil Code of the Republic of Azerbaijan) Section 2, Chapter 4. Translation:http://jafbase.fr/docAsie/Azerbajian/Civil_code_eng.pdf

mechanism exists to protect minority shareholders, otherwise, control holders would be able to adopt rules in favor of them which are detrimental to the minority shareholders. Additionally, shareholder agreement may provide for veto right to deter majority shareholder control. Inclusion into shareholder agreement provision on veto rights, grants shareholders holding less than 50% of company shares, a power to veto over certain corporate decisions[40] such as sale of corporate assets, shifting to new business line, entering voluntary bankruptcy proceeding etc.[41] From my point of view, deterring majority shareholder control by veto right enshrined in shareholder agreement is less peculiar to Azerbaijani corporate system since it is not in the interest of majority shareholders to restrict the scope of their control over corporate decision making. Besides, in AR minority shareholders' interests are not protected (it will be discussed in detail in paragraph 2.1.1) not talking about possibility for them to hold veto right.

Furthermore, in majority control, controlling shareholders may retain control over corporation by issuing non-voting stocks.[42] Although this is not peculiar to AR corporate system[43] in the US practice controlling shareholders aiming to increase company's share capital and retain control position at the same time, may issue non-voting stocks which will not dilute their control.[44]



[40] 'Shareholder Agreements' <https://www.ouryclark.com/resource-library/quick-guides/corporate/shareholder-agreements.html> accessed 4 May 2024.
[41] Gabriel V Rauterberg, 'The Separation of Voting and Control: The Role of Contract in Corporate Governance' (2020) Vol. 38:1124 2021 SSRN Electronic Journal,1124, p.1178.
[42] *United Food and Commercial Workers Union v Mark Zuckerberg and Facebook Inc* Defendant Mark Zuckerberg is the founder (Court of Chancery of the State of Delaware). Defendant Mark Zuckerberg is the founder, CEO, chairman of the board, and controlling stockholder of nominal defendant Facebook, Inc. At Zuckerberg's request, the Facebook board of directors pursued a reclassification of Facebook's shares. The transaction involved authorizing a new class of non-voting stock. The effect of the reclassification would be to shift two-thirds of Facebook's economic value into the non-voting stock. The chief beneficiary was Zuckerberg, who would be able to transfer the bulk of his economic ownership in Facebook without giving up voting control.
[43] Article 106 of CC regulates issuance of ordinary(voting) and preferred (non-voting) shares. In AR corporate system only preferred shares are understood as non-voting shares. However, in US practice non-voting stocks are not limited only to preferred shares.
[44] Dorothy Shapiro Lund, 'Nonvoting Shares and Efficient Corporate Governance' (2017), vol 1, University of Chicago Law School, p. 3.

Candidly, not in every case owning majority shares leads to concentration of control. Shareholders may own less than 50% of shares and simultaneously exercise actual control. One of such control models had been illustrated in Kahn v. Lynch Communication Systems, Inc. case.[45] Briefly, Alcatel was a shareholder of a Delaware corporation (Lynch) holding 43.3% of shares, yet it had representation of five of the eleven directors on Lynch's Board of Directors and two of the three members of the executive committee.[46] It had exercised veto power on Lynch's decision on mergers and acquisitions and Delaware Supreme Court in its holding noted that the Board of Directors induced to the shareholder's wishes where Alcatel dictated its own terms.[47]

*3.Management control.* This type of control brings to the fore the idea that in not all the cases ownership equals control. In other words, actual controllers can be the executives-the directors who make key corporate decisions rather than shareholders. Although Berle and Means used the term "management", nowadays this type of control implies control by directors or officers. When it comes to Azerbaijan, it must be noted that CC uses the terms The Board of Directors and Supervisory Board interchangeably. Starting from article 49-1 of CC, the Code refers to Board of Directors along with Supervisory Board which is in the brackets.[48] This is followed by more specific articles with the titles "Board of Directors (Supervisory Board) of LLC" and JSCs.[49] In the US (one-tier system) The Board of Directors which is comprised of executive (CEO, CFO) and non-executive directors has power to manage corporate affairs and is separate



[45] *Kahn v Lynch Communication Systems* [169AD] Delaware Supreme Court No. 169, 1995.
[46] ibid.
[47] 'Who Is in Control? Delaware Corporate Law's Answer - ProfessorBainbridge.Com' <https://www.professorbainbridge.com/professorbainbridgecom/2020/04/who-is-in-control-delaware-corporate-laws-answer.html> accessed 27 January 2024.
[48] Azərbaycan Respublikasının Mülki Məcəlləsi (Civil Code of the Republic of Azerbaijan) art 49-1. Excerpt: affiliates of legal entity are "head and members of board of directors (supervisory board) and executive body of the legal entity". Translation: https://cis-legislation.com/document.fwx?rgn=2577
[49] ibid arts 91-1, 107-7.

from Supervisory Board.[50] This is contrary to Azerbaijani model of corporate governance where the Board means Supervisory Board which oversight executive body activity. Besides, executive directors cannot be represented in the Board as per article 107-10.1 of CC. Azerbaijan follows German two-tier system where there is an executive body and supervisory board (as to CC article 107.3 Supervisory Board is mandatory for corporations with more than 50 shareholders[51]). Many companies (such as SOCAR) while explaining their corporate structure use the term Board of Director as synonym to Supervisory Board (which monitors company's activities) and refers to executive board (or body) who carries day-to-day activities.[52] In that sense, if term "directors" in respect of AR corporate practice is used, it would presuppose monitoring functions of Supervisory Board which is out of scope of this thesis. To avoid conflicts in definition, I will use the terms, executive body (analogical to the US Board of Directors), executives (CEO) while explaining control by the directors in AR.

Both the above-mentioned types of control (control through share ownership and executive control) would be separately reviewed in more detail in the subsequent paragraphs.

*4. Control through a legal device.* In some cases, control may emerge via pyramid system where majority shareholder owns company which in its turn hold controlling shares in another company[53]. This control system is typical to Azerbaijani corporations. For instance, "Pasha Holding" LLC holds largest market shares in the field of banking, construction, travel etc. This holding company owns lots of companies (e.g., Pasha Life, Pasha Travel, Kapital Bank, Competo, Pasha Development) forming a single "Pasha Group". These companies own and control more than 70 subsidiaries.[54] Starting from hotels, malls, sport clubs- all these large and



[50] Khaled Otman, 'Corporate Governance: A Review of the Fundamental Practices Worldwide' (2022), vol 3, Corporate Law and Governance Review 53, pp.55–56.
[51] ibid art 107.3.
[52] Samir Aliyev, 'SOCAR: Big Problems at the Largest Company in Azerbaijan' [2020] SSRN Electronic Journal, p.6.
[53] Adolf A.Berle & Gardiner C Means (n 6) 69.
[54] 'Group Structure | PASHA Holding' (n 27).

small-scale companies constituting the pyramid, act in accordance with the policy dictated by the holding company which is on the top of the pyramid. This pyramid system allows parent company to retain control over the companies owned and managed by its subsidiaries.

*5. Minority control.* This type is not peculiar to Azerbaijan corporate governance system as in practice minority shareholders do not possess "necessary weight" to impact decision-making what makes them vulnerable to dominancy of control holders. To illustrate, since the process of privatization (1997) in Azerbaijan, around 70% of JSCs have been either controlled by a single person or by group of persons owning majority stocks.[55] However, existence of minority control should not be overlooked since small groups of stockholders with substantial minority interest, may induce additional stockholders to vote with them so that in combination they can elect directors and grab the control.[56]

Furthermore, under Delaware law, a stockholder can be considered a controlling stockholder if he either owns more than 50% of the corporation's voting power or less than 50% but exercises actual control over the corporate affairs.[57] The most apparent example is recent litigation of Tesla Motors where Delaware Court of Chancery held that E. Musk with holding a mere 22.1% company shares was a control holder.[58] His control over Tesla was backed up by holding vital positions in company (he was a chairman of the Board of Directors and acted as Tesla's CEO since 2008) that allowed him to adopt key corporate decisions. Owning a mere 22% of voting stocks was not giving to Musk power to control (Musk was the largest individual shareholder considering that the rest individuals in Tesla owned less than 1% of stocks.



[55] 'Azerbaijan to Eliminate Minority Shareholders' <https://turan.az/en/economics/azerbaijan-to-eliminate-minority-shareholders> accessed 27 January 2024.
[56] Berle (n 31) 1214.
[57] 'Elon Musk and the Control of Tesla' <https://corpgov.law.harvard.edu/2018/04/23/elon-musk-and-the-control-of-tesla/> accessed 17 March 2024.
[58] *In re Tesla Motors, Inc Shareholder Litig,* [2022] Delaware Court of Chancery C.A. No. 12711-VCS.

However, institutional investors were holding more than 40% of Tesla's shares[59]) since technically his voting share was inferior compared to institutional investors. Hence, that was his position as Tesla's CEO which empowered him with control of Tesla's vital and strategic decisions.

*6. Factual control*. There might be a case where a person factually controls corporate affairs lacking the legal foundation (that is why it can also be called as an "extra-legal control"[60]). Here, control does not rest upon legal status but factually depending upon control holder's strategic position.[61] Merely noticed but in my practice, I witnessed the situation where certain control functions of shareholder and Supervisory Board of company "B" de facto were implemented by another corporation "C". Briefly, "B" was controlled by a shareholder owning 90% of its shares who was one of the largest shareholders of holding company "A". "C" was the subsidiary of that holding company "A". By support of company "A", "C" was factually empowered with certain decision-making powers in respect of "B". Namely, "C" was approving transactions exceeding 5% of corporate assets, determine bonuses for C-level corporate workers and other powers except exclusive shareholders rights stipulated in CC.[62]

After exercising factual control during a couple of months, it found the legal basis in "B" charter's amendment upon which control functions of "B" were shared including delegation of voting trust to that company.



[59] 'Tesla Shareholders | Who Owns the Most Shares in Tesla?' <https://capital.com/tesla-shareholder-who-owns-the-most-tsla-stock> accessed 10 May 2024.
[60] Tibor Tajti, 'Berle and Means' Control and Contemporary Problems' (2022), vol 6, issue 2, Bratislava Law Review 59, p.65.
[61] Adolf A.Berle & Gardiner C Means (n 6) 74.
[62] Azərbaycan Respublikasının Mülki Məcəlləsi(Civil Code of the Republic of Azerbaijan), arts 91.3, 107.1.

# Chapter II. Shareholder versus executive control

## 2.1. Are shareholders the main controlling figures of the corporation?

According to articles 91.1 and 107.1 of CC of Azerbaijan, GMS is considered as a supreme governing body of the corporation.[63] In the light of that, GMS elects the board of directors and such election gives shareholders control (over corporate decisions) notwithstanding that the board determines company's dividend policy, select corporate officers and defines if the company will issue dividend at all and how much minority shareholders are to be paid.[64] From that perspective, I consider independency of the Directors is vital to defeat shareholder control through the Board. As to the World Bank Report on the evaluation of current state of corporate governance in AR, amongst 1700 OJSCs and 200 CJSCs, only 18% of the companies incorporated provision on independence of Board members into their Charters. Although AR Rules on "Evaluation of Efficiency of the legal entities activity" enacted in 2019 establishes requirement that at least half of the Board members of company must be independent, in reality, the Board members are usually close relatives of the shareholders[65], and they are not independent.[66]

Although executives fulfill day-to-day management tasks, in AR they are not independent in making corporate decisions either. Therefore, they act under the rules dictated by the company's shareholders (owning the majority of company shares). Shareholders do not implement daily corporate decisions as GMS is not an executive body. However, shareholders' influence over executives is undeniable when it comes to AR. For instance, in my practice, the



[63] Azərbaycan Respublikasının Mülki Məcəlləsi(Civil Code of the Republic of Azerbaijan) Section 2, Chapter 4. Translation:http://jafbase.fr/docAsie/Azerbajian/Civil_code_eng.pdf
[64] Ladd A Hirsch and James D Sheppard, 'Claims for Oppression by Minority Shareholders in Private Companies under Texas and Delware Law: A Plaintiff's Perspective' [2012] The University of Texas School of Law. p 2.
[65] Saha Corporate Governance and Credit Rating Services, Inc, 'Corporate Governance Rating Report' (2023).
[66] Paylarının (səhmlərinin) nəzarət zərfi dövlətə məxsus olan hüquqi şəxslərin fəaliyyətinin səmərəliliyinin qiymətləndirilməsi Qaydası (Rules on Evaluation of Efficiency of the legal entities activity) 2019 art 4.4.

CEO of the company "X" (subsidiary of holding company "Y") was only partially independent in selecting contractual partners. Certain types of contracts (insurance, project management e.g.,) must have been concluded exclusively with the companies which were subsidiaries of holding company "Y". In that case, the CEO had no option rather than to approve the transaction by putting his signature.

This is explained by political leverage since Azerbaijani companies holding the largest market shares in the fields of communication, construction, tourism, non-oil sector are owned and controlled by political figures who are shareholders. In such companies, executives and directors (as board members) are often only formal figures whereas actual terms are dictated by the GMS who are political figures. For instance, "Mingechevir Tekstil" LLC, "Caspian Fish Co", "Gilan Inshaat" LLC, "Gilan Agro" LLC, "Gilan Gabala Agrotechservice" OJSC and other more than 300 companies are subsidiaries of Gilan Holding.[67] As to article 67 of CC , holding company which owns subsidiary company has discretion to adopt decisions in respect of daughter company and may give mandatory instructions.[68] Progeny is that all these listed subsidiaries are governed under common policy dictated by Gilan Holding which is totally controlled and owned by the Minister of Emergency Affairs.[69] This paves a way to monopoly since his companies control various market sectors (construction, dairy production, textile, insurance e.g.) and oversight export of certain products manufactured in Azerbaijan what makes small business development difficult. For example, "Agro-Azerinvest" Ltd (subsidiary of Gilan Holding operating since 2004) is winemaking company producing local wine brands like "Madrasa", "Aghstafa","Gabala". This company exports more than a half of produced wines to partner countries like Russia, Kazakhstan, and Belarus.[70] Gilan Empire controlled by

[67] 'The Extraordinary Businessman Kamaladdin Heydarov - MEYDAN.TV' (n 33).
[68] Azərbaycan Respublikasının Mülki Məcəlləsi(Civil Code of the Republic of Azerbaijan).
[69] 'Fövqəlbiznesmen Kəmaləddin Heydərovun Şirkətləri » XalqXeber.Az | Son Xeberler Azerbaycan Xeberleri' (n 28).
[70] 'VINE.AZ' <http://www.vine.az/content/az/2> accessed 14 May 2024.

the shareholder continues to grow by incorporating existing firms or founding new subsidiaries and by this the company increases its market share(that is why Gilan usually is called as the second biggest monopolist controlled by shareholder after Pasha Holding).

Interestingly, Azerbaijani scholarship on shareholder-centric control fails to analyze actual control beyond ownership percentage. From that perspective, Delaware courts have well developed cases where the Courts have been asked to evaluate presence of control below 50% of ownership basing on factual circumstances of the case and focusing on actual control.[71] In fact, this is one of the main reasons that justify this thesis and its main goal to make realize that it is not shareholding as such but rather control that is key for corporate governance.

The Cysive Shareholders' case[72] may serve as an example. Briefly, the Cysive was a company suffering decline in technology market, hence shifted from software service provider to company producing software.[73] However, such transformation was unsuccessful since the company could not make any profitable sales. In response to that Carnobell who was holder of 35% of voting stock and CEO of the Cysive formed a special committee of independent directors to discuss acquisition of company by him who believed into produced software market success.[74] However, that decision on acquisition had been challenged based on unfair merger price. The Court provided analysis if Carnobell is a controller since it was decisive factor to reveal if a special committee was acting under influence of controller and apply entire fairness standard.[75] The Court recognized Carnobell as a controlling shareholder emphasizing the fact that he was a Chairman and CEO of the company and by this played meaningful role in managerial operation of the company and two family members of him were present in



[71] 'Controlling Stockholders in Delaware—More Than a Number' <https://corpgov.law.harvard.edu/2014/11/12/controlling-stockholders-in-delaware-more-than-a-number/> accessed 20 March 2024.
[72] *In re Cysive, Inc Shareholders Litigation* [2003] Court of Chancery of the State of Delaware No. 20341.
[73] ibid 4–6.
[74] ibid 18.
[75] ibid 39.

executive position.[76] The case concerned, presented that actual governing power is more vital than ownership percentage to define control.

### 2.1.1. Drawbacks of shareholder-centric control system in Azerbaijan

If we talk about shareholder primacy in Azerbaijani legal system, it is worth to emphasize its side effects. The existence of shareholder-centric system causes major issues. To illustrate, minority shareholders are oppressed by the majority shareholders in the form of decision-making detrimental to the minority, especially deprivation from dividend payment, decision-making and forcing them to sell their shares so that the majority shareholders could obtain absolute control over corporate affairs. There is no proper definition of what constitutes "oppression" under Azerbaijani law. In the same vein, Delaware lacks statutory definition, too. Nevertheless, in 1992 Delaware Courts introduced so-called "reasonable expectations" test to define oppression: controlling shareholders deprive minority shareholders from what is reasonable to expect (dividends, participation in corporate affairs).[77]

Azerbaijani press frequently publishes the news with the titles "minority shareholders are suppressed by 'giant' company owners", or "controlling shareholders take absolute control". Although acknowledged, the reality is that launching suits to "tame" such abuses has little, if any, chances in courts. Even if prevailing, enforcement of such judgments would not be realistically possible.[78] Usually what happens is that the majority shareholder offers to purchase the shares of minority shareholders - typically for an inadequate price - and minority



[76] ibid 47–48.
[77] Gerard V Mantese and Ian M Williamson, 'Litigation between Shareholders in Closely Held Corporations: Protecting Minority Shareholders from Abuse at the Hands of Majority Owners' Vol. 1:1, Wayne State University Journal of Business Law, p. 4.
[78] 'Şirkətlərdə Böyük Payçılar Kiçik Səhmdarların Hüquqlarını Belə Pozurlar – MÜDAFİƏ ÜSULLARI VARMI? - MƏQALƏ - FED.Az' <https://fed.az/az/birja/sirketlerde-boyuk-paycilar-kicik-sehmdarlarin-huquqlarini-bele-pozurlar-mudafie-usullari-varmi-meqale-135165> accessed 17 March 2024.

shareholders knowing the weakness of the system, will have no chance other than sell their stocks.

Such majority shareholder control is explained by the fact that majority shareholders have representation in the Board since they have more votes basing on "one share, one vote" rule. In such a case, minority shareholders will not be in the position to have their candidates in the Board. In the light of above, Azerbaijani legal scholar Emin Karimov offers introduction of cumulative voting system in respect of election the Board members.[79] This might be a partial solution for protection of minorty shareholders from majority shareholder control as minortiy shareholders will also be in the position to be represented in the Board. Indeed, considering the fact that in Azerbaijani companies, ownership is highly concentrated in the hands of controlling shareholders, absence of cumulative voting becomes shortcoming for a good corporate governance.

The issue may be exacerbated in the case of family businesses as such control models allow families to preserve their dominance over the company either through appointment of relatives to governing bodies of the company or awarding them controlling stocks. This had been illustrated in the US Donahue case.[80] In brief, Harry Rodd together with Donahue (a minority shareholder) acquired Rodd Company where he became majority shareholder, and his sons joined the company acting as member of the Board of Directors.[81] Upon his resignation Rodd equally dispersed the shares amongst his children (51 shares for each) and sold the remaining to the company. The issue was that Donahue being minority shareholder with 50 shares also offered sale of his shares and had been rejected, what led to the dispute on the breach of the Rodd's fiduciary duties owing to Donahue.[82]



[79] Emin (n 1) 145.
[80] *Donahue v Rodd Electrotype Co of New England, Inc* (Supreme Court of the Massachutes).
[81] ibid.
[82] ibid.

Such drawbacks exist in most systems but unlike Azerbaijani corporate governance, New York legislature offers solution to protect minority shareholders from majority shareholder control. According to Section 1104-a of the NYBCL, minority shareholders owning at least 20% of company shares can file a petition on company dissolution if control holder oppressed complaining shareholder.[83] Claiming company dissolution is the harshest remedy for oppression claims. This provision had been used in Digeser v. Flach case (2015).[84] In brief J.Digeser being a minority shareholder (25%), faced mass oppressive actions by majority shareholder - Mr. Flach, in form of deprivation of bonuses and termination of his employment as a director.[85] Digeser filed a petition under § 1104-a of NYBCL and the Court justified existence of oppression by controlling shareholder and granted remedy for claimant where Flach must purchase of his shares for fair market value.[86] Besides, other remedies may be available for minority shareholders: ordering payment of dividends, redemption of issued stocks, permitting minority to purchase additional shares.[87] These are listed because I doubt that CC expressly grants (minority shareholders facing excessive control) such kind of rights (e.g., in respect of buy-back of shares CC dedicates only one article which intends stock repurchases primarily as a means to decrease the number of outstanding shares or the nominal value of the charter capital of the company [88]).

In my opinion, providing minority shareholders with the right to claim for corporate dissolution is the strongest remedy (for minority shareholders subjected to controlling shareholders oppression) which is absent in AR legislation. This is explained by the fact that article 59 of CC provides exhaustive list of grounds of company dissolution (such as if company operated without license, company shareholders agree to liquidate since company achieved its goals,



[83] New York Business Corporation Law.
[84] *Digeser v Flach, 7 NYS3d 241* [2015] Supreme Court, Albany County, New York No. 2382–13.
[85] *Digeser v Flach, 7 NYS3d 241* [2015] supreme Court, Albany County, New York No. 2382–13.
[86] ibid.
[87] Hirsch and Sheppard (n 64) 21–22.
[88] Azərbaycan Respublikasının Mülki Məcəlləsi(Civil Code of the Republic of Azerbaijan) arts 105-1.

mandatory liquidation in case of bankruptcy).[89] However, article 59.2.3 of CC stipulates that company may be dissolved upon court order if it regularly and grossly violates the law. From my perspective, if we consider violation of law in the light of oppression of minority shareholders rights in AR, then mentioned provision might imply that upon court order the legal entity's operation might be terminated. But still CC provides no expressed right for minority shareholders to request dissolution and there is no judicial practice on it.

Another concern emerges when a shareholder (of the parent company) owning the majority of shares of subsidiary company aims to acquire full control over its subsidiary. This had been illustrated in the Santa Fe Industries case.[90] Briefly, Santa Fe-the company holding 95% of Kirby, wanted to acquire full control over the subsidiary via merger.[91] According to § 253 of DGCL, a parent company owning at least 90% of subsidiary company may merge the latter upon approval of parent's Board of Directors.[92] Although in such short-term merger resulting with subsidiary's dissolution by parent company does not require consent of subsidiary's minority shareholders, the parent company must pay to minority shareholders fair value of their shares.[93] From my perspective, the mentioned rule emphasizes how DGCL tends to protect minority shareholders form controller's abuse. Unfortunately, there is no such specific rule in CC, hence most of the time upon a merger or company reorganization minority shareholders receive nothing or a grossly inadequate share price.

Legal remedies against abuse of controllers are required by the international standards such as G20/OECD Principles of Corporate Governance by OECD.[94] Azerbaijan accepts the standards



[89] ibid 4.
[90] *Santa Fe Industries Inc, et al, Petitioners, v S William Green et al* (Supreme Court of the United States).
[91] ibid.
[92] Tit 8 para 253.
[93] *Santa Fe Industries Inc., et al., Petitioners, v. S. William Green et al.* (n 90). *Respondents, minority stockholders of Kirby, objected to the terms of the merger, but did not pursue their appraisal remedy in the Delaware Court of Chancery. Instead, they brought this action in federal court on behalf of the corporation and other minority shareholders, seeking to set aside the merger or to recover what they claimed to be the fair value of their shares*
[94] *G20/OECD Principles of Corporate Governance 2015* (OECD Publishing 2015).

and recommendations on corporate governance published by OECD. Amongst the recommended principles "equal treatment for all shareholders" is emphasized as to which minority shareholders must be protected from abuses of controlling groups and provided with effective legal remedies.[95]

In my opinion, if the shareholders are considered as the "kings", then CC must tailor provisions to ensure protective mechanism from such majority shareholder control if abused. However, even if CC would provide remedial list for abuse of control, I consider it would take a while for these norms to be actually implemented in practice considering political dominance of major shareholder(s).

## 2.2. Separation of control from ownership: executive control

As mentioned in previous paragraph, in Azerbaijan shareholder control prevails together with the analyzed drawbacks. Even though corporate control is highly attached to ownership of stocks, modern trends may prove otherwise. More precisely, discussion over segregation of control from ownership brings into scene the fact that control may be concentrated in the hands of directors. For instance, company's executive director (CEO) can embark decisions on company's business strategy.[96] As documented by Berle and Means back in the 1920s and 1930s, in companies where stock ownership is widely scattered[97], the directors may become controllers even though they hold merely a small percentage of company stocks, if any.[98] Namely, that is the Board which initiates corporate activities whereas shareholder approve or reject the projects. The most obvious way of this type of control appears to be through proxy



[95] Beynəlxalq Maliyyə Korporasiya, 'Dövlətə Məxsus Müəssisələrin Korporativ Idarəetmə Təcrübələrinə Dair İƏİT-in Qaydaları (OECD)', p.30.
[96] Robert W.Hamilton, *Cases and Materials on Corporations, Including Partnerships and Limited Liability Companies* (6th edition, 1998) 566–567.
[97] Martin Gelter, 'Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance' (2009), vol 50, Fordham Law School, p. 130.
[98] Adolf A.Berle & Gardiner C Means (n 6) 82.

mechanism. In such a case dispersed shareholders sign a proxy and transfer their voting powers to individuals of proxy committee selected by the executive.[99]

If we look at the Azerbaijani corporate control system, it mostly tries to preserve control in the hands of shareholders, that is why mentioned proxy mechanism is not peculiar to AR (there is no even terminology alternative to the "proxy"). Even according to the CC shareholders cannot transfer their decision-making power to the executive body.[100]

From my point of view, in Azerbaijan except for companies subjected to high level political leverage of shareholders, executive control exists in the subtlest form. It means that even though major companies are dominated by the shareholders being political figures, there are still some companies where executives control strategical company issues rather than shareholders. Above all, shareholders are interested in maximizing the profits and are not necessarily required to take part in day-to day management (even article 107-10.7 of CC puts restriction on shareholders holding above 20% company shares for taking position at executive body[101]). Furthermore, article 49 of CC establishes fiduciary duties for executives and article 107-10.5 requires consent of the Board of Directors (Supervisory Board: as mentioned in chapter 1 CC use these terms interchangeably) for any transaction in conflict with the interests of the company.[102] It means the legislature predicted possible control by executives and incorporated mentioned provisions to avert abuse of directors' activities since directors via control mechanism may gain personal benefits.

### 2.2.1. Challenges of excessive executive control

One of the recent cases with "Baku Steel Company" LLC (BSC) is proof that executive control should not be overlooked as it may be detrimental for the company and challenge its successful

[99] ibid 80.
[100] Azərbaycan Respublikasının Mülki Məcəlləsi(Civil Code of the Republic of Azerbaijan) art 107.2.
[101] ibid 107-10.7.
[102] ibid 49, 107.10-5.

operation. BSC is a pioneering steelmaking enterprise of Azerbaijani metallurgical industry. Briefly, the CEO of the company was managing corporation till 2021. He had been accused of misappropriation of company property, causing damage in excess of 13 million of USD and other fraudulent actions.[103] More precisely, he founded several companies, sold the goods of Baku Steel to them at low price and either used them for his own construction purposes or resold the purchased goods at excessively higher price.[104] As a result he had been charged with Article 179.4 (corporate waste and misappropriation), article 308.2 and 313 (abuse of his position as CEO).[105]

The presence of executive control should not be overlooked as it may lead to a challenge of M&A transactions by the shareholders claiming that its conclusion is in breach of fiduciary duties of director. One of the recent cases - in re Tesla Motors Inc Stockholder Litigation[106] exemplifies how executive control may challenge transaction on share acquisition. Briefly, in that case several shareholders of Tesla filed lawsuit against Elon Musk (who was 22% shareholder of Tesla, as well as CEO and Chairman of the Board) arguing that Tesla's acquisition of Solar City (Elon also was the largest shareholder of Solar and took position as a chairman of its Board) was in breach of Musk's fiduciary duty since the transaction benefited him personally.[107] More precisely, plaintiffs argued that acquisition of Solar City (which they considered has high risk of bankruptcy) for $2.6 billion pursued to bail out Musk's foundering investment in SolarCity.[108] Delaware Court of Chancery dismissed the plaintiffs' claim concluding that the acquisition was fair, the target company was not bankrupt and as a result of acquisition Tesla made a profit by selling solar products to its customers.[109] It means that



[103] '"Baku Steel Company"dən Kimlər Gəldi, Kimlər Keçdi? - ARAŞDIRMA » AFN.Az - Xəbər Portalı' <https://afn.az/vacib/123526-baku-cteel-companyden-kimler-geldi-kimler-kedi.html> accessed 26 March 2024.
[104] ibid.
[105] Azərbaycan Respublikasının Cinayət Məcəlləsi (Criminal Code of the Republic of Azerbaijan).
[106] *In re Tesla Motors Stockholder Litig* [2023] Delaware Supreme Court C.A. No. 12711-VCS.
[107] ibid.
[108] *In re Tesla Motors, Inc. Shareholder Litig.*, (n 58).
[109] *In re Tesla Motors Stockholder Litig.* (n 106) 66–108.

acquisition did not pursued Musk's personal benefit but rather served Tesla's interest to assist transformation of the world to sustainable energy. Though in that case the Delaware Supreme Court did not find excess of Musk control, in my view Elon's influence (as a controller) on the acquisition of Solar City cannot be denied. To begin with, no special committee to manage acquisition was formed (no formal independent negotiating body as the court states) that was Elon who participated in the dealing process ; close relatives of Musk who were presented in the Board of Tesla voted for approval of acquisition; Musk selected outside deal counsel[110] Although the case itself refers Elon Musk as a controlling shareholder, considering all the factual circumstances discussed, I would state his control can be classified as executive control, because it is doubtful if Musk would have the same degree of control without holding position in the Board and as CEO but only owning 22% of company shares. Besides, it is not an accident that plaintiffs stated that Elon's supremacy in the company and his ability to affect key decision making is motivated by his position in the Board. I would say that case proved that owning shares is backed up by holding key positions (such as CEO, chairman of the board) can threaten the company's operation. For instance, if that position is abused then controller by dominating the board can get approval for the acquisition of the target company which is on the verge of bankruptcy and bail-out its own investment or offer high price for acquisition to fit for his own interests. I believe that this might be the reason why CC of AR bans shareholders from holding a position as an executive. As per article 107-10.7 of CC holders of more than 20% of company shares are not allowed to hold a position in the executive board.[111] But still executives domination is not totally excluded because in practice there are lots of small-middle scale business where founder or co-founder of the company serves as a director and this ban is only valid for joint stock companies(not applicable for LLC).



[110] ibid 90–94.
[111] Azərbaycan Respublikasının Mülki Məcəlləsi(Civil Code of the Republic of Azerbaijan) s 2,chapter 4.

# Chapter III. Control and the threat of takeover

## 3.1. The nature of corporate takeover

Once the concept of control and its side effects in the light of shareholder and executive control have been reviewed, it is essential to analyze control in the context of takeover activity. Let us consider that there are large entities which enjoy the power to set the rules and small-scale business actions must be in consistent with the rules dictated by large companies.[112] The significance of its consideration is that in Azerbaijan some small-scale businesses suffer from takeovers and neither legal nor knowledge on practical tactics are that strong to tackle control issue. In simple terms, takeover refers to shift of control from one company (target) to another (acquirer).[113] This usually occurs when acquiring company purchases controlling voting shares of the target, consequently obtaining power to dictate corporate policy settled by it.[114] Transfer of corporate control may happen in two scenarios: friendly and hostile takeover. The first scenario implies transfer of control by agreement between acquirer and target company and has positive outcomes since it is believed that acquiring company by taking over the target, would control (replace) inefficient management and ownership with efficient one.[115] For the second scenario the opposite is true. A hostile takeover occurs in the absence of agreement where acquirer takes over the target company against the wish of the target's Board members.[116] Thereby, acquirer makes a tender offer seeking to purchase controlling stocks



[112] Guido Ferrarini and Geoffrey P Miller, 'A Simple Theory of Takeover Regulation in the United States and Europe' (2009), vol 42, issue 3, Cornell International Law Journal, p. 302.
[113] W.T.Allen, R.Kraakman and G.Subramanian, *Commentaries and Cases on the Law of Business Organization* (6th edn, Wolters Kluwer 2021) 424 <https://archive.org/details/commentariescase0000alle/mode/2up?view=theater> accessed 11 June 2024.
[114] Alessandro Benocci, 'Purposes and Tools of the Market for Corporate Control' (2016) , vol 13, issue 1, European Company and Financial Law Review , p.60.
[115] ibid 59–60.
[116] 'Hostile Takeover Explained: What It Is, How It Works, and Examples' <https://www.investopedia.com/terms/h/hostiletakeover.asp> accessed 30 March 2024.

directly from target company's shareholders who are usually willing to do so since they are paid premiums for voting shares.[117]

## 3.2. Corporate takeovers in Azerbaijan

Hostile takeovers are one of the most problematic issues in Azerbaijan. This stems from the fact that "shark" companies with the largest market share compete unrestrained to grab total control over small businesses in the lack of any pertinent regulations. One of the recent cases was with Nigar Kocharli as the owner and CEO of bookstore "Ali and Nino" LLC vs Gilan Holding. "Ali and Nino" is the largest and oldest bookstore in Azerbaijan operating since 2005.[118] Up to date Kocharli developed her business and opened more chains of bookstore in various districts of Baku and Sumgayit city. However, in 2018 she publicly announced how her small business is under the threat of hostile takeover by Gilan Holding which demanded from her to totally hand over bookstore business to the acquirer's control.[119] Following Kocharli's refusal, she confronted with couple of issues with customs and import-export of the books.[120] Candidly, taking total control over Kocharli's bookstore business was nothing than eliminating potential competitors and becoming a monopolist in that field (Gilan Holding is one of the "giant" companies holding largest shares in the fields of construction, tourism , product manufacture, retail etc. Not an accident that it aimed to remove Ali and Nino from the market[121]). This is backed up with the fact that Chairman of the Board of Gilan (who is the son of company owner) is a founder of "Libraff" bookstore network and TEAS Press Publishing House. Libraff was founded in 2017 and is considered as one of the most prominent book



[117] Eric S Rosengren, 'State Restrictions of Hostile Takeovers' (1988), vol 18, issue 3, Oxford University Press, The Journal of Federalism 67, p.68.
[118] 'Our Book Stores' <https://alinino.az/page/shops?lang=en> accessed 30 March 2024.
[119] 'Azerbaijan: Small Bookstore Owner Describes Hostile Takeover by Powerful Minister | Eurasianet' <https://eurasianet.org/azerbaijan-small-bookstore-owner-describes-hostile-takeover-by-powerful-minister> accessed 27 January 2024.
[120] ibid.
[121] 'Azərbaycanda Ən Böyük Holdinqlərin - Rəhbərləri Kimlərdir? - Siyahı - Fed.Az' <https://fed.az/az/biznes/azerbaycanda-en-boyuk-holdinqlerin-rehberleri-kimlerdi-siyahi-69802> accessed 30 March 2024.

chains in AR after Ali and Nino.[122] Obviously, the increasing network of "Ali and Nino" was not in the interest of Gilan, as it intended to grab the control and extract private benefits.

As it is seen from the case, even attempts to take over the business have adverse effects considering the political weight and market dominancy of the raider. However, the situation may be exacerbated once a hostile takeover is realized. Namely, following shift of control, the target company may face change in corporate governance, business relations with partners, removal of management etc.[123] In the worst scenario controlling company may sell the target's assets.[124] Unfortunately, there is no reported cases in AR jurisprudence specifying which steps might be taken to restrain hostile nature of the control attack. Hence, one of the Delaware landmark cases-Unocal Corp. v. Mesa Petroleum Co.[125] might serve as an example where directors were entitled to adopt defensive measures facing control attack by the raider. Briefly, Mesa (a company with a bad reputation making profit from hostile takeovers) was holding 13% of Unocal's shares and offered to purchase 37% of the target company's shares for the price below its market value. (54$ per share).[126] As a result, Unocal declared self-tender (70$-75$ per share) for its own shares as a defense by excluding Mesa from tender.[127] The main point was that the directors might use such a defensive tactic providing that it is done for protection of the company from the hostile takeover rather than motivated by directors to perpetuate themselves in the office. [128] In that case, directors used the company's assets to resist takeover, therefore, the defensive plan was justified.



[122] 'LIBRAFF Opens the Largest Bookshop in Baku' <https://turan.az/en/culture/libraff-opens-the-largest-bookshop-in-baku> accessed 10 June 2024.
[123] Russian Economic Academy (n 10), p. 144.
[124] Dale Arthur Oesterle, *Delaware's Takeover Statute: Of Chills, Pills, Standstills, and Who Gets Iced*, vol 13, (1988) 893.
[125] *Unocal Corp v Mesa Petroleum Co* [1985] Supreme Court of Delaware 493 A.2d 946, Fed. Sec. L. Rep. (CCH).
[126] ibid.
[127] James F Ritter, 'Unocal Corp. v. Mesa Petroleum Co' (1986), vol 72, issue 4 Virginia Law Review 851, pp. 851–852.
[128] *Unocal Corp. v. Mesa Petroleum Co.* (n 125).

In general, hostile takeovers may also put pressure on shareholders to sell their shares at an inadequate price. Let us assume that "A" company makes tender offer to "B" for acquiring 51% of its shares for 60$ per share where shares market value is 80$. "A" after gaining control with 51% of "B" shares potentially may provoke merger of the target with him and afterwards acquiring remaining shares for the lowest price (10$ per share). The target company's shareholders, fearing that after full control they may end up selling the shares for 10$, agree now to trade them for 60$. Once raider acquires control over the target, it may exploit the company for own benefits such as making target to buy construction materials from acquirer at higher market prices.[129]

These all illustrate how it is vital to have proper regulation and defense mechanisms for the target company in case of control transfer.

## 3.3. Federal level of the US takeover regulation

As often stated, creating a level playing field for the contest of corporate control is the central aim for takeover regulation.[130] To learn from the experiences, and the regulatory responses of the most active takeover markets - the US - analysis of both, the federal and State level of takeover regulation is a must; especially as the approaches are not the same.

To begin with, federal law involvement into regulation of takeovers pursued the following patterns. During the merger wave between 1960's-1970's more than 10,000 companies were acquired, with approximately 25,000 firms disappearing throughout the entire period.[131] At that time transactions for acquisition target's shares were offered in a short period of time (so called "Saturday night specials") frustrating target's shareholders to decide about the tender offer very



[129] 'Grading the Goldfield Poison Pill by Aaron Brown' <pages.stern.nyu.edu/~igiddy/cases/goldfield.htm>.
[130] Benocci (n 114) 64.
[131] Steven M Davidoff, 'The SEC and the Failure of Federal, Takeover Regulation' Vol. 34:211, Florida State University Law Review Florida State University Law Review 211, p. 215.

quickly.[132] This was an issue since the target's shareholders did not possess necessary information to properly assess tender offer and they were not aware of acquiring company's plans for the target. In the light of this situation, the US Congress enacted the Williams Act in 1968 amending the US Security Exchange Act of 1934. As per amendment a person aiming to acquire at least 5% of the target company's shares must file disclosure statement with SEC within 10 days.[133] The statement must disclose essential information such as identity of acquiring company, its intention in respect of target (if acquirer upon acquisition plans to make significant changes in the target's corporate structure), number of shares owned.[134] The importance of this amendment was that such disclosure warned the target as well as the market (and SEC as a controller of integrity of capital markets) about presence of takeover attempt.[135] On top of that Williams Act required that since the time of its commencement, tender offers must remain open for the target company for at least 20 business days subjected to extension in case terms and conditions of the prior tender offer are altered.[136] As it is seen at federal level, takeovers were regulated under security law rather than corporate law.

## 3.4. State level of the US takeover regulation

When it comes to takeover laws enacted on the State level, these were contradicting with federal laws since the States maximally wanted to protect their companies from being taken over. To begin with, first generation laws (effective till 1982) required the acquirer to file extensive disclosure statement than provided by Schedule 13D within 10-30 days (this was a longer period than required by Williams Act) before the tender offer for the target, as well as keep tender offer for the target open more than 20 business days (that period varied from



[132] Arthur R Pinto and Douglas M Branson, *Understanding Corporate Law* (Fourth edition, Matthew&Bender Inc. 2013),328–329.
[133] Securities Exchange Act of 1934, Schedule 13 D (Amendment No 24).
[134] Pinto and Branson (n 132) 329.
[135] ibid.
[136] Securities Exchange Act of 1934, 17 CFR § 240.13e-4 - Tender offers by issuers.

jurisdiction to jurisdiction, e.g., in Michigan and Massachusetts it was 60 days.).[137] Such provisions were explaining the States strong takeover protective attitude since longer tender periods could increase bidder's costs (to defeat the tender offer), raise occurrence of other bidders, additionally it was giving the target extra time to launch defensive measures.[138] Such takeover regulation later deemed to be unconstitutional following Edgar vs Mite Corporation case(1982).[139] Briefly, Mite (a Delaware Corporation) made a tender offer to Chicago based company in compliance with the tender offer requirements of William Act. However, Edgar (secretary of Illinois ) argued that offer was in contrast with Illinois Business Takeover Act .[140] As to the Illinois Business Takeover Act offeror must notify the Secretary of State and the target about its offer 20 days before tender commencement (Court of Appeal concluded such pre-commencement notice is contradictory to Williams Act).[141] Furthermore, the tender cannot become into effect unless hearing by the Secretary is completed and that was causing delay of the tender (no deadline for hearing completion was determined).[142] After the US Supreme Court's decision on invalidity of first generation takeover law, a new round-second generation of takeover regulation had been introduced by the States, encompassing rules on business combination, fair price for tender offer etc. From that perspective, the States takeover regulation can be generalized in the following three models:

*"Moratorium" Model (Delaware and New York)*. As to this model, the acquirer owning at least 15% of the target's shares cannot engage in business combination with the target company for 3 years.[143] This rule is stipulated in DGCL under § 203 (a) providing for 3 years of moratorium



[137] Jonathan M. Karpof, 'Institutional and Political Economy Considerations in Natural Experiments: The Case of State Antitakeover Laws' [2015] Journal of Finance, pp. 4–5.
[138] ibid.
[139] *Edgar v MITE Corp: 457 US 624 (1982)* [1982], US Supreme Court No. 80-1188.
[140] ibid.
[141] Gregg A Jarrell, 'State Anti-Takeover Laws and the Efficient Allocation of Corporate Control: An Economic Analysis of Edgar v. Mite Corp.' (1983), vol 2, Supreme Court Economic Review 111, p. 113.
[142] *Edgar v. MITE Corp. 457 U.S. 624 (1982)* (n 128).
[143] Ivy B. Dodes, 'The Delaware Takeover Statute: Constitutionally Infirm Even under the Market Participation Exception' (1988), vol. 17:203, Hofstra Law Review 203, pp.208–209.

period which bans merger with the target company.[144] In the same vein, New York anti-takeover legislation stipulates business combination provisions to resist hostile takeovers. Under article 9, § 912 of NYBCL, acquiring company purchasing at least 20% of firm's shares cannot engage in any business combination with the target for five years, unless approved by the target's Board of Directors.[145] Namely, "the acquirer would not be able to merge or make any sale, exchange, transfer, or other disposition of the target's assets over this five-year period".[146] Statistically, coverage of the firms listed on NYSE or Amex (which were attacked by hostile takeovers during 1975-1991) by business combination statutes were increasing from 15% to 63% and reached its maximum of 87% in 1991.[147] Following the statutory measures takeover rates gradually dropped form peak of 1.5%-2%(1987-1988) to a mere 0.5%(1991) and below that rate for the upcoming years.[148] Those results illustrated how proper regulation might assist demise of hostile takeovers.

*Indiana model.* This model conditions an acquisition of control over the target company upon approval of target's majority of disinterested shareholders.[149] As to the Indiana Code § 23-1-42-9, if acquiring company places tender offer for controlling stocks of the target company, shares acquired by such company receive voting right if the target's majority of disinterested shareholders authorize to do so.[150]

*Pennsylvania model (cash-out privilege*). Pennsylvania Business Corporation Law stipulates that if a company acquires at least 20% of the target company's shares then it must pay in cash



[144] Tit 8.
[145] New York Business Corporation Law.
[146] ibid.
[147] Robert Comment and G William Schwert, 'Poison or Placebo? Evidence on the Deterrence and Wealth Effects of Modern Antitakeover Measures' (1995), vol 39, Journal of Financial Economics 3, pp.4–5.
[148] ibid.
[149] *CTS Corp v Dynamics Corp of America, 481 US 69* [1987] US Supreme Court No. 86-71.
[150] Indiana Code Title 23. Business and Other Associations § 23-1-42-9.

to the target a “fair value" for the shares of other shareholders of the corporation who object to the acquisition transaction.[151]

## 3.5. Takeover regulation in Azerbaijan

AR does not have statutory provisions which might protect the companies from hostile control in a way the US does. Candidly, there is no anti-takeover statute, hence, the fate of companies attacked by takeovers is under the question. For the moment legislative acts only mention merger and consolidation control and deal with control from the perspective of competition law. For instance, as to article 13 of the Law of AR on Anti-monopoly Activity if following merger or consolidation a business entity obtains dominant market position (holding at least 35% of market share), then such merger can only be validated upon a written consent of State Service for Anti-monopoly and Consumer Market Control.[152] This statute may preclude business entities from abuse of market dominant position, but it is not the solution for takeover. Because the provision aims to protect the market participants from the result of M&A (namely, effect on consumers, reduced competition) and does not deal with resistance to M&A itself. In my opinion, to introduce business combination as an anti-takeover measure into Azerbaijani legislation, company’s governance structure, namely the Board should be exempted from shareholder influence. Otherwise, considering shareholders’ dominancy they will put pressure on the Board for approval of the business combination if such a takeover is beneficial for them. Furthermore, even if AR civil legislation stands for shareholders’ right for fair share value it does not specifically regulate the case of takeover. From that perspective, introduction of mandatory rule (based on Pennsylvania model) that company acquiring at least 20% of the



[151] Pennsylvania Business Corporation Law. Chapter 25 svv 25E-25H.
[152] Antiinhisar fəaliyyəti haqqında Azərbaycan Respblikasının Qanunu (The Law of the Republic of Azerbaijan on Anti-monopoly Activity) art 13.

target's controlling shares must adequately compensate its shareholder[153] might be adequate protection for the target company shareholders.

## 3.6. Defense mechanism for hostile takeover: the poison pill

As already discussed, NY and Delaware anti-takeover measures delay obtaining full ownership. However, afterwards control may end up in the hands of the raider who might sell the target's assets, incur debts or even sell the target company to the third party.[154] Hence, anti-takeover measures should be backed up with defense mechanism to prevent the raider from being a controlling shareholder.[155]

One of them is the poison pill, also known as shareholder rights plan.[156] In simple words, poison pill is the mechanism allowing shareholders to repurchase their shares acquired by attacker for the discounted price when the pre-defined triggering event (purchase of certain percentage of target's shares) occurs (e.g., target's shareholders may repurchase shares which market price was 200$ for the half price and cause acquirer's shares economic dilution).[157] The term "poison" is explained by the fact that raider acquires the control over target company along with swallowing the pills (that is shareholders right plan). As a result, these pills release the poison affecting the "swallower": upon acquisition the target's shareholders become right holders to purchase the shares usually for half price of its current market value.[158] As a result, the raider's plan for corporate control is poisoned.



[153] Pennsylvania Business Corporation Law. Chapter 25.
[154] Emiliano Catan and Marcel Kahan, 'The Law and Finance of Anti-Takeover Statutes' [2014], SSRN Electronic Journal, p.12.
[155] *City Capital Associates v Interco Inc* [1988] Court of Chancery of Delaware, New Castle County 551 A.2d 787.
[156] Robert F. Bruner, *The Poison Pill Anti-Takeover Defense: The Price of Strategic Deterrence* (1st edn, CFA Institute Research Foundation 1991) 7.
[157] *Moran v Household International, Inc* [1985] Supreme Court of Delaware 500 A.2d 1346; Fed. Sec. L. Rep.
[158] Edwin L. Miller Jr., Lewis N. Segall, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide* (John Wiley & Sons Inc 2008) 290–291.

Poison pills had been employed by prominent companies (Netflix, Twitter, Papa John's e.g.,) to make the company fend off from hostile raiders. For example, in 2012 Netflix adopted poison pills to thwart the takeover attempt of Carl Ichan.[159] The Board of the Netflix approved a shareholder rights plan. In accordance with plan, Netflix shareholders would purchase newly issues shares at discounted prices following raiders acquisition of 10% and more of Netflix shares.[160] Obviously, such rights plan might discourage acquisition of control. That is not an accident that currently Carl owns only 9.98% of Netflix shares and he criticized that threshold posed by Netflix for making the pills work (in case of 10% share acquisition) was too low.[161]

In 2022, Twitter adopted a shareholder rights plan after E. Musk offered to the company to acquire 10% of its shares.[162] As to the plan, if a person acquires more than 15% of Twitter's common stocks without approval of its Board, then each Twitter shareholder has a right to purchase additional common stocks at the discounted price.[163] As a result Musk owns only 9% of Twitter common stocks. After share acquisition, Twitter's CEO offered Musk to join the Board. However, Musk refused, since the Board members are not allowed to hold more than 15% of company stocks.[164] This refusal clearly reveals that Musk aimed to obtain control rather than take part in Twitter's corporate affairs to develop its business operation.

Another landmark case exploring target's defense againt hostile bids is Unocal vs Mesa Petroleum Co. case mentioned in the previous paragraph. In that case, Mesa following its



[159] 'Netflix, Good Governance and Poison Pills – The Network' <https://sites.law.berkeley.edu/thenetwork/2012/11/16/netflix-good-governance-and-poison-pills/> accessed 2 June 2024.
[160] ibid.
[161] ibid.
[162] 'Twitter Board Adopts "poison Pill" after Musk's $43 Billion Bid to Buy Company' <https://www.cnbc.com/2022/04/15/twitter-board-adopts-poison-pill-after-musks-43-billion-offer-to-buy-company.html> accessed 6 April 2024.
[163] 'Twitter Adopts Limited Duration Shareholder Rights Plan, Enabling All Shareholders to Realize Full Value of Company' <https://www.prnewswire.com/news-releases/twitter-adopts-limited-duration-shareholder-rights-plan-enabling-all-shareholders-to-realize-full-value-of-company-301526627.html> accessed 6 April 2024.
[164] 'Twitter Board Adopts "poison Pill" after Musk's $43 Billion Bid to Buy Company' (n 162).

exclusion from Unocal's self-tender filed a complaint against Unocal. Delaware Supreme Court justified the Board's action in response to Mesa's takeover in the following manner:

- Directors acted within authority granted to them by DGCL articles 141(a) and 160(a).[165]

- It was reasonable to believe (reasonableness test) that Mesa's offer posed a threat to Unocal considering the inadequate tender price, nature of the offer and corporate raider reputation of Mesa (it made profits from hostile takeovers).[166]

- Board's action was under the business judgment rule since target's response proved to be reasonable and proportional to the threat imposed.[167]

In the light of above, the case also proved that how the directors are actual controllers since they adopt vital corporate strategy and have broad authority as long as their action is for the best interest of the company and proportional to the posed threat.

When it comes to Azerbaijan due to weakness of M&A legislation and absence of takeover regulation no practice of poison pill exists (at least statutorily). This becomes an issue since weak target companies will not be in the position to negotiate hostile bids considering the market dominant position of the bidder. Besides, implementation of poison pills requires statutorily developed stock repurchase provisions (selective buybacks in Mesa case). Unlike the US, CC recognizes buy-backs exclusively for the purpose to minimize charter capital and number of shares.[168] The legislature does not see it as a tool to discourage hostile tenders. Expanding stock repurchase definition and introducing takeover statute may pave a way to employ poison pills. Lots of businesses may frequently encounter undue influence by the raider (as was illustrated in "Ali and Nino" case) and result is they would be unable to continue their

[165] Ritter (n 127) 852.
[166] ibid.
[167] ibid.
[168] Azərbaycan Respublikasının Mülki Məcəlləsi(Civil Code of the Republic of Azerbaijan) arts 105-1.2.

business. This became of special concern after the COVID-19 pandemic what made business entities more vulnerable to M&A. In such a case a takeover attack would be inevitable, but at least employing poison pills would mitigate the situation for the target company by granting its shareholders a fair value share price.

# Conclusion

Hopefully, the thesis showed how complex corporate control is whether being exercised by the company shareholders, executives or acquired following takeover activity. On the other hand, if not properly regulated it might cause the demise of the company's reputation in the light of minority shareholder oppression so that foreign investors might not be interested in investing in AR companies. Furthermore, more small and middle scale businesses emerge in AR what requires to provide them with adequate level of protection from takeovers due to the reasons mentioned in the thesis. In the light of analyzed legal practice in the US, I would suggest the following recommendations to tackle existing issues in AR in respect of corporate control matters listed in the thesis:

To begin with, to make the majority control holders in AR companies obey the principle of equal treatment of all shareholders, it is recommended to strengthen guarantees for minority shareholders' rights. More precisely, following the discussed NYBCL and DGCL models, provisions on redemption of shares might be introduced. Besides, the harshest remedy in the form of minority shareholders' right to demand company's liquidation following mass oppression of minority shareholders rights, might be guaranteed. The threshold on how many percentages should minority shareholder own (to be eligible to require liquidation) will be determined by the legislature (in case of NYBCL it was 20%[169], but considering the major number of minority shareholder oppression in AR this threshold may be lowered).

Furthermore, it would be plausible to enact a separate takeover statute or at least incorporate anti-takeover measures in the existing CC of AR to the Chapter 4 on legal entities. The issue is that mergers and acquisitions in terms of grabbing control lack their regulation under AR laws what makes small businesses swallowed by giant companies. That is why if existing

[169] New York Business Corporation Law, section 1104-a.

measures (e.g., business combination clauses, shareholders rights plan illustrated in takeover discussion) used by the US corporations introduced, then local businesses might prosper by not fearing that their companies being totally swallowed by the giant companies holding the largest market shares in AR.

Last but not least, apart from suggestions on the legislative level, I would also give due attention to the necessity of improving legal education. It would be better to organize training or include the US practice on corporate control into course syllabuses of the educational institutions studying law, business and related fields where control issues might emerge. Above all, at least people would be aware of the threats that takeovers pose to AR corporations (this becomes vital especially if a person intends to open his or her own business in the future in AR) and they might grasp current gaps in law and make offers to the legislature for appropriate changes such as adoption of anti-takeover measures. Besides, teaching bankers and business people on corporate control would raise awareness about possible risks they might face. Furthermore, by educating people, the chances to elaborate civil legislation on corporate control increase, since the people can make proposal to National Assembly (legislative body of AR) following their rights to legislative initiative.[170]



[170] The Constitution of the Republic of Azerbaijan 1995, art 96.

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