SHAREHOLDERS' AGREEMENTS IN DANISH LAW

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1. AGREEMENTS ON VOTING RIGHTS AND THEIR PRACTICAL APPLICATION

1.1. According to the Danish and the other Nordic Companies Acts—and in contrast to both German and English law—the general meeting is the supreme authority of the company.[1] The general meeting makes its decisions by voting. Neither the Acts nor—usually—the by-laws of the companies contain numerous or detailed rules of procedure that are binding on the general meeting in limited companies. It is, however, generally recognized that such meetings are to be conducted according to the rules laid down in statutes and by-laws; these rules correspond in many ways to, and may be supplemented by, such provisions as have been generally accepted in practice with regard to the convening of meetings, the preparation of agendas, voting procedure, etc., in the Folketing (the Danish Parliament), county councils, other elected councils and boards of different kinds, cooperative societies and associations. It must not be inferred from this, however, that all these rules—including also, e.g., the provisions governing the voting rights of a member of the Folketing—apply equally to the voting rights of shareholders. According to sec. 56 of the Danish Constitution Act, members of the Folketing are bound solely by their own consciences and not by any directions given by their electors. It is, therefore, clear that the promise of a member of the Folketing to vote in a particular way is not legally valid. However, the voting rights in a commercial company differ entirely from political voting rights. Under Danish law a shareholder may make a binding promise as to how he will exercise his voting rights. In Denmark, at any rate, there is no evidence of any harmful consequences arising from such agreements. It may be desirable, both in planning the operation of the firm and in securing investments in the company, that the interested parties should be able to ensure by agreement that the company will

[1] Cf. Wiethölter, *Interessen und Organisation der Aktiengesellschaft*, 1961, pp. 49 ff.

be operated and managed on certain lines in the future. The partners in a partnership may enter into mutually binding agreements concerning the operation and management of the partnership and their own position in it. The need for a corresponding mutually binding agreement between partners also often exists in limited companies, not least in close companies with only a few shareholders. When a partnership is about to be converted into a limited company, the partners are frequently interested in coming to an agreement to maintain their existing mutual legal positions to some extent even after the conversion has taken place. The development towards more extensive co-determination and industrial democracy now perceptible does not appear to present an argument against the establishment of shareholders' agreements.

The validity of shareholders' mutual agreements on voting rights has been established not only in Denmark but also in the other Nordic countries, as well as in Germany and England.[2] The opposite opinion is held in France and Italy, where it is held that full benefit of the free interchange of opinions at general meetings is obtainable only provided the shareholders have complete freedom to exercise their voting rights. The right to vote, it is thought, is a function to be discharged by the shareholder in the interests of the company.[3] Nevertheless agreements on voting rights are also used in the two countries mentioned, and such agreements have obtained some European recognition in the draft statute for the European Company: the provision laid down in art. 93 of the statute acknowledges binding agreements on voting rights. However, they can be regarded as valid only on condition that the shareholders receive no consideration, and an agreement can be made operative against the company only if the latter has been notified of it.

1.2. Agreements on cooperation between shareholders concerning the coordination and balancing of their interests in the company

[2] Gower, *Company Law*, 3rd ed., points out on p. 562 that voting rights are subject to the same rules as other proprietary rights: "Votes are proprietary rights, to the same extent as any other incidents of the shares, which the holder may exercise in his own selfish interests even if these are opposed to those of the company. He may even bind himself by contract to vote or not to vote in a particular way and his contract may be enforced by injunction."

[3] Cf. René Demogue, *Traité des obligations*, vol. II, no. 826. A comprehensive survey of French and Italian legal practice and literature can be found in Lübbert, *Abstimmungsvereinbarungen in den Aktien- und GmbH-Rechten der EWG-Staaten, der Schweiz und Grossbritanniens*, 1971, pp. 287 ff.

exist in a large number of Danish companies. Such agreements often not only include provisions specifying how the shareholders are to exercise their voting rights in respect of particular questions but also touch upon other points of essential importance to the shareholders, e.g. their conditions of employment in the company, their rights and duties to supply the company with goods at fixed prices, or to receive such goods from it, the raising of working capital (cf. U.f.R. 1970.47 H).[4] The agreements may also contain provisions to the effect that the shareholders shall have a mutual right of pre-emption in respect of the shares or that in certain circumstances, e.g. the death of a shareholder, they may buy one another out (cf. U.f.R. 1966.739 V). Agreements concerning voting rights may, for example, provide (1) that the representatives of particular groups of shareholders shall be appointed members of the board of directors, (2) that certain shareholders shall exercise, on some or all matters, a greater or a smaller degree of influence than they would otherwise be entitled to exercise according to the size of their shareholding or the ordinary rules governing voting rights in the company, or (3) that, in certain circumstances, e.g. where a deadlock is reached in connection with some major issue, the shareholders undertake to vote for a liquidation (cf. U.f.R. 1923.636 SH and 1966.739 V). An agreement for cooperation among several firms, one object of which may be the preparation of a merger, may provide that the principal shareholders of the firms shall undertake to bring all the articles of association of the several companies into agreement with the provisions laid down in the agreement for cooperation.

An agreement between the shareholders of a company may comprise all or some of the shareholders; a majority group or a minority. A group controlling the practical, and possibly also the numerical, majority in the company may agree that the votes of the group's shares shall be cast as decided at a preliminary meeting of the group with a view to maintaining control of the company. In order to safeguard its interests, a minority may likewise agree that votes of all the shares held by the minority shall be

[4] U.f.R. is the abbreviation for *Ugeskrift for Retsvæsen*, where the decisions of the Danish Højesteret (Supreme Court), of the Danish courts of appeal, Vestre Landsret and Østre Landsret, and of the commercial court of Copenhagen, Sø- og Handelsretten, are published. The name of the court is indicated as follows: Højesteret = H, Vestre Landsret = V, Østre Landsret = Ø, and Sø- og Handelsretten = SH.

cast after mutual consultation and in the same way. Agreements of this kind are sometimes called consortial agreements. The acceptance of the validity of shareholders' agreements does at least enable shareholders to obtain the advantages to be derived from a complex association of companies even in cases where the establishment of a holding company appears to be a far too complicated and costly arrangement.

Agreements regulating in detail the cooperation of the company's shareholders are most common in close companies, which are often family companies. The object of the shareholders' agreement may be to secure a fair distribution of directors' fees, to secure that major changes in the company will not be made without the consent of all shareholders, thereby ensuring that the owner of a substantial shareholding will not suffer the unhappy fate of the minority shareholder who is for ever being outvoted (cf. the fact situations in H.R.T. 1955.97 and U.f.R. 1966.739 V), or, on the other hand, to secure the company against stagnation owing to a complete deadlock. In order further to secure the objects of such agreements, rules concerning a right of pre-emption within the groups of shareholders are generally laid down in connection with this type of provisions. In this way, moreover, the balance between shareholders or groups of shareholders is prevented from shifting through the transfer of shares to other holders. Agreements on the transfer of shares to the succeeding generation may provide in detail for the exercise of voting rights during a period of transition or so long as the former shareholder is alive, or for some assurance that a certain tradition or state of things will be maintained in the company, e.g., as in U.f.R. 1966.575 H., that a named person trusted by the former owner shall continue to be a member of the board of directors.

Limitations to, or restrictions on, the voting rights of shareholders may not only be provided for in mutual agreements but also be made a condition of the acquisition of shares by deed of gift (cf. U.f.R. 1966.575 H.) or by will (cf. U.f.R. 1966.235 H. commented upon in *U.f.R.* 1966 B.248).

Agreements on voting rights are sometimes established between shareholders and persons outside their circle. An agreement to mortgage shares, for example, may provide that, during the existence of the mortgage, the mortgagee shall have the right to vote in respect of the shares, or it may be agreed that the voting rights shall be exercised as directed by a person having sold the

shares to the holder or having undertaken to buy them from him later (cf. U.f.R. 1940.70 H. and N.J.A. 1915.590).

1.3. Whereas the general proposition that a promise to vote in a particular way is binding in principle on the shareholder is accepted in Danish law, there is some uncertainty and doubt as to the effects of agreements on voting rights in various relations. These questions will be studied in some detail in this article. In Denmark, as in most other countries, agreements on voting rights and their legal effects are not mentioned in the legislation on companies. Disputes arising out of such agreements have rarely been tried by the courts. Complicated company-law disputes are generally settled out of court, since a reasonable arrangement will often be preferred by all parties to litigation to the bitter end. Such litigation frequently causes great and irreparable damage to a company and, consequently, to its shareholders. The problem of determining what rules shall apply to agreements on voting rights is a difficult one, as the solutions can in this way be deduced only to a limited extent from the usual sources of law, legislation, and the practice of the courts. It is, however, of major interest to lay down rules that are as clear as possible both in respect of the conclusion and drafting of new agreements and with regard to the evaluation of the rights and liabilities of parties to agreements that have already been concluded.

2. THE DOCTRINE OF THE INDIVISIBILITY OF SHARES

2.1. In fields where explicit statutory provisions do not impose definite solutions, rules of law must be so formulated as to meet practical requirements as fully as possible without deviating, in the absence of strong reasons to the contrary, from the evaluations and principles otherwise acknowledged by the legal system at large. Legal theory has not always been founded on this pragmatic basis in respect of agreements on voting rights; it has to some extent been influenced by imported conceptions of the "nature" of company law. During the last century the principle of the indivisibility or unity of shares was established in Germany. The principle was presumably in some measure based on an

analogy with the law of associations. The shareholder's rights were regarded as related to a member's position in an association (*Mitgliedschaft*) and were as indivisible as the latter.[5] The principle of the indivisibility of shares has also found support in Nordic legal writing.[6] The principle has also received statutory acceptance in various forms in Finland, Norway and Sweden, but not in Denmark.

The principle of the indivisibility of shares is ambiguous. The concept of indivisibility really comprises two entirely different aspects. Like sec. 8 of the German Companies Act, sec. 3 of the Swedish Companies Act provides that a share shall be of a certain minimum denomination (50 kronor, compared with 50 DM for Germany), and that the share shall be indivisible. In this context the unity or indivisibility of the share means that a share cannot be split up into several shares of lower denominations, and that any change in the face value of shares requires a modification of the articles of association just as is provided for by Danish law, which, however, contains no provision for a minimum denomination.[7]

However, the unity of shares does not only mean that they may not be divided in this simple sense; it also implies that the rights and powers attaching to the shares cannot be separated from them.[8] This article deals only with the question of the indivisibility of shares in the latter sense, the inseparability of rights and powers.

In this sense the unity of shares has been made statutory in Norway pursuant to sec. 30, subsec. 4, of the Norwegian Companies Act, which provides that "the individual rights attaching to shares cannot be separated from them".[9] The principle is not

[5] Cf. Karl Lehmann, *Das Recht der Aktiengesellschaften*, 1898–1904, vol. 2, pp. 107 ff. *et passim*.

[6] Cf. Olsson, *Aktieförvärvares rätt*, 1949, p. 42; Roos, *Avtal och rösträtt*, 1969, pp. 189 ff.; and—critically—David in *U.f.R.* 1947 B.222.

[7] The essentially identical draft bills of companies acts recently submitted by legislative commissions in the Nordic countries follow Danish law on this point; cf., e.g., the Norwegian report, pp. 60 f. Law Reform Committees in the Nordic countries have since before the second world war worked on a Uniform Nordic Limited Companies Act. During 1969 to 1971 all four committees published their reports containing proposals for—by and large—identical acts. These committees and reports are in this paper referred to as the Danish, Norwegian, etc., committee or report.

[8] Cf., e.g., Würdinger, *Aktien- und Konzernrecht*, 2nd ed., p. 43.

[9] This provision has been left out of the Nordic drafts, cf. the Norwegian report, p. 61, which states, however, that the provision "rests on a sound basis".

without exceptions. In sec. 30, subsec. 4, second paragraph, exceptions are made from inseparability in respect of "the right to the payment of dividend or other payments and the right to subscribe for shares in accordance with a resolution to increase the share capital by issuing new shares". Thus, the Norwegian Act limits the principle of the unity of shares to the property in the shares themselves, to the voting rights, and to the other administrative powers. On the other hand, the Act acknowledges that the actual pecuniary claims of shareholders against the company can be transferred independently. The Danish Companies Act contains no corresponding express provision concerning the right of shareholders to transfer their pecuniary claims to a third party independently of proprietary rights in the share as such, but it may be taken for granted that according to Danish law, also, both the right to receive payment of dividend and the right to subscribe for new shares are transferable both together with the share and independently. Dividend warrants and provisional letters of allotment are negotiable, too. The transfer of the right to receive payment of dividend and to subscribe for new shares is binding on both transferor and the company. The transferee may obtain a court order against the transferor to deliver the warrants, provisional letter of allotment or other document authorizing the party to act, and may also recover damages if the transferor fails to fulfil the agreement. The company will be discharged from further claims only on effecting *bona fide* payment to the holder of the documents. Where no special documents authorizing a party to receive payments (dividend warrants, letters of allotment) are used and the company has—or could reasonably be expected to have—knowledge of the transfer, it will be discharged from further claims only by payment effected in accordance with the terms of the agreement with the transferee.

The principle of the unity of shares therefore does not cover the financial rights of shareholders but must—if it can be presumed to be valid at all—at any rate be limited to the administrative powers. The investigation may be limited to the question whether the administrative powers are inseparably bound up with the shares.

In practice, an isolated transfer of administrative powers other than the voting rights, e.g. of the right to attend the general meeting and to address the meeting and put questions to the directors, will hardly be a frequent occurrence. Where the voting rights are transferred, on the other hand, it is often the intention

of the parties concerned that these other powers shall pass to the transferee. Interest is therefore focused on the question whether the principle of the indivisibility of shares prevents the recognition of agreements on voting rights as legally valid.

The opponents of the separation of voting rights and proprietary rights generally invoke economic and other facts in support of the principle that shares are unitary, maintaining it to be desirable for the administrative powers always to be combined with the property in the shares. The holder possesses the economic interest in the value of the share and, consequently, in the welfare of the company. The holder, therefore, should also be in possession of the administrative powers. These powers should in no case be exercised by any person other than the shareholder, since such other person will frequently have only limited interests to safeguard, e.g. that a loan secured by a mortgage on the shares is repaid or the like.[10] It is somewhat surprising to find such views expressed in regard to company law. For the limited company is in fact one means of separating proprietary rights and management from each other. Indeed, these views have not decisively affected the legal position. For even the classic German doctrine concerning the unity of shares and its adherents in the Nordic countries acknowledge that agreements on voting rights are binding between the parties. The impossibility of separating voting rights from the other elements making up the status of shareholders only appears from the fact that the company can and must be regulated by the votes actually cast by the shareholders irrespective of any promise made by any of them as to the way in which he will exercise his vote. A breach of an agreement on voting rights is no concern of the company. The agreement is not binding on the company. So the shareholder may indeed vote as he pleases irrespective of any agreements concluded by him, but if he breaks his agreement on voting rights he is to be held responsible to the other party or parties to the agreement, and all legal means intended as securities against a possible future breach of agreement may be validly provided for in the agreement!

If this curious intermediate position is adopted, the principle that shares are unitary in the sense that the administrative powers, especially the voting rights, cannot be separated from the property in the shares loses much of its importance. With

[10] Cf., in this sense, for Danish law Borum in *J.* 1962.262 f. and—more non-committally—in *U.f.R.* 1966 B.97.

this limitation of its contents the rule cannot very well be justified by referring to the desirability of the shareholder's being at liberty to exercise his voting rights at his discretion. The rule can only be based on other and less far-reaching considerations which have in fact often been put forward, viz. that the company should always have full knowledge of all persons having the right to vote, and that full knowledge of all persons entitled to vote is secured only when no other person than the shareholders can vote. The search for the actual contents of the principle of the unity of shares and for its adequate justification, or for the considerations it takes into account, thus shows that the basis of the doctrine of indivisibility in modern law is a need for a fixed method of establishing the authority to act in the relations between the company and its shareholders. It is obvious that the companies acts have endeavoured to take exactly these kinds of considerations into account by providing for the registration of shareholders in the register of members of the company. On being entered in the register of members of the company, the shareholder acquires authority to act as shareholder in relation to the company.

The Danish rules of law providing that the entry in the register of shareholders shall be considered as evidence of their authority to act are far less absolute than the provisions which legal writers have found it necessary to establish on the basis of the doctrine of the indivisibility of shares. However, since the rules pertaining to the register of members have a direct bearing on the question of establishing the authority to act, there is reason to believe that it is not in accordance with Danish law to lay down any rule which unconditionally deprives agreements on voting rights of their effect on the company merely in order to make it clear and certain who is entitled to vote at general meetings.

According to Danish law the importance of the register of members is limited in two respects. *First,* the register acquires importance only in connection with shares issued to named holders. Where bearer shares are concerned, the authority to act is conferred by possession of the share warrant. In Denmark, as in most countries on the European Continent (cf., e.g., sec. 10 of the German Companies Act) shares may be made out either to a named holder or to bearer. In practice, almost all companies whose shares are quoted on the Stock Exchange use bearer shares, while shares issued to named holders are more commonly used

in close companies. The transferability of shares in close companies is generally restricted, and such vinculated shares cannot be issued or transferred to bearer (cf. sec. 25 of the Danish Companies Act). The companies acts of the other Nordic countries generally do not provide for the issue of bearer shares. *Secondly,* it is generally presumed that the rules laid down in sec. 28, subsec. 2, of the Danish Companies Act concerning the registration of shares issued to holder *neither* prevent the holder of a share issued to holder from establishing his authority to act as shareholder other than by registration in the register of members, *nor* prevent the voting rights from being exercised by a person not owning the share or by his agent or proxy.[1] The rule laid down in sec. 28, subsec. 2, has practical importance only in so far as it provides that the owner of a share issued to a named holder *can* establish his position as shareholder by referring to the register of members. In this respect Danish law differs from the law in other Nordic countries. There a share may only be voted upon by the owner of the share who has been registered in the register of members of the company. This principle in the present Danish law is well founded, especially in close companies in which all shareholdess are well known to one another. Nevertheless the Danish law reform commission has adopted the Norwegian-Swedish view in the Nordic draft report of 1969 (cf. p. 78 of the report) without giving any reasons.[2]

If, as in Norwegian, Swedish and German law, a share may be voted upon only by the holder,[3] it is obvious that an agreement on voting rights cannot formally transfer the voting rights

[1] Cf. Sindballe, *Dansk Selskabsret,* 1949, pp. 211 and 227 f.; Krenchel, *Håndbog i dansk Aktieret,* 2nd ed., 1954, p. 131, and in the Danish Report on the revision of the Companies Act, 1969, pp. 77 f. and 78 f. Opposed by Borum in *J.* 1962.261. For foreign law on the subject, see Roos, *Avtal och rösträtt,* 1969, pp. 156 ff.

[2] It is expressly provided in sec. 41, subsec. 1, second paragraph, of the Norwegian Companies Act: "In no circumstances may a new holder use his rights as shareholder before having proved to the company that he has acquired the share concerned. However, this does not apply to the right to receive payments of dividend and other payments." As regards Swedish law, cf. Stenbeck *et al., Aktiebolagslagen,* 6th ed. 1970, p. 111. Sec. 41 of the Norwegian Companies Act, moreover, provides that the purchaser of a share is liable to notify the register of members of the company within one month. The Norwegian report proposes that failure to give notice shall continue to be a punishable offence, cf. the Norwegian Report of 1970 on the reform of company law, pp. 89 f.

[3] Here no account is taken of the special German concept of "Legitimationsübertragung" as a basis for the votes cast by commercial banks in respect of deposited shares; cf., e.g., Günther Püttner, *Das Depotstimmrecht der Banken,* 1963.

to a person who is not a shareholder and that its only object can be to bind the holder to vote in a particular way. Danish law, on the other hand, does not exclude the possibility—either in the rules relating to the register of shareholders or in any other formal rules—of acknowledging agreements on voting rights both in the form of agreements on restricting the shareholder's voting rights (German: *Stimmbindungsverträge*) and in the form of agreements on the transfer of voting rights to any person other than the shareholder. It is hardly possible to adduce any sound reason for making a legal distinction between agreements restricting the shareholder's voting rights and agreements on the transfer of voting rights. Where—as in Sweden and Germany—an actual separate transfer of the voting rights is excluded by the rules governing the register of shareholders, it would indeed appear to be a natural presumption that the transfer of voting rights must generally be interpreted as, and be given the effect of, a restriction on the shareholder's voting rights.[4]

2.2. It has already been mentioned that all Nordic countries acknowledge agreements on voting rights as binding between the parties. The only opposition to full recognition of such agreements is found in the legal rules of certain countries, which will not allow the agreements to be binding on the companies. Whether such a limitation of the operativeness of agreements on voting rights is a natural consequence of—or at least is in accordance with—prevailing principles of company law is a question that obviously finds rather different answers in countries like Sweden and Germany, which have the statutory rule that voting rights may be exercised only by the holder of the share entered in the register of shareholders, and in a country like Denmark, where the register does not have the same decisive importance. However, although German company law is on this point closely similar to Swedish law, German courts have lately acknowledged agreements on voting rights to a far greater extent than would be considered legitimate and equitable under the older theory concerning the indivisibility of shares. In a judgment pronounced in 1967 the Bundesgerichthof ordered a member of a *GmbH* (*Gesellschaft mit beschränkter Haftung*, German limited close company) to vote in the way he had undertaken by agreement to do, and it is stated in the judgment that the court's decision does not only have

[4] Cf. Roos, *op. cit.*, p. 406.

effect as forming the basis of a claim for damages by the successful party against the unsuccessful party, but has direct effect as a vote cast in favour of the result which the shareholder was liable to vote for according to the judgment (a remedy granted in accordance with sec. 894 Z.P.O.). Hence it follows that the practical difference between the effect of the agreement on voting rights between the parties and a rule that also assigns importance to the agreement in relation to the company is fairly insignificant in German law.[4a]

The submission that agreements on voting rights are in fact binding as between the parties but not on the company as such is subject to considerable uncertainty as to its actual practical impact. If the validity of such agreements between the parties is held to incorporate the condition that the obligation undertaken by the agreement shall also include an obligation of performance in kind, as in the case of other valid agreements, and if this obligation is effectively enforced—as can be the case in Germany by application of sec. 894 Z.P.O., or in England by granting an injunction, the breach of which is considered as contempt of court[5]—the affirmation that the company is not bound by the agreement is of little practical importance. Instead of the proposition that the agreement is of no importance in relation to the company, the limitation of the effect of the agreement has in fact regularly been described in Germany as meaning that agreements on voting rights have an effect *in personam* (*schuldrechtliche* effect) but not an effect *in rem*. This should imply that the compulsion to perform which may be used against the parties is restricted to the imposition on the contracting party of a liability for damages either pursuant to ordinary rules of law or according to a specific agreed penalty, but that no other direct compulsion to perform can be applied. If it is considered desirable to counteract agreements on voting rights, the limitation

[4a] B.G.H.Z. 48.163, *Die A.G.* 1967. The judgment holds that a shareholder may bind himself by an agreement on voting rights to vote for a consent to transfer shares made necessary by the articles of association, and that the judgment establishing this fact shall be considered an affirmative vote by the company pursuant to sec. 894 Z.P.O., cf. Janberg and Schlauss in *Die A.G.* 1968, p. 35. Sec. 894 reads as follows: "Ist der Schuldner zur Abgabe einer Willenserklärung verurteilt, so gilt die Erklärung als abgegeben, sobald das Urteil die Rechtskraft erlangt hat. Ist die Willenserklärung von einer Gegenleistung abhängig gemacht, so tritt diese Wirkung ein, sobald nach den Vorschriften der §§ 726, 730 eine vollstreckbare Ausfertigung des rechtskräftigen Urteils erteilt ist."

[5] Cf. Gower, *op. cit.*, p. 562, note 9.

of the compulsion to perform to a mere liability in damages is natural in so far as the practical consequences of a direct and insuperable compulsion to perform come close to being a direct enforcement of the agreement on the company.

Though the older German doctrine, which would only attach a limited "obligatory" effect to agreements on voting rights, is losing importance in the country where it originated, it still commands a following in Denmark.[6] The Nordic legislative commissions on company law have not given much attention to this question, however. In the Danish Report of 1964, p. 137, it is only mentioned that the Danish commission has not "taken a decision on the extent to which shareholders' agreements shall be binding on the company". The question is not mentioned in the Report of 1969. The Danish courts have never taken a clear position as to the basic principle, but several decisions are at least incompatible with a general rule to the effect that agreements on voting rights should only have a *schuldrechtliche* effect.

A further reason for subjecting the older German doctrine to a more detailed study in Denmark is that a corresponding doctrine is still considered to be valid in law in the other Nordic countries. Thus in Sweden both Nial and, recently, Roos have endorsed the results established in older German law.[7] The Swedish Commission on Company Law, whose chairman was Nial, also states that, according to present Swedish law as well as according to the proposed text, such agreements have no effect in relation to the company but only between the parties to it.[8] However, no more than the present Swedish statute does the draft lay down any express rule on this point.

[6] A detailed account of the German law of agreements on voting rights has been given in a number of dissertations on the subject, including Ernst Sommerfeld, *Verträge über die Ausübung des Stimmrechts von Aktien*, 1930, Helmut Brand, *Der Stimmrechtsbindungsvertrag im deutschen und amerikanischen Recht*, 1963, and Hartmut Lübbert, *Abstimmungsvereinbarungen in den Aktien- und GmbH-Rechten der EWG-Staaten, der Schweiz und Grossbritanniens*, 1971. In Denmark, the doctrine was earlier supported by Sindballe, *op. cit.*, p. 230, and—at greater length—by Borum in *J.* 1962.255 and *U.f.R.* 1966 B.97. On the other hand, the doctrine has been criticized by David in *U.f.R.* 1947 B.205 ff. and by the present writer in *Aktieselskabsret*, 1st ed. 1956, pp. 158 ff., and 2nd ed., pp. 248 ff., and in *J.* 1969.349 ff.

[7] Nial, *Aktiebolagsrättsliga studier*, 1935, and Roos, *Avtal och rösträtt*, 1969.

[8] See *S.O.U.* 1971: 15, at p. 159.

3. MODALITIES OF AGREEMENTS ON VOTING RIGHTS: TRANSFER OF VOTING RIGHTS, BINDING OF VOTING RIGHTS, IRREVOCABLE PROXIES AND JOINT OWNERSHIP OF SHARES

3.1. Agreements on the shareholder's transfer to another person of the right to make decisions concerning the casting of votes on shares may be given various forms. The agreement may provide for the voting rights to be transferred by the shareholder to the person who is actually to control the exercise of the voting rights and who (or his proxy) will cast the vote at the general meeting. An alternative is to agree that the vote is in fact to be cast by the shareholder, but that the shareholder shall follow the instructions he receives from the person controlling the voting rights under the agreement. A third solution is that the shareholder grants an irrevocable proxy to the person who is to be in control of the voting rights. A fourth form, finally, is to agree that the shares shall be joint ownership shares and that votes on such shares shall be cast collectively.

Irrespective of which one of the three first-mentioned modalities is chosen by the parties, the situation is the same: some person other than the shareholder decides how the share is to be voted on. The question whether the Companies Act or general principles of law prevent the separation of the voting rights and other rights attaching to the shares ought to receive the same answer, irrespective of the technique employed. However, this does not imply that an agreement concerning the transfer or binding of voting rights and irrevocable proxies must always have the same legal effects in every respect. The scope of each individual agreement must be determined by interpretation of the agreement, and it is obvious that the modality chosen may, in certain circumstances, also have a bearing on the interpretation.

3.2. In this context an irrevocable proxy means a proxy which cannot be revoked by the principal with the effect that the person to whom it has been granted will lose his powers under it. Not all declarations that a proxy shall be irrevocable have this legal effect. It is conceivable that the promise of irrevocability concerns only the relationship between the principal and his proxy. If the proxy has no independent interest in the authority granted to him to perform the acts comprised by the proxy form, the promise of irrevocability—like an appointment for a specified

period or with a period of notice—only means that the proxy has a claim to a promised consideration, but not that the principal has renounced the right to forbid him to enter into agreements on his behalf. However, if, on the other hand, the proxy personally or any persons represented by him are independently interested in the principal's being deprived of the authority to make certain dispositions, the promise of irrevocability is generally interpreted so as to concern the actual granting of the proxy, and the principal is subsequently debarred from depriving the proxy of his authority to act. These principles concerning the interpretation and effects of promises or irrevocability are generally applicable to proxies in company law.[9]

> *U.f.R. 1926.1012 Ø.* A shareholder had granted a stockbroker an irrevocable proxy to vote on her shares at the impending general meeting. The shareholder revoked this proxy prior to the holding of the general meeting and issued a new one to another person. The chairman of the meeting acknowledged that the proxy granted to the stockbroker entitled him to vote, after which it was resolved to wind up the company. This resolution was cancelled by the court at the demand of the other proxy. The judgment contains the following statement: "As Mrs R (the shareholder) has only pursued her own interests in deciding on her voting rights and on granting the proxy to the stockbroker B, and as moreover the case concerns a decision of such great importance to these interests as the winding up of the company, Mrs R is held to be entitled, in the prevailing circumstances, ... to revoke the proxy."[1]
>
> *U.f.R. 1963.111 H.* The judgment holds that a mortgagor is debarred from revoking a proxy to the mortgagee (a commercial bank) to vote on the shares as the mortgagor, who was actually the sole owner of the company, has promised the bank that the proxy would be made irrevocable.

3.3. Although the validity of agreements on voting rights is acknowledged both between the parties to the agreement and in relation to the company, the enforcement of the obligations of

[9] Statutory texts on the general law of contracts usually provide that an authority can be made irrevocable if granted in the personal interest of the agent, cf. for Danish law Ussing, *Aftaler*, pp. 309 f., and Gomard, *Skifteret*, pp. 50 f. with note 15.

[1] The judgment has been commented on by Ejner Bülow in *U.f.R.* 1926 B.279 ff., David in *U.f.R.* 1947 B.219, Sindballe, *op. cit.*, p. 231, Olsson, *op. cit.*, pp. 44 f. with note 116 *a*, Borum in *J.* 1962.261 and *U.f.R.* 1966 B.100 and by Roos, *op. cit.*, pp. 197 ff.

the parties under such agreements may give rise to difficulties. It will not always be possible to obtain a court decision so quickly that the damage caused by a breach of such an agreement can be fully repaired. In order, *inter alia,* to eliminate the risk of a breach of agreement, the parties may in certain circumstances prefer to establish a co-dominion or partnership in respect of the shares instead of concluding an agreement on voting rights. The agreement on co-dominion may provide that the co-dominion shall be registered as a shareholder and that the vote of the co-dominion shares shall, for example, be cast as required by the majority of the holders of these shares. If to this are added, besides rules for the dissolution of the co-dominion or partnership and the transfer of the portions to others, expedient provisions concerning the administration and safekeeping of the shares, the parties will have obtained considerable security that the agreement will not be broken by one of them and cause major damage to the other parties and the company by neglecting voting rights. According to Danish law, a co-dominion or a non-commercial and therefore unregistered partnership is not prohibited from being registered as a shareholder in the register of members of a company. In contrast to Swedish and German law, Danish law recognizes non-commercial and non-registrable partnerships as legal persons.

3.4. The obligation under an agreement on voting rights may apply to all the company's shares held or subsequently acquired by the shareholders or may be restricted to particular shares only. In an agreement for cooperation comprising all the company's shareholders, the obligation will generally comprise all the shareholders' shares, even those shares that they may acquire, for example, as a consequence of the option to buy shares from other shareholders,[2] whereas an agreement for the transfer to a mortgagee of voting rights on some mortgaged shares does not concern any other company shares owned by the mortgagor at the time of, or subsequent to, the mortgaging of the shares. It has at times been held, however, that votes on shares held by one and the same shareholder cannot be cast in different ways. A necessary consequence of this view would be that a valid restriction on voting rights would always apply to all the shareholder's shares.

[2] Cf. judgment pronounced by the German *Bundesgerichtshof* on April 21, 1969 (*Der Betrieb* 1969.1097).

The absurdity of this view demonstrates that the idea of imposing an obligation to vote in the same way with respect to all shares should not be recognized as a principle of law.[2a]

4. SHAREHOLDERS' AGREEMENTS AND THE ARTICLES OF ASSOCIATION

4.1. Pursuant to sec. 8, subsec. (f), of the Danish Companies Act, the articles of association of a company must contain provisions as to whether the transferability of its shares is to be restricted and, if so, to what extent it is to be restricted, and according to sec. 8, subsec. (k), the articles must also contain provisions concerning the shareholders' voting rights. From these statutory rules it is not permitted to conclude that provisions cannot be made in ways other than by inclusion in the articles of rules both in respect of the restriction of transferability and the exercise of voting rights. The only certain conclusion is that provisions not contained in the articles would merely be deprived of some of the effects attached to provisions inserted in the articles of association. The parties will not obtain quite the same legal position by concluding an agreement as by including the same provisions in the articles. Thus, provisions contained in the articles can always be invoked also in relation to a *bona fide* purchaser of the shares, whereas a restriction imposed by an agreement may be deprived of its effect in such a case. This is attributable to the fact that the articles of association are registered and consequently notified to the public, whereas an agreement between shareholders cannot and is not required to be registered.[3] The agreement makes it possible for the parties to observe secrecy but it cannot at the same time enjoy the legal protection afforded by registration and publicity.[4] If the company has not been notified of the agreement, the parties run the risk that the agree-

[2a] *Inter alia* Böckli, *Das Aktienstimmrecht*, Basel, 1961, pp. 26 ff., and the leading current commentaries on sec. 134 of the German Companies Act.

[3] Cf. Jacobi in *U.f.R.* 1967 B.31.

[4] The rules laid down in the English Companies Act, 1967, concerning the notification to companies concerning shareholdings totalling more than 10 per cent of the share capital also include control of the voting rights according to agreement. Failure to effect the obligatory notification will be punishable with a fine but will not entail loss of voting rights; cf. *Palmer's Company Law*, 21st ed. 1968, pp. 458 ff. and p. 597.

ment will not be taken into account when votes are cast at meetings of the company and that, in this way, a resolution resulting from a vote in violation of its terms is valid (cf. below under 6.4).

According to sec. 28, subsec. 2, of the Danish Companies Act the person entered as shareholder in the register of members of the company is considered to be the true shareholder in relation to the company,[5] and according to sec. 28, subsec. 3, of the same Act any person may require that shares owned by him according to a title valid in form be registered in his name. The Danish Companies Act does not mention an isolated transfer of, or restriction on, voting rights as a matter to be registered in the register of members. There are, however, several sound reasons for accepting such a registration. The share certificate is endorsed to the effect that the voting rights have been transferred (cf. sec. 28, subsec. 4) and through the indication in these ways—both in the register of members and on the share certificate—of what arrangements have been made with regard to the voting rights such arrangements will be made known both to the company and to potential purchasers of shares. Thereby much of the doubt which may arise at a general meeting as to who is actually entitled to vote for the shares is avoided, and moreover the risk of a loss of rights on the transfer of shares arising from ignorance or uncertainty concerning the extent and importance of the arrangements is obviated.[6]

4.2. An agreement differs from a provision in the articles of association in other respects also. The agreement may be concluded by the shareholders and other parties wishing to accede to the agreement, and the agreement is binding only on the parties to it. It may be altered or terminated if all parties to it agree to alter it in the particular way provided for in the agreement itself or by virtue of special rules intended to limit the scope of the agreement. The articles, on the other hand, are binding on *all* the company's shareholders, and provisions embodied in articles of association can only be laid down and modified in the manner prescribed by the articles. In addition to provisions concerning voting rights, the transferability of the shares, etc., a

[5] The text of the Act adds the word "only". Nevertheless, as mentioned earlier, this provision is interpreted as a non-exclusive rule concerning the authority to act as shareholder.

[6] Cf. David in *U.f.R.* 1947 B. 215 and Borum in *J.* 1962.261.

shareholders' agreement will often contain clauses concerning a number of questions having no relation to the general contents of the articles of association, and these other provisions are often, from a business point of view, closely connected with the provisions concerning, for example, the voting rights on shares. In such a case the agreement forms a whole. It cannot be limited to questions not naturally regulated by the articles of association.

4.3. Provisions concerning questions which do not belong under the articles, or points on which alterations without the consent of the parties cannot be tolerated, must be made otherwise than by inclusion in the articles, generally by agreement between the interested parties. However, the possibility of making provisions by agreement concerning matters affecting shareholders' rights is not limited to provisions not suited for regulation by the articles of association. An agreement between all of a company's shareholders as to the procedure to be followed when electing the board of directors concerns all shareholders and relates to questions which must be mentioned in the articles pursuant to sec. 8, subsec. (k), of the Danish Companies Act.

The Danish Report of 1969 on a new Nordic Companies Act recommends that only restrictions on the transferability of shares as mentioned in secs. 19 and 20 of the draft, i.e. regulations on pre-emptive rights and provisions to the effect that the transfer of shares requires the company's consent, may be included in the articles of association. It is stated in sec. 49, subsec. 2, third paragraph, of the draft that the majority of the directors *shall* be elected by the general meeting.[7] None of these regulations can be presumed to preclude the shareholders from making provisions in a shareholders' agreement concerning the question dealt with in these rules, including such provisions as can no longer be inserted in the articles of association provided the draft is adopted.[8]

The parties' interest in making provisions for the transferability of shares or the exercise of voting rights cannot always be met by inserting provisions required by the parties in the

[7] Whereas the rules proposed in secs. 19 and 20 set aside inequitable provisions or agreements on the fixing of the value of shares where the exercise of an option to purchase is well founded, there is no sound reason—nor are any such reasons adduced in the Report—for the future exclusion from the articles of association of restrictions on transferability other than those mentioned.

[8] Cf. the comments on the analogous Swedish and Finnish drafts in *S.O.U.* 1971: 15 p. 159 and in the Finnish *Kommittébetänkande* (Committee Report) 1969: A 20 p. 75.

articles of association of the company. It may be mentioned by way of example that a shareholder who wishes to mortgage his shares and finds himself compelled to comply with the mortgagee's wish to be able to vote on the shares cannot carry through the required arrangement by a modification of the articles. The arrangement does not concern the other shareholders and must be exclusively subject to the joint control of the mortgagor and the mortgagee.

4.4. Sec. 28, subsec. 2, of the Danish Companies Act does not exclude the possibility of votes being cast by persons other than the shareholders. On the other hand, provisions in the articles may prevent an isolated transfer of the voting rights to any person other than the shareholder. A provision in the articles to the effect that voting rights can be exercised only in connection with shares that have been entered in the register of members for some time before the general meeting cannot generally be presumed to imply a complete prohibition against the transfer of voting rights.[9] Another question is whether the period of registration is also to be respected by a person who has acquired the voting rights by agreement, e.g. a mortgagee. The answer must be found in an interpretation of the articles. Presumably, the period of registration must generally be observed where it is to be feared that it might be circumvented, whereas the observance of the period of registration would hardly be necessary where no such risk is involved, e.g. in respect of the mortgaging of a few shares in a large company or in the case of a testamentary trust arrangement involving a shareholding. If an agreement on voting rights in reality amounts to a transfer of the share, the agreement will be affected by a provision of the articles of association prohibiting the transfer of shares without the consent of the board of directors, and a right of pre-emption under the articles will prevent the transfer of voting rights without such consent of the board or of those entitled to pre-emption according to the articles of association.[1]

In some situations, provisions concerning registration as well as other provisions of the articles of association may be set aside if all the shareholders are agreed on it. Thus, when transferring

[9] Cf. *U.f.R.* 1924.584 Ø; *contra,* in *U.f.R.* 1918.352 S.H. and David in *U.f.R.* 1947 B.216.

[1] Cf. *Lyle & Scott Ltd.* v. *Scott's Trustees* (1959) A.C. 763 H.L. Sc. with comments by Gower, *op. cit.*, p. 393, and by Palmer, *op. cit.*, p. 339.

all the shares of a company, the transferors may presumably transfer the voting rights to the transferees immediately after the transfer has taken place. To insist on the observance of a period of registration in such cases would not benefit any of the shareholders.

The provisions of the articles of association of a company concerning both the transferability of the shares and the exercise of voting rights are also binding on any party having acquired the voting rights or control of these rights by agreement. It may, for example, be provided in the articles that shareholders can attend the general meeting and vote by proxy only if particular conditions are fulfilled. It is not unusual for the articles to provide that proxies can be granted only to other shareholders. Such a provision will generally have to be interpreted as meaning that the voting rights, even in cases where the shares concerned are subject to an agreement on voting rights, can be exercised only by a vote cast by a shareholder, be it in his capacity as shareholder or as proxy. If the voting rights have been transferred to a person who is not a shareholder, e.g. to a pledgee, and that person is prohibited by the provisions of the articles of association from attending the general meeting personally and voting at it, the acquirer of the voting rights is entitled to grant a proxy to a shareholder to vote for him.[2]

4.5. Pursuant to sec. 56, subsecs. 6 and 7, of the Danish Companies Act, a vote cast by a shareholder is invalid in certain cases of legal incapacity. If a shareholder has transferred his voting rights to another person so that the latter may independently decide how to cast the vote, the latter is to be considered as the shareholder for the purpose of the rules governing legal incapacity.

5. CASES IN WHICH THE SEPARATION OF VOTING RIGHTS FROM OWNERSHIP IS CLEARLY RECOGNIZED IN DANISH LAW. TRUST ARRANGEMENTS AND THE MORTGAGING OF SHARES

5.1. *Trust arrangements ("Båndlaeggelse")*

Heirs whose inheritances are to be held in trust as provided for by the testator are, according to general usage, designated as the

[2] Cf. David in *U.f.R.* 1947 B.207 and Borum in *U.f.R.* 1966 B.97, note 1.

owners of the estate. The same applies to other funds held in trust. It is nevertheless generally held that the voting rights with respect to shares held in trust are not to be exercised by the owner (heir) but by the institution administering the assets of the estate (the inheritance). This opinion has been expressed in sec. 6 of Circular no. 58 of April 3, 1964, issued by the Danish Ministry of Justice, and the same view was held prior to the passing of the Succession Act of 1963.[3]

It was held in U.f.R. 1949.637 V. that—unless otherwise provided—the voting rights in respect of shares which are not at the owner's free disposal, but have been deposited for the benefit of some other person, shall be exercised by the institution acting as administrator.

Thus the doctrine of the indivisibility of shares has not excluded the assumption that some person other than the owner of an inheritance or other funds held in trust may exercise the voting rights nor the recognition in Denmark of this sensible and reasonable arrangement without explicit statutory authority. In Sweden, sec. 220 of the Companies Act contains explicit provisions concerning the exercise of voting rights in respect of shares held in trust.

5.2. *Mortgaging*

The mortgagor has the right to vote on the mortgaged shares unless otherwise agreed. An irrevocable proxy to the mortgagee authorizing him to exercise the voting rights has been upheld by the Supreme Court of Denmark in U.f.R. 1963.111 H. with regard to an actual one-man company, and the *ratio* of the judgment seems to support the submission that the Supreme Court adopts a general rule to the effect that the voting rights may be validly transferred to a mortgagee or any other lender. Provided this interpretation of the decision is correct, this is another example of separating voting rights from ownership by agreement without explicit statutory authority.

[3] Cf. Borum–Juul–Schlegel, *Båndlaeggelsesinstituttet*, pp. 106 ff.

6. LEGAL EFFECTS OF AGREEMENTS ON VOTING RIGHTS

6.1. *General survey of the most important legal effects*

The question of the legal effects of an agreement on voting rights may arise in a number of different situations. One of the parties may wish, after some time has passed or after the conditions have changed, to withdraw from the agreement, and the question then arises whether one party may unilaterally declare himself released from the agreement owing to changed conditions or whether he may give notice to terminate the agreement even in a case where it contains no provisions on termination. Is the agreement unalterable in cases where it contains no such provisions, or does the law limit the duration of an agreement on voting rights by rules of law the operation of which cannot be dispensed with by agreement between the parties? This is the subject of section 6.2 *infra* concerning the restrictions on the scope of the agreement.

If one party fails to fulfil the agreement on voting rights, or if he calls in question or disputes his obligation to observe the agreement, the question arises whether a shareholder's obligation to vote in accordance with the agreement can be enforced against the party who fails voluntarily to keep the agreement. Some of the most important means of enforcement—declaratory judgment, judgment for specific performance, damages according to ordinary rules of law, and contract penalties—are mentioned in 6.3 below.

As will be shown in section 6.4, the question of enforcement between the parties is closely connected with the importance of the agreement to the company. Should the company adopt a resolution differing in contents from that which would have been adopted if all parties having undertaken an obligation to vote had voted in accordance with existing valid agreements on voting rights, the question arises whether a breach of agreement on voting rights will affect the validity of the adopted resolution and, if so, on what conditions an agreement would become invalid. The question may also be raised whether a shareholder's obligation to vote for a particular result can be regarded as a vote cast in favour of this standpoint.

If one of the parties to the agreement on voting rights transfers his shares to others, or if the shares are transferred to others in other ways, the question arises whether the acquirer of the shares is bound by the agreement or whether obligations created by the agreement are discharged by the transfer. This point is

dealt with in 6.5 below. An agreement on voting rights often forms part of an agreement regulating other matters, e.g. an agreement concerning the mutual rights of pre-emption of shares or for cooperation in various ways between several groups of shareholders. If the obligation to vote as provided for in the agreement is violated, the question arises, as will be shown in greater detail in section 6.6, whether this constitutes a default permitting the other parties to dispute the agreement as a whole applying the normal remedies for breach. Finally, in 6.6 the question is raised whether a minority which has sought to secure its position by a shareholders' agreement may rely on ordinary legal rules for the protection of minorities in the event that the other parties break the agreement.

In the Nordic countries the problem of the legal effects of agreements on voting rights has generally been formulated, in analogy with German legal writing, first as a question of whether these agreements are valid between the parties and secondly as a question of their validity in relation to the company.[4] It is clear, however, that in several of the situations in which questions arise concerning the legal effects of an agreement on voting rights the problem cannot be classified simply as one of validity or invalidity. This applies to the questions whether voting contrary to the agreement will entail the usual effects of breach of contract and whether such voting may, according to the circumstances, have the effect of an unlawful infringement of minority rights. Nor is the concept of validity apt to describe the question of whether an agreement affects, or is to be observed by, a third party who is not a party to the agreement, be it the company or any subsequent acquirers of the shares. The conventional opinion according to which the agreement only produces the effect, as between the parties, that voting contrary to the agreement may entail liability for damages is described, both by German writers and by the Swedish scholar Nial, by stating that the agreement has effect only *in personam* (*schuldrechtliche Wirkung*). This terminology is not in accordance with common usage. The demand for specific performance of an agreement is generally not termed an action *in rem*.

[4] Thus David in *U.f.R.* 1947 B.205 ff. and Borum in *J.* 1962.289 ff. and in *U.f.R.* 1966 B. 97 ff., and in Sweden Nial, *Aktiebolagsrättsliga studier*, 1935, and Roos, *op. cit.*, p. 287. I have voiced some of the main points of the account given in the text in a review of Roos's monograph in *J.* 1969.362 ff.

6.2. *Restrictions on the scope of the agreement as between the parties*

The effects of an agreement on voting rights may be limited in time according to its own tenor. Thus the effect of a stipulation in an agreement for the transfer of shares to the succeeding generation, providing that the transferor shall retain an influence for life, or of an agreement securing the balance of power in the company during the life of the shareholder and his or her spouse,[5] is limited to the lifetime of the person or persons concerned. Provisions concerning terminability may, for instance, be contained in an agreement for cooperation between two firms, and such an agreement may also contain provisions concerning the mutual holding of shares and representation on the boards of directors.

Agreements which according to their tenor are to be valid for a very long period of time or without any fixed time limit, and which contain no provisions concerning terminability, can lay very heavy burdens on the parties if conditions change. According to American law, *voting trusts* can be established only for a specified period of time, e.g. ten years,[6] and it is held in Swedish law that, according to the circumstances, shareholders' agreements are covered by the legislation on non-commercial partnerships, and this legislation lays down rules concerning terminability which correspond fairly closely to the provisions in the German Civil Code.[7]

The question whether a shareholders' agreement that does not contain any provisions concerning terminability can be terminated is not dealt with in the Danish legislation. The Danish Registration of Business Names Act of 1889 does not touch upon the question of the terminability of partnership agreements. As emphasized in our two neighbour countries, Sweden and Germany, the shareholders' agreement bears some resemblance to agreements on co-dominion and partnership. When considering the attitude adopted by the Danish courts to the question to what extent the parties can terminate a general agreement on co-dominion, it is therefore natural to assume that the decision concerning the terminability of a shareholders' agreement will

[5] Cf., e.g., *U.f.R.* 1966.739 V.

[6] Cf. Henn on *Corporations*, p. 316, and Baker & Cary's *Casebook*, pp. 335 ff. On the other hand, corresponding time limits do not apply to shareholders' agreements, cf. Henn, *op. cit.*, pp. 318 and 417 f.

[7] Cf. Gomard in *J.* 1969.361 f.

be made on the basis of a concrete evaluation of the individual agreement.[8] Considering the cautious policy apparently adopted by the Supreme Court of Denmark in the judgment referred to in note 8 there are many indications that decisions adapted to the concrete facts in presence will be sought in each individual case. If this principle—or lack of principle—is maintained, it will hardly be possible to get any nearer to a solution of the problem. However, it must be admitted that an evaluation based on the concrete circumstances attending the conclusion of agreements, which may have reached a considerable age when the case is brought up, may easily assume a somewhat haphazard character, if only because facts in connection with the conclusion of the agreement cannot be clearly brought out in detail. The laying down of a general rule of law the operation of which can be dispensed with by agreement between the parties, but which can only be deviated from when there is a fairly sound basis for arriving at a different solution, is probably preferable, and the actual result in U.f.R. 1963.1019 H. (note 8 above) does in fact appear to be in favour of terminability when there is no concrete basis for assuming that the agreement on co-dominion cannot be terminated.[9]

> In his comments in *U.f.R.* 1964B.152 on U.f.R. 1963.1019 H. Justice Gjerulff states, concerning co-dominion, that the decision is made "on the basis of an evaluation of the concrete circumstances in the case, including how co-dominion was established. If the purchase of the property is based on an agreement between the parties concerning co-dominion, the tenor and conditions of such an agreement may obviously be of importance, and in certain cases weight may be attached to the objects which the transferor of the property had in view. If the property has been acquired under a will, the testator's testamentary directions may be of decisive importance or at least act as a guide."

Even if a general rule of law the operation of which can be dispensed with by agreement between the parties may be presumed to be in force, a corresponding principle can hardly be said to apply to shareholders' agreements. The termination of such agreements will often lead to more serious disturbances than

[8] As indicated in the comments made by a Supreme Court judge in *U.f.R.* 1964 B.152 on U.f.R. 1963.1019 H., a leading case on co-dominion.

[9] Sindballe, *op. cit.*, p. 85, with note 1, has expressed the same view in respect to partnership.

will the dissolution of an ordinary agreement on co-dominion through, for example, the sale of real property having been jointly owned by the parties. The differences existing between the fact situations underlying agreements on voting rights make it difficult to lay down a general rule of law the operation of which can be dispensed with by agreement between the parties. However, in cases where the conditions have not changed materially, it might be held that agreements on voting rights in order to secure the investments of family groups or other shareholders against devaluation by being pushed into an uninfluential minority position cannot generally be freely terminated, whereas agreements assuming the character of active cooperation must normally be considered terminable subject to due notice.

As regards agreements that cannot be presumed to be freely terminable, either because their purpose and meaning are incompatible with being terminable, or because the agreement has been concluded for a specified period of time or contains explicit provisions to the effect that it is not terminable, the question arises whether the agreement may, nevertheless, be terminated—possibly subject to a period of notice—by the unilateral declaration of one party where the said party has a major or valid reason for doing so. It seems reasonable to assume that a party has the right to withdraw from an agreement in this way, at any rate when this course of action is strongly warranted by a legitimate desire to safeguard his interests, and when his withdrawal will not cause unreasonably heavy losses to the other parties. Express provisions concerning the period of validity of the agreement, however, can be set aside only for very weighty reasons.[1] It should be pointed out that the introduction of an equitable practice in this field would remove the objection to the acknowledgment of the validity of shareholders' agreements that,

[1] Cf. U.f.R. 1966.575 H., which states that the basis for a person remaining on the board as foreseen in a clause attaching to a donation of shares in the company no longer existed in the special circumstances. In an unpublished judgment of the Court of Appeal for Eastern Denmark of September 30, 1957 (VIII no. 347/1955), it is pointed out that the parties to an agreement on voting rights had undertaken a temporary obligation to vote for the election of certain persons to the board. If the agreement had not been limited as to time, and if the conditions had developed in such a way that the obligation undertaken by the participants had been found inequitable in view of the obligations undertaken by the other party, the parties might have been granted the right to terminate the agreement on the basis of ordinary principles of law. However, the judgment does not allow the drawing of any definite conclusions as to the manner in which the court would answer this question.

in case of general and long-term agreements, the parties will unduly limit their future freedom of action in a way which they could not have anticipated at the conclusion of the agreement and which may prove to be detrimental to themselves and the company. Such a judge-made rule of *clausula rebus sic stantibus* in special fields is not without precedent. Thus equitable—and substantial—limitations of the scope of agreements on arbitration and the disclaiming of responsibility have been introduced by case law.[2]

6.3 *Enforcement of agreements between parties*

Breach of an agreement on voting rights, like any other kind of default, renders the defaulter liable to pay damages to the other party or parties to the agreement for losses incurred owing to the breach of agreement. It is generally accepted that the agreement has this effect in the relationship between the parties. Even if no other legal effects of the agreements were accepted, it must therefore also be considered obvious that the validity and tenor of the agreement can be established by an *action for a declaratory judgment.*

How effective an aggrieved party's claim for *damages in lieu of performance* will be as a means of enforcement depends largely on that party's possibility of producing evidence. The claim will only be met to the extent to which the aggrieved party can produce sufficient evidence to show the loss sustained by him owing to the breach of agreement. In case of breach of an agreement on voting rights, however, the aggrieved party often finds himself in a weak position, even though the courts will probably to some extent modify the usual rules as to evidence.[3] It is often particularly difficult to produce evidence of the extent of the loss. In many cases it is quite uncertain how the situation would have developed if the agreement had been kept. Even if a reduction in profits, turnover or the like can be substantiated, other factors, such as a trade recession, may very well be alleged as a possible

[2] Cf. on arbitration Hjejle, *Foreningsvoldgift,* especially pp. 15–67, and on the disclaiming of responsibility, Günther Petersen, *Ansvarsfraskrivelse,* pp. 131 ff.

[3] Cf. the provision in sec. 17, subsec. 5, of the Danish Unfair Competition Act, which reads as follows: "In the criminal proceedings the court shall have power, when any individual person or firm must be presumed to have suffered damage, irrespective of whether evidence of the extent of the damage can be produced or not, to order payment of damages up to the amount of D.kr. 1 000 to the injured party at his request."

cause of the reduction.[4] The difficulties of producing evidence can be overcome by inserting penalty clauses in the agreement on voting rights; but even pecuniary damages which would be considered ample under general rules and case law applying to the assessment of damages would frequently be an unsatisfactory substitute for the upholding of the agreement. Indeed, it has been said in America that "specific performance" is generally "the most adequate remedy" for breach of agreements on voting rights.[5]

A direct enforcement of the shareholders' obligation to vote as stipulated in the agreement may be effected *either* by suing the shareholder for specific performance *or,* as mentioned below in section 6.4, by bringing an action against the company. When arguing for the standpoint that obligations under agreements on voting rights should be enforceable by specific performance in the same way as other agreements, it is obviously essential to demonstrate that a judgment for specific performance can be enforced in a practical and equitable way.

If a *judgment for specific performance* is pronounced *against the shareholder,* the said shareholder may, if he deliberately fails to comply with the judgment, be punished as provided for in sec. 499 of the Danish Administration of Justice Act. Fines alone, however, are not adequate sanctions in this field. Other means of enforcement have to be found. If it is stated in the judgment that the agreement obliges the shareholder to vote unambiguously, e.g. to vote for the election to the board of the person recommended by the other parties to the agreement, the company is presumably liable, on being notified of the judgment, to consider the shareholder's vote as being in accordance with the judgment. In this way the judgment supersedes the shareholder's vote. The judgment is self-executing.[6] There is generally no need

[4] Cf. Gomard in *J.* 1969.364 f.

[5] Henn, *op. cit.,* p. 324 with note 35.

[6] This is actually the case in German law under the doctrine laid down in the judgment mentioned above under 2.2, pronounced by the *Bundesgerichtshof* in 1967. The means of enforcement differ quite considerably from country to country. This may be part of the reason why different attitudes are taken in different countries as to the question considered here. Cf. Gomard in *J.* 1969.364 f. Sec. 81, subsec. 4, of the Companies Act draft proposed in the Report of 1969 opens up the possibility of altering an unlawful resolution of a general meeting by order of the court. This provision confers on the court express authority to issue an order which supersedes the resolution of the general meeting in case of unambiguity. Cf. the comments in the Report, pp. 119 f.

for a special act of public authority, either in relation to the shareholder or the company, in addition to a judgment pronouncing that the shareholder is to vote in a particular way on a particular matter at a future general meeting.

A difficult situation arises if the agreement does in fact impose a restriction on the shareholder but nevertheless allows him a certain latitude as to how he will exercise his vote, e.g. if the agreement obliges him to vote for the election to the board of one of several members of another group of shareholders, or to vote for the adoption of accounts prepared in accordance with the general rules of law (and, possibly, certain other directions) but not necessarily for the adoption of the accounts presented to the general meeting by the board of directors. In such cases the voting of the said shareholder cannot be determined directly by a judgment in an action brought against him by the other party or parties to the agreement. It would not be satisfactory to reach a decision on the basis of several precisely formulated possibilities—where such possibilities *can* be formulated—by the drawing of lots. Nor would it be satisfactory to leave it to the judge or sheriff to determine the attitude which the shareholder is to adopt within the margin allowed to him by the agreement. However, the difficulties are hardly insuperable. To bind the shareholder, by a temporary *injunction* and by a *judgment ordering him to refrain from certain acts, not* to vote in any way other than one of those in which he has undertaken to vote under the agreement does not give rise to any procedural difficulties, if such an injunction is issued against the shareholder and notice of it served with the company (in practice the chairman at the general meeting). If the vote is wrongfully accepted though not in accordance with the agreement, the resolution passed by the meeting may be set aside (cf. section 6.4 below for further details).

A judgment or injunction against voting in a way that is contrary to agreement cannot prevent the shareholder from abstaining. However, this is contrary to the agreement, which does in fact impose the duty upon him to vote in favour of a more or less precisely defined result. As already mentioned, this difficulty cannot be overcome by the court or the sheriff choosing equitably between several possible ways of voting according to the agreement. The choice is not suited to a judicial solution. The question of what may be done in such a situation has not been tried by the courts. An expedient solution might possibly be obtained

by counting the vote of the abstaining shareholder or shareholders who are bound by an agreement on voting rights as a vote in favour of the proposal made by the other parties to the agreement, if that proposal constitutes one of the possibilities among those which the abstaining shareholders are bound by the agreement to vote for. When determining whether a majority has voted in favour of the proposal at the general meeting, all votes cast by shareholders bound by an agreement on voting rights must be included in the number of votes. According to such a rule those shareholders who are bound by agreement on voting rights, but who are reluctant to vote in favour of a proposal put forward by other shareholders, may avoid supporting proposals with which they do not sympathize by making a different proposal that also fulfils the requirements of the agreement. If, for example, the agreement stipulates that one out of two persons is to be voted for when electing a director, failure to vote is considered to be a vote in favour of the person proposed by the other parties to the agreement. If the reluctant shareholders prefer (or think less unfavourably of) the other of the two candidates fulfilling the conditions of the agreement, they may vote for him. To give another example, it may be provided, in a shareholders' agreement between two equally large groups of shareholders—in order to prevent a situation where one of the groups could compel the company to go into liquidation by refusing to adopt the accounts —that the shareholders shall vote for the adoption of legally valid accounts. In that case accounts which fulfil the requirements of the law and, consequently, those of the agreement, and which have been adopted by half the shareholders (one of the groups) must be regarded as adopted by the company if the other group refuses to adopt the accounts, contrary to the agreements, without making any other proposal which (also) fulfils the requirements of the agreement.

6.4. *Enforcement of agreements in relation to companies*

Provided the rules for the enforcement of agreements on voting rights between the parties are as described under 6.3 above, a consequence of them will be that a direct enforcement of an agreement on voting rights against a shareholder will often also imply the demand that the company shall consider a shareholder to be exercising his voting rights in a particular way. If this is acknowledged, and if it is also acknowledged that a shareholder may be forbidden to vote contrary to the agreement, we are not far

from acknowledging the power of the courts to make decisions forbidding the company to attach any importance to votes cast in contravention of the agreement *or* to set aside a resolution as invalid because some or all of the votes in favour of the resolution were cast in contravention of a binding agreement on voting rights. In the two last-mentioned cases it is necessary to summon the company as defendant or co-defendant.

Where the majority of shareholders are bound by an agreement on voting rights to vote in a particular way, the recognition of the obligation under the agreement means that shareholders may make a binding resolution by agreement—possibly by the taking of a vote—beforehand and prior to the holding of the general meeting.[7] Even if the agreement on voting rights comprises the majority of all the company's shareholders, the questions regulated by the agreement are to be dealt with at the general meeting. This is not devoid of purpose. Perhaps those who are not parties to the agreement or those who may have regretted their accession to it can persuade the parties to it to change their agreement and thereby cancel the obligation to vote in accordance with the agreement. However, this requires the consent of all the parties to the agreement.

Danish courts have not had occasion to adopt a clear attitude to the questions raised above. However, there exists an old decision which is in accordance with the main view expressed here, and the problem has been touched upon in a later case.

> *U.f.R. 1923.636 S.H.* A company's shareholders had agreed that, in certain circumstances, the company was to be wound up. After the conditions set out in the agreement for the commencement of liquidation proceedings had been fulfilled, a majority decided in contravention of the agreement that the company was not to be wound up. In an action brought by the minority against the company and the majority, the minority obtained a judgment for the liquidation of the company. The shareholders' obligation under the agreement on voting rights to vote in favour of a liquidation at the general meeting was obvious, and the company was therefore bound to act as if the liquidation had been resolved upon.
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> *Judgment given by the Court of Appeal for Eastern Denmark on September 30, 1957 (not published).* An insurance company, N., was established in 1920. An Austrian insurance company, U., sub-

[7] Cf. Gomard in *J.* 1969.357 f.

scribed nearly half the share capital and lent money to some Danish insurance people, A. and B., to purchase a number of the other shares, so that A., B. and U. together controlled more than half of the share capital. A. was appointed manager and B. a member of the board of directors. Together with the establishment of the company an agreement was concluded between A., B. and U. according to which the parties bound themselves mutually to arrange for their representation on the board and executive committee in proportion to their shareholdings. In 1947 A.'s son C. was appointed manager. In 1951 an agreement on a mutual right of pre-emption was concluded between A., B., U. and C. Following a dispute between U. and the Danish shareholders, both C. and U. attempted to secure the controlling interest. C. was ordered by the court to acknowledge that, by exercising the right to vote on the shares he had acquired from A.'s widow and from B., he was disentitled to vote against proposals that U. be represented on the board in accordance with the agreement of 1920. N. was ordered to acknowledge that a vote cast in contravention of this obligation at the general meeting would be invalid. However, during the hearing of the case, N. declared that it acknowledged the invalidity of such a vote, provided C. was found to be bound by the agreement. The opinion of the Court can hardly be construed as an adoption of the principle that voting in contravention of the agreement would be invalid, and that the shareholder's obligation would likewise have had the effect of making the agreement invalid in relation to the company if the company had not agreed to this —irrespective of the fact that, pursuant to the rules laid down in the Danish Companies Act, a limited company cannot validly accept an invalidity that would be contrary to the ordinary rules of law by agreement with a few of its shareholders. The procedural principle *non ultra petita partium* does not imply the assumption, as a matter of course, that the procedural actions of the parties are based on substantive law. However, the judgment might possibly be said to come closest to the conception that such a breach of agreement has the effect of invalidating it. The judgment is commented on by Borum in *J.* 1962.266 and Jacobi in *U.f.R.* 1967B.32.

If a company has failed to fulfil the obligation that may have been imposed on it by an agreement on voting rights to consider a shareholder as having voted in a particular way in respect of certain questions, and if the failure to fulfil this obligation has entailed the adoption of a resolution differing from the one which would have been adopted if the shareholder had voted as he was bound to do, the adopted resolution must generally be regarded

as invalid. The invalidity of the "wrong" resolution is a necessary consequence of the correct resolution being regarded as adopted. Depending on the circumstances, a resolution will presumably also be considered invalid in cases where it cannot be clearly established, as it can in U.f.R. 1923.636, on the basis of the agreement on voting rights what would have been the result of voting in accordance with the agreement.

It is clear, however, that the setting aside of resolutions once these have been adopted, and the actual uncertainty as to the validity or invalidity of an adopted resolution, can be detrimental to the company and its shareholders; and it may possibly cause even greater damage than the breach of agreement. It is therefore necessary to lay down some modifying rules to reduce the occurrence of invalidity in situations where the harmful effects must be feared to be greatest.

(*a*) The longer it takes to clear up the situation, the greater may be the inconveniences caused by uncertainty as to whether an adopted resolution can be upheld or not. The right to object against the validity of a resolution must therefore be lost by prescription under the general principles of Danish law as to the legal effects of inactivity (passivity in the defence of one's rights). In U.f.R. 1923.636 and 1955.932 it has, on the other hand, been held that the normal two months' respite allowed for the setting aside of an unlawful resolution passed by a general meeting pursuant to the Act of 1917, corresponding to sec. 58 of the Act of 1930, does not comprise actions to establish the invalidity of resolutions where the claim is based on a breach of an agreement on voting rights.

(*b*) One of the main points in German and Swedish legal writing, where it is held that the setting aside of an agreement on voting rights does not have the effect of invalidating a resolution, is that a rule concerning invalidity would give rise to undesirable uncertainty.[8] Agreements on voting rights are not registered and consequently not accessible to the general public as is the case with the articles of association, and questions as to whether such agreements are binding, as well as concerning their correct interpretation, may give rise to considerable doubt. If contravention of an agreement on voting rights were held to invalidate the vote,

[8] However, cf. Sv.J.T. 1929.53 according to which the Court of Appeal held that breach of an agreement on voting rights had the effect of invalidating a resolution, but the judgment is criticized by Nial, *op. cit.*, at pp. 10 f., and Roos, *op. cit.*, at pp. 330 and 340 f.

the company would be compelled to resolve serious doubts as to whether a vote was in accordance with or contrary to the agreement, and it would consequently become disquietingly uncertain whether adopted resolutions would have to be considered valid or invalid. Elimination of this uncertainty would be difficult and very costly.

One cannot preclude the possibility that such unfortunate situations may arise, but this fear cannot justify the standpoint that invalidity should never be admitted, not even in the cases most frequently met with in practice, viz. where the agreement on voting rights is known to all the company's shareholders and both the validity and the tenor of the agreement are indisputable. The uncertainty which may arise in rare cases as to who is to cast the vote of a share and the way in which it is to be cast can only lead to the further modification—in addition to the general principle on the legal effects of inactivity—of the main rule concerning invalidity, viz. that if the agreement on voting rights has not comprised all the company's shareholders or has at least been known to all the shareholders and the company, or if the resolution voted for concerning the interpretation of the agreement on voting rights is not regarded as obviously incorrect, even though it is subsequently found to be incorrect, the resolution should not be set aside as invalid if this should prove detrimental to the company or its shareholders. Sometimes the changing of a resolution has no specially harmful effect, even after the lapse of some time; for example, where there is a refusal in contravention of the agreement to acknowledge the transfer of shares within a group of shareholders.[9]

If the company is kept in ignorance of the existence of an agreement on voting rights, and if no person attending the general meeting objects to a person registered or otherwise identified as a shareholder voting on the share in contravention of the agreement, the vote cast must generally be considered valid. An assertion of the agreement affecting the company must presuppose that the company has been or will be notified of the agreement.

6.5. *Effect of agreements on subsequent holders of shares*

Agreements on voting rights usually contain provisions intended to secure that a shareholder cannot unilaterally terminate the

[9] Cf. the so-called *re integra* provision in sec. 39 of the Danish Contracts Act and David in *U.f.R.* 1947 B. 215.

restriction on his voting right by transferring the share to others. It may be provided—explicitly or implicitly—in the agreement on voting rights that the shareholder may only transfer his shares to persons who will make a binding promise to the other parties to the agreement, or to the transferor as their representative, to observe the terms of the agreement on voting rights. Almost the same result can be obtained by providing in the agreement that shareholders shall be disentitled to transfer their shares to others without the consent of the other parties to the agreement. The latter may then make their consent conditional upon the new shareholders acceding to the agreement. The provisions of an agreement on voting rights that are to be extended to subsequent purchasers of shares must generally be observed by all transferees, both purchasers and other transferees under the agreement, especially donees and mortgagees, and by persons having acquired the shares otherwise than by contract, especially next of kin or testamentary heirs and creditors.

It cannot be taken for granted, however, that all agreements on voting rights, according to their own tenor, attempt to maintain the obligation they impose on the parties after the shares have been transferred to others. It is not inconceivable that the parties have wanted to bind only a certain shareholder and not the share itself irrespective of whom the transferee may be. In the above-mentioned unpublished judgment given by the Court of Appeal for Eastern Denmark on September 30, 1957, the court holds that the restriction imposed on the shareholder in exercising his voting rights is not effective after the share has been sold unless the agreement contains provisions to the effect that he is disentitled to sell his share or at least that it is his duty to stipulate that the purchaser shall assume the obligations under the agreement. In the cited case, however, it was found that the transferee, a son of one of the original shareholders, was liable to observe the provisions of the agreement on voting rights because the parties to the agreement, i.e. the majority of the original shareholders, had undertaken a temporary obligation, which had not yet terminated, not to sell their shares without offering them to one another first.

In most cases the fulfilment of the purpose of an agreement on voting rights presupposes that the agreement not only binds the original parties to it but also their successors. Where it must be clear to the parties that the object of the agreement cannot be fulfilled if the shares can be transferred to others free of the

obligations imposed by the agreement, the agreement must be understood to oblige the parties to it only to transfer their shares to persons who are advised of and willing to undertake these obligations, even if the agreement does not contain any express provisions concerning prohibition of transfer, time limit, etc.; it must further be construed in such a way that other successors, especially heirs and creditors, are also bound to observe its provisions.[1] The opinion expressed in the judgment of 1957, which is only an *obiter dictum* and consequently establishes no precedent, is therefore probably too narrow.

If a shareholder transfers his share to another person without making that person accede to the agreement on voting rights and without advising him of the existence of the agreement, the question arises—in cases where the agreement according to its tenor and object must be presumed to be intended to bind subsequent transferees also—whether the subsequent transferee is liable or not to observe the provisions of the agreement on voting rights.

If the share is negotiable, and if the transferee under the agreement has not been notified of the existence of the agreement, the agreement on voting rights cannot be enforced against him. The existence of an agreement on voting rights constitutes a limitation of the rights of disposal of the share, and such a limitation cannot be imposed on a *bona fide* transferee, according to sec. 26 of the Danish Companies Act (cf. also sec. 14 of the Danish Negotiable Instruments Act). Even if the share is non-negotiable, bearing an endorsement in accordance with the articles of association of the company to the effect that it is not a negotiable instrument (cf. sec. 26, subsec. 1, of the Danish Companies Act), a *bona fide* transferee under the agreement will hardly be required to observe the provisions of the agreement if information concerning it could not be obtained either by examining the issued share certificate itself (cf. the principle laid down in sec. 34 of the Danish Contracts Act), or by applying to the company. On the other hand, the agreement will probably have to be upheld against the transferee if it is known to the company and also if the transferee has failed to obtain details concerning the company and its general status. Moreover, in situations of this kind the transferee will not often be in legitimate good faith.

On the other hand, a transferee who is aware, or must have been

[1] For German law, cf. Lübbert, *op. cit.*, p. 195, note 469.

able to realize, that the transferor was bound by an agreement on voting rights, and that the agreement—as is usually the case—presented an obstacle to the transfer of the share unless the obligations imposed by the agreement were taken over by the transferee, cannot disregard the agreement on voting rights even if the transferor has not imposed on him, and he has not personally undertaken a duty to observe the provisions of the said agreement.

Pursuant to the provision contained in sec. 137 of the German Civil Code, a prohibition of transfer according to contract cannot be enforced against any third party or even against a *mala fide* transferee under an agreement.[2] It follows also that no protection *in rem* can be given to agreements on voting rights in general.[3] In Danish law there are no rules corresponding to sec. 137 of the German Civil Code which exclude the possibility of giving legal protection to obligations imposed by agreements on the disposal of, e.g., shares. The courts are free to make their own decisions in such cases. Consequently, if it is acknowledged that agreements on voting rights serve an essential and legitimate purpose, the agreements could be given such legal protection that they can fulfil this purpose in so far as this is possible without encroaching on other legitimate interests. Protection against general long-term obligations, the consequences of which cannot be anticipated, and which later prove unreasonably onerous, should be given as suggested above in section 6.2 by laying down rules suitable for this purpose and not by establishing a much too far-reaching rule on the inoperativeness of the agreement in relation to the company and subsequent transferees. Such an absolute rule concerning the limitation of validity would affect all agreements, irrespective of whether they impose equitable or inequitable obligations on the parties. In Denmark, at least, the limitation of the effects of the agreement to the relationship between the parties is not a necessary consequence of provisions in the Companies Act, and obviously such an effect cannot be accepted as the law simply in order to conform to dogmas to the effect that a share is unitary or that an agreement on voting rights can only be

[2] However, for some limitation on this point supported by sec. 826 of the German Civil Code, see Lübbert, *op. cit.*, pp. 133 ff. and 195 ff.

[3] It is likewise held in Sweden that an agreement on voting rights cannot hold good against any third party, or against a *mala fide* purchaser, cf. N.J.A. 1915.590 and Nial, *op. cit.*, p. 11, Roos, *op. cit.*, pp. 321 ff., and, in connection with the latter account, Gomard in *J.* 1969.367 f.

schuldrechtlich and that claims *in personam* are not legally protected against third parties.[4]

6.6. *Legal effects of a breach of agreements on voting rights*

As already mentioned, an agreement on voting rights often forms part of a more comprehensive agreement between a company's shareholders or of an agreement to which third parties have also acceded. A shareholders' agreement on the composition of the board of directors may, for example, also contain provisions as to the conditions of employment of shareholders in the company, as to competition clauses, as to the obligation to take out and currently renew life assurance policies, etc. A provision concerning the exercise of voting rights may also have been inserted in an agreement on the transfer of shares. In the deed of gift by which a donor transfers shares to his children, to a fund or to other persons, the donor may, for example, have made a reservation as to the access to exercise the voting rights in general or within specified limits, and the seller of shares may have reserved the right to make decisions concerning certain matters relating to the company, e.g. during the period until the shares have been fully paid up. In this way the seller may acquire a stronger legal position than an ordinary retention of ownership alone would place him in. An agreement on voting rights may also be connected with a transfer of shares as security. Especially in the case of loans granted against security in a controlling interest in a close company, the security of the lenders generally requires that the principal shareholders who have mortgaged the shares be debarred from making such dispositions in the company that the value of the shares is reduced.[5]

The failure of a shareholder to fulfil his obligations to vote in a particular way as undertaken by him under an agreement which also concerns other matters will often—like the failure to fulfil the other terms of the agreement—entitle the other parties to use the normal remedies for breach of the agreement as a whole, especially the right to terminate the agreement. The aggrieved parties may naturally prefer to claim damages for any loss they have sustained by the violation of the agreement on voting rights, but if the breach is of essential importance to the

[4] For further details concerning the lack of legal protection of *schuldrechtliche* rights, see Ussing, *Obligationsret, Almindelig del* (The Law Relating to Obligations, General Part), 3rd ed., pp. 529 ff.

[5] Cf. U.f.R. 1963.111 H.

agreement as a whole, the remedies for breach of one of several conditions in a complex agreement are generally not limited to points directly regulated by this condition.[6] Thus, if the mortgagor has transferred his voting rights to the mortgagee until the loan has been repaid, the mortgagee may demand prompt repayment of the loan if the morgagor should nevertheless vote independently and contrary to the instructions given by the mortgagee, irrespective of whatever agreement may have been concluded concerning the calling in of the loan. A transfer of ownership, either by gift or by sale, may presumably be cancelled according to the circumstances, so that the transferor claims redelivery of his shares if the breach of the agreement on voting rights is directly in contravention of the conditions of transfer.[7]

6.7. *Application of legal rules for the protection of minorities on breach of agreements on voting rights*

The need for, and therefore also the number of, agreements on voting rights is particularly great in companies where the share capital is owned by two or very few shareholders or groups of shareholders. This type of company has not infrequently been formed by converting an existing one-man business or partnership into a limited company, and the shareholders' agreement has frequently been concluded at the formation of the company. Part of the contents of the shareholders' agreement may consist of a repetition (upholding) of the provisions concerning the mutual relations between the partners originally contained in the partnership agreement. A shareholders' agreement is a suitable means of maintaining the mutual legal relationship between the parties in a major or minor degree after the firm has been converted into a limited company. It is often of great importance to the parties that they should be able to choose this expedient in situations where, for example, the preparation for a take-over by the succeeding generation makes it necessary, or at least de-

[6] Cf. termination of agreements on periodical payments, secs. 22, 29 and 46 of the Danish Sale of Goods Act, and the termination of tenancy agreements, Items 3–10, sec. 63, subsec. 1, of the Danish Rent Act.

[7] Cf. Roos, *op. cit.*, p. 251, and Gomard in *J.* 1969.260 and 368. The rule laid down in sec. 28, subsec. 2, of the Danish Sale of Goods Act, which excludes the possibility of cancellation after delivery of the object of sale, applies exclusively to cancellation owing to failure to effect due payment of the purchase amount in connection with credit purchases and does not exclude the transferor from attempting to retake possession of the shares by cancellation on other grounds.

sirable, to convert the firm into a limited company. In close companies where the shareholders know one another and take part in the firm's activities, the objection against the validity of shareholders' agreements founded upon the contention that the clearness of intention of votes is endangered is quite unrealistic. The same remark applies to the rule which the Commission on Company Law appears inclined to propose, viz. that decisive importance be attached to the register of members even in close companies.

The position of a minority shareholder in a close company whose entire capital is owned by a very small number of shareholders may be rather unfavourable. If the proposals of the majority are carried without regard to the minority, the majority may prevent the minority from getting a real insight into the conduct of the firm, from earning dividends, and from receiving a share of the fees and salaries paid for management of, and other work carried out in, the firm. The unfavourable or uncertain position of a minority shareholder may naturally also make it difficult to sell minority shares at a price corresponding even roughly to the price of a majority shareholding or to the liquidation value.[8] It is true that both the Danish Companies Act and unwritten law lay down rules and principles concerning the protection of minorities, but this protection does not fully secure the minority against the majority's conducting the firm in such a way that the minority's rights as shareholders will be little more than "window-dressing". It is therefore quite natural that shareholders should find it desirable to conclude agreements when establishing or taking over a company, and that the provisions of such agreements should be aimed at securing that all shareholders, or at least all the parties to such agreements, will be able to participate in, and benefit from, the activities of the firm.

An obvious question which must be raised is whether breach of such an agreement concerning cooperation and participation in the firm's profits will entitle the aggrieved party or parties to claims of a kind similar to those that may be brought in case of an infringement of the ordinary rules for the protection of minorities. In some countries, e.g. Norway and England, company law contains provisions authorizing claims for the dissolution of the company and redemption of the minority's shares in case of

[8] Cf. the fact situations in U.f.R. 1966.235 H. and *Uf.R.* 1966 B. 248.

gross violations of the rules for the protection of minorities.[9] In Danish law the question whether a violation of the rules for the protection of minorities can be countered by other means of enforcement than claims for damages and injunctions has not been clarified by court decisions. However, assuming that other legal effects adapted to the special nature of the individual cases may also find application according to the circumstances in connection with a violation of the rules for the protection of minorities, it should not be considered impossible to apply such legal consequences in case of breach of shareholders' agreements which may be said to extend the general rules for the protection of minorities.

Other legal effects than the ordinary ones, especially the normal remedies for breach known from the general law of contracts and from the Danish Sale of Goods Act, should not, in case of breach of an agreement on voting rights, be conditional upon such remedies being mentioned in the agreement. On the contrary, the special situation regulated by the agreement may make the use of other legal means, e.g. a claim for redemption or for dissolution of the company, so natural and obvious that the application of such remedies may, according to the circumstances, be considered as implied in the agreement even if these effects are not recognized as being among the potential minority rights and powers comprised by the legal protection of minorities. If, for example, a shareholders' agreement provides for an active cooperation between the shareholders, and if one of these shareholders acts in such a way that the others ought to be able to terminate the cooperation, they may presumably—according to the circumstances—not only terminate the agreement for cooperation but also demand that the limited company be liquidated.[1] Possibly the shareholder may, according to the circumstances, also claim that his shares be taken over by the other shareholders, either so that he makes this claim only or makes the claim as an alternative to a claim for liquidation. However, in this case the claim cannot be supported by an analogy with the law of

[9] Proposals for the introduction of such rules in Denmark have been made in secs. 119 and 142 of the draft of 1969.

[1] Cf. sec. 110 of the Norwegian Companies Act of 1957 and earlier Norwegian cases reported in N.Rt. 1924.226 and 1952.967; these decisions are not based on any express statutory provision. For further details concerning Norwegian and English law, see Augdahl, *Aksjeselskapet,* 3rd ed., p. 386, Marthinussen's *Comments on the Companies Act,* pp. 337 ff., and Rodhe in *Festskrift til O. A. Borum,* Copenhagen 1964, pp. 441 f.

partnership, as a partner will generally be presumed not to be able to withdraw or be excluded from a partnership;[2] but the practical difficulties involved in settling accounts with a shareholder who withdraws from the company are smaller than those entailed by the settlement of accounts with a partner withdrawing from a partnership. There is no personal liability for debts in a limited company, and a procedure to establish the value of the shares has been provided for in a somewhat similar situation in sec. 57, subsec. 4, of the Danish Companies Act.

> *U.f.R. 1955.932 Ø.* An action between the minority and the majority of a limited company was withdrawn after the parties had concluded an agreement concerning the future operation of the company. The principal shareholder grossly violated the agreement and was ordered by the court to redeem the shares of the minority. However, the principal shareholder had no objection to taking over the shares at the price fixed by the minority provided the court found that the agreement had been violated, and the judgment therefore does not permit the drawing of any conclusion as to what would have been the outcome of the case if the claim had been different. The judgment established that the minority's claim could be upheld irrespective of the fact that the two months' respite provided for in sec. 58 had expired. Cf. above, p. 130, concerning U.f.R. 1923.636 S.H.

It frequently happens in practice that shareholders' agreements are concluded whenever the share capital is held by two or a very small number of shareholders, and it is generally also a suitable means of increasing the legal protection of minorities and avoiding deadlocks. It may not be inferred, however, from the mere fact that a limited company has been founded with two or three shareholders who are placed on an equal footing that they have concluded a tacit shareholders' agreement, e.g. an agreement providing that all the parties to it are entitled to a seat on the board of directors. Disputes will only arise when the cooperation between the parties fails and where the long time which may have elapsed since the establishment of the company and the impossibility of foreseeing the situation make it difficult to procure detailed and reliable information concerning the mutual understanding originally existing between the parties. It would be too difficult a task for a court of law to determine more precisely

[2] Cf. Sindballe, *Selskabsret* I, pp. 167 f., and—for Swedish law on the subject—Nial, *Om handelsbolag*, pp. 246 f. and 261 f.

the contents of an implicit agreement. Those who have been reduced to a minority will have to rely exclusively on the legal protection of minorities.

U.f.R. 1955.478 H. (H.R.T. 1955-97). In 1949 two manufacturers, L. and R., who had jointly run a factory as a partnership since 1915, converted the partnership into a limited company with a share capital of 200 000 Danish kroner. L. and R. each subscribed 99 000 kroner. A third party, T., subscribed 1 000 kroner, and a share having the denomination of 1 000 kroner was transferred to the company as its own share. After the death of R. a dispute arose between L. on the one hand and R.'s widow and T. on the other. In the Supreme Court L. asked that an election of R.'s widow and daughter and of T. to the board of directors on the basis of the votes cast by R.'s widow and T. against L.'s vote be cancelled. The Supreme Court held that L. had failed to prove that it had been agreed between L. and R., or that it was at least a clear condition at the establishment of the company with equal shareholdings to L. and the deceased R., that the two promoters were to exert an equal influence on the company, and that the third party who would have to be elected to the board as shareholder should be a person participating quite neutrally in the negotiations and voting.

The reasons adduced by the Supreme Court contain no hint that such an agreement should not be considered binding if it had been deliberately concluded. The judgment also leaves open the question whether there might be such strong indications in other situations that the parties had wanted to establish a "state of equilibrium" that the existence of such an implicit agreement could be presumed even though no expressly formulated agreement was available. However, such a situation must at any rate be presumed to arise only in very exceptional cases.